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Diplomatic immunity

- a functioning concept in the society of today?

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Abstract

The purpose is to analyze the concept of diplomatic personal immunity from four perspectives: structure: what does the concept personal immunity entail?; implementation: what problems exist with the concept in action?; conceptual comparison - equality before the law: What problems with the concept can be found when viewed upon from an 'equality before the law' perspective?; conceptual comparison - duty of States: What problems can be found when analyzing the concept from Pogge's theory on how human rights should be understood and the theory that the State has a duty to respect, protect and fulfill human rights? The main question was created from these four areas:

“What problems with the concept of diplomatic immunity regarding personal immunity can be revealed by analyzing the *structure*, by making an analysis of the Vienna Convention on Diplomatic Relations; *implementation*, by analyzing an ICJ case concerning diplomatic immunity; *conceptual comparison: equality before the law*, through comparative method analyze the concept diplomatic immunity from an 'equality before the law' perspective: *conceptual comparison: Duty of State* by analyzing the concept with the theory 'duty of State'?”

The answer consists of four conclusions: The non-existing definition of members of family; the confusion of the distinction between *ratione personae* and *ratione materiae*; the concept of diplomatic immunity creates an unjust legal system due to the lack of equality before the law; the concept of diplomatic immunity can be considered as a human right violation because it is unjust and the governments are maintaining this unjust legal system.

Key words: international law, diplomatic immunity, Vienna Convention on Diplomatic Relations, human rights, customary law

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Abbreviations:

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Court of Justice

NGO: Non-Governmental Organizations

UDHR: Universal Declaration of Human Rights

UN: United Nations

1. Introduction

The concept of diplomatic immunity is an ancient idea based on a mutual understanding between different societies. The idea that a society could send a person on their behalf to negotiate and argue for their cause has been a vital tool in the history of international relations. As the connections between the different societies grew stronger the need for diplomatic tools became more evident and the concept became customary law to later evolve to being structured by various treaties. Diplomatic relations between countries is now a central element in international relations and diplomatic agents acting in favor of their States' interests is a fundamental brick in building a peaceful internationalized world.

Diplomatic immunity in international law is the freedom from a countries jurisdiction or coercive power granted to certain persons due to customary international law and/or thru treaties. Diplomatic personnel have immunity for actions taken before both in and out of service, while consular staff only has the former. Different degrees of immunity also apply to other categories, such as officials of international organizations. Another side of immunity is integrity, which means protection from forced interventions and include personal, like diplomats, or property, like embassy building or archives. Even foreign enemy warships are in principle inviolable. Preventive measures should in principle be taken. Police receive like prevent a drunken diplomat from continued driving. Flagrant abuse may waive immunity, which incidentally does not preclude prosecution in their home countries. The privileged are nevertheless obliged to observe and comply with the residence country's laws.¹

The importance of diplomatic agents has been recognized and may be appreciated to a certain level but the concept of diplomatic immunity regarding personal immunity is far more questionable then it at first sight might appear. The fact that a person may enjoy the privileges of immunity while others may not is a significant difference and one can question if the concept of diplomatic immunity is compatible with the principle 'all equals before the law'. In this thesis the concept of diplomatic immunity will be critically analyzed from various perspectives in order to see if the concept is viable in the society of today.

¹ immunitet. <http://www.ne.se/lang/immunitet/210620>, Nationalencyklopedin, 2013-01-09

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1.1 Purpose of study and main question

The purpose of this study is to critically analyze the concept of diplomatic immunity from different perspectives. The concept will be scrutinized from four areas: [1] *Structure*: what does the concept personal immunity entail? To answer this, an analysis of the Vienna Convention is made with the purpose to provide a picture of the juridical structure of the concept of diplomatic immunity regarding personal immunity and focusing on the nature of the agents enjoying diplomatic immunity. [2] *Implementation*: what problems exist with the concept in action? To highlight the problem with the implementation of the Vienna Convention an analysis of the ICJ case “The arrest warrant case (The Democratic Republic of the Congo vs. Belgium)” is conducted to demonstrate the difficulties of the implementation of diplomatic immunity regarding personal immunity and the difficulty with the definitions of official vs. personal acts. [3] *Conceptual comparison: Equality before the law*: What problems with diplomatic immunity can be found when analyzes from an ‘equality before the law’ perspective? [4] *Conceptual comparison: Duty of State*: What problems can be found when analyzing the concept of diplomatic immunity from the theory, presented by Thomas Pogge, that human rights claims should be understood as asserting that each society ought to be organized so that all members enjoy full access to those rights the theory that the State has a duty to respect, protect and fulfill all human rights?² The purposes of this study are to, in different stages and from different angles, demonstrate the flaws with today’s perception and implementation of diplomatic immunity regarding personal immunity. With this purpose as a base a main question was created:

What problems with the concept of Diplomatic immunity can be revealed by analyzing the *structure*, by making an analysis of the Vienna Convention on Diplomatic Relations; *implementation*, by analyzing an ICJ case concerning diplomatic immunity; *conceptual comparison: equality before the law*, by using comparative method analyze the concept diplomatic immunity from an ‘equality before the law’ perspective; *conceptual comparison: Duty of State*, by analyzing the concept with the theory ‘duty of State’?

² Hayden, Patrick, *The Philosophy of Human Rights*, Paragon House, New York, 2001, p. 187

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1.2 Boundaries and clarifications

This thesis will only focus on the personal diplomatic immunity of state officials, diplomatic agents and those agents declared in the Vienna convention article 1.³ The concept of personal immunity will be further introduced in the section “Conceptual description” and in the analysis of the Vienna Convention on Diplomatic Relations. Since the main question focuses on personal immunities of state officials there will not be a focus on state immunity in a larger extent than to demonstrate the protection that it might provide state officials. There will not be a discussion about the conflict between state immunity and diplomatic immunity.

There will not be an analysis of the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents even though there are relevant sections to diplomatic immunity it does not have enough relevance to the main question.

