



FACULTY OF LAW
University of Lund

Monika Lozancic

**Diplomatic and Consular
Immunities from National
Jurisdiction in Criminal Cases**

**- Practice from the Swedish, Dutch and
Danish Ministries of Foreign Affairs -**

Master thesis
30 credits

Supervisor
Christoffer Wong

International Law - Criminal Law

Spring 2009

Contents

SUMMARY	1
SOMMAIRE	2
SAMMANFATTNING	4
ACKNOWLEDGEMENTS	6
ABBREVIATIONS	7
1 INTRODUCTION	8
1.1 Purpose	8
1.2 Delimitations	9
1.3 Method and material	9
1.3.1 Literature study	9
1.3.2 Empirical study	10
1.3.3 Nature of the conclusions	11
1.4 Definitions	11
2 THE CONCEPT OF ‘JURISDICTION’ IN RELATION TO DIPLOMATIC AND CONSULAR ‘IMMUNITIES’ AND ‘PRIVILEGES’	13
2.1 Introduction	13
2.2 The difference between jurisdiction, immunities and privileges	14
2.3 Different types of jurisdictions	15
2.3.1 Legislative jurisdiction	15
2.3.2 Adjudicative jurisdiction	15
2.3.2.1 The principle of territoriality	16
2.3.2.2 The active personality principle	17
2.3.2.3 The passive personality principle	17
2.3.2.4 The protective principle	17
2.3.2.5 The principle of the flag State	18
2.3.2.6 The principle of universal jurisdiction	18
2.3.3 Enforcement jurisdiction	18
2.3.4 General remarks	19
2.4 The distinction between immunity from criminal jurisdiction, inviolability and individual criminal responsibility	19
2.5 Mixed cases – a question of complicity	21

3	DIPLOMATIC IMMUNITIES AND PRIVILEGES	22
3.1	Introduction	22
3.1.1	Theoretical bases for diplomatic immunity	22
3.1.1.1	Diplomatic immunity due to personal representation of the Sovereign	22
3.1.1.2	Diplomatic immunity due to extritoriality	23
3.1.1.3	Diplomatic immunity due to functional necessity	23
3.1.2	The role of reciprocity	24
3.1.3	Sources of diplomatic immunity law	24
3.1.3.1	International custom	24
3.1.3.2	Treaties	25
3.1.3.2.1	<i>Multilateral treaties</i>	25
3.1.3.2.1.1	The 1815 Regulation of the Congress of Vienna	25
3.1.3.2.1.2	The 1928 Havana Convention on Diplomatic Officers	25
3.1.3.2.1.3	The 1961 Vienna Convention on Diplomatic Relations and its Optional Protocols	25
3.1.3.2.1.4	The 1969 Convention on Special Missions and its Optional Protocol	26
3.1.3.2.1.5	The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents	27
3.1.3.2.2	<i>Bilateral treaties</i>	27
3.1.3.2.3	<i>Prevalence in case of conflict between the VCDR and bilateral treaties</i>	27
3.1.3.3	National legislation	28
3.1.3.4	Jurisprudence and doctrine	28
3.2	The 1961 Vienna Convention on Diplomatic Relations	29
3.2.1	Categories of personnel and the scope of their immunities and privileges	29
3.2.1.1	Diplomatic agents and their family members (Article 1(e), 38(1) and 37(1))	29
3.2.1.2	Members of the administrative and technical staff and their family members (Article 1(f), 37(2), 38(2) and 37(2))	31
3.2.1.3	Members of the service staff and their family members (Article 1(g), 37(3) and 38(2))	32
3.2.2	The notion of ‘permanently resident in the receiving State’	32
3.2.3	The content of the personal immunities and privileges	33
3.2.3.1	Freedom of movement (Article 26)	33
3.2.3.2	Immunity from any form of arrest or detention (Article 29)	33
3.2.3.3	Inviolability of the residence and property (Article 22 and 30)	34
3.2.3.4	Immunity from jurisdiction, execution and exemption from giving evidence (Article 31)	34

3.2.3.4.1	<i>Does diplomatic immunity from criminal jurisdiction impede prosecution of crimes against jus cogens-norms?</i>	35
3.2.3.5	Exemption from social security provisions (Article 33)	37
3.2.3.6	Exemption from personal, public and military services (Article 35)	37
3.2.3.7	Exemption from customs duties and inspections, taxes and related charges (Article 23, 34 and 36)	37
3.2.4	Duration	39
3.2.5	The inviolability of the premises of the mission, of private residences and of their archives and documents (Article 22, 24 and 30)	40
3.2.6	The inviolability of official correspondence and other official means of communication – the diplomatic bag and the status of the diplomatic courier (Article 27 and 40)	41
3.2.7	Actions in case of abuse	42
3.2.7.1	Declaring a member of the diplomatic staff or of the mission <i>persona non grata</i> or <i>not acceptable</i> (Article 9)	43
3.2.7.2	Waiver of immunity (Article 32)	44
3.2.7.3	Breaking off diplomatic relations	45
3.2.7.4	Limiting the size of the mission (Article 11)	46
3.2.7.5	Other remedies	46
4	CONSULAR IMMUNITIES AND PRIVILEGES	48
4.1	Introduction	48
4.1.1	Theoretical bases for consular immunity	48
4.1.1.1	Consular immunity due to functional necessity	48
4.1.1.2	Consular immunity due to the principle of reciprocity	48
4.1.2	Sources of consular immunity law	48
4.1.2.1	International custom	48
4.1.2.2	Treaties	49
4.1.2.2.1	<i>Multilateral treaties</i>	49
4.1.2.2.1.1	The 1963 Vienna Convention on Consular Relations and its Optional Protocols	49
4.1.2.2.1.2	The European Convention on Consular Functions	49
4.1.2.2.2	<i>Bilateral treaties</i>	49
4.1.2.2.3	<i>Prevalence in case of conflict between the VCCR and bilateral treaties</i>	50
4.1.2.3	National legislation	50
4.1.2.4	Jurisprudence and doctrine	50
4.2	The 1963 Vienna Convention on Consular Relations	50
4.2.1	Categories of personnel and the scope of their immunities and privileges	50
4.2.1.1	Career consular officers and their family members (Article 1(d), (2), article 37(1) and article 71(2))	50

4.2.1.2	Honorary consular officers and their family members (Article 1(d), (2), article 58(3) and article 71(2))	53
4.2.1.3	Consular employees and their family members (Article 1(e) and article 71(2))	53
4.2.1.4	Members of the service staff and their family members (Article 1(f) and article 71(2))	54
4.2.2	The content of the immunities and privileges	55
4.2.2.1	Freedom of movement (Article 34)	55
4.2.2.2	Personal inviolability (Article 41)	55
4.2.2.3	Immunity from jurisdiction (Article 43, 58(2), 63)	55
4.2.2.4	Liability to give evidence (Article 44)	56
4.2.2.5	Exemption from registration of aliens and residence permits (Article 46, 65)	57
4.2.2.6	Exemption from work permits (Article 47)	57
4.2.2.7	Social security exemption (Article 48)	57
4.2.2.8	Exemption from taxation (Article 49, 51, 66)	58
4.2.2.9	Exemption from customs duties and inspection (Article 50)	59
4.2.2.10	Exemption from personal services and contributions (Article 52, 67)	60
4.2.3	Duration	60
4.2.4	The inviolability of the consular premises, of private residences and of their archives and documents (Article 27, 31, 33, 59, 61)	61
4.2.5	The inviolability of official correspondence and other official means of communication – the consular bag and the status of the consular courier (Article 35, 54, 58)	62
4.2.6	Actions in case of abuse	63
4.2.6.1	Declaring a consular officer or a member of the consular staff <i>persona non grata</i> or <i>not acceptable</i> (Article 23)	63
4.2.6.2	Waiver of immunity (Article 45)	64
4.2.6.3	Breaking off consular relations	64
4.2.6.4	Limiting the size of the mission	65
4.2.6.5	Other remedies	65
5	DIPLOMATIC AND CONSULAR IMMUNITY IN CRIMINAL CASES – PRACTICE FROM THE SWEDISH, DUTCH AND DANISH MINISTRIES OF FOREIGN AFFAIRS	66
5.1	Sweden	66
5.1.1	Introduction	66
5.1.2	Conventional crimes	67
5.1.2.1	Traffic offences	67
5.1.2.2	Shoplifting and attempted fraud	69
5.1.2.3	Slavery and threats of private servants	69
5.1.2.4	Assault	69

5.1.2.5	Murder	70
5.1.2.6	Aiding child abduction	70
5.1.2.7	Rape	71
5.1.3	Crimes specific to persons enjoying immunity	71
5.1.3.1	Espionage	71
5.1.3.2	Smuggling of narcotics using the diplomatic or consular bag	71
5.1.3.3	Abuse of import privilege	71
5.1.4	General remarks	71
5.1.4.1	Definition of 'family member forming part of the household'	71
5.1.4.2	Duration	72
5.1.4.3	The importance of bilateral agreements	72
5.1.4.4	Waiver of immunity	72
5.1.4.5	Persona non grata	73
5.2	The Netherlands	73
5.2.1	Introduction	73
5.2.2	Conventional crimes	74
5.2.2.1	Traffic offences	74
5.2.2.2	Shoplifting and attempted fraud	76
5.2.2.3	Slavery and threats of private servants	76
5.2.2.4	Assault	77
5.2.2.5	Murder	78
5.2.2.6	Aiding child abduction	78
5.2.2.7	Rape	79
5.2.3	Crimes specific to persons enjoying immunity	79
5.2.3.1	Espionage	79
5.2.3.2	Smuggling of narcotics using the diplomatic or consular bag	79
5.2.3.3	Abuse of import privilege	80
5.2.4	General remarks	80
5.2.4.1	Definition of 'family member forming part of the household'	80
5.2.4.2	Duration	81
5.2.4.3	Repeated offences	82
5.3	Denmark	82
5.3.1	Conventional crimes	82
5.3.1.1	Traffic offences	82
5.3.1.2	Shoplifting and attempted fraud	84
5.3.1.3	Slavery and threats of private servants	84
5.3.1.4	Assault	85
5.3.1.5	Murder	85
5.3.1.6	Aiding child abduction	85

5.3.1.7 Rape	86
5.3.2 Crimes specific to persons enjoying immunity	86
5.3.2.1 Espionage	86
5.3.2.2 Smuggling of narcotics using the diplomatic or consular bag	86
5.3.2.3 Abuse of import privilege	87
5.3.3 General remarks	87
5.3.3.1 Definition of 'family member forming part of the household'	87
5.3.3.2 Duration	87
5.3.3.3 The role of reciprocity	88
6 CONCLUSIONS	89
BIBLIOGRAPHY	91
TABLE OF CASES	97
SUPPLEMENT A: THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS	98
SUPPLEMENT B: THE 1963 VIENNA CONVENTION ON CONSULAR RELATIONS	110
SUPPLEMENT C: OVERVIEW OF DIPLOMATIC AND CONSULAR IMMUNITIES	133
SUPPLEMENT D: THE HYPOTHETICAL SITUATIONS USED IN THE CASE STUDY	137

Summary

This study looks into diplomatic and consular immunity under international law as applied by the Ministries of Foreign Affairs in Sweden, Denmark and The Netherlands. It does so by examining the practice and/or considerations of these Ministries in 10 different hypothetical cases where individuals enjoying such immunity commit crimes in respective State, i.e., abuse of local laws and/or regulations of the receiving State committed on the territory of the latter. The cases were chosen so as to cover some of the most common situations where individuals enjoying such immunity commit crimes. The situations are divided in two categories: conventional crimes (*traffic offences, shoplifting and attempted fraud, slavery and threats of private servants, assault, murder, child abduction and rape*) and crimes that have a specific meaning for persons enjoying immunity either because they are historically connected to the diplomatic or consular sphere or because their commission requires that the person in question is enjoying such immunity (*espionage, smuggling of narcotics using the diplomatic or consular bag and abuse of import privileges*). A large part of the study is also dedicated to giving an overview of the legal framework regarding diplomatic and consular immunity. It focuses on the 1961 Vienna Convention on Diplomatic Relations (VCDR) and the 1963 Vienna Convention on Consular Relations (VCCR), both when looking into the legal framework but also when looking into the Ministries' practice.

The study concludes that there are both differences and similarities between the Ministries' practices and considerations in these cases. As an example one could mention the approach to waiver of immunity according to article 32 of the VCDR and 45 of the VCCR, where Sweden maintains a strict policy never to request waiver in cases where persons enjoying immunity commit crimes in the State, while in The Netherlands waiver can be requested but is often dependent on the public's demands in relation to the offense. The differing practice is due to the fact that neither the VCDR nor the VCCR require any reasons to be given by the receiving State when it makes the decision on which course of action to take and to the fact that the Conventions do not provide any guidance or other criteria to be applied when such a decision is made. The most prominent common denominators for all the three States' Ministries is however the fact that they – in most cases – take the same measures no matter if the person who committed the crime is a consul or a diplomat and their reluctance to employ the remedies provided in the VCDR and the VCCR specifically aimed at covering such situations, mainly the *persona non grata*-declaration (article 9 of the VCDR and article 23 of the VCCR) and the possibility of a request for waiver (article 32 of the VCDR and article 45 of the VCCR). The latter is avoided in favour of more informal ways to address the problem, e.g. by having a severe talk with the head of the mission concerned. It is shown that there are a variety of ways to approach these types of situations before even considering to invoke the provisions mentioned above (in the Vienna Conventions), which are often seen as very controversial.

Sommaire

Cet ouvrage a pour objectif d'examiner brièvement l'immunité diplomatique et consulaire selon le droit international telle que celle-ci est appliquée par les ministères des Affaires étrangères en Suède, au Danemark et aux Pays-Bas. Il le fait en examinant les pratiques et/ou les considérations de ces ministères dans dix cas hypothétiques où des personnes bénéficiant de cette immunité ont commis des crimes dans les différents Etats accréditaires.

Les cas ont été choisis de manière à couvrir les situations les plus courantes où des personnes bénéficiant de cette immunité ont commis des crimes. Les situations sont divisées en deux catégories: crimes classiques (*infractions routières, vol à l'étalage et tentative de fraude, esclavage et menaces contre les domestiques privés, agression, homicide, viol et enlèvement d'enfant*) et crimes qui ont une signification particulière pour les personnes bénéficiant de l'immunité, soit parce qu'ils sont historiquement reliés à la sphère diplomatique ou consulaire, soit parce que la commission présuppose que la personne en question bénéficiait de l'immunité (*espionnage, contrebande de stupéfiants à l'aide de la valise diplomatique ou consulaire et de l'abus des privilèges d'importation*).

L'étude est consacrée à donner un aperçu du cadre juridique concernant l'immunité diplomatique et consulaire. Elle met l'accent sur la Convention de Vienne de 1961 sur les relations diplomatiques (VCDR) et sur la Convention de Vienne de 1963 sur les relations consulaires (VCCR) en ce qui concerne le cadre juridique, mais aussi en ce qui concerne la pratique des ministères.

La conclusion de l'étude est qu'il existe des différences et des similitudes entre les pratiques et les considérations des ministères dans les cas mentionnés. Pour illustrer, on peut citer la pratique autour de la levée d'immunité en vertu de l'article 32 de la VCDR et de l'article 45 de la VCCR, où la Suède maintient une stricte politique de ne jamais demander une levée dans les cas où des personnes bénéficiant de l'immunité ont commis des crimes sur le territoire de l'Etat, alors qu'aux Pays-Bas on peut demander à l'Etat accréditant de lever l'immunité de leur représentant pour rendre possible une poursuite de celui-ci aux Pays-Bas. Une telle demande dépend souvent cependant de la réaction du public face à l'infraction. Les différences entre les pratiques sont dues au fait que ni la VCDR ni la VCCR ne demandent aucune explication de la part de l'Etat lorsque celui-ci prend la décision sur la base de laquelle des mesures sont prises et au fait que les conventions ne prévoient pas d'orientation ou d'autres critères à appliquer lorsqu'une telle décision est prise. Les dénominateurs communs les plus importants pour les trois ministères de l'Etat sont toutefois d'abord le fait que ceux-ci prennent les mêmes mesures dans la plupart des cas - que la personne qui a commis le crime soit un consul ou un diplomate - et ensuite leur réticence à utiliser les voies de recours fournies dans la VCDR et la VCCR spécifiquement destinées à couvrir de telles situations. Les pratiques différentes montrent que cette matière n'est pas entièrement claire et qu'il demeure toujours un risque pour des interprétations nationales variées,

particulièrement en ce qui concerne la prédisposition à utiliser la déclaration *persona non grata* ou *non-acceptable* (article 9 de la VCDR et article 23 de la VCCR) et la possibilité de lever l'immunité des personnes qui en bénéficient (article 32 de la VCDR et article 45 de la VCCR). Le recours à ces dernières possibilités est évité en faveur de moyens plus informels pour faire face au problème, par exemple en adressant une réprimande sévère au chef de mission concerné. Il est démontré qu'il existe une variété de façons d'aborder ces situations sans invoquer les dispositions susvisées des Conventions de Vienne, qui sont souvent considérées comme très controversées. Les mesures prises par les Etats accréditaires (par leur ministères des Affaires étrangères) mènent à des débats difficiles. Chaque situation demande une évaluation individuelle, soigneusement faite avec une considération particulière de toutes les circonstances utiles.

Sammanfattning

Denna studie innehåller en redogörelse för hur det internationella regelverket gällande diplomatisk och konsulär immunitet tillämpas av utrikesministerierna i Sverige, Danmark och Nederländerna. För att ta reda på detta har författaren genomfört intervjuer med företrädare för de tre olika ministeriernas protokollavdelningar. Intervjuerna syftade till att undersöka hur de resonerar samt vilka åtgärder de vidtar i situationer där personer som åtnjuter diplomatisk eller konsulär immunitet begått brott i respektive stat, d.v.s. mottagarstaten. Intervjuerna baserades på 10 frågor, var och en uppbyggd som en hypotetisk situation. Frågorna var utformade på ett sådant sätt att de skulle täcka in de vanligaste situationerna där personer som åtnjuter sådan immunitet har begått brott. Dessa kan i sin tur delas in i två kategorier: konventionella brott (trafikbrott, snatteri och försök till bedrägeri, slaveri, hot mot privattjänare, misshandel, mord, bortförande av barn och våldtäkt) samt brott som har en särskilt innebörd för personer som åtnjuter diplomatisk eller konsulär immunitet – antingen för att brottet historiskt är kopplat till den diplomatiska eller konsulära sfären eller för att själva förutsättningen för att brottet begås är att personen ifråga åtnjuter sådan immunitet (spionage, smuggling av narkotika med hjälp av den diplomatiska eller konsulära kurirförsändelsen samt missbruk av importprivilegier). Studien syftar också till att ge en överblick över det rättsliga regelverk som behandlar diplomatisk och konsulär immunitet. Här handlar det främst om 1961 års Wienkonvention om diplomatiska förbindelser (VCDR) och 1963 års Wienkonvention om konsulära förbindelser (VCCR). I studien har fokus legat på dessa två konventioner både i den del som belöper på det rättsliga regelverket (avsnitt 1-4 i studien) men också i den del som handlar om ministeriernas praxis (avsnitt 5 i studien).

Studien konkluderar att det finns både skillnader och likheter mellan ministeriernas metoder och överväganden i dessa typer av situationer. Som exempel kan nämnas praxis kring upphävandet av immunitet i enlighet med artikel 32 i VCDR och 45 i VCCR, där Sverige har en relativt strikt policy att aldrig begära att sändarstaten upphäver den berörda personens (tillika dess representant) immunitet i situationer där personen har begått brott i Sverige, medan Nederländerna kan begära upphävande av immunitet i vissa allvarliga situationer men där frågan om en sådan begäran skall föras fram samtidigt ofta är beroende av allmänhetens reaktioner på det begångna brottet. Den tydligaste gemensamma nämnaren för samtliga ministerier som ingick i studien var dock det faktum att de i de flesta fall vidtar samma åtgärder oavsett om personen som begått brottet är en konsul eller diplomat samt deras ovilja att använda de åtgärder som föreskrivs i Wienkonventionerna och som syftar till att användas i sådana situationer, främst möjligheten till *persona non grata*-förklaring (artikel 9 i VCDR och artikel 23 i VCCR) och möjligheten att begära att sändarstaten upphäver immuniteten för dess representant (artikel 32 i VCDR och artikeln 45 av VCCR). Dessa åtgärder undviks till förmån för mer informella

tillvägagångssätt, till exempel genom att man håller ett allvarligt samtal med beskickningsschefen. Att metoderna varierar mellan ministerierna beror framför allt på det faktum att varken VCDR eller VCCR kräver att mottagarstaten ger skäl för sitt beslut i ett visst fall eller ger några kriterier till ledning för dess bedömning härvidlag.

Studien visar att det finns olika sätt att närma sig dessa typer av situationer innan man alls överväger att åberopa de åtgärder som föreskrivs i Wienkonventionerna, då dessa åtgärder ofta ses som mycket kontroversiella inom diplomatin.

Acknowledgements

I would like to express my gratitude towards the following persons, whose assistance during the course of this study has been indispensable;

My supervisor Dr Christoffer Wong, Faculty of Law, University of Lund, for the much valuable guidance he provided throughout the writing process as well as his constructive academic advice in forming the subject-matter of the study;

Ms Annette Lassen, Deputy Director of Protocol and Mr John Pontoppidan, Minister Counsellor, at the Danish Protocol Department in Copenhagen, Denmark, Mr Frank de Hoop Scheffer, Head of Foreign Missions, Privileges and Immunities at the Dutch Ministry of Foreign Affairs' Protocol Department in The Hague, The Netherlands and Mr Anders Nyström, Deputy Chief of Protocol and Director at the Swedish Ministry of Foreign Affairs in Stockholm for their kind generosity and the valuable insights into respective Foreign Ministry's practice and reasoning they gave during the course of my interviews – without which this study would not have been;

Ms Petra Lärke, currently First Secretary at the Permanent Swedish Representation to the European Union in Brussels, for first introducing me to the diplomatic world;

Mr Berndt Fredriksson, Department Counsellor at the Swedish Ministry of Foreign Affairs' Security Section (UD-SSSB) and his secretary Ms Gabrielle Karlsén-Beretta, for providing me with records on the type of crimes committed by persons enjoying diplomatic and consular immunity, as well as for their professional handling of the matter;

Ms Ulla Baugner and Mr Michael Jenks for proof-reading the manuscript.

Last but not least – I would like to thank my family and friends for their infinite and unconditional love, support and encouragement.

Monika Lozancic

May 2009

Abbreviations

Cont.	Continued
CSM	1969 Convention on Special Missions
CSM-OP	Optional Protocol to the 1969 Convention on Special Missions, concerning the Compulsory Settlement of Disputes
D.C.	District of Columbia
DKP/BV	Protocol Department/Foreign Missions, Privileges and Immunities Division
ECCF	The European Convention on Consular Functions
edt.	Editor
ICC	International Criminal Court
ICJ	International Court of Justice
ID	Identification
ILC	International Law Commission
ILSA	International Law Students Association
NGO	Non-governmental organization
PCIJ	Permanent Court of International Justice
RättsH	Rättshandbok
SFS	Svensk Författningssamling
SOU	Statens offentliga utredningar
UD	Utrikesdepartementet
UD-SSSB	Utrikesdepartementet - Sekretariatet för Säkerhet, Sekretess och Beredskap
UK	United Kingdom
UN	United Nations
US	United States
UNTC	United Nations Treaty Collection
VAT	Value Added Tax
VCDR	1961 Vienna Convention on Diplomatic Relations
VCDR-OPAN	Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality
VCDR-OPSD	Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes
VCCR	1963 Vienna Convention on Consular Relations
VCCR-OPAN	Optional Protocol to the 1963 Vienna Convention on Consular Relations, concerning the Acquisition of Nationality
VCCR-OPSD	Optional Protocol to the 1963 Vienna Convention on Consular Relations, concerning the Compulsory Settlement of Disputes
VCLT	1969 Vienna Convention on the Law of Treaties

1 Introduction

The principle of non-interference is an indispensable requirement in a world order defined by sovereign States. The concept of immunities in international law stems from this principle but also from the States' necessity to have and maintain a channel for communication on a regular and personal basis.¹ This is particularly evident from the principles safeguarding diplomatic and consular immunities - two of the oldest and most acknowledged notions in international law. The majority of the rules governing immunities and jurisdictions are based on different principles embodied in both international custom and treaty law. When it comes to practice concerning diplomatic and consular issues, including immunities, the main international agreements are the 1961 Vienna Convention on Diplomatic Relations (VCDR) and the 1963 Vienna Convention on Consular relations (VCCR), which are considered as having codified most of the existing customary law. There is, however, still room for interpretation on the national level as regards the application of these treaties, including the scope of the privileges and immunities granted and the provisions on abuse and waiver of immunity. This can sometimes be due to the fact that some states grant more far-reaching rights because of reciprocity or *courtesy*, but also because the VCDR and the VCCR might not contain any detailed guidance in some provisions.² In this study, we will gain some insights into how such a national interpretation could be done, particularly by looking at how these provisions are interpreted and/or applied by the foreign ministries in three different European States (Sweden, Denmark and The Netherlands) in cases where immunity from criminal jurisdiction – the latter being defined³ as the direct prosecution of an individual by the State's authorities - is under issue.

1.1 Purpose

The purpose of this study is twofold: first, it aims to explore the concepts of 'jurisdiction' and, in particular, 'immunity', in the broad sense of the word. Because these are wide concepts and in some parts controversial, a categorisation will have to be defined based on existing literature and discussion. As regards the latter, the focus will be on the scope and content of diplomatic and consular immunities according to the VCDR and the VCCR, especially regarding immunity from criminal jurisdiction. The treaties' provisions will be selected and commented upon from the point of view of criminal relevance, i.e. when commenting on article 31 of the VCDR, I will only comment on those provisions in the article that regulate immunity from criminal process. Even if civil cases also fall within the

¹ De Smet (2003), p. 314.

² RättsH II (1996), p. 13, Lee & Quigley (2008), p. 440.

³ Fox (2002), p. 59.

wording of the article, these will consequently not be commented upon. Nor will civil claims related to criminal cases be discussed.

After the theoretical framework has been laid down and the key provisions of both conventions accounted for, an analysis on how the Ministries of Foreign Affairs in Sweden, The Netherlands and Denmark address issues where persons enjoying diplomatic and consular immunities according to the two conventions and who have committed criminal offenses in the State while posted there (i.e. violations of the laws of the receiving State) will follow (see also the discussion in section 1:3:2 below). The focus here will be on diplomatic agents and consular officers. The study ends with a conclusion, where the result from the analysis will be presented together with the author's comments on the latter.

1.2 Delimitations

This study will not include State/sovereign immunity, nor will it deal with immunity for Heads of State/government, foreign ministers and other high-ranking State officials – current as well as former ones – that fall outside the scope of the diplomatic or consular sphere, except where this is necessary to explain the concept of diplomatic and consular immunity. Furthermore, immunities for international organisations and/or their representatives or employees will not be addressed. As regards diplomatic and consular immunities, the focus will be on immunity from criminal jurisdiction, i.e. immunity from civil proceedings will not be dealt with. The study will also exclude immunities enjoyed by the private servants of a member of the mission (article 1(h) of the VCDR), since they are not employed by the sending State and thus not part of the category 'members of the staff of the mission' (article 1(c) of the VCDR). The same exclusion is made for private servants of a member of the consular post (article 1(i) and (h) of the VCCR).

1.3 Method and material

The method can be divided into two parts, a literature study and an empirical study consisting of interviews based on hypothetical situations. Below I will discuss and explain the contents and the meaning of each part, including the material used.

1.3.1 Literature study

Confusion regarding the interpretation and meaning of many of the different notions as well as the scope and contents of the diplomatic and consular immunities for different categories of staff and their family members necessitates an explanation of the applicable set of international rules and regulations on the field. The descriptive parts of the study, i.e. sections 2, 3 and 4, are thus mainly based on the literature in the field.

Of the many sources used during the course of the study, I would particularly like to point out Denza's book *Diplomatic Law – Commentary*

on the Vienna Convention on Diplomatic Relations⁴, which has been of great value in writing the part on diplomatic immunities and privileges; and Lee's and Quigley's *Consular Law and Practice*⁵ - a thoroughly well-written book which has been my main source of information for the section on consular immunities and privileges.

Since both the VCCR and (especially) the VCDR codifies well-established international custom in their fields, many of the articles and monographies used in this study, although they might seem quite old by today's standards, contain very useful and relevant information also as regards immunity-issues arising today. It is crucial also because the nature of this area of law is such that changes have developed over a considerable time-span and occur very rarely.

1.3.2 Empirical study

In order to avoid any problems as regards to confidentiality and therefore difficulties with respect to inaccessibility, I decided to discuss hypothetical cases instead of studying documentation on incidents that have actually occurred and that might still be sensitive (and therefore not obtainable). Thus, I do not discuss any concrete cases, only hypothetical ones, although similar cases have occurred. The empirical study consists of the answers and comments given by representatives of the Ministries of Foreign Affairs to questions based on 10 different hypothetical situations⁶. The hypothetical situations were chosen so as to cover the most common incidents, based on the literature and available statistics⁷, where persons with diplomatic or consular immunity have committed crimes in the receiving State. For instance, different offences involving motor vehicles, e.g. parking offences and driving under the influence of alcohol or drugs, are often mentioned as the most common type of criminal offences involving members of the diplomatic and consular missions.⁸ The same applies to abuse of private servants – e.g. by breach of the receiving State's employment law – which in some States has led to the adoption of new procedures on the issuance of visas to private servants in order to deter this type of exploitation.⁹ Shoplifting is also relatively common, as well as sexual offences and assault – the two latter however still to a limited extent.¹⁰ Other examples of crimes that historically have been associated with diplomatic immunities and privileges are smuggling (e.g. by using the diplomatic/consular bag – see

⁴ Oxford University Press, Oxford, 2008.

⁵ *Ibid.*

⁶ See supplement D.

⁷ The Swedish Ministry of Foreign Affairs' diary over dossier C 52 U (contains a list of crimes that persons enjoying diplomatic immunity are accused of having committed).

⁸ Denza (2008), p. 288, Brown (1988), p. 81-82, Adler & Gegax (1997), p. 49-50, Whitelaw (1997), p. 14, Lee & Quigley (2008), p. 74, 470 *et seq.*, Parkhill (1998), p. 580, Wilson (1984), p. 128-129.

⁹ Denza (2008), p. 463.

¹⁰ Brenchley (1984), p. 15.

section 3.2.6 and 4.2.5 below), espionage and abuse of the import privilege.¹¹

The interviews were carried out at the Protocol Departments of the Ministries of Foreign Affairs of Sweden, The Netherlands and Denmark, respectively. They were recorded with the consent of the persons interviewed, who also had an opportunity to read and comment on the text under their respective section (i.e. sections 5.1, 5.2 and 5.3 below) so as to avoid uncertainties or ambiguities relating to their parts. The three countries were chosen since they have many common denominators. For instance, they are part of Western Europe, member states of the EU and have the same political system. Given these similarities, one of the aims would be to find out whether their practice in these cases was likewise similar.

1.3.3 Nature of the conclusions

International diplomacy is a field where generalisations and methodological/theoretical approaches are almost non-existent.¹² The reason for this is mainly that the actions taken by States vary from case to case, depending on the special circumstances they entail, e.g. the relationship in general between the States concerned. I would therefore like to stress that the presentation of the practice does not imply that the respective Ministries will *always* take measure *x* in situation *y* but rather, this section reflects which considerations are taken into account and the line of reasoning that is employed in certain criminal cases. The study is thus not purely outcome-oriented but aims at describing the policies (if any), lines of reasoning and the processes applied by the Ministries in these situations. Thus, even in cases where certain patterns are discernible it is extremely important to keep in mind that each case has to be judged on its own merits and that there might be compelling reasons to act differently also in situations where the Ministry concerned is currently maintaining a strict policy.

1.4 Definitions

The 10 hypothetical situations described under section 1.4.2 above distinguish between so-called ‘conventional crimes’ and ‘crimes specific to persons enjoying immunity’. *Conventional crimes* are in this study understood as traffic offences, shoplifting and attempted fraud, slavery and and threats of private servants, assault, murder, child abduction and rape. These are crimes that can be committed by anyone, whether they have immunity or not, and are not specifically linked to the diplomatic or consular field. *Crimes specific to persons enjoying immunity* are understood as crimes that have a specific meaning for persons enjoying diplomatic or

¹¹ Frey & Frey (1999), p. 221 *et seq.*, Cahier (1964), p. 184, Lee & Quigley (2008), p. 406-407, Grzybowski (1981), p. 46-47, Fry (ed.) *et al.* (2002), p. 431 *et seq.*, Wilson (1967), p. 138 *et seq.*, Witiw (1988), p. 348 *et seq.*, Southwick (1988-1989), p. 91.

¹² See also part 2 of professor Christer Jönsson’s lecture ‘Diplomati – en introduktion’, available at <http://www.svet.lu.se/resources.lasso?-token.unique=62140>. Webpage viewed on 2009-04-08 at 11:37:30 hours.

consular immunity – either because they are historically connected to the diplomatic or consular sphere or because their commission requires that the person in question is enjoying such immunity. Espionage, smuggling of narcotics using the diplomatic or consular bag and abuse of import privileges are examples of such crimes that are discussed in this study.

The notion of ‘the ambassador/embassy concerned’ in section 5 refers to the ambassador/embassy of the sending State whose representative has committed a crime in the receiving State.

As regards the use of masculinum and femininum, in this study, the word ‘he’, ‘him’ and ‘his’ has been used to refer to both sexes, unless it follows from the context that one of the sexes is referred to. This has been done for the sole purpose of simplifying the text.

2 The concept of ‘jurisdiction’ in relation to diplomatic and consular ‘immunities’ and ‘privileges’

2.1 Introduction

The main consequence of diplomatic and consular immunity (i.e. personal immunity) is that it entails an exemption from the local jurisdiction of the receiving State under certain circumstances, which will be explained in more detail below. The concept of *personal immunity* requires an understanding of the concept of *jurisdiction*, since immunity is always immunity from jurisdiction and therefore cannot exist without the latter.¹³ It is therefore important to give an account of the different types of jurisdictions that a state can invoke to exercise its authority.¹⁴ Immunity and jurisdiction are thus strongly interrelated.¹⁵

The international legal doctrine traditionally categorizes immunities in two fields, namely *State* (also known as *sovereign*) *immunity* and *personal immunity*, also known as *immunity racione personae* (the latter also comes with *functional immunity* or *immunity racione materiae*¹⁶, which will be explained below in section 3.2.3). The provisions on the former (i.e. State immunity) comprise protection for State property, government, authorities and representatives from the adjudicative and enforcement jurisdiction (see section 2.3.2 and 2.3.3 below) of another State (i.e. national law), while the latter (i.e. personal immunity, including functional immunity) aims at protecting official envoys of the State and related issues.¹⁷ State immunity is based on the recognized principle in international customary law that one State cannot exercise jurisdiction over another due to their legal equality as sovereigns, a fact that is also expressed in the Latin expression *par in parem non habet imperium*.¹⁸ Immunity is, in other words, an exception to the fundamental rule in international law according to which a State has an exclusive and all-encompassing jurisdiction over its territory.¹⁹ *Personal immunity* encompasses diplomatic and consular agents, as well as some high-ranking officials in a State, e.g. the head of state/government and

¹³ ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 46.

¹⁴ Bröhmer (1997), p. 34.

¹⁵ See also Barker *et al.* (1998), p. 950 *et seq.*

¹⁶ Van Alebeek (2008), p. 161-162.

¹⁷ Linderfalk (ed.), *et al.* (2006), p. 43, Dixon (2005), p. 163, 173-174, Fox (2002), p. 1.

¹⁸ See for instance the government of Germany's plea on State immunity in the Italian *Ferrini*-case, Italian Court of Cassation, Judgment No. 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*.

¹⁹ Kjeldgaard-Pedersen (2005), p. 44.

minister of foreign affairs.²⁰ The difference compared to State immunity is that personal immunity deals with a State envoy (his title and actions) or a State envoy's property.²¹ Consequently, there is a certain overlap between personal and State immunity.²²

The rules governing the States' jurisdictional authority have developed through international custom, mainly by the States' use of jurisdiction within their own territory and the subsequent approval (whether it was explicit or implied due to their passiveness) or protests from other States.²³

2.2 The difference between jurisdiction, immunities and privileges

'Jurisdiction' comprises the States' powers to legislate, adjudicate and enforce²⁴, as will be described further in section 2.3. The main difference between jurisdiction (from now on, 'jurisdiction' will be referring to 'adjudicative' jurisdiction (see section 2.3.2 below), if nothing else is expressly stated) and immunity is that the State is never obliged to exercise its right to the former, even if, according to well-established international custom, they *might* do so under certain circumstances, based on different principles that will be described further below.²⁵ Immunity, on the other hand, constitutes a restriction of this freedom since the State *has to* refrain from exercising its jurisdiction where immunity applies, in other words a procedural constraint.²⁶ This has also been confirmed by the ICJ in the *Arrest Warrant*-case, where it is stated that 'jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction'.²⁷ Another important reason why one should distinguish between jurisdiction and immunities is that 'immunity' does not equal 'non-justiciability'. Non-justiciability means that the State *lacks* jurisdiction because (a) there is no sufficient jurisdictional link between the State and the issue under dispute (see also section 2.3.2-2.3.2.6 below) or (b) because the issue at hand has no bearing whatsoever on the national law of the State concerned or (c) because the issue relates to actions taken by the government of another State in its own territory (the last mentioned ground for non-justiciability is not recognized in all States, even if it is quite common).²⁸ Immunity, however, can only arise in a situation where the State *does* have jurisdiction but is not allowed to invoke it due to

²⁰ ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 51.

²¹ Linderfalk (ed.), *et al.* (2006), p. 43.

²² See also Whomersley (1992), p. 852 regarding the relationship between State immunity, the VCDR and the VCCR.

²³ Linderfalk (ed.), *et al.* (2006), p. 37.

²⁴ Bassiouni (2001-2002), p. 89.

²⁵ Linderfalk (ed.), *et al.* (2006), p. 37-38, Dixon (2005), p. 133.

²⁶ Linderfalk (ed.), *et al.* (2006), p. 37-38.

²⁷ ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 59.

²⁸ Dixon (2005), p. 164-165.

State/sovereign or personal immunity.²⁹ In conclusion, whereas non-justiciability pertains to the substance of the issue at hand, immunity pertains to the status of the presumptive respondent.³⁰

Immunities and privileges apply to the diplomatic and consular mission (premises, property, and communications) as well as to their staff and functions. It is, nonetheless, difficult to make a clear distinction between the meaning of ‘immunity’ on one hand and ‘privilege’ on the other; the notions are often used synonymously without any further explanation of their meaning, nor does the VCDR or the VCCR define them.³¹ However, the general view is, according to *Satow*, that a *privilege* entails a broad exemption from the laws and regulations of the receiving State, e.g. from the duty to pay taxes or obeying social security provisions, while *immunity* pertains to the *procedural* exception from the jurisdiction of the receiving State and not – as such – from its *material* or *substantive* law.³²

2.3 Different types of jurisdictions

2.3.1 Legislative jurisdiction

According to the traditional view in international law, there are no limitations as regards the State’s authority to legislate.³³ A State can legislate on everything – even persons, property and events outside of its own territory – and enjoys the freedom to adopt the laws that it finds suitable.³⁴ Another issue is that the State’s subsequent *application* of its national laws can be at odds with international law, due to the territorial constraint following from the jurisdiction to enforce (see section 2.3.3 below).³⁵ However, this is seen as a separate question and does not restrict the State’s legislative jurisdiction as such.³⁶

Legislative jurisdiction is also known as *jurisdiction to prescribe* or *prescriptive jurisdiction*.³⁷

2.3.2 Adjudicative jurisdiction

Adjudicative jurisdiction deals with the ability of national courts to adjudicate issues that are conveyed upon them.³⁸ For this type of jurisdiction and in the context of diplomatic and consular immunities, a

²⁹ Dixon (2005), p. 163, 165.

³⁰ *Ibid.*, p. 165-166.

³¹ See also Cahier (1964), p. 183-184 and Malanczuk (1997), p. 126.

³² *Satow* (1979), § 15.1. See also Hill (1931), p. 252.

³³ Linderfalk (ed.), *et al.* (2006), p. 38.

³⁴ *Ibid.*, p. 38, Dixon (2005), p. 132-133, Bring & Mahmoudi (2007), p. 72.

³⁵ Linderfalk (ed.), *et al.* (2006), p. 38, Dixon (2005), p. 133-134, Bring & Mahmoudi (2007), p. 72. For instance, a State can pass a law that prohibits a certain behaviour abroad but such a law would be difficult to enforce since the State’s jurisdiction to enforce is, as opposed to its legislative jurisdiction, bound to its territory. See also Cryer *et al.* (2007), p. 37-38.

³⁶ Linderfalk (ed.), *et al.* (2006), p. 38.

³⁷ O’Keefe (2004), p. 736.

³⁸ Cryer *et al.* (2007), p. 38.

distinction is made depending on whether the issue concerns immunity from jurisdiction in civil (and administrative) cases or immunity from jurisdiction in criminal cases.

When it comes to civil cases, the traditional view in international law has been that there are no restrictions (except for cases where the State has concluded international agreements on this matter) as regards the State's right to exercise jurisdiction.³⁹ There are, however, some uncertainties surrounding this. Some claim that there should be a link between the State and the civil proceedings in order for the State to rightfully claim jurisdiction over the matter, for instance that the same links that are required for jurisdiction over criminal cases (see next paragraph) should apply equally for the State's jurisdiction over civil cases.⁴⁰

A State's right to exercise criminal jurisdiction according to international law presupposes that there is a link between the State on one hand and the alleged crime and/or the suspect on the other. There are six different principles, which will be described briefly in section 2.3.2.1 – 2.3.2.6 below, that provide for such links. These principles are not mutually exclusive, meaning that disputes due to concurrent jurisdiction claims between two or more States (the forum State and the foreign State(s) respectively) might occur.⁴¹ To give an account for such concurrent claims however goes beyond the scope of this study.

Adjudicative jurisdiction is also known as *judicial* or *curial jurisdiction*.⁴²

2.3.2.1 The principle of territoriality

The principle of territoriality assumes that there must be a territorial link to the territory of the forum State in order for it to claim jurisdiction, e.g. the presence of the defendant on the State's territory when the crime was committed or the fact that the conduct under dispute took place there.⁴³

From the point of view of criminal jurisdiction, this principle thus focuses on the site of the crime. Its essence is that, since the crime has been committed on the territory of the State - whether it happened on its land, sea, or airspace - the State concerned is entitled to claim jurisdiction rights over it. The reason for its popularity – the principle is the most invoked of the six - lies in its simplicity and its functional inherent aptitude to avoid concurrent jurisdictional claims in addition to the fact that it normally (if the alleged perpetrator is present on the State's territory) facilitates execution.⁴⁴ There are however problems also in relation to this, namely the issue of where a crime should be regarded as having been committed.⁴⁵ The problem is particularly relevant when it comes to durative crimes, i.e. where the different constituent elements of the crime took place on the territories of

³⁹ Linderfalk (ed.), *et al.* (2006), p. 38-39.

⁴⁰ Dixon (2005), p. 134-135.

⁴¹ *Ibid.*, p. 135-136, Fox (2002), p. 45.

⁴² O'Keefe (2004), p. 737.

⁴³ Bröhmer (1997), p. 35.

⁴⁴ Fox (2002), p. 52.

⁴⁵ Dixon (2005), p. 136.

two or more States.⁴⁶ There are two possible approaches to this issue: The crime can be seen as being committed on the territory of the State either (a) if it was completed on its territory, even if some constituent part of the criminal offence happened abroad (the objective principle of territoriality) or (b) if it began on its territory, even if some constituent part of the criminal offence was completed abroad (the subjective principle of territoriality).⁴⁷

2.3.2.2 The active personality principle

The active personality principle gives the State jurisdiction as the person suspected of committing the crime is a national of the State.⁴⁸ Whether a person is a national of a particular country is determined by the law of the State concerned and the relevant time for when nationality was at hand is when the offence was committed.⁴⁹ In addition to this, there must be a *genuine link* between the supposed national and his State.⁵⁰

2.3.2.3 The passive personality principle

The passive personality principle is the same as the active personality principle described above, except that it focuses on the victim of the crime instead of the alleged perpetrator.⁵¹ It is seen as a natural consequence of the State's obligation to provide diplomatic protection to their nationals and entitles jurisdiction to the State of nationality in cases where a crime abroad has been committed against its nationals.⁵² The principle was confirmed as a legitimate basis for criminal jurisdiction in the *Lotus*-case⁵³, but is rarely invoked – partially due to the somewhat odd and not so practical effects it might lead to. For instance, since the principle in effect would mean that a person carries the protection of the State of which he is a national wherever he is, all people that he encounters – no matter which State they are in or which nationality they have – would be subjected to the laws of his State of nationality.⁵⁴

2.3.2.4 The protective principle

The State has jurisdiction over crimes aimed at its national security, e.g. high treason, espionage and terrorism, even when the crime has been committed abroad by a non-national.

⁴⁶ A classical example of such a crime is when a person fires a shot in country A that kills a person in country B. See also Linderfalk (ed.), *et al.* (2006), p. 39.

⁴⁷ Dixon (2005), p. 136.

⁴⁸ Cryer *et al.* (2007), p. 41.

⁴⁹ *Ibid.*, p. 41.

⁵⁰ Cryer *et al.* (2007), p. 41.

⁵¹ Dixon (2005), p. 142.

⁵² *Ibid.*, p. 142, Bröhmer (1997), p. 36.

⁵³ PCIJ in *the Case of the S.S. 'Lotus' (France v Turkey)*, PCIJ Series A, Judgement No. 9, 1927, p. 22-23.

⁵⁴ Dixon (2005), p. 142.

2.3.2.5 The principle of the flag State

The principle of the flag State provides that a State has jurisdiction over crimes committed on a vessel on the high seas, provided that the vessel is registered in that State.⁵⁵ For this purpose, the crime will be seen as if it happened on the territory of the flag State.⁵⁶

2.3.2.6 The principle of universal jurisdiction

The principle of universal jurisdiction – the most controversial of the principles described in this section – allows states to assume jurisdiction over international crimes, i.e. crimes against universally applicable international norms that entail individual criminal responsibility for the perpetrator (see also section 3.2.3.4.1 regarding *jus cogens*-norms).⁵⁷ The sole basis for the exercise of this type of jurisdiction is thus the nature of the crime. The rationale of universal jurisdiction is that certain crimes are considered being so threatening to the international order (*delicta juris gentium*) that any State should be allowed to prosecute them.⁵⁸ The crime of genocide, torture, crimes against humanity, piracy and aggression are often mentioned in this context, although there is some uncertainty as to the exact scope of this category of crimes.⁵⁹ The principle has been invoked by (amongst others) The Netherlands in a case against the Surinamese military leader Desiré Bouterse concerning narcotics smuggling, by Belgium in a case against the Congolese minister of foreign affairs, Abdulaye Yerodia Ndombasi concerning crimes against humanity and by Spain in a case against the former Chilean dictator Augusto Pinochet concerning gross human rights violations.⁶⁰

2.3.3 Enforcement jurisdiction

Enforcement jurisdiction means that the State has the right to take - through its courts, police or other authorities – coercive measures such as arrests, seizures and searches on its territory.⁶¹ Enforcement jurisdiction is thus entirely bound to the State territory and can only be carried out on another State's territory with prior consent from that State.⁶² This is also expressed in article 2(7) of the UN Charter as *the principle of non-intervention*: “Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”

⁵⁵ PCIJ in *the Case of the S.S. 'Lotus' (France v Turkey)*, PCIJ Series A, Judgement No. 9, 1927, p. 25.

⁵⁶ *Ibid.*

⁵⁷ Linderfalk (ed.), *et al.* (2006), p. 41.

⁵⁸ Dixon (2005), p. 137-138.

⁵⁹ Linderfalk (ed.), *et al.* (2006), p. 41.

⁶⁰ Roht-Ariazza (2004), p. 375 *et seq.*, Dixon (2005), p. 138.

⁶¹ Cryer *et al.* (2007), p. 38.

⁶² O'Keefe (2004), p. 740. An example of such an arrangement is the 1999 agreement between UK and The Netherlands following the Lockerbie incident. The agreement enabled a trial in on Dutch territory by a Scottish court applying Scottish law, Dixon (2005), p. 133.

Enforcement jurisdiction is also known as *jurisdiction to enforce* or *executive jurisdiction*.⁶³

2.3.4 General remarks

As becomes evident from the presentation above, there exists an overlap between different types of jurisdictional claims, especially when it comes to the different principles guarding criminal jurisdiction (this overlap is also known as ‘concurrent jurisdiction’).⁶⁴ In spite of this, there are no principles in international law that provide guidance as to which jurisdictional claims should be given precedence.⁶⁵ The Permanent Court of International Justice (PCIJ) also stressed in the *Lotus*-case that States in general enjoy a wide discretion as to which principles it wants to invoke in order to extend its legislative and adjudicative jurisdiction to persons, property and acts that occur outside of its territory.⁶⁶

2.4 The distinction between immunity from criminal jurisdiction, inviolability and individual criminal responsibility

It is very important to distinguish between immunity from criminal jurisdiction and inviolability on one hand and individual criminal responsibility on the other. Nothing prohibits the receiving State to arrest and prosecute a diplomat when his posting has ended (and after a reasonable time for him leaving the country has expired, see article 39(2) of the VCDR) or when his immunity has ceased to exist due to other reasons - e.g. in case of waiver by the sending State (see section 3.2.4 and 3.2.7.2 below) – *even in situations where the proceedings were instigated/the events they refer to occurred at a time when his immunity was still in force*.⁶⁷ This is precisely because immunity from the criminal jurisdiction of the receiving State for the individual concerned does not entail immunity from legal liability for the crime committed and therefore does not presuppose impunity.⁶⁸ The reason for this is, as mentioned above under section 2.2, the fact that it is a procedural constraint hindering adjudication and/or execution in a particular case.⁶⁹ However, the issue might be raised whether the instigation of proceedings/investigations by the receiving State’s authorities awaiting the cease of the diplomat’s immunity and therefore the possibility of charging/punishing him at that (later) stage is compatible with the obligation

⁶³ O’Keefe (2004), p. 736.

⁶⁴ See also the PCIJ in *the Case of the S.S. ‘Lotus’ (France v Turkey)*, PCIJ Series A, Judgement No. 9, 1927, p. 30-31.

⁶⁵ Cryer *et al.* (2007), p. 37.

⁶⁶ PCIJ in *the Case of the S.S. ‘Lotus’ (France v Turkey)*, PCIJ Series A, Judgement No. 9, 1927, p. 19.

⁶⁷ Denza (2008), p. 311, 435.

⁶⁸ ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 60.

⁶⁹ See also *ibid.*

in article 29, according to which the receiving State shall treat him with “due respect”.⁷⁰ It has been suggested that the decisive point in this regard should be if the actions initiated are such that they might be seen as penal in their nature.⁷¹ If so, they would be deemed contradictory to article 31(1) and their subsequent enforcement to article 29.⁷² It should however be pointed out that deciding on such measures lies on the police and judiciary of the receiving State – meaning that the Ministry of Foreign Affairs in most cases (especially if they have an independent police and judiciary) cannot affect the decisions on whether to investigate the matter or even taking it to court.⁷³ However, a person enjoying diplomatic immunity can clearly not be forced to attend court proceedings due to article 29 of the VCDR. Article 29 does, however, not hinder the matter from being adjudicated *in absentia*.

It is important to stress that the discrepancy discussed above pertaining to diplomatic immunity is interesting to discuss only when it comes to criminal acts committed in the concerned person’s private capacity, since – as will be explained further below – immunity from local jurisdiction for criminal acts committed in his official capacity continues to exist indefinitely (see section 3.2.3 below regarding the meaning of immunity *ratione materiae* and immunity *ratione personae*).⁷⁴ Even if the disputed act is a private one, the receiving State can only exercise enforcement measures provided that the individual concerned is still physically present on the State’s territory after his immunity has expired (which ought to be rare under these circumstances).⁷⁵ As for consular immunity, the same distinction between impunity and immunity must be made, although the scope of such immunity is much more narrow (see sections 4.2.1.1 and 4.2.2.3 below).⁷⁶

Another example of the difference between immunity from criminal jurisdiction, inviolability and individual criminal responsibility is the fact that immunity from the jurisdiction of the receiving State can be waived by the sending State, which would mean that the accused could be arrested and prosecuted in the receiving State. In addition to this, the person enjoying diplomatic immunity is never immune to the jurisdiction of the sending State (article 31(4) of the VCDR), meaning that he might be arrested and prosecuted in the sending State for criminal acts committed in the receiving State (provided that there are no other rules hindering this, e.g. the principle of double criminality). Immunity does, in other words, not necessarily have to lead to impunity.

⁷⁰ Brown (1988), p. 74-75.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See also Wilson (1967), p. 88-89.

⁷⁴ See also Dinstein (1966), p. 79-80 and Denza (2008), p. 435.

⁷⁵ Barker (2000), p. 169. See also section 2.3.3 above.

⁷⁶ Lee & Quigley (2008), p. 74.

2.5 Mixed cases – a question of complicity

A special question is how to deal with ‘mixed cases’, i.e. situations where a person enjoying immunity (x) has acted as an *accomplice* to another person who does not enjoy immunity (y) and who was principal in committing the crime.

As far as the Vienna Conventions are concerned, it does not matter whether the person enjoying immunity has acted as an accomplice or was principal in committing the crime, as long as he has committed *a crime*. This means that immunity only becomes interesting when a person (x) acts as an accomplice and *if being an accomplice (to the crime at issue) is criminalized in the receiving State*. This follows from the principle that immunity is an exception to jurisdiction. Where there is no jurisdiction, i.e. if the act committed (complicity to a crime) is not criminalized, then there is no jurisdiction and thus there cannot be any immunity *from* jurisdiction.

Should complicity be criminalized in a certain case, then the question arises whether a person enjoying immunity who acted as accomplice can be mentioned in the criminal charge against the principal. In some cases, this should be considered prohibited according to the Vienna Conventions and the prosecution concerning this person should therefore be withdrawn. The question, however, falls outside the scope of this paper, since it mainly deals with the practice of the Ministries of Foreign Affairs in Sweden, Denmark and The Netherlands.⁷⁷ The wording of the criminal charge and statement of circumstances constituting the offence is a matter pertaining to the practice of the *judiciary* of the receiving State and will thus not be discussed in detail. It is however probable that the situation will come down to the same considerations as mentioned above in section 2.4, i.e. the decisive point on whether it is allowed should be if the actions initiated (in this case, the wording of the accusation) are such that they might be seen as penal in their nature.

⁷⁷ The same also applies to cases where a person enjoying immunity was principal in committing a crime and a person who does not enjoy immunity acted as accomplice.

3 Diplomatic immunities and privileges

3.1 Introduction

3.1.1 Theoretical bases for diplomatic immunity

There are traditionally three theories that are used to describe the rationale behind diplomatic immunities and privileges, namely the theory of *personal representation*, the theory of *exterritoriality* and the theory of *functional necessity*.⁷⁸ Under this section, an account will be given for each of these theories together with an explanation of their current standing in international legal doctrine.

3.1.1.1 Diplomatic immunity due to personal representation of the Sovereign

This view on immunity can be summarised as personification through representation. The person enjoying diplomatic immunity is viewed as not only representing but also personifying the Sovereign (i.e. the ruler of the sending State) and is therefore entitled to the same privileges and immunities as the Sovereign himself.⁷⁹ The famous quote by Louis XIV “L’État, c’est moi!” is often used to illustrate the basis of this principle – the identification of the Sovereign with the State.⁸⁰ This argument for diplomatic immunity is, however, virtually abandoned today, mainly because it places the representative above the laws of the receiving State – something that does not go well with the meaning of the principle of sovereignty’s idea of all states being equal.⁸¹ Another contra-argument is that in today’s modern and democratic society, the diplomat represents *the people* (who do not themselves enjoy immunity from foreign States’ jurisdiction) – not the individual Sovereign.⁸² The opponents also mean that the argument does not provide a good theoretical basis for protecting private acts (even if it is compatible with the protection of official acts, diplomatic immunity does provide protection for both).⁸³

⁷⁸ Wilson (1967), p. 1.

⁷⁹ *Ibid.*, p. 1 *et seq.*

⁸⁰ Frey & Frey (1999), p. 248.

⁸¹ Farhangi (1986), p. 1520, Wilson (1967), p. 4.

⁸² Cahier (1964), p. 185, Parkhill (1998), p. 571, Wilson (1967), p. 4, Wilson (1984), p. 115.

⁸³ Shapiro (1990), p. 282, Farhangi (1986), p. 1520, Wilson (1967), p. 4.

3.1.1.2 Diplomatic immunity due to extritoriality

The *principle of extritoriality* was popular in the 17th and 18th centuries with the expansion of territorial law.⁸⁴ It rests on the legal fiction that the diplomat – also when present in the receiving country - is always on the territory of his country and therefore cannot be subjected to the jurisdiction of the receiving State even though he is physically present in that State.⁸⁵

The principle fails to explain why the diplomat is under an obligation to respect the laws of the receiving State as well as why the receiving State is obliged to protect him.⁸⁶ Technically speaking it is also misleading in that it confers the diplomat with unrestricted immunities and privileges and therefore goes way beyond what they are actually entitled to according to international law.⁸⁷ Due to these setbacks, the principle is today largely abandoned.⁸⁸ Although they have many similarities, the principle of *extritoriality* has to be distinguished from the principle of *extraterritoriality*. While the principle of *extritoriality* refers to the immunities vested in an envoy due to international law, *extraterritoriality* is defined as pertaining to the ‘establishment of an international servitude by elevating the nationality principle of jurisdiction over the territorial principle’.⁸⁹

3.1.1.3 Diplomatic immunity due to functional necessity

The theory of functional necessity is for the time being the most widely acknowledged theoretical base for diplomatic immunity.⁹⁰ The functionality lies in the fact that, knowing that immunity will protect him from interference from the authorities of the receiving State, the diplomat will be able to carry out his functions effectively, even in States that are perceived as somewhat hostile and that might otherwise be inclined to use their jurisdiction for reasons of political vengeance.⁹¹ The purpose of the immunity is thus not to be of personal benefit for the individual diplomat, but rather to enable him – as a representative of the State - to carry out his duties in a secure, independent and (fairly) unhindered manner.⁹²

For these reasons, the principle also justifies (as opposed to the principle of extritoriality) the protection of family members, since lack of protection of the latter might be utilized in order to threaten the diplomat.⁹³ The functional necessity of diplomatic immunities and privileges is also stressed in the VCDR, which in its preamble states that the purpose of such immunities and privileges is not to benefit the individuals but to ensure the

⁸⁴ Farhangi (1986), p. 1520-1521, Frey & Frey p. 207, 248.

⁸⁵ Farhangi (1986), p. 1520-1521, Frey & Frey p. 207, 248, Cahier (1964), p. 186.

⁸⁶ Wilson (1967), p. 14.

⁸⁷ *Ibid.*, p. 14 *et seq.*

⁸⁸ See for instance Wilson (1967), p. 9 *et seq.*

⁸⁹ Lee & Quigley (2008), p. 7.