2. Method and Theory

2.1 Method

In this thesis four analyses were made, according to the areas previously presented. In the thesis two primary sources were used: the international treaty developed by the United Nations, the Vienna Convention on Diplomatic Relations; the ICJ case “The arrest warrant case (The Diplomatic Republic of the Congo vs. Belgium). The method conducted in this thesis is divided into three parts referring to the previously mentioned areas: [1] How to interpret a treaty? What rules should be followed when one interprets a treaty? [2] How to interpret legal cases? What is the subject of interpretation? Who is recognized as an interpreter of the object? What status possesses the interpreter in the international community? [3&4] What is the structure of a comparative method where the concept and the different theories are compared?

2.1.1 Method when interpreting treaties

The method for interpreting treaties used in this thesis is built on a set of rules of interpretation created by Ulf Linderfalk based on his understanding of the Vienna Convention Law of Treaties. There are vital difficulties with the idea of interpretation of various treaties

³ The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Apr. 18, 1961, 500 U.N.T.S. 95. Art. 1

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due to the subjective perspective of an interpretation. This methodical weakness was in consideration during the creation of the thesis.

When one interprets a treaty, in compliance with the rules of interpretation laid down in the Vienna Convention on the Law of Treaties article 31-33⁴, it is consequently because one wants to clarify a treaty, or the significance of the treaty text. What is the meaning of a treaty text is determined by the intentions of the parties of a treaty.⁵

The rules of interpretation laid down in international law contain a description of the way an applier shall be proceeding to determine the correct meaning of a treaty provision considered from the point of view of international law.⁶

There are, in principle, three kinds of meanings to choose from whenever one speaks about the meanings of texts.⁷ [1] *Utterance meaning* refers to the contents of the utterance or utterances expressed in the text and utterance is the use of a specific subject in a specific occurrence of a specific piece of spoken or written language, for example a word or a phrase.⁸ [2] *Sentence meaning* of the text is the contents of the sentence or sentences that make up the text. [3] *Receiver meaning* of a text refers to the contents of the text as received.⁹ According to the rules of interpretation presented in international law, the correct meaning of a treaty does not correspond to the sentence meaning of that treaty. When an applier interprets a treaty, by applying the rules of interpretation laid down in international law, the purpose is to establish the intention of the parties.¹⁰ Linderfalk declares that the correct meaning of a treaty is a meaning of the kind previously defined as its utterance meaning, but the statement cannot be made without some reservation. A treaty is always an expression of multiple utterances, often derived from a variety of subjects and one can claim that a treaty gives voice to utterances derived from each and every individual who participated in the drafting process leading to the adoption of that treaty. These individuals may include a representatives from various States as well as independent experts or representatives of NGO:s. The rules of interpretation laid down in the Vienna Convention on the Law of Treaties contain expressions

⁴ Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679, 1969; 63 AJIL 875, 1969

⁵ Linderfalk, Ulf *Folkrätten i ett nötskal*, Studentlitteratur: Lund, 2006, p. 96

⁶ Linderfalk, Ulf "Rule of Interpretation" *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* ed. Linderfalk Ulf, Law and Philosophy Library, Vol. 83, 2007, p. 29

⁷ Ibid

⁸ Ibid p. 30

⁹ Ibid

¹⁰ Ibid

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that can be said to support the third alternative. Article 31(2) speaks of “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”, and of “any instrument, which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”. Article 31(3) speaks of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”; “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”; and “relevant rules of international law applicable in the relations between the parties”. Further clarity is provided in the provisions of Article 31(4): “A special meaning shall be given to a term if it is established that the parties so intended”¹¹

Furthermore, Linderfalk explains various different interpretation means: *conventional parlance, context + purpose, supplemental means of interpretation*.¹² As stated above, article 31 in the Vienna Convention on the Law of Treaties declares that a treaty should be interpreted consistently with the ordinary meaning of the treaty terms. The ordinary meaning of the treaty terms refers here to the meaning in which the treaty has according to conventional parlance. Conventional parlance includes all forms of jargon and therefore all forms of languages are used when interpreting treaties. The main problem with conventional parlance is its changing form and can therefore create a larger spectrum to misinterpret treaties.¹³ The Vienna Convention on the Law of Treaties also mentions, in article 31, two fundamental means of interpretation which should be used when interpreting a treaty; context and the object and purpose of the treaty. The usage of context and the purpose of the treaty is the next step in an interpretation process and works as a complement to conventional parlance. When the ordinary meaning of a treaty text is considered weak one can use the context and purpose of the treaty to make the text more precise and when a text is ambiguous the usage of context and purpose of the treaty may provide an insight into which of several possible meanings is correct.¹⁴ The Vienna Convention on the Law of Treaties article 32 speaks about the supplemental means of interpretation; these are particularly the preparatory work of the treaties and the circumstances at its conclusion. If the ordinary meaning of a treaty remains weak, despite usage of all other fundamental means of interpretation, one ought

¹¹ Linderfalk, Ulf, “Rule of interpretation” *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* ed. Linderfalk Ulf, 2007 p. 31

¹² Linderfalk, Ulf “Folkrätten i ett nötskal”, 2006, p.100

¹³ Ibid

¹⁴ Ibid p. 101

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to use the supplemental means of interpretation to make the text more precise. When using the supplementary means of interpretation one has the possibility to achieve an interpretation result which goes beyond the frame provided by conventional parlance.¹⁵

2.1.2 Method when interpreting an ICJ case

Initially a description of the ICJ will be conducted because it is recognized as the main interpreter of international law.¹⁶ The ICJ is a UN organ and obtains a mandate established by the UN Charter, more directly article 92, where it is also concluded that the Court should operate in coherence with its own statute.¹⁷ The Court is assembled by 15 permanent judges, all with different nationalities and praxis is that all five States possessing a permanent seat in the UN Security Council should always be represented with a judge. The Court's competence covers the cases of two different types. The first is the Court's competence to adjudicate disputes between states. When the Court judges a dispute between two states it leads to a judgment and the judgment is international law binding on both parties, concluded in article 59 of the ICJS.¹⁸ This judging part of the ICJ is often referred to as its compulsory jurisdiction. The Court's second competence is that, on request, provide advisory opinions on legal matters.¹⁹

When interpreting an ICJ case the tools used when interpreting a treaty may also be applied. In this thesis the same method of interpretation presented by Linderfalk was used. Central terms in the method are: *conventional parlance*, *context + purpose*, *supplemental means of interpretation*.²⁰ The contents of these terms have already been explained in the previous section and a repeat of its meaning is therefore not necessary.