⁹⁰ Shapiro (1990), p. 283, Farhangi (1986), p. 1521, Cahier (1964), p. 190-191.

⁹¹ See also Zaid (1998), p. 627.

⁹² Bermann *et. al.* (2005), p. 227.

⁹³ Cahier (1964), p. 192, Hickey & Fisch (1990), p. 362, Nash Leich (1988), p. 108.

efficient performance of the functions of diplomatic missions as representing States. This can also be seen in the content and scope of the immunities granted to different categories of staff, where the rationale for such differentiation is to give the staff member concerned immunity to effectively perform his tasks (which of course varies depending on the category of staff to which he belongs).⁹⁴ The functional rationale for the granting of immunity is also apparent from the exceptions to the latter pertaining to the holding of private immovable property situated in the receiving State, succession and professional or commercial activity exercised outside of official functions (article 31(1)).⁹⁵ The same is true for the exception in article 38, which excludes nationals and permanent residents of the receiving State from immunities not relating to official acts, since these categories are in the main less likely to be hindered due to political reasons.⁹⁶

3.1.2 The role of reciprocity

The principle of reciprocity reaffirms the principle of functional necessity (see section 3.1.1.3 above), since the lack of protection in the receiving State might retaliate against their representatives abroad.⁹⁷ What is more, reciprocity and retaliation are equally acknowledged principles of international law.⁹⁸ Reciprocity has been employed for retaliatory purposes especially after the second world war, e.g. by using *persona non grata*-declarations and restricting the freedom of movement for diplomats.⁹⁹ Immunity from jurisdiction as a limitation of *the receiving State's* sovereign rights is considered as acceptable because the sovereign rights of *the sending State* vis-à-vis the persons enjoying diplomatic immunity on *their* territory are equally restricted. The principle of reciprocity is thus, in Shapiro's words, '... an important, discretionary rule for diplomatic immunity'.¹⁰⁰

In the VCDR, the principle of reciprocity follows from article 47(2)(a), which provides that discrimination (which is forbidden according to article 47(1)) shall not be regarded as taking place where *the receiving State* applies any of the provisions of the Convention restrictively because of a restrictive application of that provision *to its mission in the sending State*.

3.1.3 Sources of diplomatic immunity law

3.1.3.1 International custom

International custom consists of two elements: state practice and *opinio juris*. The former refers to the *actual practice* applied by the States in a

⁹⁴ Parkhill (1998), p. 575, McDonough (1997), p. 486.

⁹⁵ Denza (2008), p. 4.

⁹⁶ *Ibid.*, p. 5-6.

⁹⁷ Southwick (1988-1989), p. 89.

⁹⁸ Wilson (1967), p. 1270.

⁹⁹ *Ibid.*, p. 32.

¹⁰⁰ Shapiro (1990), p. 286.

certain field (e.g. diplomatic privileges and immunities), while the latter refers to the fact that the States *regard* this practice as legally binding.¹⁰¹ In the diplomatic and consular fields, this practice slowly evolved throughout the centuries and was for a long period of time the only and the most important source of law in this area.¹⁰² The widespread adoption of the VCDR, however, marked a new era as regards the sources of diplomatic law (immunities included) in the sense that treaty law ‘replaced’ (or rather codified) international custom as the main source of law in the field.¹⁰³ This, however, does not mean that international custom has lost its importance – it continues to regulate the relationship between States that have not adopted the Convention and States that have.¹⁰⁴ In addition, the preamble of the Convention provides that international custom shall continue to govern questions not expressly regulated by the VCDR.

3.1.3.2 Treaties

3.1.3.2.1 Multilateral treaties

3.1.3.2.1.1 *The 1815 Regulation of the Congress of Vienna*

The Regulation was signed by the Congress on March 19, 1815.¹⁰⁵ It dealt with the classification of diplomatic agents and the meaning of their different ranks and was the earliest attempt at multilateral codification of diplomatic law.¹⁰⁶ As regards immunity it only contained provisions as far as heads of missions were concerned.¹⁰⁷ In spite of being signed by only eight European powers the Regulation soon became generally accepted, evolving into international custom and later into international customary law.¹⁰⁸

3.1.3.2.1.2 *The 1928 Havana Convention on Diplomatic Officers*

The 1928 Havana Convention regarding Diplomatic Officers was adopted in the Cuban capital by the Sixth International American Conference and subsequently adhered to by some Latin American States.¹⁰⁹ The Convention was also a source of influence for the drafters of the VCDR.¹¹⁰

3.1.3.2.1.3 *The 1961 Vienna Convention on Diplomatic Relations and its Optional Protocols*

The importance of the 1961 Vienna Convention on Diplomatic Relations (VCDR) as a source of diplomatic immunity law can hardly be underestimated. It was adopted by the United Nations Conference on

¹⁰¹ Salmon (1994), p. 10.

¹⁰² *Ibid.*, p. 9.

¹⁰³ Cahier (1964), p. 30, Hardy (1968), p. 4.

¹⁰⁴ Cahier (1964), p. 30.

¹⁰⁵ Salmon (1994), p. 8.

¹⁰⁶ *Ibid.*, p. 8, Denza (2008), p. 3.

¹⁰⁷ Wilson (1984), p. 121 (footnote 62).

¹⁰⁸ Salmon (1994), p. 8.

¹⁰⁹ Hardy (1968), p. 5-6.

¹¹⁰ *Ibid.*, p. 6.

Diplomatic Intercourse and Immunities (below ‘the Conference’), held in Vienna from March 2 to 14 April, 1961, and entered into force on April 24, 1964. Today (2009-04-09), there are 186 States party to the Convention, which is regarded as the main source of law on diplomatic immunities.¹¹¹ Its 53 articles are considered as codifying – to a large extent – international customary law.¹¹² This is also evident from one of its introductory paragraphs, which states that the States party to the Convention affirm that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the VCDR.

The main value of the Convention lies in its strong utility, the clarity it brings to the conduct of diplomatic relations but also to the fact that it is widely followed by the party States.¹¹³

There are two optional protocols to the Convention, both adopted simultaneously with the latter: The Optional Protocol Concerning Acquisition of Nationality (VCDR-OPAN) and the Optional Protocol concerning the Compulsory Settlement of Disputes (VCDR-OPSD). The former provides that members of the mission not being nationals of the receiving State and members of their families forming part of their household, shall not solely by the operation of the law of the receiving State acquire the nationality of that State (article II of the VCDR-OPAN). The definition of ‘members of the mission’ is the same as in the VCDR (article I of the VCDR-OPAN). The latter protocol provides that disputes arising out of the interpretation or application of the VCDR shall lie within the compulsory jurisdiction of the International Court of Justice (ICJ) and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the protocol concerned (article I of the VCDR-OPSD). The parties may however agree, within a period of two months, to adopt a conciliation procedure before resorting to the ICJ (article III(1) of the VCDR-OPSD). According to article III(2) of the VCDR-OPSD, the conciliation commission shall make its recommendations within five months after its appointment. Should the disputing parties not accept the recommendations within two months after they have been delivered, either party may bring the dispute before the ICJ by an application. There is also the possibility to take the dispute to an arbitral tribunal providing that both parties agree to such an arrangement (article II of the VCDR-OPSD).

3.1.3.2.1.4 The 1969 Convention on Special Missions and its Optional Protocol

The 1969 Convention on Special Missions (CSM), adopted by the UN General Assembly, got much less support than the VCDR (it has just over 30 States Parties) and is not seen as codifying or representative of international customary law.¹¹⁴ In spite of this, its provisions can be used as guidance when determining the scope of the immunities granted to diplomats forming part of such missions.¹¹⁵ It was adopted on December 8,

¹¹¹ UNTC – Status of Treaties, Dixon (2005), p. 188.

¹¹² Dixon (2005), p. 188, McDonough (1997), p. 478.

¹¹³ Brown (1988), p. 54.

¹¹⁴ Van Alebeek (2008), p. 168.

¹¹⁵ SOU 2008:2 p. 57.

1969 and entered into force on June 21, 1985.¹¹⁶ The Convention also has an Optional Protocol regarding the Compulsory Settlement of Disputes (CSM-OP).

The CSM regulates immunities for so-called *ad hoc*-diplomats.¹¹⁷ As the name suggests, these are diplomats that have been appointed to carry out certain, temporary tasks, e.g. the negotiation of a bilateral treaty.¹¹⁸ They are not part of the permanent diplomatic representation in the country to which they are sent – which is the case in the majority of interstate relations.¹¹⁹ According to the CSM, a ‘special mission’ is such a temporary post that represents the sending State and that is sent to the receiving State with its consent to negotiate on specific issues or to perform a certain task.¹²⁰

3.1.3.2.1.5 The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents – a spin-off from the VCDR and VCCR - was adopted by the UN General Assembly on December 14, 1973 and entered into force on February 20, 1977.¹²¹ The adoption of the Convention was a response to a number of attacks on diplomatic agents at the end of the 1960’s.¹²² The initiative for its adoption came from the ILC, which also prepared the draft articles.¹²³ There are currently (spring 2009) 171 States party to the Convention.¹²⁴

3.1.3.2.2 Bilateral treaties

Bilateral treaties can have objectives such as the establishment of diplomatic relations and/or missions between/in the countries, the change of rank of a mission, e.g. by promoting it from a legation to an embassy and agreeing on most favourable treatment-clauses.¹²⁵ The latter is frequently seen in bilateral treaties and it only entitles the States party to the treaty the right to such treatment.¹²⁶

3.1.3.2.3 Prevalence in case of conflict between the VCDR and bilateral treaties

Article 47 of the VCDR does not hinder bilateral agreements. It states (1) that, when applying the provisions of the VCDR, the receiving State shall not discriminate as between States, but also stresses ((2)(b)) that discrimination shall not be regarded as taking place where by custom or

¹¹⁶ Bröhmer (1999), p. 366.

¹¹⁷ SOU 2008:2, p. 56-57.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 56.

¹²⁰ *Ibid.*, p. 57.

¹²¹ UN Audiovisual Library of International Law.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ UN Treaty Collection – Status of Treaties.

¹²⁵ Cahier (1964), p. 31.

¹²⁶ *Ibid.*, p. 32.

agreement States extend to each other more favourable treatment than is required by the provisions of the VCDR. This means that the VCDR offers minimum standards and that the party States are free to negotiate on more extensive immunities and privileges than those provided for in the Convention.

3.1.3.3 National legislation

Assessing national legislation is important in order to determine how the diplomatic law is applied in a particular State, e.g. the meaning of 'permanently resident' (see section 3.2.1.2 below) or to determine the exact scope of the diplomat's duty according to article 41(1) of the VCDR to respect the laws of the receiving State - as well as to see how the State has chosen to give effect to treaties it may have adopted in this field.¹²⁷ Thus, national legislation can regulate or specify issues that have not been addressed/specified in international law and/or (in dualistic States as opposed to monistic ones) implement the international agreements adopted by the State so that they can be applied by the State's authorities.¹²⁸

3.1.3.4 Jurisprudence and doctrine

Jurisprudence – national as well as international - and doctrine constitute sources of law on this field where they help bringing clarity to or fill in the gaps of laws that are somewhat ambiguous.¹²⁹ The importance of jurisprudence is also that it can confirm the existence of a uniform State practice on a certain issue and, by so doing, also verify the existence of international custom.¹³⁰

Jurisprudence on international level consists of case law from the arbitral tribunals, conciliation commissions, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).¹³¹

Doctrine as a source of law was of great significance during the 18th century, with its many well-known writers like Grotius that commented on diplomatic law, but also during the 20th century due to the codifications that took place then (e.g. the VCDR).¹³²

¹²⁷ Cahier (1964), p. 38, Hardy (1968), p. 4.

¹²⁸ Cahier (1964), p. 38, Dixon (2005), p. 88-89.

¹²⁹ Cahier (1964), p. 42.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

3.2 The 1961 Vienna Convention on Diplomatic Relations

3.2.1 Categories of personnel and the scope of their immunities and privileges

The VCDR distinguishes between three different categories of staff when it comes to the scope and contents of the immunities vested in them, namely diplomatic agents, members of the administrative and technical staff and members of the service staff. In this section, an account will be given for the different categories of staff as well as the scope, contents and duration of the immunities and privileges enjoyed by them and their family members.

3.2.1.1 Diplomatic agents and their family members (Article 1(e), 38(1) and 37(1))

The scope of immunity is most extensive for the category of staff known as *diplomatic agents*, defined (*singular*) in article 1(e) as ‘the head of the mission or a member of the diplomatic staff of the mission’. The *head of the mission* is ‘the person charged by the sending State with the duty of acting in that capacity’ (article 1(a)) while the *members of the diplomatic staff* are ‘the members of the staff of the mission having diplomatic rank’ (article 1(d)). According to article 14(1), heads of mission are divided into three different categories, namely:

- a) That of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
- b) That of envoys, ministers and internuncios accredited to Heads of State;
- c) That of *chargés d’affaires* accredited to Ministers for Foreign Affairs.

It follows from article 14(2) that no differentiation shall be made between the different categories except regarding their *precedence*¹³³ and *etiquette*. The VCDR lays out the minimum requirements that are to be met by the receiving State regarding the scope of the immunities enjoyed by the sending State’s diplomatic agents. This follows from article 38(1), which states that “Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State *shall* enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions [emphasis added]”, i.e. only immunity *ratione materiae* (see section 3.2.3 regarding the meaning of immunity *ratione*

¹³³ *eDiplomat* defines ‘precedence’ as follows: ‘the right to superior honor on a ceremonial or formal occasion; for ambassadors in a country, precedence is determined by the order in which they presented their credentials to the host government.’ Definition available at <http://www.ediplomat.com/nd/glossary.htm#E>. Webpage viewed on 2009-03-10 at 18:29:15 hours.

materiae and immunity *ratione personae*). This means, *e contrario*, that a diplomatic agent who is not a national and/or permanently resident in the receiving State – which is the case in the majority of these situations¹³⁴ – enjoys immunity for actions conducted as part of his duties as a diplomatic agent *but also* for acts performed outside of his duties, i.e. in his capacity as a private individual. However, there are some exceptions to this pertaining to immunity from the receiving State’s civil and administrative jurisdiction, which shall be examined further below in section 3.2.3.4 The VCDR does not contain a definition of what permanent residence entails, meaning that different states apply different criteria. The differing nature of private and official acts is also stressed in article 31(1) of the VCDR, which, among other things, mentions that a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the sending State. One of the three exceptions to this rule are actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions (see *ibid.*).

There is, however, no precise definition of what constitutes a private and official act respectively, although the provisions in article 3(1) of the VCDR might provide some guidance. This article states that the functions of a diplomatic mission, *inter alia*, consist in:

- a) Representing the sending State in the receiving State;
- b) Protecting (in accordance with international law), the interests of the sending State and its nationals;
- c) Negotiating with the Government of the receiving State;
- d) Ascertaining (by lawful means) conditions and developments in the receiving State, and reporting these to the sending State’s Government;
- e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Acts performed in private (i.e. non-official capacity) could therefore (as a guidance) be interpreted as being contrary to or other than the ones mentioned in article 3(1)(a)-(e). It is, however, important to stress that the question of whether article 31(1)(c) or article 38 should be interpreted with referral to article 3 is not an undisputed one. Some suggest that it is more correct to determine whether an act is official or private by consulting the receiving and the sending States respectively, preferably by looking at the sending States’ instructions to the diplomat concerned.¹³⁵

According to article 37(1), the family members of a diplomatic agent who form part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36, i.e. the same privileges and immunities as the diplomatic agent enjoys himself. The VCDR does, however, not contain any definition of *family*

¹³⁴ See Feltham (1980), p. 4. See also article 8 of the VCDR.

¹³⁵ Denza (2008), p. 307.

*members of a diplomatic agent forming part of his household.*¹³⁶ The States enjoy discretion as regards the interpretation of the former notion, although as a minimum spouses and minor children are considered to fall within the scope of it.¹³⁷ Whether the family member is permanently resident in the receiving State is determined by the law of that State (see section 3.2.2 below).

3.2.1.2 Members of the administrative and technical staff and their family members (Article 1(f), 37(2), 38(2) and 37(2))

Members of the administrative and technical staff are in article 1(f) identified as ‘the members of the staff of the mission employed in the administrative and technical service of the mission’. This category of staff enjoys more limited immunities and privileges than diplomatic agents. According to article 38(2), members of the administrative staff of the mission (among other staff that are not diplomatic agents) *who are nationals of or permanently resident*¹³⁸ *in the receiving State*, enjoy privileges and immunities only to the extent admitted by the receiving State. The receiving State must, however, exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission (article 38(2) *in fine*).

The immunities and privileges enjoyed become more extensive in cases where the member of the administrative and technical staff is not a national of or permanently resident in the receiving State. In those cases, article 37(2) provides that they shall enjoy the privileges and immunities specified in articles 29 to 35 of the VCDR, except that the immunity from civil and administrative jurisdiction of the receiving State as specified in article 31(1) shall not extend to acts performed outside the course of their duties. This means, among other things, that they enjoy full immunity from criminal jurisdiction as well as personal inviolability. In addition to this, they also enjoy the privileges specified in article 36(1) (see section 3.2.3.7) in respect of articles imported at the time of first installation.

Members of the family of the administrative and technical staff of the mission that are part of the staff members’ household shall, *if they are not nationals of or permanently resident*¹³⁹ *in the receiving State*, enjoy the same privileges and immunities as the staff member himself according to article 37(2) of the VCDR (see section 3.2.1.2 above). This means that, compared to family members of diplomatic agents, an additional exception of permanent residence applies to family members of a member of the administrative and technical staff.¹⁴⁰ They enjoy the same immunities and privileges as the staff member even when they are not nationals of or permanently resident in the receiving State (see *ibid.*). The VCDR does,

¹³⁶ See section 3.2.1.2 below and Brown (1988), p. 66 *et seq.*

¹³⁷ O’Keefe (1976), p. 329.

¹³⁸ The VCDR does not contain a definition of *permanent residence*, see section 3.2.2 above.

¹³⁹ *Ibid.*

¹⁴⁰ See also O’Keefe (1976), p. 340.

however, not contain any definition of *family members of a diplomatic agent forming part of his household* or of what constitutes *permanent residence*.¹⁴¹ The States enjoy discretion as regards the interpretation of the former notion, although as a minimum spouses and minor children are considered to fall within the scope of it.¹⁴²

3.2.1.3 Members of the service staff and their family members (Article 1(g), 37(3) and 38(2))

The *members of the service staff* are defined as ‘the members of the staff of the mission in the domestic service of the mission’ (article 1(g)). The difference between the *service staff* and *private servants* (the latter will not be discussed in this study) is that the former are employed by the sending State while the latter are employed by members of the mission (article 1(h)). According to article 38(2) of the VCDR, members of this category of staff (i.e. service staff) who are not nationals of or permanently resident¹⁴³ in the receiving State enjoy privileges and immunities to the same extent as the members of the administrative and technical staff (see section 3.2.1.2 above). However, if they are not nationals of or permanently resident in the receiving State, article 37(3) stipulates that they shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.

The family members of the service staff do not enjoy any privileges and immunities according to the VCDR.

3.2.2 The notion of ‘permanently resident in the receiving State’

As evident from above, the extent of the immunities and privileges granted vary depending on whether a member of the diplomatic mission (or his family member forming part of his household) is considered to be ‘permanently resident in the receiving State’. Since the notion has not been defined in the VCDR, and also does not follow from international custom, the party States are free to apply their own definition in this regard.¹⁴⁴ Many States for instance apply the presumption that locally recruited staff are considered to be permanently resident in the receiving State unless the sending State gives convincing reasons that would merit another conclusion, i.e. if they are intended to be posted abroad in a not too distant future.¹⁴⁵ Similarly, a person that is not locally recruited can become permanently resident if the circumstances of the case indicate that a person is intended to remain in the country, e.g. if his posting gets prolonged considerably.¹⁴⁶ Since no party State’s definition has precedence over the other – receiving

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, p. 329.

¹⁴³ *Ibid.*

¹⁴⁴ Denza (2008), p. 418.

¹⁴⁵ *Ibid.*, p. 423.

¹⁴⁶ *Ibid.*

and sending States alike – they will have to agree on which definition should be applied, either beforehand or *ad hoc* for a particular case.¹⁴⁷

3.2.3 The content of the personal immunities and privileges

The provisions in articles 29-31 and 33-36 expressly mention *diplomatic agents* in the context of immunities and privileges but, as we have seen, article 37 assigns many of the same immunities and privileges to other categories of staff/family members. In this section, I will give an account of these provisions by explaining the extent of the immunities and privileges vested and how they can affect the criminal liability of the individual.

3.2.3.1 Freedom of movement (Article 26)

Article 26 of the VCDR provides that the receiving State shall make sure that all members of the mission enjoy freedom of movement and travel on its territory. These freedoms can however be restricted in the sense that the receiving State may prohibit entry to certain zones due to national security reasons.

3.2.3.2 Immunity from any form of arrest or detention (Article 29)

Article 29 of the VCDR entails the principle of inviolability beneficial to diplomatic agents – the oldest principle in diplomatic law.¹⁴⁸ According to the article, the person of a diplomatic agent shall be inviolable, meaning that he shall not be liable to any form of arrest or detention and that the receiving State shall treat him with due respect as well as take all appropriate steps to prevent any attack on his person, freedom or dignity. This has been interpreted so as to include obligatory measures like for instance search, breathalyzer testing and taking of samples from the human body, e.g. blood samples.¹⁴⁹ Nevertheless, the diplomat's inviolability does not protect him from preventive measures, i.e. the police hindering him from further driving when under the influence of alcohol, or from self-defence.¹⁵⁰ However, it does entitle him to refuse a breathalyser test taken by the receiving State's authorities since a submission to such a test is considered as falling within

¹⁴⁷ *Ibid.*, p. 419.

¹⁴⁸ *Ibid.*, p. 256.

¹⁴⁹ Parkhill (1998), p. 574.

¹⁵⁰ ICJ in *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 3, 1980, para. 86: '... the observance of this principle [of inviolability] 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 commission of a particular crime.' See also Van Alebeek (2008), p. 163, Hill (1931), p. 253, Przetacznik (1971), p. 384 and Denza (2008), p. 257.

the scope of being *liable to any form of arrest or detention*, which is prohibited in article 29.¹⁵¹

3.2.3.3 Inviolability of the residence and property (Article 22 and 30)

Article 30 of the VCDR provides (article 30(1)) that the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission, i.e. the agents of the receiving State may not enter them without the diplomatic agent's permission. The receiving State is obliged to protect it from intrusion and damage as well as any disturbance of its peace or impairment of its dignity and it shall be immune from search, requisition, attachment or execution (article 22 of the VCDR). Furthermore, article 30(2) states that the diplomatic agent's papers, correspondence and property shall similarly enjoy inviolability. However, with respect to property the article states that the inviolability does not cover the exception provided for in article 31(3) of the Convention. Inviolability thus entails a duty for the receiving State *not* to exercise sovereign rights in this regard *as well as* a duty to protect.¹⁵²

As pointed out by Denza, there is an incongruity between article 30(2) and article 36(2), which provides for customs inspection of the diplomat's luggage under certain circumstances (see section 3.2.3.7 below).¹⁵³ Even if this issue was not solved by the Convention itself, the Conference pointed out that article 36 should have priority in this regard.¹⁵⁴

3.2.3.4 Immunity from jurisdiction, execution and exemption from giving evidence (Article 31)

According to article 31(1) of the VCDR, a diplomatic agent shall enjoy immunity from the criminal as well as civil and administrative jurisdiction of the receiving State. There are, however, three exceptions to the immunity when it comes to the civil and administrative jurisdiction of the State, namely when the civil or administrative jurisdiction is pertaining to (a) a real action relating to private immovable property situated in the territory of the receiving State, unless the diplomatic agent holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. Thus, since article 31(1) mentions that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State and no exceptions are given to this rule, such immunity is valid both for the diplomat's official acts as well as for acts committed in his capacity as a private individual. The International Court of Justice (ICJ) in the *Hostages*

¹⁵¹ Brown (1988), p. 85.

¹⁵² Denza (2008), p. 135.

¹⁵³ *Ibid.*, p. 387.

¹⁵⁴ *Ibid.*, p. 387.

*Case*¹⁵⁵ emphasized the importance of immunity from criminal jurisdiction according to article 31 of the VCDR.¹⁵⁶ In § 79 of the judgement, the Court stresses that if the threat of submitting the hostages – which in this case enjoyed diplomatic immunity according to the VCDR – to ‘any form of criminal trial or investigation’ would be implemented, this would entail ‘... a grave breach... of [the receiving State’s] obligations under Article 31 paragraph 1 of the 1961 Vienna Convention.’

The article also provides that a diplomatic agent is not obliged to give evidence as a witness (article 31(2)), that no measures of execution may be taken against him except in cases relating to the three exceptions mentioned above relating to the civil and administrative jurisdiction of the receiving State – provided that the measures can be taken without infringing the inviolability of the agent’s person or residence (article 31(3)). Even if this means that most judgements cannot be enforced on the person enjoying immunity, failure to comply with the judgement could in some cases be reason to use the *persona non grata*-declaration (see section 3.2.7.1 below) against the person concerned.¹⁵⁷

Finally, the article stresses (article 31(4)) that the diplomatic agent’s immunity from the jurisdiction of *the receiving State* does not exempt him from the jurisdiction of *the sending State*. Even if it sometimes would be plausible to take measures in the sending State against a diplomat abusing his immunity in the receiving State, such an arrangement might bring about certain problems. The sending State’s courts might for instance lack jurisdiction over the subject-matter or show indifference as to the punishment of the offence.¹⁵⁸ According to Denza, in cases where the sending State would like to see measures being taken against the person enjoying immunity, they are more likely to waive his immunity in this regard in order for criminal proceedings to be carried out by the authorities of the receiving State rather than taking him back so that he may be prosecuted in the sending State (see also section 3.2.7.2 below).¹⁵⁹

If the diplomatic agent or a person enjoying immunity under article 37 of the Convention has himself initiated proceedings in the receiving State, article 32(3) provides that he thereby submits to the jurisdiction of this State in respect of any counter-claim directly connected with the principal claim.

3.2.3.4.1 Does diplomatic immunity from criminal jurisdiction impede prosecution of crimes against *jus cogens*-norms?

Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines the notion of *jus cogens* as having the following meaning: “... a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be

¹⁵⁵ ICJ in *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 3, 1980.

¹⁵⁶ Denza (2008), p. 283.

¹⁵⁷ *Ibid.*, p. 408.

¹⁵⁸ *Ibid.*, p. 322.

¹⁵⁹ *Ibid.*, p. 323.

modified only by a subsequent norm of general international law having the same character.” Uncontroversial examples of such norms are the prohibitions of torture, genocide and slavery.¹⁶⁰

The provision in the VCLT mentioned above is also considered as customary international law – just like the rules governing diplomatic immunity in the VCDR.¹⁶¹ It has been discussed whether diplomatic immunity can be successfully invoked in cases where a person enjoying such immunity breaches a *jus cogens*-norm. The proponents argue that, since customary and treaty law enjoy the same hierarchy in the international law system, *jus cogens*-norms are the only norms within this system that have a higher rank and therefore should be seen as an exception to diplomatic immunity.¹⁶² In other words, a person enjoying diplomatic immunity could – in spite of the provision in article 31 of the VCDR regarding immunity from criminal jurisdiction – be prosecuted in the receiving State – or any other State for that matter, since these types of crimes entitle to universal jurisdiction¹⁶³ - if he breaches a *jus cogens*-norm.

Even if national prosecutions pertaining to violations of *jus cogens*-norms have taken place, the fact remains that these are very rare and it is disputed whether international customary law imposes a duty on States to extradite or alternatively prosecute (according to the well-known principle *aut dedere aut judicare*) individuals accused of such crimes.¹⁶⁴ According to the ICJ in the *Arrest Warrant*-case, such duties – sometimes following from international treaties – do not always affect immunities under customary international law.¹⁶⁵ There are also numerous cases from national as well as international courts such as the European Court of Human Rights and the ICJ where this argumentation has been rejected.¹⁶⁶ The reason for this is – which was also found by the House of Lords in a case from 2006 (*Jones v Kingdom of Saudi Arabia*) – that the argumentation is based on false presumptions since *jus cogens*-norms are prohibitive norms, i.e. they prohibit a certain conduct but do not attend to the time or comportment of prosecution.¹⁶⁷ Crimes against *jus cogens*-norms are thus not necessarily valid exceptions to *diplomatic immunity*. State practice and jurisprudence have shown that international law does not allow *functional immunity* for breaches of such norms.¹⁶⁸ It does, however, sustain *personal immunity* – regardless of the type of charges (i.e. also for breaches of human rights and

¹⁶⁰ Linderfalk (edt.), *et al.* (2006), p. 33.

¹⁶¹ *Ibid.*

¹⁶² Friedrich (2007), p. 1167 *et seq.*

¹⁶³ Cryer *et al.* (2007), p. 61, Parker & Neylon (1988-1989), p. 155-156.

¹⁶⁴ See also Cryer *et al.* (2007), p. 59 *et seq.*

¹⁶⁵ ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 59.

¹⁶⁶ Cryer *et al.* (2007), p. 427. See also Oxford Reports on International Law in Domestic Courts, Analysis of *Public Prosecutor v LC*, Appeal Judgment, RW (Rechtskundig Weekblad) 2002–2003, no 8 (the comments regarding the *Arrest Warrant*-case from the ICJ) and Denza (2008), p. 8.

¹⁶⁷ Cryer *et al.* (2007), p. 427-428.

¹⁶⁸ *Ibid.*, p. 434, Vicuna (1991), p. 47-48.

international criminal law).¹⁶⁹ As we shall see below in section 3.2.3, diplomatic immunity comprises both.