2.1.3 The comparative method

The comparative method is defined as one of the basic methods of establishing general empirical propositions. The terms "variable" and "independent variable" must be defined in order to understand the comparative method. Variable refers to a concept that can have various values for example, the "degree of democracy" in a country. The variable in this

¹⁵ Ibid p. 103-104

¹⁶ Linderfalk, Ulf "Folkrätten i ett nötskal", 2006, p. 127

¹⁷ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art. 92

¹⁸ United Nations, Statute of the International Court of Justice, 18 April 1946, art. 59

¹⁹ Linderfalk, Ulf "Folkrätten i ett nötskal", 2006, p. 128

²⁰ Ibid p. 100

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thesis is the concept of diplomatic immunity regarding personal immunity. The term independent variable refers to the variable framing the causal phenomenon of a causal theory or hypothesis. In the hypothesis “literacy causes democracy” and here the degree of literacy can be understood as an independent variable.²¹

The nature of the comparative method aim at scientific explanation, which consists of two basic elements: The establishment of general empirical relationships between two or more variables and all other variables are controlled, that is, held constant. These two elements are inseparable: one cannot be sure that a relationship is a true one unless the influence, or other variables is controlled. The number of data used when applying the comparative method must be limited in order to produce an accurate analysis of the variables.²²

The principal problems with the comparative method are: too many variables and a small number of independent variables. These two problems are closely interrelated. The former is common to virtually all social science research regardless of the particular method applies on and in the latter is peculiar to the comparative method. The latter is peculiar to the comparative method and renders the problem of handling many variables more difficult to solve. A concern when using the comparative method is the fallacy of attaching too much significance to negative findings, a fallacy that may have occurred during this thesis but since this is a critical analysis of the concept of diplomatic immunity regarding personal immunity such a fallacy have to, in some ways, be accepted. All independent variables should be selected systematically and the scientific research should be aimed at probabilistic generalizations.

Continually different areas, including the two problems presented in the beginning of this section, and its solutions, will be presented in order to demonstrate the comparative method's different sides: [1] the first problem, previously presented, was the problem of having too many variables. If one has too many variables an increase to the number of independent variables must be made. Though this was not a present problem during the creation of this thesis its existence must be presented to demonstrate a level of understanding of the problems

²¹ Evera van, Stephen, *Guide to Methods for Students of Political Science* Cornell University Press: Cornell, 1997, p. 10

²² Lijphart, Arend, "Comparative Politics and the Comparative Method", *The American Political Science Review*, Vol. 65, issue 3, Sep 1971, p. 685

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with using the comparative method. If a sample of independent variables express an essentially similar underlying characteristic it may be made into a single variable. In this thesis a combination of the independent variables ‘State’s duty to respect, protect and fulfill’ and Pogge’s theory were combined into one variable to reduce the number of independent variables. [2] Focus the comparative analysis on “comparable” cases. In this context, “comparable” means similar in a large number of important characteristic which one wants to treat as constants but dissimilar as those variables are concerned which one wants to relate to each other. If such comparable independent variables can be found they offer good opportunities for the applicant to the comparative method because they allow the establishment of relationships among a few variables while many other variables are controlled. [3] Focus the comparative analysis on the “key” variables. Comparative analysis must avoid the danger of being overwhelmed by large numbers of variables, and as a result losing the possibility of discovering controlled relationships or other interesting conclusions from the analysis.²³

2.2 Theory

2.2.1 Equality before the law

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.²⁴

One of the comparative aspects of this thesis is founded on the theory of equality before the law amongst. For the purposes of an articulate study a description of the concept of equality before the law will here be conducted. Article 29 in ICCPR constitutes the equality amongst all persons before the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁵

What is the significance of such an article? Lawyers often speak of equality before the law and they do not just do so under the influence of many constitutional and related provisions

²³ Ibid p. 686-688

²⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 7

²⁵ International Covenant on Civil and Political Rights 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368, 1967. Art. 26

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which affirm that notion and its cognates.²⁶ The principal argumentative claim in this section is that juridical equality is found in diverse and seemingly unrelated areas of legal doctrine. Juridical equality can be divided into three components. [1]*The presumptive-identity component* - It is named because the law usually sees its recipients not in all their particularity but as identical abstract things.²⁷ Furthermore, recipients of the law are identical in two respects according to this component: they are regarded as if they are the same in terms of those capacities, both mentally and physically, that enable human to comply with achievable and intelligible legal standards, and that they are taken to be identical in the sense of all having the same entitlement to the same bundle of legal rights and abilities.²⁸ [2]*The uniformity component* – this entails that, generally speaking, the law judges its recipients by reference general and objective standards equally applicable to all. The idea that the same laws should apply to all citizens of recipients of the law is so powerful that it casts doubt upon laws that apply to particular persons or groups, like the law concerning diplomatic immunity.²⁹ This requirement, once called “isonomy” is in many ways identical to some versions of the overview requirement of the rule of law ideal.³⁰ [3]*The limited-avoidability component* highlights the fact that the application of the standards in play in the uniformity component described previously is often alleviated only by a limited number and range of exculpatory claims. Exculpatory claims are limited in range because it is subject to reasonableness standards. This can mean, for example, to successfully invoke the partial defense of provocation in criminal law, it is not enough simply to show that one is very bad tempered. One is held to a reasonableness standard here, as is the case in many other areas of both private and criminal law.³¹

The three components show a coherent conception of juridical equality.³² They each emphasize the impact those components have within a legal system. The presumptive-identity component, in treating all recipients of the law as if they were the same in terms of both their capacities and their formal legal rights, is a mean of ensuring equality before the law: all who

²⁶ Lucy, William ”Equality Under and Before the Law”, University of Toronto Law Journal, Vol. 61 Num. 3, 2011, p. 411

²⁷ Ibid p. 413

²⁸ Ibid.

²⁹ Ibid.