3.2.3.5 Exemption from social security provisions (Article 33)

According to article 33(1) of the VCDR, a diplomatic agent is, with respect to services rendered for the sending State, exempted from the social security provisions of the receiving State. However, if he employs private servants who are not nationals of or permanently resident in the receiving State and/or covered by the social security provisions of the sending State or a third State, he shall not be exempt from obeying such provisions in respect of his employees (article 33(2) and (3)). Article 33(4) provides that the diplomatic agent can choose voluntarily to participate in the social security system of the receiving State, provided that the laws of the receiving State allows such participation. The article is subsidiary to any bilateral or multilateral treaties in this field – both those that were applied prior to the entry into force of the Convention as well as future ones (article 33(5)).

3.2.3.6 Exemption from personal, public and military services (Article 35)

Article 35 of the VCDR provides that the diplomatic agent shall be exempted from all personal and public service of any kind in the receiving State, as well as from military obligations such as those connected with requisitioning, military contributions and billeting.

3.2.3.7 Exemption from customs duties and inspections, taxes and related charges (Article 23, 34 and 36)

The exemption from taxation pertaining to diplomatic as well as consular missions and staff is partially due to the fact that their immunity (i.e. both for person and property) hinders any enforcement measures and lawsuits in this regard, thereby excluding any possibility of collecting the sums.¹⁷⁰

¹⁶⁹ Cryer *et al.* (2007), p. 434-435. See also ICJ in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports 1, 2002., para. 58. Personal immunity can however not be invoked successfully in some cases of international jurisdiction, e.g. the ICC (Cryer *et al.* (2007), p. 444). However, article 98(1) of the Rome Statute (which established the ICC, below) reads: ‘The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity [emphasis added].’ This means, that if the Court requests surrender or assistance from a State that is not a party to the Statute (i.e. a ‘third State’), it is dependent on that State’s waiver of immunity. Such a waiver is however not needed if the State concerned is a party to the Statute, see Lindholm (2004), p. 186 and Bassiouni (2001-2002), p. 84 *et seq.*

¹⁷⁰ Lee & Quigley (2008), p. 495.

According to article 23(1) of the VCDR, the sending State as well as the head of the mission shall be exempted from all national, regional or municipal dues and taxes in respect of the premises of the mission – both owned and leased ones – so long as the dues and/or taxes do not represent payment for ‘specific services’¹⁷¹ rendered. Furthermore, article 23(2) makes an exception in this regard for dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 34 of the VCDR exempts the diplomatic agent from all dues and taxes, whether they are ‘personal’ or ‘real’, regional or municipal, except the following ones:

- a) Indirect taxes which are usually included in the price of goods or services;
- b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless it is held by the diplomatic agent on behalf of the sending State for the purposes of the mission;
- c) Estate, succession or inheritance duties imposed by the receiving State and governed by the provisions of paragraph 4 of article 39;
- d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
- e) Charges imposed for ‘specific services’ rendered;
- f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions in article 23.

Exemption from dues and taxes can be granted either because of the provisions directly mentioned in the VCDR but can also be based on the principle of reciprocity. Some countries, e.g. The Netherlands, apply exemptions from VAT – which is not mandatory according to article 34 of the VCDR – based on this principle.¹⁷²

Article 36(1) provides that the receiving State shall allow the entry of and exemptions from all customs duties, taxes and related charges (except charges for storage, cartage and similar services) on articles for the official use of the mission (a) and articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles needed for his establishment (b). It has been suggested that this exemption from customs inspection is the privilege most abused for the purpose of smuggling.¹⁷³ The article does not say anything on the legality of these articles. However, according to article 41 of the Convention, the diplomatic agent is obliged to respect the laws of the receiving State - including import

¹⁷¹ Water rates, lightning and cleaning of roads have been mentioned as an example of such services, see Malanczuk (1997), p. 126 and Denza (2008), p. 187. The receiving State defines what constitutes payment for such services, and practice can vary considerably, see Denza (2008), p. 185 *et seq.*

¹⁷² The Protocol Guide (2008), p. 60.

¹⁷³ McDonough (1997), p. 481.

laws – and therefore has no right to import illegal substances even where they are aimed for the official use of the mission or for the agent’s and/or his family member’s personal use.¹⁷⁴ In addition, article 36(2) provides that the personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains items not covered by the exemptions mentioned in article 36(1) or items whose import or export is forbidden by the law of the receiving State or controlled by its quarantine regulations. In those situations, article 36(1) provides (*in fine*) that the inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 36 applies equally to export from the receiving State (see article 36(2)) as it does to the duty to respect the laws of the receiving State according to article 41. An important difference between import and export is however that the VCDR does not contain any right to the latter (i.e. the export of goods) for the diplomat and the sending State as it does to the former (i.e. the import of goods).¹⁷⁵

As regards the discrepancy between article 30 and article 36(2), see section 3.2.3.3 above.

3.2.4 Duration

As regards the period during which the diplomatic agent enjoys his privileges and immunities, article 39(1) provides that this starts from the moment he enters the territory of the receiving State on proceeding to take up his position or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed on (see also article 13(1)). Concerning the termination of the privileges and immunities, article 39(2) states that when the functions of the person concerned have ended, such enjoyments shall *normally* cease at the moment when he leaves the country or on expiry of a ‘reasonable period’ in which to do so, however only regarding acts committed in that person’s *private* capacity (also known as *personal immunity* or immunity *ratione personae*¹⁷⁶). When it comes to acts committed because of the person’s *official* functions (also known as *functional immunity* or immunity *ratione materiae*¹⁷⁷), immunity will continue to exist even after the official posting has ended (article 39(2) *in fine*). It follows from article 43 that the function of a diplomatic agent comes to an end, *inter alia*, on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end or on notification by the receiving State to the sending State that the diplomatic agent will no longer be recognized as a member of the mission.

According to article 39(3), a member of the missions’ family members forming part of his household’ shall, in case of the death of the former, continue to enjoy the privileges and immunities to which they are entitled until the expiry of a ‘reasonable period’ in which to leave the country.

¹⁷⁴ Denza (2008), p. 383.

¹⁷⁵ *Ibid.*, p. 384.

¹⁷⁶ Cryer *et al.* (2007), p. 423.

¹⁷⁷ *Ibid.*, p. 423.

As regards the duration of the privileges and immunities enjoyed by the members of the administrative and technical staff and members of the service staff, the same provisions apply as those mentioned above in relation to diplomatic agents.

The notion of 'reasonable period' has not been defined by the VCDR. Practice has also shown to vary considerably between different States in this regard, with periods stretching from everything to one month and up to 6 months.¹⁷⁸ In cases where a person enjoying immunity has committed a crime in the receiving State or otherwise abused his position, the receiving State can give him a very short time (e.g. 24 hours or a couple of days) to leave the country.¹⁷⁹

A diplomatic agent also enjoys such immunity that may be required to ensure his transit or return, when he is passing through or being present in the territory of a third state that has granted him a passport visa - if such visa is necessary - while proceeding to take up or to return to his post, or when returning to his own country (article 40(1)). The same goes for his family members who are enjoying privileges or immunities and who are accompanying him or travelling separately to join him or to return to their country (*ibid.*). As regards members of the administrative and technical or service staff of the mission and members of their families, article 40(2) says that third States shall not hinder their passage through the State's territory.

3.2.5 The inviolability of the premises of the mission, of private residences and of their archives and documents (Article 22, 24 and 30)

According to article 22(1) of the VCDR, the premises of the mission (defined in article 1(i) as the buildings or part 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) shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission (*ibid.*). Furthermore, the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity (article 22(2)). The premises, their furnishings and other property thereon as well as the means of transport of the mission shall also be immune from search, requisition, attachment or execution (article 22(3)). According to articles 30(1) and 37(1), the private residence of a diplomatic agent and the members of his family forming part of his household shall enjoy the same inviolability and protection as the premises of the mission. However, the members of his family forming part of the household are only entitled to this provided they are not nationals of the receiving State,

¹⁷⁸ Denza (2008), p. 437.

¹⁷⁹ *Ibid.*, p. 437, Dembinski (1988), p. 144.

The same goes for their papers, correspondence and, except as provided in article 31(3) (see section 3.2.3.4), their property (article 30(2)). Members of the technical and administrative staff of the mission, together with members of their families that are forming part of their respective households *and* that are not nationals of or permanently resident in the receiving State enjoy the same protection (article 37(2)).

Article 24 settles that the archives and documents of the mission shall be inviolable at any time and wherever they may be.

3.2.6 The inviolability of official correspondence and other official means of communication – the diplomatic bag and the status of the diplomatic courier (Article 27 and 40)

Article 27 of the VCDR regulates the different means of communication to and from the mission. Article 27(1) states that the receiving State shall permit and protect free communication on the part of the mission for all official purposes. The mission may utilize all appropriate means, including diplomatic couriers and messages in code or cipher (however wireless transmitters only with the consent of the receiving State), in communicating with the Government and the other missions and consulates of the sending State, wherever situated (*ibid.*). Article 27(2) further states that the official correspondence of the mission shall be inviolable. *Official correspondence* means all correspondence relating to the mission and its functions (*ibid.*). The official correspondence and other official communications in transit - including messages in code or cipher - shall, according to article 40(3), be accorded the same freedom and protection by third States as is accorded by the receiving State.

The majority of the provisions in article 27 deal with the so-called *diplomatic bag*. The diplomatic bag is used for sending and receiving packages to and from diplomatic missions. According to article 27(3), the bag shall not be opened or detained. This ban has made some commentators argue that it might be allowed to scan the bag electronically or investigate it by using sniffer dogs.¹⁸⁰ The benefit of such an interpretation is that it would enable the authorities to find and prevent smuggling, although it is controversial whether the Convention should be understood this way.¹⁸¹ Some argue that, since electronical scanning could damage or decipher documents and/or equipment containing sensitive information, which means that it would undermine the very essence behind the provisions concerning the diplomatic bag – that being the protection of free communications between the sending State and its mission abroad – and thus cannot be allowed according to the Convention.¹⁸² Denza, however, points out that unless express reservations have been made to article 27 by the States

¹⁸⁰ Shapiro (1990), p. 295, Denza (2008), p. 238 *et seq.*

¹⁸¹ Shapiro (1990), p. 295.

¹⁸² Denza (2008), p. 241.

concerned, also very profound suspicions of abuse does not excuse an opening or detaining of the bag, but rather a using declaration of *persona non grata* or, in very severe cases, breaking off of diplomatic relations (see also sections 3.2.7.1 and 3.2.7.3 below).¹⁸³

A diplomatic bag can vary in shape and size, it can be a parcel, container or, as the name suggests, a bag – neither article 27 nor international practice specifies any restrictions as to shape, size or weight, meaning that different States can apply different standards in this respect.¹⁸⁴ The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use (article 27(4)). However, since the bag cannot be opened or detained, many commentators argue that suspected violations by the sending State of the obligation pertaining to the contents of the bag following from article 27(4) do not permit examination by the receiving State, even in cases of suspected illicit contents and – even if such a procedure was applied by the receiving State and illicit contents revealed – the question remains whether the bag should be opened or perhaps returned to the sending State.¹⁸⁵

The diplomatic courier shall carry with him an official document indicating his status and the number of packages constituting the diplomatic bag and be protected by the receiving State in the performance of his functions (article 27(5)). His person shall be inviolable and he shall not be liable to any form of arrest or detention (*ibid.*). The same provisions apply in cases where the sending state or the mission have designated a diplomatic courier *ad hoc*, except that the immunities then will cease to be valid when such a courier has delivered the diplomatic bag to the consignee (article 27(6)). Article 27(7) contains provisions for cases where the diplomatic bag has been entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. According to article 40(3), third States are under the obligation to accord to diplomatic couriers – who have been granted a passport visa if such visa is necessary – and to diplomatic bags in transit, the same inviolability and protection as the receiving State is obliged to accord.

Abuse of the diplomatic bag is also regarded as a form of abuse of diplomatic immunity.¹⁸⁶ There have been incidents where the bag has been used to smuggle weapons, drugs, art and even (in several cases) people across borders.¹⁸⁷

3.2.7 Actions in case of abuse

As previously mentioned, the immunities and privileges accorded in the VCDR are not aimed to benefit individuals but to ensure the efficient

¹⁸³ *Ibid.*, p. 242.

¹⁸⁴ *Ibid.*, p. 231 *et seq.*

¹⁸⁵ Addicott (1991), p. 229, Denza (2008), p. 235, 240.

¹⁸⁶ Zeidman (1989), p. 428. See also Oxford Reports on International Law in Domestic Courts, Analysis of *JKO v Public Prosecutor*, Judgment on appeal, 23-003075-01; ILDC 147 (NL 2002) LJN: AF1037, 19 November 2002.

¹⁸⁷ Zeidman (1989), p. 430-431., Higgins (1985), p. 643, Addicott (1991), p. 221 *et seq.*

performance of the functions of diplomatic missions as representatives for the sending State. Article 41(1) of the VCDR confirms this view by pointing out that, notwithstanding the privileges and immunities, all persons enjoying such privileges and immunities are under the obligation to respect the laws and regulations of the receiving State *as well as* under the obligation not to interfere in the internal affairs of that State.¹⁸⁸ However, there are only a limited range of measures available that a receiving State who is a signatory to the VCDR can take in cases where diplomatic privileges and immunities have been abused contrary to article 41(1).

3.2.7.1 Declaring a member of the diplomatic staff or of the mission *persona non grata* or not acceptable (Article 9)

Article 9 is the most commonly used measure by receiving States in cases of abuse or misuse of the Convention by an individual enjoying diplomatic immunity, provided that he is a member of the diplomatic staff or of the diplomatic mission.¹⁸⁹ According to article 9(1), the receiving State may at any time and without having to motivate its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is *not acceptable*. The declaration can thus not be used for a family member of a member of the mission or of the staff, although it is possible that the receiving State uses it on a person belonging to such a category because of his family members' behaviour.¹⁹⁰ There are, traditionally two types of situations where such declarations are put to the fore: a) Acts that are attributable to the staff member personally and which are expressed in unlawful or harmful behaviour and b) Acts that are aiming at harming the interests of the receiving State and where diplomatic immunity is used as a cover, i.e. acts pertaining to the staff member's official capacity.¹⁹¹ The declaration can also be made when the behaviour is attributable to a family member of one of the categories of staff mentioned above.¹⁹² In cases where the sending State believes that the receiving State is misusing the declaration to expel the sending State's diplomats, practice has shown that it responds to this by declaring a member of the receiving State's diplomatic staff present on its territory *persona non grata*.¹⁹³ To avoid such action, the receiving State might feel obliged (in spite of the wording of article 9(1)) to

¹⁸⁸ As regards the duty to respect the laws and regulations of the receiving State, Denza points out that the modern view is that the laws and regulations are to be respected unless there is a specific exception for the person enjoying immunity, e.g. in order to implement the tax and social security provisions following from the Vienna Conventions or the State's practice due to reciprocity (2008, p. 461).

¹⁸⁹ Brenchley (1984), p. 19. See also Denza (2008), p. 76 *et seq.*

¹⁹⁰ Dembinski (1988), p. 144. However, in such situations the receiving State is much more likely to request the family member concerned to leave the country instead of invoking article 9, (*ibid.*).

¹⁹¹ Feltham (1980), p. 5-6.

¹⁹² Cahier (1964), p. 125.

¹⁹³ Grzybowski (1981), p. 55.

motivate its decision so that the declaration will not be perceived as based on political premises.¹⁹⁴

A person may be declared *non grata* or *not acceptable* prior to his arrival in the territory of the receiving State. According to article 10, the receiving State shall be notified of the appointment, arrival and final departure of members of the mission (article 10(1)(a)). Thus, the article does not necessarily have to be invoked in cases of abuse of the privileges and immunities while the person concerned is accredited to the sending State, even if this is the situation in the majority of the cases.

When a person has been declared *persona non grata* or *not acceptable*, the sending State shall, according to article 9(1), either recall the person concerned or terminate his functions with the mission (see also article 43(b) of the VCDR). Should the sending State refuse to or fail to carry out its obligations under article 9(1) within a 'reasonable period', the receiving State may, according to article 9(2), refuse to recognize the person concerned as a member of the mission. Because of this, he will also lose his privileges and immunities and his person will no longer be inviolable, meaning that the receiving State can exercise its executive jurisdiction over him and, subsequently, expel him.¹⁹⁵ The notion of 'reasonable period' is, as previously mentioned in section 3.2.4, not defined in the Convention, although State practice reveals that it is usually a matter of days when the person concerned has committed a serious crime in the receiving State.¹⁹⁶ In some cases where a person enjoying immunity has been caught spying in the receiving State, the reasonable time-period (determined by the receiving State) was 24-48 hours.¹⁹⁷

Even if article 9 is considered to be the chief resort for receiving States, the fact remains that States have been reluctant to invoke it save for the most obvious cases of abuse, the most common reasons being espionage and association with terrorists.¹⁹⁸ The reason for this restrictive application is mainly the fear of reciprocal action from the sending State vis-à-vis the receiving State's representatives.¹⁹⁹

3.2.7.2 Waiver of immunity (Article 32)

Even if diplomatic immunity is seen as a personal immunity, it does not mean that it is a personal right of the diplomat. Instead, immunity is a consequence of the fact that the diplomat is a representative of the sending State, which is why only that State is competent to renounce the immunity.²⁰⁰ Thus, article 32(1) of the VCDR states that the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 (e.g. family members forming part of their households) may be waived by the sending State. However, it seems to be acceptable that the

¹⁹⁴ Denza (2008), p. 85.

¹⁹⁵ Cahier (1964), p. 129.

¹⁹⁶ Dembinski (1988), p. 144, Denza (2008), p. 437-438.

¹⁹⁷ Dembinski (1988), p. 144.

¹⁹⁸ Barker (2000), p. 167-168., Denza (2008), p. 77 *et seq.*

¹⁹⁹ Barker (2000), p. 168.

²⁰⁰ Van Alebeek (2008), p. 164, Cryer *et al.* (2007), p. 424, Denza (2008), p. 331.

head of the mission holds the authority to waive immunity of other members of staff than head of mission.²⁰¹

A waiver deprives the person concerned of any immunity from jurisdiction and thus enables the receiving State to (for instance) prosecute him for criminal offenses and, in case of a conviction, subsequently to enforce the punishment without violating the Convention. However, since a waiver of immunity from jurisdiction does not entail a waiver from the jurisdiction to enforce, a separate waiver has to be given in order to subsequently enforce the court's judgement, according to article 32(4). Since article 32(4) only speaks about civil and administrative proceedings, i.e. does not mention criminal proceedings, one might claim that a waiver of immunity from criminal jurisdiction also entails a waiver of immunity from execution should the person concerned be found guilty.²⁰² Denza, however, argues that, given the *travaux préparatoires* of the VCDR, the fact that there is no reference to criminal proceedings in article 32(4) is most likely unintentional.²⁰³

There are no special criteria as regards the time-span and form of a waiver from criminal jurisdiction, other than that it has to be made explicitly by the sending State (article 32(2) and (4) *e contrario*). The States' foreign ministries deal with a formal request for waiver posed by the receiving State to the sending State.²⁰⁴ Because the immunity enjoyed by the individual is based on his rank and position, i.e. is due to his official capacity, it is generally accepted that immunity from jurisdiction can only be waived by the sending State as a provider of this capacity and not by the individual concerned.

3.2.7.3 Breaking off diplomatic relations

The severance of diplomatic relations can be seen as the ultimate response to the abuse of diplomatic immunity by the receiving as well as the sending State. This has also been confirmed by the ICJ in the *Hostages Case*, where the court held that the receiving State '... has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. These are the powers that every receiving State has at its own discretion: to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.'²⁰⁵ The breaking off of diplomatic relations is, however, used very rarely due to its limited and often disproportionate effects.²⁰⁶ However, different States have different approaches in this regard – some see it as a way of effectively protesting against a certain policy and/or Government, while others argue that it should

²⁰¹ Nascimento (1972), p. 129. See also Denza (2008), p. 347-348.

²⁰² Denza (2008), p. 343.

²⁰³ *Ibid.*

²⁰⁴ Denza (2008), p. 308.

²⁰⁵ ICJ in *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 3, 1980, para. 85.

²⁰⁶ Feltham (1980), p. 7, Shapiro (1990), p. 286. The breaking off of diplomatic relations will entail a duty for the sending as well as the receiving State to close their diplomatic missions in respective State and recall their personnel, Dembinski (1988), p. 92.

only be used modestly, since diplomatic relations should be maintained even where the relationship between two States is not at its best.²⁰⁷

For abuse relating to the use of the diplomatic bag there are very few remedies available according to the Convention. Should the receiving State suspect such abuse, its options are either to protest to the sending State concerned or to terminate diplomatic relations with it.²⁰⁸

3.2.7.4 Limiting the size of the mission (Article 11)

Another option for the receiving State in cases of abuse is to limit the size of the mission of the sending State. Article 11(1) of the VCDR provides for this stating that, where there are no agreements regarding the size of the mission, the receiving State may demand it to be kept ‘within limits considered by it [i.e. by the receiving State] to be reasonable and normal, having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission.’ In addition to this, article 11(2) provides that the receiving State may refuse – on a nondiscriminatory basis and based on the same criteria as follows from article 11(1) – to accept officials of a certain category.

Article 11 has been invoked in some cases where diplomatic agents or missions in the receiving State have abused their positions, usually where the diplomatic mission carried out espionage and/or were involved in terrorist activities in the receiving State.²⁰⁹ It is less common to use the article when certain individuals abuse their position, rather it is used when the receiving State is aggravated with the sending State.²¹⁰ The measure is most likely to be followed by reciprocal action from the sending State.²¹¹

3.2.7.5 Other remedies

In addition to the classical remedies outlined in the VCDR (i.e. the *persona non grata*- or *not acceptable*-declaration, waiver of immunity, severance of diplomatic relations and limiting the size of the mission) other, more informal remedies can be used for the purpose of addressing a situation where the sending State’s representative has committed a crime in the receiving State. Such remedies can consist in the head of the mission (or his deputy) concerned being summoned to the Ministry of Foreign Affairs’ Protocol Department and - in some cases that are particularly severe or happen repeatedly – the latter might even ask for the offender to be recalled or transferred back to the sending State.²¹² Other informal ways of addressing the problem can be to apply diplomatic pressure (“if you do not do x... then we will not give you y”) or threaten to leak the incident to the media (something that will have negative consequences for the missions’ reputation, which they are often very keen on preserving on a high level). In

²⁰⁷ Brenchley (1984), p. 17, Dembinski (1988), p. 91-92.

²⁰⁸ Zeidman (1989), p. 428.

²⁰⁹ Brenchley (1984), p. 18-19, Denza (2008), p. 96.

²¹⁰ Bring & Mahmoudi (2007), p. 95.

²¹¹ Brenchley (1984), p. 18-19.

²¹² See also Wilson (1967), p. 90.

some European countries it is practice for the Ministry of Foreign Affairs to circulate (to all missions accredited to the country) notes containing top-ten lists of representations with unpaid parking tickets so as to exert pressure on them to pay the fines.²¹³

²¹³ Bring & Mahmoudi (2007), p. 93.

4 Consular immunities and privileges

4.1 Introduction

4.1.1 Theoretical bases for consular immunity

4.1.1.1 Consular immunity due to functional necessity

Functional necessity is the theoretical basis for consular immunity according to the VCCR.²¹⁴ Article 43(1) states that [career] consular officers and employees shall enjoy immunity in the exercise of consular functions, i.e. the immunity is directly linked to the positions' function (article 58(2) confirms that article 43 is also applicable to honorary consular officers). The functional aspect is also stressed in the Convention's preamble, which provides that the purpose of privileges and immunities granted according to the Convention is not to benefit individuals but to warrant the efficient performance of functions by consular posts for their States. The rationale for the functional necessity theory is, as mentioned above for diplomatic immunity (section 3.1.1.3), to enable the State's representatives to carry out their functions without interference or independently from the receiving State.²¹⁵

4.1.1.2 Consular immunity due to the principle of reciprocity

As for diplomatic agents, the principle of reciprocity is of the utmost importance for the granting of consular immunities as well as privileges – see section 3.1.2 above (what is said there regarding reciprocity is valid also for consular immunities) and 4.2.2.8 below.

4.1.2 Sources of consular immunity law

4.1.2.1 International custom

Prior to the adoption of the VCCR, there were only very few customary principles in international law that concerned consular relations.²¹⁶ In addition to this, bilateral and regional treaties as well as draft codes were the main sources of law in the field.²¹⁷ International custom has thus never been of any great importance when it comes to consular immunity and consular

²¹⁴ Milhaupt (1988), p. 847-848.

²¹⁵ *Ibid.*, p. 848.

²¹⁶ Lee & Quigley (2008), p. 16.

²¹⁷ *Ibid.*

law in general, making the impact of the adoption of the VCCR even more significant (see section 4.1.2.2.1.1 below).

4.1.2.2 Treaties

4.1.2.2.1 Multilateral treaties

4.1.2.2.1.1 *The 1963 Vienna Convention on Consular Relations and its Optional Protocols*

The Vienna Convention on Consular Relations (VCCR) was adopted by the United Nations Conference on Consular Immunities, held at Vienna from 4 March to 22 April, 1963 and entered into force on March 19, 1967.²¹⁸ Today (2009-04-09), there are 172 States party to the Convention.²¹⁹ Like the VCDR, the VCCR has two optional protocols, adopted by the same conference: The Optional Protocol to the 1963 Vienna Convention on Consular Relations concerning the Acquisition of Nationality (VCCR-OPAN) and the Optional Protocol to the 1963 Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (VCCR-OPSD). The provisions in both protocols are – save for different dates for adoption - identical to the provisions in the protocols to the VCDR (see section 3.1.3.2.1.3 above).

Unlike the adoption of the VCDR, the VCCR entailed more difficulties due to the fact that - compared to diplomatic immunity - there were few uniform customary principles in this field.²²⁰

4.1.2.2.1.2 *The European Convention on Consular Functions*

Besides promoting a European unification and standardization on the issue, the aim behind the European Convention on Consular Functions (ECCF), adopted on 11 December 1967 was to complement the upcoming VCCR (the preparations of the ECCF commenced in 1960) insofar as consular functions were concerned, since it was known that the latter would not regulate this area in too much detail.²²¹ For this purpose, it is orientated around article 5(a)-(l) of the VCCR, but also adds some functions that are viewed as compatible with article 5(m) of the article.²²² The Convention has not had any great success – by 2008, it had not yet entered into force due to the insufficient amount of ratifications.²²³ One explanation for this is that States prefer the more flexible provisions of the VCCR and therefore see no need in also ratifying the ECCF.²²⁴

4.1.2.2.2 Bilateral treaties

Although the VCCR has been widely endorsed, many States have also chosen to conclude bilateral agreements instead of or as a more detailed

²¹⁸ UNTC – Status of Treaties.

²¹⁹ *Ibid.*

²²⁰ Lee & Quigley (2008), p. 23.

²²¹ *Ibid.*, p. 113.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

complement to the Convention.²²⁵ These treaties normally entail more restricted rights regarding privileges, although immunities tend to be accorded to the same extent as in the Convention.²²⁶

4.1.2.2.3 Prevalence in case of conflict between the VCCR and bilateral treaties

States that are party both to the Convention and to bilateral treaties apply the most favourable provisions in cases where the Convention and the treaty conflict, providing that the other State applies the same standard.²²⁷ This follows from article 73(2) of the VCCR, which states that nothing in the Convention shall hinder States from adopting international agreements that confirm, complement, extend or broaden its provisions.

4.1.2.3 National legislation

See section 3.1.3.3 above.

4.1.2.4 Jurisprudence and doctrine

See section 3.1.3.4 above.

4.2 The 1963 Vienna Convention on Consular Relations

4.2.1 Categories of personnel and the scope of their immunities and privileges

4.2.1.1 Career consular officers and their family members (Article 1(d), (2), article 37(1) and article 71(2))

Article 1(2) of the 1963 Vienna Convention on Consular Relations (VCCR) distinguishes between two types of consular officers, namely *career consular officers* and *honorary consular officers* (the latter will be dealt with in section 4.2.1.2 below). According to article 40 of the VCCR, the receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom and dignity. The provisions in Chapter II of the VCCR apply to consular posts headed by career consular officers (article 1(2)).

The title *consular officer* in the VCCR refers to any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions (Article 1(d)). The *head of a consular post* is in turn

²²⁵ *Ibid.*, p. 24-25.

²²⁶ Feltham (1980), p. 47.

²²⁷ *Ibid.*

defined as the person charged with the duty of acting in that capacity (Article 1(c)). There are four classes of heads of consular posts, namely (a) consuls-general, (b) consuls, (c) vice-consuls and (d) consular agents (Article 9).