³⁰ Hayek, FA, *The Constitution of Liberty*, London: Routledge and Kegan Paul, 1960, p. 164–166.

³¹ Lucy, William, ”Equality Under and Before the Law” 2011, p. 414

³² Ibid

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stand before the law, making and denying legal claims, are *prima facie*³³ of the same stature.³⁴ Therefore the law neither sees the claimant nor defendant, not accused or victim, as the actual human being truly are, in all their detail and specificity. Neither does it often see or even notice the specific set of abilities or experiences those being judged have, nor recognize their different social, cultural, economic or ethnic backgrounds. Unless legal doctrine requires otherwise, the law is supposedly blind to these differences, treating duke and indigent, man and woman, Christian and Muslim, homo and heterosexual or other differences alike.³⁵

The law should also treat those brought before it alike in that it regards all its recipients as having the same bundle of formal legal rights.³⁶ The uniformity component is not about how the law conceives of its recipients. The uniformity component is most immediately about the range or scope of the legal standards that apply to the law's recipients, insisting that the same standards govern all. This component insists that legal standards should be general in the sense that their content is the same for all whom they apply and that their range of application should be as broad as possible, normally including all citizens or all in jurisdiction. It is often thought that these standards should apply whether or not particular recipients can live up to their requirements. This also leads us to the limited-avoidability component. Reasonableness requirements are the principal means by which the law treats those before as the same: the law's requirements are not tailored to the specific capacities and context of particular agents, in all their differences and subjectivity. In this respect, the limited-avoidability component reinforces the equality before the law of the presumptive-identity component.³⁷

2.2.2 Duties to fulfill human rights of all persons

2.2.2.1 The theory of how one should conceive human rights created by Tomas Pogge

In short, Thomas Pogge's theory of how human rights should be conceived is built upon his idea that, as explained previously, human rights claims should be understood as asserting that each society ought to be organized in such a manner so that all its members may enjoy secure access to their human rights and if a society does not organize itself in this manner it violates the negative duty of justice, namely, the duty not to impose unjust social institutions on its

³³ In common law jurisdictions, *prima facie* denotes evidence that – unless denied – would be sufficient to prove a particular proposition or fact.

³⁴ Lucy, William "Equality Under and Before the Law" 2011, p. 415

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Ibid* p. 419

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members. Pogge's focus on duties is relevant to this thesis because it demonstrates the importance of having to secure access to the substance of any right requires others to perform a wide range of duties, including reforming or eliminating unjust social policies and institutions and ensuring the creation of just ones.³⁸ Further some central concept of Pogge's theory will be presented.

Right-holders is a central concept in Pogge's theory and he begins by establishing that all human beings have the exact same human rights and that the moral significance of human rights and human rights-violators does not vary with those whose human rights are at stake because, as far as human rights are concerned, all human beings are equals.³⁹

Pogge defines the main duty-bearers of human rights as official institutions, governments and other official actors and gives an example with a stolen car. If a car it is stolen, its owner, the right-holder, have been deprived of her or his property but this is not defined as a violation of article 17.2 in UDHR or a human-rights violation.⁴⁰ Pogge explains this change of definition as our perception of human right violations must be, in some senses, official and that human rights thus protect persons only against violations from certain sources. Pogge believes that we can capture this idea by conceiving it to be implicit in the concept of human rights that human rights postulates are addressed to those who occupy positions of authority within a society, or other comparable social systems.⁴¹ Official disrespect for human rights is then paradigmatically exemplified by a government violating rights that are considered as human rights. Governments may do so by creating, and/or maintaining, an unjust law that permit or require human-rights violations or they may do so "under the color of the law".⁴² A government may also, while legally committing itself not to violate human rights and effectively enforcing this commitment against its own agencies, fail to make such violations illegal for some or all of the persons and associations under its jurisdiction.⁴³ Pogge describes the character of duties as negative which means that official agents have to refrain from

³⁸ Hayden, Patrick, *The Philosophy of Human Rights*, 2010 p. 187

³⁹ Pogge, Thomas, "How Should Human Rights be Conceived?", *The Philosophy of Human Rights*, ed. Hayden, Patrick, 2010, p. 189

⁴⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 17.2

⁴¹ Pogge, Thomas "How Should Human Rights be Conceived?", *The Philosophy of Human Rights*, ed. Hayden, Patrick, 2010, p. 191-192

⁴² *Ibid* p. 193

⁴³ *Ibid* p. 195

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violating the rights in question. Pogge continues by constituting that human rights are moral claims upon the organization of one's society.⁴⁴

By postulating a person P's right to X as a human right we are asserting that P's society ought to be (re)organized in such a way that P has secure access to X and, in particular, so that P is secure against being denied X or deprived of X officially: by the government or its official agents.⁴⁵

Pogge believes that human rights generate negative moral duties through two claims: [1]A social order where some or all participants lack secure access to the object of some human rights, especially through official denial and deprivation, is to an extent unjust. [2]Persons share a collective responsibility for the justice of any social order in which they participate; they must not simply cooperate in imposing an unjust social order without attempting to reform it toward greater justice.⁴⁶

2.2.2.2 State's duty to respect, protect and fulfill human rights

Under traditional international law the manner in which an obligation is supposed to be discharged is not specified. States basically have to do what they commit themselves to do, and considerable discretion is left as to means by which they do so.⁴⁷ When it comes to human rights the traditional laissez-faire approach is not acceptable, international human rights law has thus come up with complex concept on how obligations are to be discharged.⁴⁸ UN human rights treaty bodies have adopted a tripartite typology of how human rights obligations should be secured and according to that typology states must respect, protect and fulfill human rights.⁴⁹ The obligation of the State to respect, protect and fulfill human rights of all persons is relevant as a theory because when a diplomatic agent enjoys diplomatic immunity, and can avoid prosecution, the rights of the victim is somewhat diminished. How can diplomatic immunity exist when the idea that the State should respect, protect and fulfill the rights of all persons in the sovereign State also is implemented?

The duty to secure human rights is, first and foremost, a duty to "respect" human rights. States have thus a negative obligation not to take any measures that result in a violation of a given

⁴⁴ Ibid p. 200

⁴⁵ Ibid.