The *exercise of consular functions* is carried out by consular posts but also by diplomatic missions in accordance with the provisions in the VCCR (Article 3). A *consular post* is, according to article 1(a), a consulate-general, consulate, vice-consulate or consular agency. The sending State appoints the head of the consular post and then notifies the Government of the State where the appointee is to exercise his functions, i.e. the receiving State (articles 10 and 11), upon which they issue an *exequatur*, i.e. an authorization admitting the appointee to the exercise of his functions (Article 12). As regards the meaning of *consular functions*, article 5 contains a long and detailed list of what such functions consist in, namely:

- a) To protect the interests of the sending State as well as its citizens and corporations in conformity with international law;
- b) to endorse friendly relations between the sending and the receiving State as well as the development of their commercial, financial, cultural and scientific relations;
- c) to learn about the conditions and development in the sectors mentioned in article 5(b) of the receiving State by using legitimate means, report this to the sending State's government as well as informing persons that are interested;
- d) to issue passports and travel documents to the sending State's citizens as well as visas or appropriate documents to persons wanting to travel to the sending State;
- e) to help and support citizens and corporations of the sending State;
- f) to act as as a notary, a civil registrar and in capacities similar to these, as well as perform certain administrative functions, providing that there is nothing prohibiting this in the receiving State's laws and regulations;
- g) to look after - in a way that conforms with the laws and regulations of the receiving State - the interests of the sending State's nationals and corporations in inheritance cases in the receiving State;
- h) to look after - in a way that conforms with the laws and regulations of the receiving State –the interests of minors and other persons that do not have full capacity (e.g. guardianship and trusteeship) and who are citizens of the sending State;
- i) to represent or arrange suitable representation for citizens of the sending State before the courts and other authorities of the receiving State so as to get interim measures preserving the citizens' rights and interests where they cannot by themselves assume the defence of their rights and interests in due time;
- j) to transmit judicial and extra-judicial documents or executing letters or commissions to take evidence for the courts of the sending State

according to applicable international agreements or, when there are no such agreements, in any other manner compatible with the receiving State's laws and regulations;

- k) to supervise and inspect vessels and aircraft registered in the sending State – as well as their crews - in accordance with the laws and regulations of the sending State;
- l) to - as regards article 5(k) - take statements regarding the vessel's voyage, examine and stamp the ship's papers and, independently from the powers and authorities of the receiving State, investigate any incidents that occurred during the voyage and settle disputes between the captain, the officers and the seamen to the extent provided for by the laws of the sending State;
- m) to perform any function entrusted to the consular post by the sending State that is either (1) not forbidden according to the receiving State's laws and regulations *or* (2) not objected to by the receiving State *or* (3) referred to in the international agreements in force between the sending and the receiving State.

In spite of this detailed enumeration, the interpretation of 'consular functions' has been highly disputed and it has been argued that the article lacks enough clarity in order to provide sufficient guidance for the national courts as to how the notion of consular functions should be understood.²²⁸ As we shall see in more detail below, a career consular officer enjoys immunity for acts constituting consular functions according to article 43 of the VCCR (see section 4.2.2.3 below).

Immunity is however limited for career consular officers that are nationals of or permanently resident in the receiving State. Article 71(1) states that, except in so far as additional facilities may be granted by the receiving State, such officers shall enjoy immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in article 44(3) (regarding the latter, see section 4.2.2.4 below). In any case, the receiving State shall still be obliged to follow article 42 also for these officers, i.e. they shall notify the head of the consular post or - in cases where the head of the consular post is involved himself - the sending State in the event of the arrest or detention pending trial of a member of the consular staff or of criminal proceedings being instituted against him. Article 71(1) further states that, in cases where criminal proceedings are instituted against such a consular officer, the proceedings shall – except when he is under arrest or detention – be conducted in a manner which will hamper the exercise of consular functions as little as possible.

Family members of career consular officers enjoy the same privileges and immunities as the officer himself, providing that they are nationals of or permanently resident in the sending State and provided that they form part of the officer's household (article 37(1)). However, if the career consular officer is permanently resident in or a national of the receiving State, the family members shall, according to article 71(2) of the VCCR, enjoy

²²⁸ Milhaupt (1988), p. 843 *et seq.*, Green (1991), p. 151.

facilities, privileges and immunities only in so far as these are granted to them by the receiving State. The same applies to family members that are nationals of or a permanently resident in the receiving State by their own virtue (article 1(g) and 71(2)). Nonetheless, the receiving State is obliged to exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post (article 71(2) *in fine*).

The VCCR does not contain a definition of family member, which means that its meaning ultimately is to be determined by the receiving State. As a rule, the notion encompasses the spouse and minor children (although also this is open for interpretation since, for instance, the age of maturity varies between different States).²²⁹

4.2.1.2 Honorary consular officers and their family members (Article 1(d), (2), article 58(3) and article 71(2))

Just as career consular officers, *honorary consular officers* are defined in article 1(d) of the VCCR as persons, including the head of a consular post, entrusted in that capacity with the exercise of consular functions. Likewise, both categories are to be protected by the receiving State according to article 40 of the VCCR. The principal difference between career consular officers and honorary consular officers is that the provisions of Chapter II of the VCCR apply to consular posts headed by the former while the provisions of Chapter III apply to consular posts headed by the latter (article 1(2)).

Article 58(2), the first article in Chapter III, points out articles 42 and 43, article 44(3), articles 45 and article 55(1) shall apply (also) to honorary consular officers. In addition to this, the same article mentions that articles 63-67 shall govern the facilities, privileges and immunities of honorary consular officers. This means, as we shall see below, that honorary consular officers enjoy immunities and privileges to a somewhat lesser extent than career consular officers do.

The family members of honorary consular officers or of a consular employee employed at a consular post headed by an honorary consular officer do not enjoy any of the privileges and/or immunities provided for in the VCCR (article 58(3)). However, article 71(2) of the VCCR says that – if they are not nationals of or permanently resident in the receiving State - they shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State *and* that the latter shall exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

4.2.1.3 Consular employees and their family members (Article 1(e) and article 71(2))

Article 1(e) of the VCCR defines *consular employee* as meaning any person employed in the administrative or technical service of a consular post.

²²⁹ Lee & Quigley (2008), p. 28 *et seq.*

Unlike consular officers, consular employees do not enjoy any special protection or personal inviolability according to the Convention (article 40 and 41 *e contrario*).²³⁰ They do however enjoy immunity from jurisdiction from the receiving State's judicial and administrative authorities when it comes to acts performed in the exercise of *consular functions* (see article 5 of the VCCR), according to article 43(1) of the Convention. There are two exceptions to this rule, as stated in article 43(2), namely when the employee is facing a civil action either (a) pertaining to an agreement concluded by him in which he did not act on behalf of the sending State or (b) pertaining to damage caused to a third party and occurring from an accident in the receiving State caused by a vehicle, vessel or aircraft.

According to article 46(1), consular employees are not obliged to follow the receiving State's rules regarding the registration of aliens and residence permits unless they are not permanent employees of the sending State carrying on gainful occupation in the receiving State – in which case the rules do apply to them as well (article 46(2)). They are also exempted from customs duties and inspection when importing articles to the receiving State at the time of their first installation (article 50 of the VCCR).

Consular employees (being members of the consular post, see article 1(g)) *who are permanently resident in the receiving State* shall, according to article 71(2) of the VCCR, enjoy immunities and privileges only to the extent permitted by the receiving State. The latter must however exercise its jurisdiction over such persons in a manner that does not hamper the performance of the consular post's functions (article 71(2) *in fine*).

As regards family members of consular employees permanently resident in or nationals of the receiving State *or* where the family member himself is a national or permanently resident in the receiving State, article 71(2) applies in the same way as for career consular officers (see section 4.2.1.1 above).

4.2.1.4 Members of the service staff and their family members (Article 1(f) and article 71(2))

A member of the service staff is any person that is employed in the domestic service of a consular post (article 1(f)). Persons belonging to this category do not enjoy personal inviolability or immunity from jurisdiction (article 41 and 43 of the VCCR *e contrario*). Neither do they enjoy any privileges or immunities if they are carrying out any private gainful occupation in the receiving State (article 57(2)(a) of the VCCR). They enjoy freedom of movement according to article 34 of the VCCR (see article 1(g), which mentions members of the service staff). They are also exempted from the receiving State's regulations on work permits, provided that they do not carry out any other gainful occupation in the receiving State (article 47(2) of the VCCR). In addition to this, special rules apply to them regarding exemption from social security provisions (article 48 of the VCCR) and exemption from taxation (article 49 of the VCCR).²³¹

²³⁰ Lee & Quigley (2008), p. 37.

²³¹ See supplement B.

Members of the service staff (being members of the consular post, see article 1(g)) *who are permanently resident in the receiving State* shall, according to article 71(2) of the VCCR, enjoy immunities and privileges only to the extent permitted by the receiving State. The receiving State must, however, exercise its jurisdiction over such persons in a manner that does not hinder the performance of the consular post's functions (article 71(2) *in fine*).

As regards family members of consular employees permanently resident in or nationals of the receiving State *or* where the family member himself is a national or permanently resident in the receiving State, article 71(2) applies in the same way as for career consular officers (see section 4.2.1.1 above).

4.2.2 The content of the immunities and privileges

4.2.2.1 Freedom of movement (Article 34)

Article 34 of the VCCR provides that the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post. The only exception to this is where entry is forbidden or controlled for reasons of national security.

4.2.2.2 Personal inviolability (Article 41)

Article 41(1) of the VCCR states that consular officers (i.e both career and honorary) shall not be liable to arrest or detention pending trial, unless a grave crime is at issue and there is a decision by the competent judicial authority providing for such measures. Should this be the case, article 41(3) provides (*in fine*) that the proceedings against the person concerned shall be instituted as soon as possible. In addition to this, article 41(2) provides that – save for cases mentioned in article 41(1) - consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom, except when it comes to the execution of a judicial decision of final effect.

Should criminal proceedings be instituted against a consular officer, article 41(3) obliges him to appear before the relevant authorities of the receiving State. Furthermore, the article states that the proceedings shall be carried out in such a way that it respects him by reason of his official position and - with the exception of the situations mentioned in article 41(1) – in a way that hinders the exercise of his consular functions minimally.

4.2.2.3 Immunity from jurisdiction (Article 43, 58(2), 63)

Consular officers and consular employees enjoy immunity from jurisdiction to the extent that is specified in article 43 of the VCCR. Article 43(1) reads that these categories of personnel shall not be subjected to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of *consular functions* (see article 5 and

section 4.2.1.1 above). However, article 43(2) mentions two exceptions to this as regards the civil jurisdiction of the receiving State, namely a) where a civil action is arising out of a contract concluded by a consular officer/employee in which he did not contract on behalf of the sending State or b) where a civil action is brought about by a third party for damage suffered due to an accident in the receiving State caused by a vehicle, vessel of aircraft.

According to article 58(2), article 43 shall also apply for honorary consular officers. However, if criminal proceedings are instituted against an honorary consular officer, article 63 provides that he must appear before the competent authorities. The article further states that the proceedings must be conducted in such a manner that it respects him by reason of his official position and, save for when he is under arrest or detention, in a way that impairs the exercise of consular functions to the minimum extent. In case of detention, the proceedings shall be instituted as soon as possible (article 63 *in fine*).

As follows from the wording of article 43, consular immunity from jurisdiction is dependent on the meaning of 'consular functions'. The term 'consular functions' in article 43 of the VCCR can be interpreted as somewhat more narrow than 'official acts' in article 71 of the VCCR and 'official functions' in article 31(1)(c) of the VCDR, although it is questionable whether this difference has any substantial practical meaning, since local courts have found immunity to apply also in cases where the disputed act was obviously of an official nature.²³² According to article 3 of the VCCR, consular functions may also be exercised by diplomatic missions. Article 70(4) provides that diplomats performing such consular functions shall continue to enjoy the more extensive immunity accorded to diplomats in the VCDR. A consular officer that is performing diplomatic functions is, however, not entitled to claim diplomatic immunities and privileges according to article 17(1) of the VCCR.

4.2.2.4 Liability to give evidence (Article 44)

Members of a consular post (i.e. consular officers, consular employees and members of the service staff, see article 1(g)) are not exempted from the liability to give evidence in judicial or administrative proceedings (article 44(1) of the VCCR). A consular employee or a member of the service staff shall not decline to give evidence, save for when he is called to testify concerning a) matters related to the exercise of his functions *or* b) to produce official correspondence and documents relating thereto *or* c) the law of the sending State by virtue of expert witnesses (article 44(1) with reference to article 44(3)). The same three exceptions apply to the consular officer, however should he refuse to do so, no coercive measures or punishment may be enforced on him due to this (article 44(1) with reference to article 44(3)). Article 44(2) states that the authority demanding the evidence of a consular officer shall avoid interference with the performance of his functions. When possible, the evidence can be taken at his residence,

²³² Lee & Quigley (2008), p. 447-448.

at the consular post or as a statement from him in writing (article 44(2) *in fine*).

According to article 58(2), article 44(3) (the three mentioned above exceptions) shall also apply for honorary consular officers.

4.2.2.5 Exemption from registration of aliens and residence permits (Article 46, 65)

According to article 46 of the VCCR, consular officers/employees and members of their families forming part of their households shall be exempt from all duties concerning registration of aliens and residence permits under the laws and regulations of the receiving State (article 46(1)). This exemption does, however, not apply to consular employees who are not permanently employed in the sending State or who hold private gainful occupation in the receiving State, nor to their family members (article 46(2)).

Similar provisions apply for honorary consular officers according to article 65, which states that such officers – providing that they are not carrying out any professional or commercial activity in the receiving State for the sake of their personal profit – shall be exempted from all duties under the laws and regulations concerning registration of aliens and residence permits of the receiving State.

4.2.2.6 Exemption from work permits (Article 47)

Article 47 of the VCCR deals with exemptions from work permits for members of the consular post (i.e. consular officers, consular employees and members of the service staff, see article 1(g)). According to article 47(1), such members shall, in regard to services performed for the sending State, be exempted from all obligations concerning work permits made compulsory by the laws and regulations of the receiving State as to the employment of foreign labour. The same shall, according to article 47(2), apply to members of the private staff (i.e. persons employed solely in the private service of a member of the consular post, see article 1(i)) of consular officers and of consular employees as long as they do not hold any other gainful occupation in the receiving State.

4.2.2.7 Social security exemption (Article 48)

According to article 48(1) of the VCCR, members of the consular post (i.e. consular officers, consular employees and members of the service staff, see article 1(g)) and members of their families forming part of their households shall – with regard to services rendered by them on behalf of the sending State - be exempted from applicable social security provisions of the receiving State. The same exemption applies to members of the private staff (i.e. persons employed exclusively in the private service of a member of the consular post, see article 1(i)) who are in the sole employ of members of the consular post, provided that they *are not* nationals of or permanent residents in the receiving State *and* that they *are* covered by the social security system

in force in the sending State or a third State (article 48(2)(a)-(b)). Should a member of a consular post employ a person to which such an exemption that was just mentioned (article 48(2)) does not apply, then he – as an employer – is under the obligation to comply with the relevant social security provisions (article 48(3)). Finally, article 48(4) states that the exemptions following from article 48(1) and (2) do not preclude the voluntarily participation in the social security system of the receiving State in cases where such participation is allowed by that State.

4.2.2.8 Exemption from taxation (Article 49, 51, 66)

Article 49(1) of the VCCR provides that consular officers/employees and their family members forming part of their household are exempt from all dues and taxes, whether they are personal or real, national, regional or municipal, except from the following:

- a) indirect taxes that are usually included in the price of goods or services;
- b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32 (i.e. consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee),
- c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51 (i.e. movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post);
- d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
- e) charges levied for ‘specific services’²³³ rendered;
- f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32 (see article 49(1)(b) above).

In addition to this, article 49(2) exempts the members of the service staff (i.e. any person employed in the domestic service of a consular post, see article 1(f)) from dues and taxes on the salary. Should a member of a consular post (i.e. consular officers, consular employees and members of the service staff, see article 1(g)) employ a person whose salary is not exempted from the income tax imposed by the receiving State, article 49(3) states that he is then – as an employer - obliged to obey those tax provisions.

According to article 58(2), article 66, which also regulates exemption from taxation, shall apply to honorary consular officers. Article 66 states that a honorary consular officer shall be exempted from dues and taxes on

²³³ See also section 3.2.3.7 above.

the payments pertaining to the exercise of consular functions that he receives from the sending State.

As with the VCDR, a State can apply exemptions from certain taxes that are not provided for by the VCCR based on the principle of reciprocity.²³⁴ According to article 72(1), the receiving State is forbidden to discriminate between States when applying the Convention. Discrimination shall, however, not be regarded as taking place either where the receiving State applies the convention provisions restrictively because of a restrictive application of the provisions concerned to its own consular posts in the sending State (article 72(2) a) *or* where there is custom or agreements between the States where they extend to each other more favorable treatment than is required by the provisions of the VCCR (article 72(2)(b)), i.e. in both cases based on reciprocity.

Article 51 of the VCCR provides that, when a member of a consular post or of a member of his family forming part of his household dies, the receiving State shall permit the export of the deceased's movable property, save for property that was obtained in the receiving State and whose export was forbidden at the time of his death (article 51(a)). Furthermore, the receiving State is under the obligation not to charge national, regional or municipal estate, nor inheritance duties and duties on transfers and movable property, *but only* if their presence on the receiving State's territory was due to the presence in the State of the deceased as a member of the consular post or of the family of a member of the consular post (article 51(b)).

4.2.2.9 Exemption from customs duties and inspection (Article 50)

Article 50(1) of the VCCR obliges the receiving State to allow entry of and exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services on two types of articles, namely a) articles for the official use of the consular post and b) articles for the personal use of the consular officer or members of his family forming part of his household, together with articles for his establishment. Article 50(1) specifies (*in fine*) that articles intended for consumption shall not be of such quantity that it exceeds what is considered necessary for direct utilization by the persons concerned. These privileges and exemptions are also enjoyed by consular employees according to article 50(2), however, only for articles imported at the time of first installation.

Article 50(3) exempts from inspection any personal baggage accompanying consular officers and members of their families forming part of their households. Inspection may, however, be carried out *if* there is serious reason to believe that the baggage concerned contains one of the following:

- Articles other than than articles for the personal use of the consular officer or members of his family forming part of his household together with articles for his establishment *or*

²³⁴ See section 3.1.2 above.

- Articles of which export is illegal according to the law of the receiving State or which are subjected to quarantine laws and regulations,

In those situations, inspection is allowed only in the presence of the consular officer or the concerned family member.

4.2.2.10 Exemption from personal services and contributions (Article 52, 67)

Article 52 of the VCCR obliges the receiving State to exempt members of the consular post (i.e. consular officers, other than the head of a consular post, consular employees and members of the service staff, see article 1(g)) and members of their families forming part of their households from all personal services, all public service of any kind and from military obligations.

According to article 58(2), article 67, which also regulates exemption from personal services and contributions, shall apply to honorary consular officers. Article 67 has the exact same wording as article 52, except that the sentence ‘members of the consular post and members of their families forming part of their households’ in article 52 have been replaced with ‘honorary consular officers’.

4.2.3 Duration

As regards the beginning and end of consular privileges and immunities, article 53(1) states that every member of the consular post (i.e. consular officers, consular employees and members of the service staff, article 1(g)) shall enjoy the privileges and immunities provided for in the VCCR from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post. For members of the family of a member of the consular post that are forming part of his household as well as for members of his private staff, the immunities and privileges in the VCCR from the same date as the members of the consular post do according to article 53(1) *or* from the date of their entry into the territory of the receiving State *or* from the date of their becoming a member of such family or private staff - whichever is the latest (article 53(2)).

The enjoyment of the privileges and immunities ceases for both the member of the consular post and for a member of his family forming part of his household when the functions of the member of the consular post have come to an end *and* – normally – at the moment when the person concerned leaves the receiving State *or* on the expiry of a reasonable period in which to do so – whichever is sooner (article 53(3)). The privileges and immunities shall, however, subsist until that time, even in case of armed conflict (*ibid.*). For members of the family of a member of the consular post that are forming part of his household as well as for members of his private staff, the privileges and immunities shall cease when they are no longer part of the household or in the service of a member of the consular post (*ibid.*). If, however, such persons intend to leave the receiving State within a

reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure (*ibid.*).

What is said above is also valid with the exception of acts performed by a consular officer or a consular employee in the exercise of his functions, where, according to article 53(4), immunity shall continue to subsist without any limitation of time.

Finally, article 53(5) states that in the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so – whichever is the sooner.

4.2.4 The inviolability of the consular premises, of private residences and of their archives and documents (Article 27, 31, 33, 59, 61)

Article 31(1) of the VCCR stresses that consular premises shall be inviolable to the extent provided in the article. This means that the authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post, except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State (article 31(2)). The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action (*ibid.*). Furthermore, article 31(3) states that the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity. In addition to this, the consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility (article 31(4)). Should expropriation prove to be necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State (*ibid.*). The *consular premises* include, according to article 1(j), the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post. The provisions governing the protection of the consular premises of a consular post headed by an honorary consular officer are to be found in article 59. The article puts the receiving State under the obligation to take such steps as may be necessary to protect the premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

As regards the archives and documents of a consular post headed by a career consular officer, article 33 provides that they shall be inviolable at all times and wherever they may be. Similarly, article 61 states that the consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be,

provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade. The *consular archives* include all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping (article 1(k)). The consular premises and archives – both those headed by a career consular officer and those headed by a honorary consular officer (see article 1(2)) – shall, according to article 27, be protected by the receiving State even in exceptional cases, such as the severance of the consular relations between the receiving State and the sending State concerned.

4.2.5 The inviolability of official correspondence and other official means of communication – the consular bag and the status of the consular courier (Article 35, 54, 58)

Article 35(1) of the VCCR states that the receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher (*ibid.*). However, the consular post may install and use a wireless transmitter only with the consent of the receiving State (*ibid.*). According to article 54(3), third states shall accord the same freedom and protection as the receiving State is bound to accord under the VCCR to official correspondence and to other official communications in transit, including messages in code or cipher.

Article 35(2) states that the *official correspondence* of the consular post, i.e. all correspondence relating to the consular post and its functions, shall be inviolable. The provisions mentioned also apply to consular posts headed by career consular officers as well as honorary consular officers (articles 1(2) and 58(1)).

Article 35(3) states that the consular bag should not be opened nor detained. However, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in article 35(4), i.e. official correspondence and documents or articles intended exclusively for official use, they may request that the bag be opened in their presence by an authorized representative of the sending State (*ibid.*). If the authorities of the sending State refuse this request, the bag shall be returned to its place of origin (*ibid.*).

The packages constituting the consular bag shall bear visible external marks of their character (article 35(4)) and the consular courier provided with an official document indicating his status and the number of packages in the bag (article 35(5)). Except with the consent of the receiving State, he shall be neither a national of the receiving State, nor shall he be - unless he is a national of the sending State - permanently resident in the receiving State (*ibid.*). In the performance of his functions, he shall be protected by the receiving State, enjoy personal inviolability and not be liable to any form of arrest or detention (*ibid.*). Article 35(5) shall also apply in cases where the sending State, its diplomatic missions or its consular posts appoint a consular courier *ad hoc*, save for the fact that the immunities then shall cease to exist when such a courier has delivered the consular bag in his charge to the consignee (article 35(6)). Article 35(7) contains provisions for situations where a consular bag has been entrusted to the captain of a ship or a commercial aircraft scheduled to land at an authorized port of entry.

According to article 54(3), third states are obliged to accord the same inviolability and protection as the receiving State is bound to accord under the VCCR, to consular couriers who have been granted a visa, if a visa was necessary, as well as to consular bags in transit.

The provisions mentioned above shall apply equally to consular posts headed by career consular officers and consular posts headed by honorary consular officers, except that for the latter, article 58(4) states that the exchange of consular bags between two consular posts headed by honorary consular officers in different states shall not be allowed without the consent of the two receiving states concerned.

4.2.6 Actions in case of abuse

Persons enjoying immunities and privileges according to the VCCR are nevertheless obliged to respect the laws and regulations of the receiving State, according to article 55(1) of the VCCR. In addition to this, article 55(1) states (*in fine*) that these persons also have a duty not to interfere in the internal affairs of that State. Under this section, the most common actions available to the receiving State in cases where consular immunity has been abused will be explained.

4.2.6.1 Declaring a consular officer or a member of the consular staff *persona non grata* or *not acceptable* (Article 23)

Article 23 provides that the receiving State may – without giving any reasons for this - notify the sending State that its consular officer is *persona non grata* or any other member of its consular staff is *not acceptable* (article 23(1) and (4)). The sending State then has the choice either to recall the person concerned or terminate his consular position (article 23(1)). Should the sending State fail to do this within a reasonable time, the receiving State can either withdraw the *exequatur*²³⁵ from the person declared *persona non*

²³⁵ See article 12 of the VCCR.

grata/not acceptable or cease to consider him a member of the consular staff (article 23(2)). Such declarations can also be made in cases where the person appointed as a member of the consular post has not yet arrived in the receiving State's territory or where he has arrived but prior to him taking up his consular duties. When this is the case, the sending State is obliged to withdraw his appointment (article 23(3)). Article 23 applies to both career and honorary consular officers and staff (article 1(2) *e contratio*).

4.2.6.2 Waiver of immunity (Article 45)

Article 45(1) of the VCCR provides that the sending State, as regards a member of the consular post, may waive any of the privileges and immunities provided for in articles 41, 43 and 44 of the Convention, i.e. the waiver may concern the personal inviolability, immunity from jurisdiction and liability to give evidence. The waiver must be express, save for where the consular officer or employee has initiated proceedings and his counterpart raises a counterclaim (from which the consular officer/employee does not enjoy immunity according to article 45(3)), and shall also be communicated to the receiving State in writing (article 45(2)). A waiver of immunity from jurisdiction for civil or administrative proceedings does not include waiver of immunity from eventual measures of execution following the judgement. In those cases, article 45(4) provides that a separate waiver must be given for the execution. According to article 58(2), article 45 shall also apply to honorary consular officers.

As regards the ban on interference in the receiving State's internal affairs, it is evident that consuls are not protected from the civil and criminal jurisdiction of the receiving State in such cases (articles 43(1) and 55(1) of the VCCR), compared to diplomatic immunity, which would assert such protection from local jurisdiction.²³⁶ A waiver of immunity is thus not necessary for consuls in those situations.

4.2.6.3 Breaking off consular relations

Article 27 of the VCCR talks about the protection of consular premises and archives and of the interests of the sending State in exceptional circumstances, amongst them the 'severance of consular relations between two States' and 'the event of a temporary or permanent closure of a consular post'. The convention does however not specify the grounds for such severance of consular relations or closure of the post. Practice however shows that the closure of consulates is often made on a reciprocal basis – especially if it happens because of political reasons.²³⁷ There have also been incidents where the sending State has ordered the closure of the consulates of another State where the sending State's consuls have been accused of espionage in that (receiving) State.²³⁸

The establishment of diplomatic missions in a State is, in principle, also a consent to the establishment of consular mission(s) in that State (article 2(2)

²³⁶ Lee & Quigley (2008), p. 76.

²³⁷ *Ibid.*, p. 88 *et seq.*

²³⁸ *Ibid.*, p. 90.

of the VCCR). The severance of diplomatic relations, however, does not necessarily mean that consular relations between the States concerned should also be interrupted (article 2(3) of the VCCR).

4.2.6.4 Limiting the size of the mission

Article 20 of the VCCR enables the receiving State – provided that there are no agreements on the matter between the sending and the receiving State - to limit the size of the consular post (see the corresponding article 11(1) of the VCDR) to a number that it finds ‘reasonable’ and ‘normal’ given the circumstances and conditions in the consular district and the needs of the consular post in question, i.e. an entirely subjective assessment. The provision is almost identical to the provision in article 11(1) of the VCDR, which is why what is said in section 3.2.7.4 also applies to consular posts.

4.2.6.5 Other remedies

What is said for diplomats above under section 3.2.7.5 also applies to consular officers.

5 Diplomatic and consular immunity in criminal cases – practice from the Swedish, Dutch and Danish Ministries of Foreign Affairs

5.1 Sweden²³⁹

5.1.1 Introduction

In each case, when deciding which measure or measures to take, the Swedish Ministry of Foreign Affairs' Protocol Department (below 'the Protocol' will be used when referring to respective State's Ministry of Foreign Affairs' Protocol Department) will among other considerations take into account how those measures will affect Sweden, particularly its missions abroad and its interests in the State concerned. There are, for instance, some States that strictly uphold reciprocity, where Sweden could expect the same measure it takes to be applied to Sweden's diplomatic and consular personnel. Such considerations may affect the way in which they are *implemented* (e.g. the channel of communication to be employed) but normally not the actual choice of *measure*. Since this can vary considerably from one State to another, every case has to be assessed as a whole and on its own merits.

When determining whether a request should be made to the sending State to recall a person enjoying immunity who has committed a crime in Sweden, the Protocol always relates his behaviour to the fact that he has been assigned to represent the sending State. The latter requires that the person behaves in a certain way and, above all, the duty to respect the laws of the receiving State. Looking at the person's behaviour, the starting-point will be that the Vienna Conventions relate to national law (article 41(1) of the VCDR and article 55(1) of the VCCR), which then becomes a standard when assessing whether the person in question should be recalled. However, behaviour that is not illegal but that could be regarded as inappropriate may also be followed up, providing that the Protocol has been informed about it by a reliable source. If the case at hand is not severe, the Protocol might consider it sufficient just to inform the embassy concerned about the problem. In more severe cases, the Protocol will inform them about the problem as well as suggest a measure to be taken. Thus, there is a difference

²³⁹ The contents of this section are entirely based on the interview with Mr Anders Nyström, Deputy Chief of Protocol and Director at the Swedish Ministry of Foreign Affairs' Protocol Department in Stockholm (held at 2009-03-27), unless other sources are explicitly mentioned.

depending on the severity of the case and how much the Protocol knows about it. The more it knows, the more accurately can it decide on the appropriate measure(s) to be taken.

In most cases where crimes have been committed by persons enjoying immunity, the Protocol would most likely call the ambassador or the deputy head of mission concerned to discuss the incident with him. The Protocol would never speak to the person who actually committed the crime. In cases involving the ambassador himself, the issue would be discussed either directly with the sending State's Ministry of Foreign Affairs or with the ambassador himself, all depending on the type of issue. However – as in every case – the course of action would depend on the circumstances in the case at hand, i.e. an individual assessment would have to be made.

5.1.2 Conventional crimes

5.1.2.1 Traffic offences

As regards *traffic offences*, Sweden holds a very strict view. The Protocol takes every opportunity to underline that one of the areas where Sweden has a strictly maintained policy and where the Protocol will request a recall of the person concerned even if it is a first-time offence is when a person enjoying immunity has been found to drive under the influence of alcohol and drugs.²⁴⁰ As for any type of crime, the first thing the Protocol would do is to request the Swedish police to send a report over the incident. The report should be as detailed and informative as possible. It should contain information regarding the condition of the person enjoying immunity at the time when the alleged act was committed, i.e. signs of intoxication. The Protocol often communicates with the police to get as much information on what has happened as possible. In Stockholm there is also a department within the police that deals specifically with the embassies. They can also provide the Protocol with additional information should it be necessary.

The next step would be to call the ambassador or deputy head of mission concerned to the Protocol to have a talk with him regarding the incident and also to hand over the police report. If it is very clear what has happened the Protocol would also put forward a request that the person enjoying

²⁴⁰ A circular note on drunk driving from the Swedish Protocol Department (dated March 2009) reads as follows:

'The attitude to driving while under the influence of alcohol and drugs varies from country to country. Many states take a more liberal view than Sweden, where this is considered a serious offence. It is therefore essential that heads of mission bring the following facts to the attention of all members of their staff.

Driving while under the influence of alcohol, minimum 0.2 per mille alcohol in the blood or 0.10 milligrams of alcohol per litre of breath, is regarded as a serious offence in Sweden, even if no accident has occurred.

If found guilty by a court for having driven under the influence of alcohol or drugs, a person would risk imprisonment for a maximum of 24 months and the withdrawal of his/her driving licence.

The Ministry regards drunken driving by a member of a diplomatic mission as serious misbehaviour and will take action at the first offence.' The circular can be found at <http://www.regeringen.se/sb/d/8075/a/73188>. Webpage viewed on 2009-04-01 at 17:23:15 hours.

immunity who committed the traffic offence should be recalled. The Swedish Ministry of Foreign Affairs can however not withdraw the person's drivers licence since drivers licences are issued and withdrawn by the Swedish Road Administration Board ('Vägverket') and persons enjoying immunity get to use their national drivers licences in Sweden – a policy that differs from the practice in some other States where the Ministry of Foreign Affairs gets to issue and withdraw drivers licences.²⁴¹

Sweden also has a very strict policy when it comes to speeding in the vicinity of daycare centres and schools. In those cases, a representative of the embassy would most likely be summoned to the Protocol, where the severity of the offence would be made clear to him. In all of the abovementioned cases, it would not have made any difference whether the person enjoying immunity was a diplomat, a career consular officer or a family member forming part of their respective households (see section 5.1.4.1 below) – the action taken from the part of the Ministry would have been the same notwithstanding the title of the perpetrator. However, one must always look to the scope of the immunities granted to the person enjoying immunity. If, for instance, the incident involves a career consular officer there would have to be a discussion on whether the situation falls within the scope of 'consular functions' according to article 5 of the VCCR, for which the career consular officer enjoys immunity. In this respect, one could argue in two ways: either you could see the driving from place A to place B to prepare for a bilateral meeting as part of the career consular officer's duties *or* one could question whether it – notwithstanding if the act falls within the scope of 'consular functions' or not - lies within his duties to breach the law of the receiving State *while performing those duties*, especially since the consul is obliged to respect the law of the receiving State according to article 55 of the VCCR. In this case, Sweden would most probably take on the latter view.

Should the traffic offence(s) have been committed in Sweden as a third State (i.e. the person who committed the crime is on his way through Sweden to take up his posting in a neighbouring State), Sweden would most likely not have accepted immunity since, according to article 40 of the VCCR, awarding him immunity and inviolability would not have been required in order to 'ensure his transit or return'. This means that Swedish authorities could take the same coercive measures against him as they could take against any other person.

Looking at the severity of the offence, the Swedish Ministry of Foreign Affairs' reaction would not have been any different had the same behaviour led to a victim being injured and eventually dying due to the injuries suffered compared to a situation where he gets injured but survives. The Swedish Ministry might also contact the sending State's Ministry of Justice in order to – and, where possible, by using applicable conventions in the field of cooperation in criminal investigations – transfer our authorities' criminal investigation on the incident to their authorities so that the

²⁴¹ See circular note on driving licences from the Swedish Ministry of Foreign Affairs' Protocol Department (dated February 2009), which can be found at <http://www.regeringen.se/sb/d/8075/a/73188>. Webpage viewed on 2009-04-01 at 17:21:30 hours.

perpetrator might eventually be prosecuted in the sending State. Sweden would most likely not ask for a waiver of immunity since it applies a strict policy not to ask for or – when their own diplomatic or consular personnel is concerned – waive immunity, see section 5.1.4.4 below.

Should the Swedish police have forced the person enjoying immunity to undergo a breathalyzer test, in spite of knowing about the person's status, the Protocol would not in any way have seen this as a mitigating circumstance. A formal apology would have been given to the embassy due to the police's behaviour, but the Protocol's reaction would in all other respects have been the same.

5.1.2.2 Shoplifting and attempted fraud

In cases of shoplifting and fraud, the Protocol would call the ambassador concerned regarding the incident and also hand him the police report. A request of withdrawal of the person enjoying immunity might be made depending on the severity of the crime. If however the behaviour is repeated the Protocol would most likely ask for a recall of the person concerned.

5.1.2.3 Slavery and threats of private servants

In situations where a diplomatic family treats their private servants²⁴² badly by letting them work under slave-like conditions, threatens them and takes away their passports, the Protocol would consider asking the sending State to recall the diplomat. The person(s) concerned might also be declared *persona non grata*, depending on the severity of the crimes committed (which under the conditions now mentioned is to be seen as very severe).

5.1.2.4 Assault

In cases where a diplomat or a career consular officer is abusing his wife and minor children, the Swedish authorities would be able to act to protect them, provided that they give their consent since they are also protected from coercive measures according to article 29 of the VCDR, provided they are not Swedish nationals (article 37(1) of the VCDR). The wife and children could then be taken to a protected residence. As regards minor children, consent in these types of situations would have to be assumed. Should the Protocol be contacted by the police because they fear that if they do not enter the premises, there might be a danger for the victims' lives, the Protocol would accept preventive measures to be taken in order to protect the victims in the same way as if the assault happened outside (see below). The Protocol can however not guarantee that the police will not be prosecuted for breach of duty. Should the assault happen outside of the premises, the police can take preventive measures, i.e. measures to hinder the assault to continue - just like they can in any other case where a person enjoying immunity is committing a criminal act.

²⁴² In this context understood as persons who do not have Swedish nationality or permanent residence status in Sweden.

Had it been a career consular officer who committed the disputed act, one must ask whether this is something that falls within the notion of ‘consular functions’ according to article 5 of the VCCR. Assault can however hardly be within the scope of the article.

5.1.2.5 Murder

Should a person enjoying diplomatic immunity commit murder in the country the Ministry would probably not ask for a waiver of immunity, due to its policy (see section 5.1.4.4 below). The diplomat would then most probably be declared *persona non grata* and sent back home and a contact would be taken with that country’s authorities in order to have him prosecuted.

5.1.2.6 Aiding child abduction

Should an embassy in Sweden issue passports in order to aid child abduction, for instance if one parent (who is not a Swedish citizen) wants to take his child (who has Swedish citizenship) out of the country contrary to a Swedish custody judgement according to which custody has been given to the other parent only and this is done without that parent’s knowledge, the main difficulty would be to prove that this was the intent for which the passport was issued. In cases where the criteria for issuing the passport are met according to the law of the sending State and there is no other evidence on more active involvement (e.g. that the embassy official also helps in physically removing the child) it is very difficult if not impossible to prove that the passport was issued with this intent. The Protocol cannot do anything about the fact that the passport is issued, since this is a right of the sending State and allows them to apply the criteria it has legislated on. However, if the embassy official is issuing the passport contradictory to the law of the sending State (i.e. he is not obliged to issue the passport in the case at hand but still does so) and aiding in that case is punishable according to Swedish law, then the assessment would have been different. In that case, he would be committing a criminal act and the Protocol could take measures in response to it.

If it could be proven that this happens systematically, i.e. that passports are repeatedly issued by the embassy where they, in effect, enable the parent to take the child out of the country - contrary to Swedish custody judgements - *and* Swedish authorities have enough evidence to prove the intent, a request for a recall of the person/persons involved might be put forward by the Protocol. Should it turn out that only one official is behind this, the Protocol would call the ambassador concerned to have a talk with him regarding what has happened. Should it be that the whole embassy is involved, the Protocol would contact the sending State’s Ministry of Foreign Affairs for the same purpose. The Protocol might also contemplate to declare the persons involved as *persona non grata* or *not acceptable*.

It would not have mattered in this case whether the passport was issued by an embassy official or by a consular officer. The task of issuing passports explicitly falls within the scope of article 5(d) of the VCCR.

5.1.2.7 Rape

In case of rape, where authorities have proof that the person enjoying immunity committed it, the Protocol would call the ambassador or deputy head of mission concerned to have a talk with him regarding the incident. During the talk the ambassador would most likely be handed over a report over what has happened. The Protocol would also request the person to be recalled by the sending State. Should the sending State not comply with the request, the person who committed the act might be declared as *persona non grata*.

5.1.3 Crimes specific to persons enjoying immunity

5.1.3.1 Espionage

In cases of espionage, the Protocol would most probably declare the person concerned as *persona non grata* (see section 5.1.4.5 below).

5.1.3.2 Smuggling of narcotics using the diplomatic or consular bag

In cases where a diplomatic or consular bag is being used to smuggle drugs into the country, whether this is done by the diplomatic/consular courier or a diplomat/career consular officer, the Protocol would ask the sending State to recall the person concerned alternatively declare him *persona non grata*. Should the sending State not comply with this request, the Protocol might consider declaring the person *persona non grata*. Had the smuggling involved a considerable amount of narcotics, e.g. several kilos of heroin, the Protocol would try to see to that the person leaves the country as quickly as possible, i.e. within 24 hours.

5.1.3.3 Abuse of import privilege

Abuse of import privilege - i.e. when a person who enjoys exemption from customs duties and inspection imports large quantities of alcohol in order to sell it on the black market - is a behaviour that is clearly not acceptable. In such situations, the Protocol would consider requesting the sending State to recall the person.

5.1.4 General remarks

5.1.4.1 Definition of 'family member forming part of the household'

Sweden does not apply a working definition of 'family member forming part of the household' for the purpose of the VCDR and VCCR but rather employs an individual assessment. Spouses (including same sex

relationships) and minor children forming part of the household are always included. Certain exceptions can be made in cases where, for instance, the diplomat's parent is dependent on him. The Protocol always tries to find pragmatic solutions where the sending State applies another view on the notion of family.

As far as children are concerned, the Protocol accepts them as family members up until they have reached 19 years of age (the Swedish age of maturity is 18) and are living together with the diplomat. For children that form part of the diplomat's household *and* are older than 19 but not younger than 23, the Protocol requires proof of enrolment at an institute for higher education in order to register the child as a family member for the purpose of the Vienna Conventions. The Protocol does not accept any other activity as far as children within this age group are concerned.

It is important to stress that, for immunity to apply, the person concerned must be registered as a family member at the Protocol Department. Should this not be the case, the immunity will not apply even if the person concerned would qualify as a family member according to the Swedish criteria.

5.1.4.2 Duration

The representative's immunity ends at the same time as his posting to Sweden. Under certain circumstances, the Protocol can approve of a longer stay (2-3 months) for personal reasons. Normally one month is always approved upon request, although the Protocol does not have any fixed time-limits in this regard. If the person stays in the country beyond that period, he would no longer enjoy immunity and could thus be subjected to coercive measures, just like everybody else – although it is ultimately up to the public prosecutor to decide whether the person should be prosecuted or not.

5.1.4.3 The importance of bilateral agreements

If the person committing a criminal act had been a member of the sending State's mission but not enjoyed immunity according to the VCDR or VCCR in that particular case, it is important to remember that the outcome would have been different had there been a bilateral treaty – according to which the person's immunity is extended in that regard - between Sweden and the sending State. For instance, if a career consular officer commits assault and there is a bilateral treaty between Sweden and the sending State saying that consuls enjoy immunity from criminal and enforcement jurisdiction for acts that fall outside of the notion of consular functions (article 5 of the VCCR), as long as their posting is effective, the agreement would have been respected, i.e. the extended immunity upheld.

5.1.4.4 Waiver of immunity

Sweden has a policy not to ask for waiver of immunity for diplomats and consular officers accredited to Sweden. The reason for this is because then – by necessity – Sweden would have to apply the same policy *vis-à-vis* her own diplomats abroad, who then could be subjected to trial and punishment

in States where the legal system does not fulfill basic legal standards. This policy is strictly upheld, i.e. even towards countries that do meet this legal standard. If the alleged act is also punishable in Sweden, a Swedish prosecutor could choose to press charges in Sweden.

Sweden would not ask for a waiver even in cases where the crime committed in Sweden as a receiving State (i.e. by a persons enjoying immunity) would not be punished at all or be seen as/punished much less rigourously in the sending State than it would in Sweden had immunity been waived.

5.1.4.5 Persona non grata

The *persona non grata*-declaration is an administrative procedure. What the Protocol does when making such a declaration is, in effect, to withdraw a residence permit. This is not a penal measure, but rather a declaration saying that the person in question is considered not to be suitable as a representative for the sending State. There are no legal safeguards applying to these situations, as opposed to situations where a person not enjoying immunity committs the same act(s). Should the criminal act be repeated, the *persona non grata*-declaration would be used, save for cases of drunk driving, where the Protocol would use the declaration even if it is a first-time offence (provided that the sending State refuses to meet our request to recall the person on their own accord). The Protocol carefully considers that, even if the effect of requesting the person to be recalled to the sending State and using a *persona non grata*-declaration is the same, there is – in diplomatic language - a huge difference between them. A *persona non grata*-declaration is seen as much more severe.

The Chief of Protocol is normally the one who issues the *persona non grata*-declaration, i.e. makes the decision on such a declaration. The decision is made by virtue of delegation from the Minister of Foreign Affairs. If the case at hand is very delicate, the decision is made after being presented to the Minister of Foreign Affairs. The latter can also choose to present the case to the Government before a decision is made. The Minister of Foreign Affairs furthermore has the power to grant residence permits for persons enjoying immunity – a right that is also delegated to the Chief of Protocol and his Deputy.

5.2 The Netherlands²⁴³

5.2.1 Introduction

In most cases where persons enjoying immunity commit criminal acts in The Netherlands, the reaction of the Protocol department would be to send a diplomatic note to the embassy concerned and/or call the ambassador

²⁴³ The contents of this section are entirely based on the interview with Mr Frank de Hoop Scheffer, Head of Foreign Missions, Privileges and Immunities at the Dutch Ministry of Foreign Affairs' Protocol Department in The Hague, The Netherlands (held at 2009-03-20), unless other sources are explicitly mentioned.

concerned to the Ministry of Foreign Affairs to have a talk with him regarding the incident. It is however important to remember that the Ministry of Foreign Affairs works independently from the judiciary (and vice versa), so the police can continue to investigate the offences in spite of diplomatic and/or consular immunity. Moreover, a Dutch prosecutor could also take the case to court and the court could deliver a judgement. When the person no longer enjoys his immunities the judgement can also be enforced in The Netherlands and he can be arrested – the only restriction is that it cannot be executed as long as the immunities are effective). This is not seen as a breach of article 31(1) of the VCDR, since the person enjoying immunity cannot be forced to go to court. However, the Protocol's advice in these cases is that the person concerned goes to court – with an attorney – to defend himself and claim immunity, since the judge will not *ex officio* take this fact into account. The court could also pass a conviction *in absentia*, upon which seizure of bank accounts and inclusion in the wanted persons-list might follow, which is why it is even more advisable that the person concerned shows up when summoned to court.²⁴⁴ According to the Ministry of Foreign Affairs's Protocol Guide, '[I]f the person to whom the summons is addressed takes no action and fails to appear in court, either in person and/or represented by an attorney, they are liable to be convicted and sentenced *in absentia*, in which case the judgment will be posted to them. If an offender convicted in this manner still fails to respond, their personal particulars will be entered on the list of wanted persons which is widely distributed to police forces. This may lead to the offender being detained by the police, and, unless the offender can produce satisfactory evidence of identity and immunity, they run the risk of being arrested.'²⁴⁵

When faced with a case where a person enjoying immunity has committed a crime, there are other, more informal ways than requesting waiver of immunity, calling the ambassador to the Protocol, sending diplomatic notes and using the *persona non grata*-declaration to deal with the matter. The Protocol can also apply diplomatic pressure by linking cases, e.g. if there is a problem with a person enjoying immunity who committed a crime and the sending State refuses to cooperate with the Protocol, the latter could retaliate by putting pressure on the mission concerned by requiring them to cooperate - otherwise ID-cards will not be issued for newcoming embassy staff. If such measures are taken the Protocol will apply them consistently and proportionately, meaning that each case has to be judged on its own merits and its circumstances carefully weighed against the measures that are deliberated to be taken.

5.2.2 Conventional crimes

5.2.2.1 Traffic offences

The Protocol does not make any distinction between career consular officers, diplomatic agents and members of their family forming part of the

²⁴⁴ Protocol Guide (2008), p. 51.

²⁴⁵ *Ibid.*, p. 58.

household (see section 5.2.4.1 below) when deciding which measures should be taken when persons belonging to those categories commit traffic offences. When deciding which action(s) to take against the perpetrator, the Protocol's first step will be to look at the police report over the incident, which is always communicated to the Protocol by the police in situations involving persons enjoying immunity. If the offence is minor the Protocol might not take any action. Should the case concern speeding, drunk driving²⁴⁶, driving through a red light and/or lead to third party-injury, the Protocol would take action. Like always, each case will have to be judged individually and as a whole.

After having read the police report and decided to take action, the Protocol would send a diplomatic note to the embassy concerned, repeating what it said in the police report, stressing that these offences are considered as serious and appalling and also remind them of the obligation following from article 41 of the VCDR and 55 of the VCCR, i.e. that they are obliged to respect the laws and regulations of The Netherlands notwithstanding the privileges and immunities accorded to them. The Protocol could alternatively contact the person who committed the offence(s) so as to have a talk with him at the Ministry of Foreign Affairs, explain how seriously the Protocol considers the incident to be and also hand over the diplomatic note. A third option could be to talk to the ambassador concerned. The first and second/third options could also be combined since it is not too uncommon that no reaction is given if only a diplomatic note is sent. The Protocol's experience is that calling the ambassador or the person who committed the crime to the Ministry often makes a big impression.

Following the conversation/notification the embassy will in most cases take action to make sure that these types of incidents will no longer be repeated. They are generally very keen on maintaining their reputation on a very high level and concerned about the effect this would have on the latter should the incident leak out to the media.

The ultimate action that could be taken – although the practice (save for very exceptional cases) is not to use it for traffic offences – is to declare the person to be *persona non grata* or *not acceptable*. As far as traffic offences are concerned, the declaration would not be used even if the person's acts lead to third party-injury with death as a result. Thus, should a third party die from his injuries due to the person's driving, the Protocol's actions would be the same as if nobody got injured.²⁴⁷ However, the Protocol would do its utmost to assist the victim's family in their claim for damages. The Protocol would likewise not ask for a waiver of immunity in most traffic offence-cases. The Dutch judiciary might try the case in court but the judgement would not be possible to implement due to the bar on execution

²⁴⁶ According to the Protocol Guide (2008), the statutory limit is a blood alcohol level of 0.05% or 220 micrograms per litre of exhaled air, p. 56.

²⁴⁷ The Ministry of Foreign Affairs Protocol Guide (2008) mentions the following in relation to these types of situations: 'If a privileged person has caused serious injury to a third party while under the influence of alcohol, drugs or certain medicines, the sending state may be requested to recall the person concerned. In addition, in cases where a privileged person has not caused serious injury, but has twice been stopped while driving under the influence of alcohol or drugs, the sending state may be requested to recall him/her', p. 57.

following from article 29 of the VCDR (compared to article 41(2) of the VCCR).

The offender could also be fined by the police, although if he refuses to pay the fine, coercive measures cannot be taken in order to ensure payment.²⁴⁸ The same coercive restraint applies to the police's use of breathalyzer tests. Should it happen that the police forces the diplomat to undergo the test, the Protocol's reactions would remain the same but a diplomatic note would be sent to the embassy to apologize for the police's behaviour. The Protocol will however first contact both the police and the person concerned to hear both versions of what happened. If the person claims immunity, the police can always contact the Protocol at any time to verify his status (on which records are kept) and to get further instructions. The Ministry of Foreign Affairs' Protocol Guide (2008) mentions the following on suspected drunk driving and the use of breathalyzer tests: 'The police decide, based on their own observations, whether there are reasonable grounds for assuming that a privileged person is driving under the influence of alcohol, drugs or certain medicines. They may also use testing equipment such as breathalysers. The breathalyser test shows whether a motorist has exceeded the statutory limit. This is currently a blood alcohol level of 0.05% or 220 micrograms per litre of exhaled air. All privileged persons are obliged to cooperate with these tests but they cannot be compelled to do so. The Ministry would, however, urge all privileged persons to cooperate in the interests of road safety. Refusal by a privileged person to cooperate with a test contravenes Dutch law and a fine will be imposed.'²⁴⁹

Should the traffic offence(s) be committed in The Netherlands as a transit State (article 40(1) of the VCDR and article 54(1) of the VCCR), the immunities would still – according to the Vienna Conventions - be the same as if the person was accredited to The Netherlands, why the Protocol's course of action would have been the same. The Protocol would then contact the person's embassy in The Netherlands or, if his State is not represented in The Netherlands, the closest embassy where they are represented, e.g. in a neighbouring country.

5.2.2.2 Shoplifting and attempted fraud

Same assessment and procedure as in section 5.2.2.1 above.

5.2.2.3 Slavery and threats of private servants

The Protocol is aware of the problem with private servants²⁵⁰ being threatened and mistreated by persons enjoying diplomatic immunity – who are also their employers. Cases where private servants have escaped from the bad working conditions have come to the Protocol's attention indirectly through police reports, as well as notes from embassies saying that a private

²⁴⁸ *Ibid.*, p. 55.

²⁴⁹ *Ibid.*, p. 56-57. As mentioned above, fines can be imposed but payment cannot be enforced.

²⁵⁰ In this context understood as persons who do not have Dutch nationality or permanent residence status in The Netherlands.

servant has disappeared, that they do not know where he is and that they no longer wish to take responsibility for him. It is also quite common that the passports are taken from the private servants.

The Protocol tries to protect this category as much as possible, for instance by asking, when they present themselves to the Ministry, to show the contract between them and their employer. The contract has to be compatible with Dutch law (minimum wages-requirements, holidays e.t.c.). The employer also has to give guarantees that he is responsible for the person (insurance e.t.c.). The problem with this procedure is however that they might display shadow contracts, i.e. contracts that are in accordance with Dutch law but that are not being respected. The Protocol cannot enter the premises of the mission or the private residence of a diplomat to carry out inspections, making sure that the obligations are respected.

When the police finds out that the person has escaped they will write a report. The moment that the person escapes he is in fact 'illegal'. If the servant reports himself to the police, he will get protection whether he is illegal or not. This protection will persist through the police investigation and court procedure, after which the person is sent back to his home country.

When the police finds out that the person has been working for a privileged person, they will contact the Protocol. Following this, the Protocol will employ the usual procedure, i.e. send a diplomatic note and/or call the ambassador concerned/the person who committed the offences against the private servant.²⁵¹

5.2.2.4 Assault

In cases of assault, the Protocol would have a talk with the ambassador concerned and maybe also suggest that the person who committed the assault be recalled. The Protocol would not contact the perpetrator himself. Should a diplomat assault his minor children, the Protocol would contact the Council for the Protection of Children ('Raad voor de

²⁵¹ The Protocol acknowledges that these cases are often very delicate to deal with – the private servants are usually subjected to pressure from two sides – the employer on one hand and the family in their home country for which they earn money on the other. The Protocol does not want to make the situation worse for these servants but the course of action is very difficult to determine: If the Protocol talks with the ambassador they might get fired and sent back home, if it does not notify them the maltreatment will probably continue. Currently, the Protocol is considering to introduce the same procedure that they have in Belgium. In Belgium, the private servants have to pick up their private ID-cards (issued by the Ministry of Foreign Affairs) in person. When they come to pick up the cards they are also informed of their rights according to Belgian law and provided with information on NGO:s that they can contact should there be any problems. The Protocol believes that the step for a private servant to go to them when they feel that they are not treated well is very big. They might also feel - since the Protocol is part of the Ministry of Foreign Affairs – that it is 'playing the same game' as their employer and therefore cannot be trusted. That is why the Protocol is contemplating whether it might be better to refer the person to an organisation that does not have any ties to the Government. This procedure is however only discussed. Thus, for the time being, it is the embassy that applies for and picks up the private servants' ID-cards.

Kinderbescherming'²⁵²) to ask what could be done. It might however be problematic to reach the children and to enforce measures to protect them since the Council's representatives cannot enter the private residence of a diplomat or take care of the children without his consent. If the child is in immediate danger the Protocol would contact the embassy right away to notify them of what is going on and that it has to be stopped. The sending State's Ministry of Foreign Affairs would not be contacted. However, if it is the ambassador who commits the assault and does not change his behaviour the Protocol might contact higher representatives, e.g. at the Ministry of Foreign Affairs.

Had it been a career consular officer who committed the assault, coercive measures could be taken against him, since assault falls outside the scope of article 5 of the VCCR (according to article 43(1) of the VCCR, career consular officers enjoy immunity for *consular functions*, which are defined in article 5). However, had there been a bilateral treaty between The Netherlands and the sending State according to which consuls enjoy immunity from criminal and enforcement jurisdiction for acts that fall outside of the notion of consular functions as long as their posting is effective, The Netherlands would have respected this treaty. Thus, the Protocol would then have acted just like they did in the case of the diplomat, since the immunity then would have been the same for the consul concerned as for diplomats according to the VCCR.

5.2.2.5 Murder

Should a person who enjoys immunity commit murder in the country, the Dutch public would be seriously concerned and demand that the Government should do something to punish the perpetrators, especially if the murder is honour-related. The Protocol would immediately ask the sending State to recall the violator. Another option would be to ask the sending State to waive the immunity so that he can be prosecuted in The Netherlands.

How the sending State views the crime also plays a role when determining whether a waiver of immunity should be requested. If the crime committed is seen equally severely by the sending State (i.e. judgements passed and sentences enforced in order to punish it), the Protocol might demand that the perpetrator should be recalled by the sending State so that its own authorities can deal with the matter. The Dutch embassy in the country would then monitor the subsequent trial.

5.2.2.6 Aiding child abduction

If an embassy official issues passports to a parent of a Dutch child and to the child itself so that they can leave the country contrary to a Dutch custody judgement, according to which custody is given to the other parent only and this happens without that parent's knowledge, it will be very difficult for the Protocol to take actions. The reason for this is that the embassies accredited to The Netherlands can issue passports for many different reasons, which

²⁵² Part of the Ministry of Justice and the Ministry of the Youth and the Family.

the Protocol cannot affect. What the Protocol could do in such a situation (provided that there is enough evidence to prove this) is to protest against the issuance as far as the child is concerned since the passport obviously has been issued for the sole purpose of taking the child out of the country. This type of protest is called a *diplomatic demarché*, and means that the Protocol asks the Dutch ambassador in the sending State to complain against the issuance. The same protest would be put forward if this is something that happens repeatedly. If it is very serious the sending State's ambassador to The Netherlands would be called to the Ministry of Foreign Affairs so that the Chief of Protocol could have a serious talk with him regarding the situation.

Should it turn out that the embassy official had also actively participated in abducting the child, e.g. by physically taking the child from his custodian or by purchasing flight tickets, the Protocol would have a talk with the ambassador concerned since the level of involvement is more definite. During the meeting with the ambassador, the Protocol would point out that child abduction is a very serious offence according to Dutch law. It would also be suggested that the person concerned should be recalled to the sending State.

5.2.2.7 Rape

In cases where a person who enjoys immunity commits rape, the ambassador concerned would be called to the Protocol for a talk. Should it be a member of the family forming part of the person's household, the parent (also a person who enjoys immunity) would be called to the Protocol, i.e. the family member and actual perpetrator would not be called. If the incident has leaked out to the public and demands are very strong that something concrete should be done, the Protocol might ask the sending State to waive the immunity of the person concerned.

5.2.3 Crimes specific to persons enjoying immunity

5.2.3.1 Espionage

Should it be discovered that embassies or embassy staff are spying, the ambassador of the embassy concerned will be requested to recall the person(s) involved immediately. Should the case be very clear it would certainly be a *persona non grata*-situation. If the Protocol chooses to employ this measure, the Ministry of Foreign Affairs will give the person a reasonable time to leave the country.

5.2.3.2 Smuggling of narcotics using the diplomatic or consular bag

Should there be a very strong suspicion that the diplomatic or consular bag is used in order to smuggle illegal goods to The Netherlands, the Protocol would call the ambassador concerned and make it very clear that this cannot

happen again. The Dutch view is that this is a very serious breach of the Vienna Conventions. There is no clear practice on what to do in these cases. One option would be – if it is clear who is responsible for the smuggling - to ask for a waiver of his immunity. Such a link can however be difficult to establish, for instance if the diplomatic or consular courier is the only person who can be linked to the case, since a courier is – in most cases – only a messenger (i.e. not aware of the bag's contents). The Protocol's reaction would have been the same had it been a consular courier who smuggled using a consular bag as if it was a diplomatic courier who smuggled using a diplomatic bag.

Had there been a career consular officer carrying out the smuggling, claiming that the parcel was his personal luggage and its contents intended for personal use, he could be prosecuted for it, although he could not be forced to attend the trial and the judgement could not be implemented. The consul would be called up to the Protocol, where it would be made clear to him that he has committed a very serious crime. The Protocol might also suggest to his embassy that they make sure he leaves the country. Should the sending State refuse to recall him, he might be declared to be *persona non grata*.