⁴⁶ Ibid p. 202-203

⁴⁷ Mégret, Frédéric, "Nature of Obligations" Moeckli, Daniel(red), Shah, Sangeeta(red) och Sivakumaran, Sandesh(red), *International Human Rights Law*, Oxford University Press: Oxford, 2010, s. 130

⁴⁸ Laissez-faire means a let-go mentality

⁴⁹ Mégret, Frédéric, "Nature of Obligations" Moeckli, Daniel(red), Shah, Sangeeta(red) och Sivakumaran, Sandesh(red), *International Human Rights Law*, 2010, p. 130

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right. States should not consciously violate rights, either through their organs, for example through parliament or the executive or through their agents such as civil servants, the police or the army.⁵⁰

States must “protect” individuals from human rights violations, which means that the State needs to proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hand of third actors. Naturally, States do not become liable for every adverse interference with individuals’ rights by private actors. However the state is liable for those failures that can be traced to its shortcomings in protecting individuals from other individuals.⁵¹

The obligation to “respect” human rights is primarily a negative obligation. Treaty bodies however have long emphasized the existence of an obligation to “fulfill” human rights. Fulfilling human rights means that States very actively act and form institutions, procedures and assign resources with a purpose to fulfill the human rights of all persons. The State’s main intention is then to give right holders all possible opportunities to exploit and enforce their rights while government presses duty bearers to fulfill their role to meet the right holder’s rights.⁵²

2.3 Conceptual description

2.3.1 Diplomatic immunity – international law vs. national legislation

There exist two categories of immunities that may, in principle, come into play and be relied upon. [1] There are those immunities accruing under international law. These may relate to the conduct of a state agent acting in their official duty and are entitled functional immunities (*ratione materiae*) or they may be constructed to protect the private life of the state official, so-called personal immunities (*ratione personae*). The functional immunities, on the strength of the so-called “Act of State Doctrine”, to all states discharging their official duties and only the state may be held responsible at the international level and, in principle, individual performing acts on behalf of a sovereign state may not be called to account for any violations of international law he or she may have committed while acting in an official function. Personal immunities are instead granted by international customary or treaty rules to some

⁵⁰ Ibid

⁵¹ Ibid p. 131

⁵² Ibid.

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categories of individuals on account on their functions and are intended to protect both their private and their public life. The individuals of whom these privileges comprise are Head of State, prime ministers or foreign ministers, diplomatic agents and other high-ranking agents of various international organizations. The reason they enjoy these privileges is to be able to conduct their official mission free from any impairment or interference. [2] There are immunities provided for in national legislation and are normally granted to the Head of State, the members of the cabinet and members of Parliament. These generally cover the acts of the individuals concerned and involve exemption from national jurisdiction. In addition, they also often include immunity from national prosecution for ordinary crimes having no link with the function and committed either before or during the exercise of the functions. Such immunities, however, terminates as soon as the functions come to an end, although normally the individual remains immune from jurisdiction for any official act performed during the discharge of his or hers function. The basis behind these national immunities is grounded in the principle of separation of powers in particular the need to protect state officials from interference from other state organs that could jeopardize their independence, mission or political action.⁵³ In this thesis the immunities provided in international law will be analyzed.

2.3.2 Two classes of immunity in international law

Interesting to analyze is the distinction between the two categories of immunities presented in international law, functional immunities and personal immunities. Functional immunities is based on the notion that states must respect other states' internal organization and may not therefore interfere with the structure of foreign states or the allegiance a state official may owe to his own state. Hence, no state agents are accountable to other states for acts conducted in an official capacity and which therefore must be attributed to the state. Personal immunities is predicted to need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of state agents under the pretext of dealing with an exclusively private act.⁵⁴

This distinction, based on state practice, is very important. Functional immunities [1]relate to substantive law, that is, amount to a substantive defense; [2]cover official acts of any de jure or de facto state agent; [3] do not cease at the end of the discharge of official functions by the

⁵³ Cassese, Antonio. *International Criminal Law Second Edition.*, Oxford University Press, Oxford, 2008, p. 302

⁵⁴ Ibid p. 303

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state agent [4]are erga omnes; that is, may be invoked towards any other state.⁵⁵ In contrast, personal immunities [1] relate to procedural law, they render the state official immune from civil or criminal jurisdiction; [2] cover official or private acts carried out by the state agent while in office, as well as private or official acts carried out before taking office; [3]are intended to protect only some categories of state officials, namely diplomatic agents, Head of State, heads of government, foreign ministers;[4]come to an end after cessation of the official functions of the state agent; [5]may not be erga omnes. The distinctions presented above permits us to realize that the two classes of immunity coexist and somewhat overlap as long as a state official who may also invoke personal or diplomatic immunities is in office. While he is conducting his official functions he always enjoys personal immunity. In addition he also enjoys functional immunity, subject to one exception which is discussed in this thesis, in the case of perpetration of international crimes. Nonetheless, the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the state official may be prosecuted for such crimes after leaving office.⁵⁶

3. Analyses

3.1 Structure: The Vienna Convention on Diplomatic Relations, 1961

Here will an analysis of the international documents on diplomatic relations be conducted where the various relevant articles will be studied and presented. The articles presented below are of most relevance for this thesis and thereby ignoring other important, although non-relevant, articles. The study is divided into different categories to provide an articulate representation of the legal basis of diplomatic relations.