5.2.3.3 Abuse of import privilege

In cases where a person enjoying immunity is violating the import duties according to the Vienna Conventions and the Dutch import regulations by importing e.g. alcoholic beverages without paying taxes (even though he situation is such that he is required to do so) and also later by selling them on the black market, where he makes a considerable profit, the Protocol would apply diplomatic pressure by sending a note to the embassy concerned, calling up the ambassador to the Ministry e.t.c., and make them understand that this is unacceptable behaviour. The Protocol's first option would not be to request the person in question to be recalled by the sending State, but rather to ask the embassy to pay the unpaid taxes. The reaction would have been the same no matter if it was a member of the consular or diplomatic staff who committed the offence.

5.2.4 General remarks

5.2.4.1 Definition of 'family member forming part of the household'

When it comes to defining who is a family member, the Protocol starts by looking at article 37 of the VCDR, where it says that members of the family of a diplomatic agent forming part of his household enjoy certain immunities provided that they are not nationals of the receiving State. In most cases the notion entails the spouse or the partner (the Protocol also recognizes same sex partnerships) and minor children that are unmarried. The Netherlands thus distinguishes between children that are 18 (and therefore have reached the age of maturity) and children that are under 18 (who are considered as minors). For children that are 18 years old or more,

the parents have to show an annual statement confirming that the child forms part of the parents' household, is unmarried and that the parents are financially responsible for him/her. Should a child aged 18-23 be enrolled at a full-time study in The Netherlands, such a declaration is not necessary as long as written proof of enrolment is submitted.²⁵³ Children are considered as forming part of the parents' household also if they, for the purpose of their study, are not living together with their parents.²⁵⁴ If the child is between 18 and 23 years old and *not* enrolled at a full-time study in The Netherlands, the Protocol would require proof signed by both the embassy/consulate concerned and the child's employer stating that he is unmarried, forming part of the parents' household and his parents financially responsible for him.²⁵⁵ If the child is between 23 and 27 years old, he could also be registered as a family member, but only if enrolled at a full-time study. If this cannot be shown, as well as if the child is over the age of 28, he would not be considered as a family member by The Netherlands for the purpose of the VCDR. The Protocol has however made exceptions for children in certain cases, for instance female muslim children that are unmarried and therefore – according to the view in the sending State - have to live with their families. The Protocol however wishes to stress that it is quite strict in this regard and that these are not general exceptions. An individual estimation is always made and the circumstances carefully considered before an exception is given.

As for other family members than children, The Netherlands does not recognize mothers, stepmothers or aunts/uncles, but exceptions can be made in certain cases. For instance, according to Chinese law, at a certain age the children are obliged to take care of their parents. Thus, if a Chinese diplomat can show that indeed the parent cannot provide for him-/herself, the Protocol would recognize him/her as a family member – but only on the basis of an exception.

5.2.4.2 Duration

The notion of 'a reasonable period' (not defined in the Vienna Conventions) - in the context of termination of functions - is 3 months, according to the Dutch view. What happens then is that the Protocol gets a note from the sending State's embassy in The Netherlands stating that there will be a person replacing one of their members of staff, but that the person who is being replaced will still be in the country for 2-3 months following the replacement. Under some circumstances that are well motivated the Protocol can allow a period longer than three months (known as 'grace period').

If the successor has taken up his post, i.e. after he has presented his credentials to the queen (when this is done the other persons posting is simultaneously terminated) and the person replaced is still in the country after the expiry of the reasonable time-period, he no longer has immunity and Dutch authorities would deal with the matter just as usual.

²⁵³ Protocol Guide (2008), p. 25.

²⁵⁴ *Ibid.*, p. 26.

²⁵⁵ *Ibid.*, p. 25.

5.2.4.3 Repeated offences

As always when persons enjoying immunity commit crimes, the Protocol gets a police report. The police would also be able to see whether the offence has been committed by the same person before or whether he previously has committed other offences. Should this be the case, the Protocol will have a talk with the ambassador - not the person who committed the offence. Diplomatic notes would not be sent in case of repeated offences. Had it been a first-time offence, the Protocol would undertake the usual procedure, i.e. send a diplomatic note to the embassy concerned together with the police report and emphasizing the duty to respect Dutch law according to article 41 of the VCDR and 55 of the VCDR. Depending on the severity of the offence (e.g. drunk driving) the Protocol might also suggest that the sending State considers whether it is appropriate that the person concerned continues to represent it in The Netherlands and also request his recall. The Protocol is keen on keeping a balanced approach in these situations. It looks to the severity of the offence and the circumstances in the case at hand (e.g. how often the offence has happened) when deciding which actions should be taken.

5.3 Denmark²⁵⁶

5.3.1 Conventional crimes

5.3.1.1 Traffic offences

Traffic offences – especially driving under the influence of drugs or alcohol and reckless driving²⁵⁷ - are seen as very severe breaches of Danish law. If a person who enjoys immunity is caught committing a serious traffic offence (e.g. where a third party has been injured due to the incident) the Protocol's reaction would be to summon the ambassador concerned to the Ministry of Foreign Affairs to discuss what has happened. The driver's licence of the person concerned might also be recalled for a period of up to three months. If the traffic offence is not considered as serious (e.g. where a third party has not been injured due to the incident), the procedure would normally be that the Chief of Protocol writes to the ambassador concerned to notify him that the co-worker has committed an offence and asking him to have a talk with this person. The ambassador would be asked to point out that this type of behaviour cannot be repeated. Should it nevertheless happen again, the same procedure as for serious traffic offences would be employed, i.e. the Chief of Protocol would summon the ambassador concerned to the Ministry of Foreign Affairs in order to have a talk with him regarding the incident.

²⁵⁶ The contents of this section are entirely based on the interview with Ms Annette Lassen, Deputy Director of Protocol and Mr John Pontoppidan, Minister Counsellor, at the Danish Protocol Department in Copenhagen, Denmark (held at 2009-03-17), unless other sources are explicitly mentioned.

²⁵⁷ The limit for drunk driving in Denmark is an alcohol content in the blood of 0,5 per thousand or more, *Diplomat in Denmark* (2008), p. 16.

The Protocol's starting-point in cases where a person who enjoys immunity has committed a crime is always the police report. What is mentioned in the report forms the basis for the actions that the Protocol takes. The Protocol and the police have a very strict policy saying that whatever *can be done* to prevent a person from continuing his criminal behaviour *will be done*. Another factor that has to be taken into account is whether it is a minor offence or a more severe one, which – as seen above – often determines the procedure employed to address the issue. If the offence is seen as severe, the Protocol might consider invoking article 9 of the VCDR or article 23 of the VCCR (i.e. the person concerned to be declared *persona non grata* or *not acceptable*). The first step in such (severe) cases, however, would always be to call the ambassador concerned to have a talk with him regarding the incident, to show how severe the Protocol thinks it is and perhaps even suggest that they should consider whether it is a good idea that the person concerned continues to represent their country in Denmark. The Protocol thus tries to avoid using the *persona non grata* and the apparatus it entails since it can be very controversial and therefore ought to be used only in very exceptional cases. Thus, the Protocol first and foremost points out how severely it sees the incident and, if the message comes through, the effect obtained (i.e. the person's recall) would be the same as if the *persona non grata*-declaration had been formally invoked – but without the controversy surrounding it. The aim is to resolve these situations in as a friendly manner as possible.

Another measure that the Protocol could use in severe cases is to contact the Ministry of Foreign Affairs of the sending State and request it to waive the person's immunity so that he can be prosecuted in Denmark. However, this happens very rarely. In those cases the ambassador will be called to the Protocol, but contact with the sending State's ministry would still be necessary in order to waive the immunity, since the ambassador does not have this authority.

If the offence is minor, the Protocol would probably only give a strict warning and notify the ambassador concerned.

The Protocol would not make any distinction between diplomats, ambassadors, or career consular officers (the latter provided that the criteria of 'consular functions' in article 5 of the VCCR is met, see article 43(1) of the VCCR) in this regard – the Protocol's reasoning and the actions taken would thus have been the same. This would also apply to family members forming part of their households who have reached the age of maturity, since they enjoy immunity to the same extent as *their* family member, provided that they are nationals of or permanently resident in the sending State. In cases where a honorary consular officer committed the crime, the Protocol will employ the same procedure as is used when persons enjoying diplomatic immunity have committed traffic offences (see above). Overall, the Protocol considers it easier to act when honorary consular officers are involved, since they - in the majority of the cases - are Danish citizens, see article 63 of the VCCR (although they could then not be expelled from Denmark due to their nationality).

Should the traffic offence be committed in Denmark while the person enjoying immunity is on his way to his posting in a third State, i.e. Denmark

is a transit State, the Protocol's first action would be to confirm this with the person's Ministry of Foreign Affairs. Should this be the case, the actions taken and the reasoning would be the same as described above.

As regards breathalyzer tests, it is not allowed by the Vienna Conventions to force a person enjoying immunity to undergo such a test. However, they can undergo it voluntarily. Should the police force them to undergo it, the Protocol would send an apology to the embassy concerned, but the actions taken and the reasoning leading to them would not change.

5.3.1.2 Shoplifting and attempted fraud

In cases of shoplifting and/or attempted fraud, the Protocol would call in the ambassador concerned to let him know that this kind of behaviour is regarded as totally unacceptable. The Protocol would also remind him of the duty to respect Danish law, according to article 41 of the VCDR and (in case of consular immunity) article 55 of the VCCR. The Danish view is that this is just as serious as traffic offences. As always, the Protocol would base its assessment on the police report. In previous cases of shoplifting the Protocol has given a warning saying that repeated offences will not be tolerated.

Should the behaviour be repeated it will be seen as more serious, although in effect the reaction from the Protocol would have been the same. The *persona non grata*-declaration would not be used even in cases of repeated behaviour in these situations, and even if the talk held with the ambassador does not lead to a change.

5.3.1.3 Slavery and threats of private servants

The Protocol has not dealt with cases where persons enjoying immunity subject their private servants²⁵⁸ to slavery and threats. The Protocol would like to see that the Danish authorities have a look at the employment contract of the person concerned before they grant residence permits (according to Danish law, private servants cannot obtain visa and residence permits until the authorities have seen the contract). Measures will be taken should it come to the Protocol's attention that the employer does not fulfill his duties according to the contract – something that the Protocol sees as unacceptable. The Protocol could, for instance, refuse to issue new permits for future private servants. The social authorities would also be notified so that they could take care of the servants. The ambassador concerned would also be called to the Ministry of Foreign Affairs where the Protocol would explain that this kind of behaviour is unacceptable. If the case at hand is very serious and/or this has happened more than once, the Protocol would also express its wish that the person concerned should leave Denmark.

²⁵⁸ In this context understood as persons who do not have Danish nationality or permanent residence status in Denmark.

5.3.1.4 Assault

In cases where a person enjoying immunity is assaulting his spouse and children, the Protocol would contact the social authorities, who then would take care of the children since they are minors – in spite of the fact that they are the children of a person enjoying immunity. Denmark has not made any reservations to the VCDR in this regard (see article 29 and article 37(1)), since it regards this situation as a matter of necessity and self-defence and therefore claims that the social authorities are entitled to take care of minor children in situations like these. Denmark holds a very firm position on this and the Danish authorities will act to protect minor children.

The outcome would have been the same had a career consular officer committed the assault and there had been a bilateral treaty between Denmark and the sending State, according to which consuls enjoy immunity from criminal and enforcement jurisdiction for acts that fall outside of the notion of ‘consular functions’ (article 5 of the VCCR), as long as their posting is effective, i.e. the Danish authorities would still have acted to protect the children, notwithstanding the provisions of the bilateral treaty.

5.3.1.5 Murder

In cases where persons enjoying immunity commit murder, the Ministry of Foreign Affairs would ask the sending State’s Ministry of Foreign Affairs to waive the immunity of the person concerned so that he can be prosecuted in Denmark. It would not have mattered if the crime is seen equally severely in the sending State as it is in Denmark or not. Denmark will do what it can so that its authorities can deal with the case.

5.3.1.6 Aiding child abduction

According to the Protocol, it is difficult to deal with situations where an embassy official accredited to Denmark issues passports in order to aid child abduction, for instance if one parent (who is not a Danish citizen) wants to take his Danish child out of the country contrary to a Danish custody judgement according to which custody has been given to the other parent only and this is done without that parent’s knowledge. Neither the Ministry of Foreign Affairs nor the Danish authorities can do anything to stop the embassies’ right to issue passports, even if it is clear that they are being issued so that the child can be taken out of the country. The embassy has the right to issue passports on whatever ground that the sending State finds appropriate (i.e. according to the law of the sending State). What Denmark could do is to – through their embassies and consulates - negotiate with the local authorities abroad in order to get the child back to Denmark.

If the embassy official has also actively participated in abducting the child and/or purchasing flight tickets the assessment would have been different. The Protocol would then call the ambassador to the Ministry of Foreign Affairs in order to point out the seriousness of the offence as well as to request that the person concerned should be recalled.

The Protocol's view is that it is not relevant in this context whether it was an embassy official or a consul who carried out the actions – the considerations and the actions taken on behalf of the Protocol would have been the same.

Should it turn out that this is something that occurs systematically, Denmark would have to negotiate with the sending State if the entire embassy is involved. The ambassador would be called to the Ministry of Foreign Affairs to explain what is going on. If there are only one or a few officials involved the Ministry of Foreign Affairs might ask the sending State to waive the immunity of the persons concerned so that they can be prosecuted in Denmark.

5.3.1.7 Rape

In cases where a person enjoying immunity commits rape, the Ministry of Foreign Affairs will ask the sending State to waive the immunity of the person concerned so that he can be prosecuted in Denmark.

5.3.2 Crimes specific to persons enjoying immunity

5.3.2.1 Espionage

When it comes to espionage carried out by persons enjoying immunity, the Protocol would probably not be involved at all. This is something that in Denmark is dealt with on a much higher level, either by the Government, the security service and/or the police. They would most likely contact the sending State's embassy and its Ministry of Foreign Affairs immediately. This is also a typical situation where it would be plausible to declare the person concerned as *persona non grata*. The Foreign Minister and the Prime Minister of Denmark would decide which measures that ought to be taken in this situation.

5.3.2.2 Smuggling of narcotics using the diplomatic or consular bag

The Protocol sees smuggling of narcotics using the diplomatic or consular bag as totally unacceptable behaviour, especially since the diplomatic means for communication are involved. As in other cases, the Protocol would cooperate with the police authorities and look at the police report. The sending State would be strongly advised to recall the person concerned, if it can be established that its representative and/or courier lies behind the smuggling. The *persona non grata*-declaration could be used in cases like these. However, before any action is taken it has to be absolutely undisputed that the person is guilty of smuggling – something that will be investigated by the police. Situations like these are normally dealt with by the Protocol. Should however a *persona non grata*-declaration be considered, the Protocol will always ask the Foreign Minister for approval.

The outcome would have been the same had the person enjoying immunity claimed that the parcel was his personal luggage and its contents intended for his personal use. However, if he actually does carry such a small amount of narcotics that it can be seen as intended for his personal use, the authorities would not take any action, since this is considered as legal in Denmark.

5.3.2.3 Abuse of import privilege

Should a person enjoying immunity abuse his import privileges, e.g. by importing alcoholic beverages without paying taxes (even though he situation is such that he is required to do so) and also later by selling them on the black market, where he makes a considerable profit, the Protocol would demand that the sending State recalls him. Article 9 of the VCDR (for persons enjoying diplomatic immunity) and article 23 (for persons enjoying consular immunities), i.e. a *persona non grata*-declaration could very well be invoked in relation to this person, although it ought to be avoided - if possible. The situation would not have been seen any differently had it been a consul who committed the crime than if it had been a diplomat – the Protocol does not distinguish between persons enjoying diplomatic immunity from persons enjoying consular immunity in this regard.

5.3.3 General remarks

5.3.3.1 Definition of ‘family member forming part of the household’

Any person that has been recognized (and registered) by the Protocol as a family member forming part of the household is considered as such in Denmark for the purpose of the VCDR and the VCCR. It can typically be a mother or a father that lives in Denmark together with the person enjoying immunity. The spouse/partner (Denmark also recognizes same sex partnerships) and children under the age of 21 forming part of the household are always included in this category, but depending on the situation, other family members might be included if they are dependent on the person enjoying immunity.²⁵⁹ The Protocol makes an individual assessment in this regard, and other reasons than dependency could also be accepted.

5.3.3.2 Duration

A representative will be enjoying immunity until the person replacing him has taken up his post, i.e. until the Ministry of Foreign Affairs has been notified by the sending State that the newcomer has taken up his post and – consequently – his predecessor has terminated his. This applies to both diplomats and consuls. Should the representative still be present in the country after the notification, he will no longer enjoy immunity and can thus be prosecuted in Denmark just like anybody else.

²⁵⁹ See also *Diplomat in Denmark* (2008), p. 4.

5.3.3.3 The role of reciprocity

Reciprocity is something that might play a role only if the sending State considers that their representatives have not done anything wrong, i.e. that they are falsely accused. In those cases, the sending State might take reciprocal measures so as to show their discontentment, e.g. expel two Danish diplomats because Denmark expelled two of their diplomats that were caught spying in Denmark. The concern over reciprocal measures is one of the reasons why the Protocol tries to avoid using the *persona non grata*-declaration and instead talks with the ambassador, explaining that what has happened is unacceptable and suggesting that the person concerned should be recalled (i.e. that the sending State should recall him of their own accord).

6 Conclusions

Based on available literature and empirical research, there are a number of conclusions which can be distinguished. The high dependence on the circumstances of the case at hand when determining the course of action makes it difficult (if not impossible) to make any definite statements on the practice of the Ministries of Foreign Affairs of the receiving States in situations where a person enjoying diplomatic or consular immunity has committed a crime on their territory. Nevertheless, as shown from the study presented in section 5, there are elements of practice that are both shared by and differ between the Ministries of Foreign Affairs in Sweden, Denmark and The Netherlands. For example, Sweden has a fairly strict (due to reciprocity) policy not to ask for or grant waiver of diplomatic and consular immunity, as well as a policy to, in most cases, ask for a recall should a person enjoying such immunity be caught driving under the influence of drugs or alcohol. Denmark and The Netherlands on the other hand - while considering traffic offences as very serious breaches of national law - take a different approach in this regard and firstly take other actions (e.g. summon the head of mission concerned to the Protocol department and/or recall the perpetrator's driving licence) before considering to put forward to the sending State a request for withdrawal of the perpetrator (i.e. the sending State's representative) or even using the *persona non grata*- (or *not acceptable*) declaration. Thus, while the Swedish practice in general is not to ask for waiver of immunity according to article 32 of the VCDR and article 45 of the VCCR, Denmark might request a waiver in cases where very serious crimes have been committed. In The Netherlands, the use of this remedy will be strongly connected to the Dutch public's demands - in other words, the strength of the public resentment in relation to the crime committed/the demands raised as regards what measures should be taken in order to punish the perpetrator and compensate the victim.

The most common action taken by the different Ministries in cases where a person enjoying immunity has committed a criminal offence in the country is to report the incident to the ambassador concerned (or his deputy), who may also be called to the Ministry of Foreign Affairs' Protocol department for a talk. Depending on the seriousness of the offence, the perpetrator might also be recalled by the sending State, sometimes after a request for withdrawal has been put forward by the receiving State.

The Ministries make use of article 9 of the VCDR only in exceptional cases. Thus, even if the (scarce) wording of the article could be applied on the situation at hand, they will try to avoid using it - in other words a very restrictive application.

The conclusion that can be drawn from this is that the main remedies (the *persona non grata*-declaration and waiver of immunity) outlined in the VCDR and the VCCR - by far the most important international regulations on the field of diplomatic and consular law, including immunities - normally are avoided in favour of more informal procedures, in most cases notifying the ambassador concerned and having a serious talk with him regarding the

incident and sometimes even asking for the perpetrator's recall. The reason for this is mainly because in most cases, the same effect can be obtained by using these informal ways of addressing the problem as when using the remedies in the Vienna Conventions – with the benefit that one also (by using the informal ways) avoids the strong controversy - in diplomatic language - of invoking the express provisions of the latter. In addition to this, article 9 of the VCDR offers no guidance as to the grounds for employing such a (*persona non grata*-) declaration

Another common approach between the Ministries is that they normally do not make any distinction depending on whether it was a diplomat or a career consular officer who committed the act – the Ministries' reactions would have been the same for both categories in criminal cases.

The different approaches taken are also clearly shown when it comes to helping minor children that are abused by their diplomat parent. Here, Sweden motivates intervention by assuming consent (which is necessary sine the children – provided that they are not nationals of the receiving State - also enjoy diplomatic inviolability according to article 29 of the VCDR, see article 37(1) of the VCDR), while Denmark uses self defence and The Netherlands – among other possible actions - refers the incident to a special council for the protection of children.

To conclude, it can be said that the VCDR and VCCR form the legal framework to diplomatic and consular immunities, within which a more informal system of practice has been established. Within this system of practice, emphasis is primarily placed on informal methods to solving issues where a person enjoying diplomatic/consular immunity is involved in a crime, as opposed to the formal methods enshrined in the VCDR and VCCR. Within this context, the VCDR and VCCR can be seen as outlining what *can* be done when a person enjoying diplomatic/consular immunity is involved in a crime, while the informal system of practice decides what *is* done.

Bibliography

Monographs

Barker, J. Craig: *International Law and International Relations*, Continuum International Publishing Group, London, 2000.

Brenchley, Frank: *Diplomatic Immunities and State-sponsored Terrorism*, Institute for the Study of Conflict, London, 1984.

Bring, Ove; Mahmoudi, Said: *Sverige och folkrätten*, Norstedts Juridik, 3rd edition, Stockholm, 2007.

Bröhmer, Jürgen: *State Immunity and the Violation of Human Rights*, Martinus Nijhoff Publishers, Vol. 47, The Hague, 1997.

Cahier, Philippe: *Le Droit Diplomatique Contemporain*, Publications de l'Institut Universitaire de Hautes Études Internationales, No. 40, 2nd edition, Geneva, 1964.

Cryer, Robert; Friman, Håkan; Robinson Darryl; Wilmshurst, Elizabeth: *An Introduction to International Criminal Law and Procedure*, Cambridge University press, Cambridge, 2007.

Dembinski, Ludwik: *The Modern Law of Diplomacy – External Missions of States and International Organizations*, Martinus Nijhoff Publishers, Dordrecht, 1988.

Denza, Eileen: *Diplomatic Law – Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, 3rd edition, Oxford, 2008.

Dixon, Martin: *Textbook on International Law*, Oxford University Press, 5th edition, Oxford, 2005.

Do Nascimento E Silva, C.E.: *Diplomacy in International Law*, A.W. Sijthoff, Leiden, 1972.

Feltham, Ralph George: *Diplomatic Handbook*, Longman, 3rd edition, New York, 1980.

Fox, Hazel: *The Law of State Immunity*, Oxford University Press, 1st edition, Oxford, 2002.

Frey, Linda S.; Frey, Marsha L.: *The History of Diplomatic Immunity*, Ohio State University Press, 1999.

Fry, Michael G.; Langhorne, Richard; Goldstein, Erik (edt.): *Guide to International Relations and Diplomacy*, Continuum, London, 2002.

Hardy, Michael: *Modern Diplomatic Law*, Manchester University Press, Manchester, 1968.

Kjeldgaard-Pedersen, Astrid: *Statsrepræsentanters immunitet*, Thomson, 1st edition, Copenhagen, 2005.

Lee, Luke T.; Quigley, John: *Consular Law and Practice*, Oxford University Press, 3rd edition, Oxford, 2008.

Linderfalk, Ulf *et al.*: *Folkkrätten i ett nötskal*, Studentlitteratur, 1st edition, Lund, 2006.

Malanczuk, Peter: *Akehurst's Modern Introduction to International Law*, Routledge, 7th edition, London, 1997.

Salmon, Jean: *Manuel de Droit Diplomatique*, Bruylant, Brussels, 1994.

Satow, Ernest: *Satow's Guide to Diplomatic Practice*, Longman, 5th edition, London, 1979.

Van Alebeek, Rosanne: *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, 1st edition, Oxford, 2008.

Wilson, Clifton E.: *Diplomatic Privileges and Immunities*, The University of Arizona Press, 1st edition, Tuscon, 1967.

Articles

Addicott, Jeffrey F.: 'The Status of the Diplomatic Bag: A Proposed United States Position', *Houston Journal of International Law*, Vol. 13, pp. 221-257, 1991.

Adler, Jerry; Gegax, Trent T.: 'Rudy to the World: Drop Dead - New York and the United Nations battle over parking tickets', *Newsweek*, Vol. 129, Issue 16, pp. 49-50, 1997.

Barker, Craig J.; Warbrick, Colin; Dominic, McGoldrick: 'State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action?', *International and Comparative Law Quarterly*, Vol 47, pp. 950-958, 1998.

Bassiouni, M. Cherif: 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', *Virginia Journal of International Law Association*, Vol. 42, pp. 81-162, 2001-2002.

Bermann, George A. *et al.*: 'Immunity and Accountability: Is the Balance Shifting?', *American Society of International Law*, Proceedings of the Annual Meeting, pp. 227-242, 2005.

Brown, Jonathan: 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations', *International and Comparative Law Quarterly*, Vol. 37, pp. 53-88, 1988.

Bröhmer, Jürgen: 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator', *Leiden Journal of International Law*, Vol. 12, pp. 361-371, 1999.

De Smet, Simon: 'The Immunity of Heads of States in US Courts after the Decision of the International Court of Justice', *Nordic Journal of International Law*, Vol. 72, pp. 313-339, 2003.

Dinstein, Yoram: 'Immunity from Jurisdiction Ratione Materiae', *International and Comparative Law Quarterly*, Vol. 15, pp. 76-89, 1966.

- Farhangi, Shirin, Leslie: 'Insuring Against Abuse of Diplomatic Immunity', *Stanford Law Review*, Vol. 38, pp. 1517-1547, 1986.
- Friedrich, Krista: 'Seeking Justice Under United States Law When Diplomats Traffic in Persons', *Brooklyn Law Review*, pp. 1139-1171, 2007.
- Green, Cami: 'Counsel, Consul or Diplomat: Is There any Practical Significance for Practitioners?', *University of Miami Yearbook of International Law*, pp. 143-159, 1991.
- Grzybowski, Kazimierz: 'The Regime of Diplomacy and the Tehran Hostages', *International and Comparative Law Quarterly*, pp. 42-58, 1981.
- Hickey, James E., Jr.; Fisch, Annette: 'The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States', *Hastings Law Journal*, pp. 351-382, 1990.
- Higgins, Rosalyn: 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', *American Journal of International Law*, pp. 641-651, 1985.
- Hill, Chesney: 'Sanctions Constraining Diplomatic Representatives to Abide by the Local Law', *American Journal of International Law*, pp. 252-269, 1931.
- Lindholm, Rolf H.: Inskränkningar i Immuniteten för Statschefer, *Förvaltningsrättslig tidskrift*, pp. 181-190, 2004.
- McDonough, Michael B.: 'Privileged Outlaws: Diplomats, Crime and Immunity', *Suffolk Transnational Law Review*, pp. 475-500, 1997.
- Milhaupt, Curtis J.: 'The Scope of Consular Immunity under the Vienna Convention on Diplomatic Relations: Towards a Principled Interpretation', *Columbia Law Review*, Vol. 88, pp. 841-862, 1988.
- Nash Leich, Marian: 'Contemporary Practice of the United States Relating to International Law – Diplomatic Privileges and Immunities: Crimes by Foreign Mission Personnel: Corrective Measures', *American Journal of International Law*, pp. 106-111, 1988.
- O'Keefe, Patrick J.: Privileges and Immunities of the Diplomatic Family, *International and Comparative Law Quarterly*, pp. 329-350, 1976.
- O'Keefe, Roger: 'Universal Jurisdiction – Clarifying the Basic Concept', *Journal of International Criminal Justice*, No. 2, pp. 735-760, 2004.
- Parker, Karen; Neylon, Lyn Beth: 'Jus Cogens: Compelling the Law of Human Rights', *Hastings International and Comparative Law Review*, Vol. 12, pp. 411-463, 1988-1989.
- Parkhill, James S.: 'Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications', *Hastings International and Comparative Law Review*, pp. 565-596, 1998.
- Przetacznik, Franciszek: 'Les pouvoirs découlant pour l'Etat accréditaire de l'inviolabilité personnelle de l'agent diplomatique', *McGill Law Journal*, pp. 360-404, 1971.

Roht-Ariazza, Naomi: 'Universal Jurisdiction: Steps Forward, Steps Back', *Leiden Journal of International Law*, No. 17, pp. 375-389, 2004.

Shapiro, Lori J.: 'Foreign Relations Law: Modern Developments in Diplomatic Immunity', *Annual Survey of American Law*, pp. 281-306, 1990.

Southwick, James T.: 'Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms', *Syracuse Journal of International Law and Commerce*, Vol. 15, pp. 83-101, 1988-1989.

Whitelaw, Kevin: 'When Diplomats Break the Law', *Newsweek*, Vol. 122, Issue 2, p. 14, 1997.

Whomersley, C.A.: Some Reflections on the Immunity of Individuals for Official Acts, *International and Comparative Law Quarterly*, Vol. 41, pp. 848-858, 1992.

Vicuna, F.O.: 'Diplomatic and Consular Immunities and Human Rights', *International and Comparative Law Quarterly*, Vol. 40, pp. 34-48, 1991.

Wilson, Clifton E.: 'Diplomatic Privileges and Immunities: The Retinue and the Families of the Diplomatic Staff', *International and Comparative Law Quarterly*, pp. 1265-1295, 1965.