3.1.1 Who is a diplomatic agent?

Article 1 is the interpretation paragraph where the aim is to define the different concepts of agents in possession of different levels of diplomatic immunity; “head of the mission”, “members of the mission”, “members of the staff of the mission”, “members of the diplomatic staff”, “members of the administrative and technical staff”, “members of the service staff”, “diplomatic agents”, “private servant” and lastly “premises of the mission”.⁵⁷ The general rule is that diplomatic agents are those persons so designated by the sending State and the receiving

⁵⁵ Ibid p. 304

⁵⁶ Ibid p. 304

⁵⁷ The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Apr. 18, 1961, 500 U.N.T.S. 95. Art. 1

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State simply receives.⁵⁸ When asked in 1984 whether it was the policy of the UK government to accord diplomatic status to any individual so nominated by a sending State, unless there were positive reasons for declaring an individual persona non grata, the Foreign and Commonwealth Office replied: “HMG⁵⁹ do not accord diplomatic status. This is done by the sending State pursuant to its right under Article 7 of the Convention freely to appoint the members of the staff of the mission.”⁶⁰ Diplomatic agents should, according to Article 8 be of the nationality of the sending State while the receiving State may declare a member of the diplomatic staff unacceptable (Article 9). The receiving State has often a particular interest in ensuring that diplomatic agents are what they purport to be.⁶¹ That is that they should be representatives of the sending State performing diplomatic functions, as stated in Article 3, and not be practicing for personal profit or commercial activity, prohibited by Article 42.⁶² The freedom of appointment and classification has become somewhat eroded in today’s practice of the Vienna Convention, by means of an increasingly elaborate form of notification required by the receiving State.⁶³ Article 10 requires that the ministry for foreign affairs of receiving State shall be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission. Similar notifications are required in respect of other persons enjoying privileges or immunities. In practice though, some States have required a great number of details to be submitted as part of the notification process. Based on these details, the foreign ministry can determine whether or not the person notified properly falls into the classification given.⁶⁴ In practical terms, the value of ensuring proper classification of staff is prevent, for example, a driver being notified as a member of the administrative and technical staff, who enjoys full immunity from criminal jurisdiction, when he/she may more appropriately be considered a member of the service staff, who enjoys immunity only in respect of acts performed in the course of his or her duties.⁶⁵ The same considerations apply to members of the administrative and technical staff, who enjoy the privilege of duty-free imports only “in respect of articles imported at the time of

⁵⁸ Jonathan Brown “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relations” *The International and Comparative Law Quarterly*, Vol. 37, No. 1. Jan., 1988, p. 55

⁵⁹ HMG= Her Majesty’s Government

⁶⁰ *Ibid* H.C Rep. minutes of evidence p. 8

⁶¹ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 55

⁶² The Vienna Convention on Diplomatic Relations, 1961. Art. 3, Art. 42

⁶³ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 55

⁶⁴ *Ibid* p. 56

⁶⁵ The Vienna Convention on Diplomatic Relations, 1961, Art. 37(3)

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first installation,⁶⁶ whose governments seek to notify them as members of the diplomatic staff, who enjoys the privilege of duty-free imports throughout their posting.⁶⁷ Why is it then so important with the notification system? The importance of the notification system is that it enables the foreign ministry of the receiving State to say who is a diplomatic agent: the sending State appoints, but the receiving State in effect determines status. There is nothing in the Vienna Convention on the recognition, as such, of diplomatic agents. The juridical practice of many countries consist of courts which determine immunity that state that recognition is a matter for the executive government, or for the foreign ministry in particular.⁶⁸ The advantages to the receiving State of the formal notification and certification process is that it can limit privileges and immunities to those properly entitled to them. There are several cases where, in the absence of any statement to the court by the executive that the appointments have been duly made and accepted or that the person have been recognized as having diplomatic status, the courts have held that the persons concerned are not entitled to diplomatic immunity. In some cases the persons have been appointed as representatives by the sending State in all good faith, yet the freedom of appointment is ineffective without acceptance: the receiving State must “accord” diplomatic status to representatives of the sending State if it is to be operative.⁶⁹

3.1.2 Members of a diplomat’s family

A question that confronts officials, and sometimes courts, of the State to which diplomat are accredited is: what privileges and immunities are their wives, husbands, children and other relatives entitled to if they enter that State?⁷⁰ The Vienna Conference in 1961 failed to agree upon any definition of "the members of the family of a diplomatic agent forming that part of his household" who enjoy the same privileges and immunities as the diplomat.⁷¹ Instead, the formulation proposed by the International Law Commission was adopted.⁷² For receiving States, the family members of diplomats may entail pressure in seeking approval to

⁶⁶ Ibid 37(2)

⁶⁷ Ibid 36(1)

⁶⁸ Brown, Jonathan, "Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation" 1988, p. 55-56

⁶⁹ Ibid

⁷⁰ O’Keefe J. Patrick “Privileges and immunities of the Diplomatic family” British Institute of International a Comparative Law Quarterly, Vol. 25, No. 2, 1976, p. 329

⁷¹ The Vienna Convention on Diplomatic Relations, 1961, Art. 37(1)

⁷² Brown, Jonathan, "Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relations" 1988, p. 63

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undertake local employment for while they are not bound by the duty not to practice⁷³ for personal profit any professional or commercial activity, it is the general practice of receiving States to prohibit employment by family members in the absence of any bilateral agreement or arrangement or approval in a particular case and fiscal privileges, mostly in the form of free or subsidized education.⁷⁴ The Vienna Convention on Diplomatic Relations art 37 specifies the privileges and immunities which shall be accorded members of families but does not provide a definition of the term “family” for the purposes of the Convention. The creators of the Convention recognized that the concept of “family” differs among the societies of the world and left the matter to be resolved according to standards of the respective receiving States and on the basis of reciprocity. The advantage of these administrative practices, apart from the certainty it provides to sending States, their diplomatic agents and their families, is to signal to the courts that the term “member of the family” should not be interpreted literally – it can include nephews, nieces and cousins – but in the light of the executive’s understanding of its international obligations, its practice, and its normal notification procedures.⁷⁵

3.1.3 Nature of the diplomatic immunity

The diplomats are not liable to be sued, unless the particular action falls into one of the three exceptions listed in article 31(1) where it is stated that a diplomatic agent enjoys immunity from criminal jurisdiction except in the case of.⁷⁶: (a) a real relating to private immovable property situated in the territory of the receiving State, unless he/she 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 its official functions.⁷⁷ Of course diplomatic agents may be sued in respect of a matter claimed to fall within one of the three exceptions. If the diplomatic agents are sued, they do not have to claim immunity because they have already it.⁷⁸ If the agents are held immune from the jurisdiction, the

⁷³ The Vienna Convention on Diplomatic relations, 1961, Art. 42

⁷⁴ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relations” 1988, p. 63

⁷⁵ Ibid

⁷⁶ Ibid p. 71

⁷⁷ The Vienna Convention on Diplomatic relations, 1961, Art. 31(1)

⁷⁸ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relations” 1988, p. 71

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proceedings are stayed and may be reactivated if the person loses his or her immunity, for example by the termination of duties.⁷⁹ The oldest rule of diplomatic law is formulated in Article 29 which proclaims the inviolability of a diplomatic agent. He shall not be liable for any form of arrest or detention. The receiving State ought to treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.⁸⁰ However the notion of attack is not defined in the Convention or in the later Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents.⁸¹ The receiving State has a duty, under Article 29, to treat a diplomat “with due respect”. Thereby it is of great importance for both the receiving State and diplomatic agents to know the proper limits within which the authorities of the receiving State, the law enforcement authorities as well as the courts, must act if this duty is to be observed. Immunity and inviolability do not simply mean diplomatic agents cannot be convicted by a court for offences they allegedly commit.⁸² The immunity also covers “the law enforcement activities of the agents of the State itself”⁸³. The receiving State’s duty to treat diplomatic agents with due respect is broad, and must preclude the whole range of law enforcement and related measures.⁸⁴ It is clear that an ordinary criminal investigation, in which no alleged offender possessing diplomatic immunity is approached or interviewed by police, is clearly permissible, as would be the issue of a minor charge such as a parking ticket or traffic infringement notice issued by an official who is confronted with *prima facie*⁸⁵ evidence of an offence. But any more considered, serious or formal action, such as a charge or summons issued by a magistrate or prosecuting authority, or the empanelling of a jury-and there is no suggestion this was done in the present case, at least while the ambassador was in the country-could, it is considered, be in the nature of a law enforcement or penal action in contravention of Article 31.1. Any attempt at execution would of course be in contravention of Article 29. Remedies are available to the receiving State and its residents, but it is suggested they do not lie down this road.⁸⁶

⁷⁹ Ibid p. 72

⁸⁰ The Vienna Convention on Diplomatic Relation, 1961. Art. 29

⁸¹ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Person 1035 U.N.T.S. 167, 13 I.L.M. 41, entered into force Feb. 20, 1977.

⁸² Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 73

⁸³ Ibid

⁸⁴ Ibid p. 74

⁸⁵ At first glance

⁸⁶ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 75

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3.2 Implementation: ICJ “arrest warrant case (Congo vs. Belgium)”

To demonstrate the flaws of the concept with diplomatic immunity and how questionable the implementation of Vienna convention on diplomatic immunities is an analysis of the ICJ case “The arrest warrant case (Democratic Republic of the Congo vs. Belgium)” will here be conducted.⁸⁷ This case is of relevance because of its remarkable judgment. The case concerns the minister of foreign affairs in DRC, Mr. Adbulaye Yerodia Ndombase (Yerodia). In this case the Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office, breached international law. In particular, according to the Congo, Belgium violated the ‘principle that a state may not exercise its authority on the territory of another state’, the principle of sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state.⁸⁸ The Court has pronounced only upon the scope of immunities accruing to foreign ministers and ruled that Belgium violated international law, as those immunities cover all acts performed abroad by foreign ministers, and are designed to ensure the effective performance of their functions on behalf of their respective states, as stated earlier in the thesis. According to the Court, with reference to the Vienna Convention on diplomatic immunity, a foreign minister enjoys immunities from foreign criminal jurisdiction and inviolability, whether the minister is on foreign territory on an official mission or in a private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity.⁸⁹

3.2.1 Ratione materiae vs. Ratione personae

This part of the analysis will focus on the problematic of the distinction between *ratione materiae* and *ratione personae* and the Court’s conflation of the two. The ICJ’s confusion resulted in a category of immunity for former state officials, in this case a foreign minister, who contradicts the rationale of sovereign immunity established under customary international law, by all but granting former for foreign ministers absolute impunity.⁹⁰ The Court held that “throughout the duration of his or her office, he or she when abroad enjoys

⁸⁷ Cassese, Antonio “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case” *EJIL*, Vol. 13 No. 4, 2002, p. 855

⁸⁸ *Ibid.* p. 854

⁸⁹ *Ibid.* p. 854

⁹⁰ Day, Adam “Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong” *Berkeley Journal of International Law* Vol. 22, No. 489, 2004 p. 492

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full immunity from criminal jurisdiction and inviolability”⁹¹ This definition of the immunity afforded to an incumbent foreign minister adheres to the definition of *ratione personae*, present in customary international law. Personal immunity is founded on the notion that a head of state or foreign minister must be immune from foreign jurisdiction over any activity, in order to protect against “foreign states either infringing sovereign prerogatives of states or interfering with the official functions of the foreign state agents under the pretext of dealing with an exclusively private act”.⁹² The ICJ reasoned, the role of high state officials in international relations requires this total inviolability while state officials maintain their governmental position.⁹³ There is though a crucial aspect of personal immunity which is that it does not render the official permanently immune from criminal proceedings; rather, it guarantees immunity only as long as the official retains his or her position in government.⁹⁴ Personal immunity therefore, is procedural law that [1]protects any act carried out by a state agent while in office or before taking office; [2]is afforded only those high officials who represent the state in international relation; [3]comes to an end at the termination of the official position.⁹⁵ In contrast to personal immunity, as describes in the “conceptual description”, *rationae materiae* is a matter of substantive law rendering state officials permanently unaccountable to other states for acts that fall within his or her official capacity. Instead, under *rationae materiae*, official acts are directly attributable to the state itself and thus give rise to individual criminal responsibility.⁹⁶ The substantive nature of *rationae materiae* means that a state official’s violation of national or international law does not negate the violation. It only means that individual liability does not attach.⁹⁷ Because no individual liability ever arises for these official acts, at the termination of a state agent’s position, that agent bears no personal criminal or civil liability. The critical difference between functional and personal immunity in the ICJ case rests upon the distinction between official vs. private acts. Whereas personal immunity protects the agent for all acts, official of private, functional immunity is limited to those acts carried out on behalf of the state.⁹⁸ When understood as a

⁹¹ Bekker, H.F Pieter “World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister” *Am. Soc’y of International Law*, Feb, 2002