Wilson, Robert A.: 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations', *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 7, pp. 113-138, 1984.

Witiw, Eric Paul: 'Persona Non Grata: Expelling Diplomats who Abuse Their Privileges', *New York Law School Journal of International and Comparative Law*, pp. 345-359, 1988.

Zaid, Mark S.: 'Diplomatic Immunity: to Have or Not to Have, that is the Question', *ILSA Journal of International and Comparative Law*, Vol. 4, pp. 623-633, 1998.

Zeidman, Amy: 'Abuse of the Diplomatic Bag: A Proposed Solution', *Cardozo Law Review*, pp. 427-444, 1989.

Internet

Circular note (dated February 2009) on driving licences from the Swedish Ministry of Foreign Affairs' Protocol Department, available at <http://www.regeringen.se/sb/d/8075/a/73188>. Webpage viewed on 2009-04-01 at 17:21:30 hours.

Circular note (dated March 2009) on drunk driving from the Swedish Ministry of Foreign Affairs' Protocol Department, available at <http://www.regeringen.se/sb/d/8075/a/73188>. Webpage viewed on 2009-04-01 at 17:23:15 hours.

'Diplomati – en introduktion' (part 2), lecture by professor Christer Jönsson, Department of Political Science, Lund University, available at <http://www.svet.lu.se/resources.lasso?-token.unique=62140>. Webpage viewed on 2009-04-08 at 11:37:30 hours.

'Diplomat in Denmark', Danish Ministry of Foreign Affairs' Protocol Department, (March 2008), available at <http://www.um.dk/en/menu/AboutUs/TheProtocolDepartment/Publications/DiplomatInDenmark/>. Webpage viewed on 2009-04-08 at 14:24:02 hours.

eDiplomat: 'Glossary of Diplomatic Terms', available at <http://www.ediplomat.com/nd/glossary.htm#E>. Webpage viewed on 2009-03-10 at 18:29:15 hours.

Protocol Guide for Diplomatic Missions and Consular Posts – 'Your Posting to The Netherlands', the Dutch Ministry of Foreign Affairs, Protocol Department (DKP/BV), (August 2008), available at http://www.minbuza.nl/en/welcome/comingtoNL,staff_of_foreign_missions/Protocol-Guide-for-embassy-and-consular-staff.html. Webpage viewed on 2009-04-08 at 14:20:28 hours.

UN Audiovisual Library on International Law, section on 'the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' available at <http://untreaty.un.org/cod/avl/ha/cppcipp/cppcipp.html>. Webpage viewed on 2009-04-09 at 13:36:43 hours.

UNTC – 'Status of Treaties', available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=369&chapter=18&lang=en>. Webpage viewed on 2009-04-09 at 13:59:12 hours.

Interviews

Interview with Ms Annette Lassen, Deputy Director of Protocol and Mr John Pontoppidan, Minister Counsellor, at the Danish Protocol Department in Copenhagen, Denmark (held at 2009-03-17).

Interview with Mr Frank de Hoop Scheffer, Head of Foreign Missions, Privileges and Immunities at the Dutch Ministry of Foreign Affairs' Protocol Department in The Hague, The Netherlands (held at 2009-03-20).

Interview with Mr Anders Nyström, Deputy Chief of Protocol and Director at the Swedish Ministry of Foreign Affairs' Protocol Department in Stockholm (held at 2009-03-27).

Other publications

Oxford Reports on International Law in Domestic Courts, Analysis of *JKO v Public Prosecutor*, Judgment on appeal, 23-003075-01; ILDC 147 (NL 2002) LJN: AF1037, 19 November 2002.

Oxford Reports on International Law in Domestic Courts, Analysis of *Public Prosecutor v LC*, Appeal Judgment, RW (Rechtskundig Weekblad) 2002–2003.

Rättshandbok: *Immunitet och privilegier - Offentlighet och sekretess – Förvaltningslagen - Internationella överenskommelser - Protokollära*

frågor - Sjöfartsärenden m.m., Utrikesförvaltningens rättshandböcker II (RättsH II), 1996.

SOU 2008:2: *Immunitet för Stater och deras egendom*, Stockholm, 2007.

Swedish Ministry of Foreign Affairs - Diary over dossier C 52 U, 2009-02-06.

Table of Cases

International courts

ICJ

Case concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v Iran*), ICJ Reports 3, 1980.

Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*) ICJ Reports 1, 2002.

PCIJ

Case of the S.S. 'Lotus' (*France v Turkey*), PCIJ Series A, Judgement No. 9, 1927.

National Courts

Italian Court of Cassation

Judgment No 5044 of 11 March 2004, *Ferrini v Federal Republic of Germany*.

Supplement A: The 1961 Vienna Convention on Diplomatic Relations

The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing 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,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;
- b) the "members of the mission" are the head of the mission and the members of the staff of the mission;
- c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
- d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;
- e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;
- f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;
- g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;
- h) a "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
- i) the "premises of the mission" are the 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.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist inter alia in:
 - a) representing the sending State in the receiving State;
 - b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - c) negotiating with the Government of the receiving State;
 - d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
 - e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the agrément of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving State is not obliged to give reasons to the sending State for a refusal of agrément.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a charge d'affaires ad interim in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attaches, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
 - a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
 - b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
 - c) the arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
 - d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.
2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of

the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:
 - a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
 - b) that of envoys, ministers and internuncios accredited to Heads of State;
 - c) that of charges d'affaires accredited to Ministers for Foreign Affairs.
2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.
2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a charge d'affaires ad interim shall act provisionally as head of the mission. The name of the charge d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or

cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. 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.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
 - a) that they are not nationals of or permanently resident in the receiving State; and
 - b) that they are covered by the social security provisions which may be in force in the sending State or a third State.
3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.
5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

- d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
- e) charges levied for specific services rendered;
- f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
 - a) articles for the official use of the mission;
 - b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the 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. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or traveling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official

communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.
2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, inter alia:

- a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
- b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

- a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
- b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
- c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
 - b) where by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

- a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;
- b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this eighteenth day of April one thousand nine hundred and sixty-one.

Supplement B: The 1963 Vienna Convention on Consular Relations

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nation concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

Definitions

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
 - a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
 - b) "consular district" means the area assigned to a consular post for the exercise of consular functions;
 - c) "head of consular post" means the person charged with the duty of acting in that capacity;
 - d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
 - e) "consular employee" means any person employed in the administrative or technical service of a consular post;
 - f) "member of the service staff" means any person employed in the domestic service of a consular post;
 - g) "members of the consular post" means consular officers, consular employees and members of the service staff;
 - h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employees and members of the service staff;

- i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;
 - j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
 - k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.
2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.
 3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by Article 71 of the present Convention.

CHAPTER I - CONSULAR RELATIONS IN GENERAL

Section I - Establishment and Conduct of Consular Relations

Article 2

Establishment of Consular Relations

1. The establishment of consular relations between States takes place by mutual consent.
2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.
3. The severance of diplomatic relations shall not ipso facto involve the severance of consular relations.

Article 3

Exercise of Consular Relations

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4

Establishment of a Consular Post

1. A consular post may be established in the territory of the receiving State only with that State's consent.
2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.
3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.
4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.
5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 5

Consular Functions

Consular functions consist in:

- a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
- d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
- i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests;
- j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
- k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
- l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

- m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 6

Exercise of Consular Functions Outside the Consular District

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7

Exercise of Consular Functions in a Third State

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8

Exercise of Consular Functions on Behalf of a Third State

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9

Classes of Heads of Consular Posts

1. Heads of consular posts are divided into four classes, namely:
 - a) consuls-general;
 - b) consuls;
 - c) vice-consuls;
 - d) consular agents.
2. Paragraph 1 of this Article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

Article 10

Appointment and Admission of Heads of Consular Posts

1. Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.
2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending State and of the receiving State respectively.

Article 11

The Consular Commission or Notification of Appointment

1. The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.
2. The sending State shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the State in whose territory the head of a consular post is to exercise his functions.
3. If the receiving State agrees, the sending State may, instead of a commission or similar instrument, send to the receiving State a notification containing the particulars required by paragraph 1 of this Article.

Article 12

The Exequatur

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization.
2. A State which refuses to grant an exequatur is not obliged to give to the sending State reasons for such refusal.
3. Subject to the provisions of Articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an exequatur.

Article 13

Provisional Admission of Heads of Consular Posts

Pending delivery of the exequatur, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

Article 14

Notification to the Authorities of the Consular District

As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

Article 15

Temporary Exercise of the Functions of the Head of a Consular Post

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given

in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.

3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 16

Precedence as Between Heads of Consular Posts

1. Heads of consular posts shall rank in each class according to the date of the grant of the exequatur.
2. If, however, the head of a consular post before obtaining the exequatur is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the exequatur.
3. The order of precedence as between two or more heads of consular posts who obtained the exequatur or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of Article 11 were presented to the receiving State.
4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of Article 15.
5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.
6. Heads of consular posts shall have precedence over consular officers not having that status.

Article 17

Performance of Diplomatic Acts by Consular Officers

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.
2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

Article 18

Appointment of the Same Person by Two or More States as a Consular Officer

Two or more States may, with the consent of the receiving State, appoint the same person as a consular officer in that State.

Article 19

Appointment of Members of Consular Staff

1. Subject to the provisions of Articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.
2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending State to the receiving State in sufficient time for the receiving State, if it so wishes, to exercise its rights under paragraph 3 of Article 23.
3. The sending State may, if required by its laws and regulations, request the receiving State to grant an exequatur to a consular officer other than the head of a consular post.
4. The receiving State may, if required by its laws and regulations, grant an exequatur to a consular officer other than the head of a consular post.

Article 20

Size of the Consular Staff

In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular post.

Article 21

Precedence as Between Consular Officers of a Consular Post

The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Article 22

Nationality of Consular Officers

1. Consular officers should, in principle, have the nationality of the sending State.
2. Consular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 23

Persons Declared "Non Grata"

1. The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.
2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this Article, the receiving State may, as the case may be, either withdraw the exequatur from the person concerned or cease to consider him as a member of the consular staff.
3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.
4. In the cases mentioned in paragraphs 1 and 3 of this Article, the receiving State is not obliged to give to the sending State reasons for its decision.

Article 24

Notification to the Receiving State of Appointments, Arrivals and Departures

1. The Ministry for Foreign Affairs of the receiving State or the authority designated by that Ministry shall be notified of:
 - a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;
 - b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;
 - c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;
 - d) the engagement and discharge of persons resident in the receiving State as members of a consular post or as members of the private staff entitled to privileges and immunities.
2. When possible, prior notification of arrival and final departure shall also be given.

Section II - End of Consular Functions

Article 25

Termination of the Functions of a Member of a Consular Post

The functions of a member of a consular post shall come to an end inter alia:

- a) on notification by the sending State to the receiving State that his functions have come to an end;
- b) on withdrawal of the exequatur;
- c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

Article 26

Departures from the Territory of the Receiving State

The receiving State shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving State, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving State the export of which is prohibited at the time of departure.

Article 27

Protection of Consular Premises and Archives and of the Interests of the Sending State in Exceptional Circumstances

1. In the event of the severance of consular relations between two States:
 - a) the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives;
 - b) the sending State may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third State acceptable to the receiving State;
 - c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.
2. In the event of the temporary or permanent closure of a consular post, the provisions of sub-paragraph (a) of paragraph 1 of this Article shall apply. In addition,
 - a) if the sending State, although not represented in the receiving State by a diplomatic mission, has another consular post in the territory of that State, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving State, with the exercise of consular functions in the district of that consular post; or
 - b) if the sending State has no diplomatic mission and no other consular post in the receiving State, the provisions of sub-paragraphs (b) and (c) of paragraph 1 of this Article shall apply.

CHAPTER II - FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Section I - Facilities, Privileges and Immunities Relating to a Consular Post

Article 28

Facilities for the Work of the Consular Post

The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 29

Use of National Flag and Coat-of-Arms

1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this Article.
2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.
3. In the exercise of the right accorded by this Article regard shall be had to the laws, regulations and usages of the receiving State.

Article 30

Accommodation

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 31

Inviolability of the Consular Premises

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defense or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32

Exemption from Taxation of Consular Premises

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33

Inviolability of the Consular Archives and Documents

The consular archives and documents shall be inviolable at all times and wherever they may be.

Article 34

Freedom of Movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post.

Article 35

Freedom of Communication

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.
5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.
7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 36

Communication and Contact with Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
 - c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Article 37

Information in Cases of Deaths, Guardianship or Trusteeship, Wrecks and Air Accidents

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;
- b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;
- c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

Article 38

Communication with the Authorities of the Receiving State

In the exercise of their functions, consular officers may address:

- a) the competent local authorities of their consular district;

- b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

Article 39

Consular Fees and Charges

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.
2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

Section II - Facilities, Privileges and Immunities Relating to Career Consular Officers and Other Members of a Consular Post

Article 40

Protection of Consular Officers

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41

Personal Inviolability of Consular Officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42

Notification of Arrest, Detention or Prosecution

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43

Immunity from Jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:
 - a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
 - b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44

Liability to Give Evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.
2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.
3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

Waiver of Privileges and Immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.
2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.
3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 46

Exemption from Registration of Aliens and Residence Permits

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.
2. The provisions of paragraph 1 of this Article shall not, however, apply to any consular employee who is not a permanent employee of the sending State or who carries on any private gainful occupation in the receiving State or to any member of the family of any such employee.

Article 47

Exemption from Work Permits

1. Members of the consular post shall, with respect to services rendered for the sending State, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving State concerning the employment of foreign labor.
2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving State, be exempt from the obligations referred to in paragraph 1 of this Article.

Article 48

Social Security Exemption

1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:
 - a) that they are not nationals of or permanently resident in the receiving State; and
 - b) that they are covered by the social security provisions which are in force in the sending State or a third State.
3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49

Exemption from Taxation

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
 - a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
 - b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32;
 - c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;
 - d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
 - e) charges levied for specific services rendered;
 - f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.
3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

Article 50

Exemption from Customs Duties and Inspection

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
 - a) articles for the official use of the consular post;
 - b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.
2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.
3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

Article 51

Estate of a Member of the Consular Post or a Member of his Family

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

- a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
- b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 52

Exemption from Personal Services and Contributions

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 53

Beginning and End of Consular Privileges and Immunities

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.
3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.
4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.
5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

Article 54

Obligations of Third States

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or traveling separately to join him or to return to the sending State.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.
3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official

communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

Article 55

Respect for the Laws and Regulations of the Receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.
2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.
3. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 56

Insurance Against Third Party Risks

Members of the consular post shall comply with any requirement imposed by the laws and regulations of the receiving State in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

Article 57

Special Provisions Concerning Private Gainful Occupation

1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving State.
2. Privileges and immunities provided in this Chapter shall not be accorded:
 - a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
 - b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
 - c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

CHAPTER III - REGIME RELATING TO HONORARY CONSULAR OFFICERS AND CONSULAR POSTS HEADED BY SUCH OFFICERS

Article 58

General Provisions Relating to Facilities, Privileges and Immunities

1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and 39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 59, 60, 61 and 62.
2. Articles 42 and 43, paragraph 3 of Article 44, Articles 45 and 53 and paragraph 1 of Article 55 shall apply to honorary consular officers. In addition, the facilities, privileges

and immunities of such consular officers shall be governed by Articles 63, 64, 65, 66 and 67.

3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.
4. The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.

Article 59

Protection of the Consular Premises

The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Article 60

Exemption from Taxation of Consular Premises

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

Article 61

Inviolability of Consular Archives and Documents

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

Article 62

Exemption from Customs Duties

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

Article 63

Criminal Proceedings

If criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible. When it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 64

Protection of Honorary Consular Officials

The receiving State is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.

Article 65

Exemption from Registration of Aliens and Residence Permits

Honorary consular officers, with the exception of those who carry on for personal profit any professional or commercial activity in the receiving State, shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

Article 66

Exemption from Taxation

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Article 67

Exemption from Personal Services and Contributions

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 68

Optional Character of the Institution of Honorary Consular Officers

Each State is free to decide whether it will appoint or receive honorary consular officers.

CHAPTER IV - GENERAL PROVISIONS

Article 69

Consular Agents who are not Heads of Consular Posts

1. Each State is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending State.

2. The conditions under which the consular agencies referred to in paragraph 1 of this Article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending State and the receiving State.

Article 70

Exercise of Consular Functions by Diplomatic Missions

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. In the exercise of consular functions a diplomatic mission may address:
 - a) the local authorities of the consular district;
 - b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.
4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 71

Nationals or Permanent Residents of the Receiving State

1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in Article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.
2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

Article 72

Non-Discrimination

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:
 - a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;
 - b) where by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention.

Article 73

Relationship Between the Present Convention and Other International Agreements

1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

CHAPTER V - FINAL PROVISIONS

Article 74

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article 75

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 76

Accession

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 74. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 77

Entry Into Force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 78

Notification by the Secretary-General

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 74:

- a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 74, 75 and 76;
- b) of the date on which the present Convention will enter into force, in accordance with Article 77.

Article 79

Authentic Texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 74.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

Supplement C: Overview of diplomatic and consular immunities**

	Category of personnel*	Immunity from criminal jurisdiction?	Immunity from civil and administrative jurisdiction?	Immunity from arrest or detention (inviolability)?	Immunity for family members forming part of the household?	Duration
DIPLOMATIC IMMUNITY (VCDR)	Diplomatic agents (article 1(e) and 38(1))	Yes, except in respect of a counterclaim pertaining to a process they initiated (article 31(1), 32(3)). If nationals of or permanently resident in the receiving State, only for acts performed during the course of duty (article 38(1)).	Yes, except (a) if the case falls within the scope of one of the three exceptions mentioned in article 31(2) (see also article 31(1), (3) and (b) in respect of a counterclaim pertaining to a process they initiated (article 32(3)). If nationals of or permanently resident in the receiving State, only for acts performed during the course of their duties (article 38(1)).	Yes (article 29). If nationals of or permanently resident in the receiving State, only for acts performed during the course of duty (article 38(1)).	Yes, if they are not nationals of the receiving State (article 37(1)).	Article 39(1)-(2) (see also article 43).
	Members of the administrative and technical staff (article 1(f))	Yes, if they are not nationals of or permanently resident in the receiving State (article 37(2)). If nationals of or permanently resident in the receiving State, only to the	Yes, if they are not nationals of or permanently resident in the receiving State. However, immunity according to article 31(1) does not cover acts performed outside their duty (article 37(2)). If nationals of or	Yes, provided they are not nationals of or permanently resident in the receiving State (article 37(2)). If nationals of or permanently resident in the	Yes, if they are not nationals of or permanently resident in the receiving State (article 37(2)). If nationals of or	Article 39 (1)-(2)

**DIPLOMATIC
IMMUNITY
(VCDR) cont.**

Category of personnel*	Immunity from criminal jurisdiction?	Immunity from civil and administrative jurisdiction?	Immunity from arrest or detention (inviolability)?	Immunity for family members forming part of the household?	Duration
Members of the service staff (article 1(g))	Yes, if they are not nationals of or permanently resident in the receiving State (article 37(3)). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 38(2)).	Yes, if they are nationals of or permanently resident in the receiving State, but only for acts performed during the course of their duties (article 37(3)). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 38(2)).	Yes, if they are nationals of or permanently resident in the receiving State, but only for acts performed during the course of their duties (article 37(3)). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 38(2)).	No	Article 39(1)-(2)
Private servants (article 1(h))	Only to the extent admitted by the receiving State (article 37(4), 38(2)).	Only to the extent admitted by the receiving State (article 37(4), 38(2)).	Only to the extent admitted by the receiving State (article 37(4), 38(2)).	No	Article 39(1)-(2)
Diplomatic couriers* (article 27)	Yes, in performance of their functions (article 27(5)).	Yes, in performance of their functions (article 27(5)).	Yes (article 27(5)).	No	Article 39(1)-(2)
Category of personnel*	Immunity from criminal jurisdiction?	Immunity from civil and administrative jurisdiction?	Immunity from arrest or detention (inviolability)?	Immunity for family members	Duration

					forming part of the household?	
CONSULAR IMMUNITY (VCCR)	Career consular officers (article 1 (d) and (2))	Yes, but only in respect of acts performed in the exercise of consular functions (article 43(1) and (5)). If nationals of or permanently resident in the receiving State, only for acts performed during the course of their duties (article 1(3), 71(1)).	Yes, in respect of acts performed in the exercise of consular functions (article 43(1) and (5)). However not if the civil claim pertains to one of the two exceptions mentioned in article 43(2). If nationals of or permanently resident in the receiving State, only for acts performed during the course of their duties (article 1(3), 71(1)).	Yes, except in case of a grave crime and pursuant to a decision by the competent judicial authority (article 41(1), see also article 41(2)). If nationals of or permanently resident in the receiving State, only for acts performed during the course of their duties (article 1(3), 71(1)).	Yes (article 37(1)). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 71(2)).	Article 53
	Honorary consular officers (article 1 (d) and (2))	No (article 63). If nationals of or permanently resident in the receiving State, only for acts performed in the exercise of their functions (article 1(3), 71(1)).	Yes, in respect of acts performed in the exercise of consular functions (article 43(1), (5) and 58(2)). However not if the civil claim pertains to one of the two exceptions mentioned in article 43(2). If nationals of or permanently resident in the receiving State, only for acts performed in the exercise of their functions (article 1(3), 71(1)).	Yes, except in case of a grave crime and pursuant to a decision by the competent judicial authority (article 41(1), see also article 41(2)). If nationals of or permanently resident in the receiving State, only for acts performed in the exercise of their functions (article 1(3), 71(1)).	No (article 58(3)). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 71(2)).	Article 53
	Consular employees (article 1(e))	Yes, in respect of acts performed in the exercise of consular functions (article 43(1) and (5)).	Yes, in respect of acts performed in the exercise of consular functions (article 43(1) and (5)). However not if the civil claim pertains to one of the	No (article 40 and 41 <i>e contrario</i>). If nationals of or permanently resident in the receiving State, only to the	No If nationals of or permanently resident in the receiving State,	Article 53

CONSULAR IMMUNITY (VCCR) cont.			two exceptions mentioned in article 43(2).	extent admitted by the receiving State (article 71(2)).	only to the extent admitted by the receiving State (article 71(2)).	
	Category of personnel*	Immunity from criminal jurisdiction?	Immunity from civil and administrative jurisdiction?	Immunity from arrest or detention (inviolability)?	Immunity for family members forming part of the household?	Duration
	Members of the service staff (article 1(f))	No	No	No (article 40 and 41 <i>e contrario</i>). If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 71(2)).	No If nationals of or permanently resident in the receiving State, only to the extent admitted by the receiving State (article 71(2)).	Article 53
Consular couriers* (article 35(1))	Yes, in the performance of their functions (article 35(5)).	Yes, in the performance of their functions (article 35(5)).	Yes (article 35(5)).	No	No	While performing his functions, article (35(5)).

*Couriers have been included under this heading for the sake of comprehensiveness, although it has to be pointed out that couriers are not part of the mission's personnel in the strict sense of the word.

**The table presents the basic rules according to the Vienna Conventions. It is important to notice, however, that the immunity enjoyed in a particular case might be more extensive due to special bilateral agreements between the sending and the receiving State in question.

Supplement D: The hypothetical situations used in the case study

Each question is to be read as if the factual circumstances are undisputed and as if the situation occurred on the territory of the receiving State, unless something else is expressly stated.

“The receiving State” or “country” is understood as Sweden/Denmark/The Netherlands (depending on which country’s Ministry of Foreign Affairs’ official that is being interviewed).

1. *Traffic offenses:* Diplomatic agent X, accredited to an embassy in the receiving State, is driving to a meeting with an official of the receiving State’s Environmental Department as part of preparations for a bilateral agreement between their States. At an intersection, he runs a red light and collides with a cyclist. The cyclist is severely injured and needs to be cared for in a hospital for several weeks following the incident. Despite this, X does not stop to see what happened and leaves the scene of the accident. He continues driving - well above the permitted speed limit - for about half an hour before he is finally stopped by the police. X is clearly under the influence of a substance, almost certainly alcohol. Despite the police’s request, he refuses to undergo a breathalyzer test on grounds of diplomatic immunity. The police, however, refuses to let him carry on in his condition, which is why they drive him to his residence to ‘sober up’. When they contact the Ministry of Foreign Affairs, they get confirmation that X is indeed enjoying diplomatic immunity according to the VCDR. It also turns out that X has a considerable number of unpaid parking- and speeding tickets.

- a) How does the Ministry react to this situation?

How would the Ministry respond...

- b) If, under the same circumstances, it had been career consular officer Y behind the wheel instead of the diplomatic agent X?
- c) If, under the same circumstances, it was diplomatic agent X’s 18 year-old son Z (who lives together with X) who was behind the wheel?
- d) If, under the same circumstances, X – instead of being accredited to an embassy in the country where the scenario took place – was on his way to his posting in a neighboring State (i.e. the country where the scenario above occurred is a transit or ‘third’ State)?
- e) If, under the same circumstances, the cyclist dies after a few days in the hospital due to the injuries suffered?
- f) If, under the same circumstances, nobody gets injured?
- g) If, under the same circumstances, the police forces diplomatic agent X to undergo the breathalyzer test?

2. *Shoplifting and attempted fraud:* An ambassador’s wife is caught shoplifting for the third time in a row. It also turns out that she, on the same day as the last shoplifting incident occurred, attempted to shop in a clothing store using a forged gift card. How does the Ministry of Foreign Affairs react to this situation?

3. *Slavery and threats of private servants:* A diplomatic family has two nannies (who do not have the nationality of or permanent residence status in the receiving State) working for

them in slavery-like conditions. The family has taken the nannies' travel documents and threatened that if they go to the police, they will be deported to their home State (the girls are in the country even though their visas expired a long time ago). The girls have been forbidden to leave the house where the family lives and they are very afraid of deportation or punishment, because they are working and residing in the country illegally. One of the girls, however, decides - after a year living under such difficult conditions – that she cannot take it anymore. She manages to escape and notifies the police about what happened. When the police learns that it concerns a family who enjoys diplomatic immunity they contact the Ministry of Foreign Affairs. How does the Ministry react to this situation?

4. *Espionage*: The security services' counterespionage branch reports to the Ministry of Foreign Affairs that an ambassador has infiltrated the Ministry of Defense and managed to get hold of sensitive information. This had been going on for a little more than one year.

- a) Which measures will the Ministry of Foreign Affairs take given the situation?
- b) Would the outcome have been any different had the espionage been revealed at a time when the ambassador's posting had been terminated for a couple of months, but he was still present in the country?

5. *Smuggling (narcotics)*: A diplomatic courier is smuggling drugs to the receiving State using the diplomatic bag. The Ministry of Foreign Affairs finds out.

- a) Which measures will the Ministry take in this situation?
- b) Would the outcome have been any different had it been a consular courier who smuggled using a consular bag?
- c) Would the outcome have been any different had a career consular officer carried out the smuggling and claimed that the parcel was his personal luggage and its contents intended for his personal use?

6. *Assault*: A *chargé d'affaires* from the country X is beating his wife and his two minor children so severely that the neighbors had to call the police a number of times to stop the violence.

- a) How does the Ministry of Foreign Affairs react to this situation?
- b) Would the outcome have been any different if a career consular officer had committed the assault?
- c) Would the outcome have been any different if a career consular officer had committed the assault and there had been a bilateral treaty between the receiving and the sending State, according to which consuls enjoy immunity from criminal and enforcement jurisdiction for acts that fall outside of the notion of consular functions (article 5 of the VCCR), as long as their posting is effective?

7. *Murder*: A diplomat kills his female cousin together with his two uncles. The cousin and the uncles are – as opposed to the diplomat – citizens of the receiving State and permanently resident there since many years back. Later it turns out that the murder is honor-related. Should the diplomat be expelled to his country, he would get a very marginal or no punishment whatsoever.

- a) How does the Ministry of Foreign Affairs react to this situation?
- b) Would the outcome have been different if the crime had been viewed equally severely in the sending State as in the receiving State?

8. *Aiding child abduction*: An official of State X's (a non-EU country) embassy issues a passport to a man that holds a citizenship of State X and to the man's child, who is a citizen of the receiving State. This is done without the mother's knowledge and contradictory to a custody judgment in the receiving State, according to which custody is given to the child's

mother (also a citizen of the receiving State) only. The father and child leave the receiving State thanks to the passports issued.

- a) How does the Ministry of Foreign Affairs react to this situation?

How would the Ministry respond...

- b) If, under the same circumstances, the passports had been issued by a consul instead of an embassy official?
- c) If it turns out that this was not a single incident but it happens more or less systematically?
- d) If the embassy official had also actively participated in abducting the child as well as purchasing flight tickets?

9. *Rape*: The son of an ambassador – we can call him X – from the State Y rapes a woman in an apartment. When the police comes to the place, it turns out that the neighbors heard a woman screaming for help from the apartment but that since they could not force the door open, they called for the police instead. When the police finally manages to get in, they find X and the woman – whose body shows clear signs of violence. X claims diplomatic immunity as the son of an ambassador. Through the Ministry of Foreign Affairs, it is confirmed that X's claim is correct. How does the Ministry of Foreign Affairs react to this incident?

10. *Abuse of the import privilege*: A member of the consular staff at a general consulate in the country is violating the import duties according to article 50(2) of the VCCR and the country's import regulations. He does this by importing alcoholic beverages to the country without paying taxes, claiming that the packages contain products that are to be used by the general consulate for official purposes as well as his and his family's personal use – in spite of the fact that he and his family are already 'established' in the country (article 50(1)(b) and article 50(2)). These products are later sold by him on the black market, where he makes a considerable profit.

- a) How does the Ministry of Foreign Affairs react to this situation?
- b) Would the reaction have been any different had it been the general consul himself who committed the breach?