⁹² Cassese, Antonio “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case”, 2002, p.857

⁹³ Day, Adam “Crimes Against Humanity as a Nexus if individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong”, 2004 p. 493

⁹⁴ *Ibid*

⁹⁵ *Ibid*

⁹⁶ Cassese, Antonio “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case”, 2002 p.857

⁹⁷ *Ibid*

⁹⁸ *Ibid*

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matter of substantive law, by which individual acts are attributed to a state, functional immunity should be limited to those acts that are actually to those acts that are actually committed on behalf of the state. There is no basis in international customary law to impute the private actions of individuals to the state. Likewise, when personal immunity is understood as a provisional, procedural immunity intended to protect an official's position within the sovereign structure, it should dissolve at the moment the official leaves that position. As an agent's private actions are not attributed to the state, personal immunity attaches to the official position itself, not the individual.⁹⁹ The ICJ case referred to the immunity enjoyed by incumbent foreign ministers solely in terms of personal immunity. For instance, it asserted that all of Yerodia's acts are immune.¹⁰⁰

...regardless of whether the Minister of Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity.¹⁰¹

By failing to distinguish between private and official acts, the Court reinforced that its application of immunity was personal rather than functional. This finding should under customary international law, lead to the conclusion that the immunity evaporated at the moment the minister left office.¹⁰² In apparent support of this conclusion, the court held that jurisdictional immunity was "procedural in nature" and hence could not exonerate an official from all criminal responsibility.¹⁰³ This clear categorization of foreign minister's immunity as procedural (and thus personal), can be paired with the holding that customary international law provides no exception to the rule that incumbent foreign ministers enjoy immunity for all acts done before or during their tenure.¹⁰⁴ These two statements together support a finding that

⁹⁹ Day, Adam "Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong", 2004 p. 494

¹⁰⁰ Ibid

¹⁰¹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 55

¹⁰² Cassese, Antonio "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case", 2002, p. 857

¹⁰³ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 60

¹⁰⁴ Day, Adam "Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong", 2004 p. 494

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former foreign ministers do not enjoy the same immunity.¹⁰⁵ When the foreign minister leaves office personal immunity must in that moment dissolve.¹⁰⁶

The Court consequently inferred, however, that the immunities granted to incumbent foreign ministers do not represent a bar to criminal prosecution in four different circumstances, the third of which significantly undermines the court's initial rationale:

The immunities enjoyed under international law by an incumbent or former Minister of foreign Affairs do not represent a bar to criminal prosecution in certain circumstances [The court mentions two other exceptions but because they are not relevant to this paper they won't be cited]

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, the or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period in office, as well as in respect of acts committed during that period of office in a private capacity.¹⁰⁷

By limiting the liability of former foreign minister for their crimes against humanity to only those acts committed outside of their tenure in office, or to acts committed “in a private capacity”, the Court recognized an unlimited immunity for all acts committed by foreign ministers in their official capacity.¹⁰⁸ This is a surprising statement considering that the Court's sole rationale for granting this type of immunity is the protection of high state officials' ability to perform their functions.¹⁰⁹ A former foreign minister clearly does not require this this protection, however, because his or her official functions have already ceased.

The Court thus merged the two distinct categories of immunity regarding international crimes. The Court merged personal immunity, which covers all acts (official and private) while the minister is in office, with functional immunity, which negated individual liability and instead attributes all official acts to the state itself. The result is that the former foreign ministers

¹⁰⁵ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 58 also Bekker, H.F Pieter “World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister” *Am. Soc'y of International Law*, Feb, 2002, note 17 at 2.

¹⁰⁶ Day, Adam “Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong”, 2004 p. 494

¹⁰⁷ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 61

¹⁰⁸ Day, Adam “Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong”, 2004 p. 495

¹⁰⁹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 55

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retain no liability for international core crimes, provided they can show the acts were committed as part of their official duties while in office.

International core crimes, genocide, crimes against humanity and war crimes, are almost never committed in private capacity.¹¹⁰ Rather, the very nature of these crimes generally requires individual perpetrators to utilize military or governmental authority to achieve their objectives. It is, in fact the abuse of their official status that enables such officials to order, instigate or tolerate crimes against humanity or grave breaches of the Geneva Convention.¹¹¹ The ICJ's limited exception to the otherwise absolute immunity is therefore a *de facto*: international crimes committed by incumbent foreign ministers in their private capacity simply do not occur that often.¹¹² The empty exception laid out by the ICJ to the immunity granted to foreign ministers thus expands both functional and personal immunity far beyond what is allowed under customary law.¹¹³ The ICJ ruling offers an "either/or" response to the problem of attribution: either [1] a former foreign minister's acts are considered official acts and are attributed directly to the state or [2] they are considered private acts, and the state is not accountable for the ministers' crimes.¹¹⁴ This result contradicts the Court's reasoning that foreign minister's jurisdictional immunity is procedural in nature and does not mean impunity for the perpetrator of serious international crimes.¹¹⁵

3.3 Conceptual comparison: Equality before the law

Equality before the law is a worldwide perception of how a fair legal system should be constructed. The fact is that before the law assets, heritage, gender, sexual orientation or other source for discrimination should not be of any significance. As described in the theory section, the concept of equality before the law may be divided into three components; *the presumptive-identity*, which describes the fact that the recipients of the law are identical in the two respects that they are regarded as if they are the same in terms of the capacities that enable human to comply with legal standards and that the recipients are to be taken as

¹¹⁰ Cassese, Antonio "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case", 2002, p. 588

¹¹¹ Ibid.

¹¹² Cassese, Antonio "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case", 2002, p.589

¹¹³ Day, Adam "Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong", 2004 p. 495

¹¹⁴ Spinedi, Marina, "State Responsibility v. Individual responsibility for International Crimes: *Teritum Non Datur?*" *EJIL*, Vol. 13 No. 4, 2002, p. 899

¹¹⁵ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, § 60

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identical in the sense of them all having the same entitlement to the same bundle of legal rights and abilities;¹¹⁶ *the uniformity component* demands the law to judge its recipients by referencing to general and objective standards equally applicable to all; *the limited-avoidability component* entails that the general and objective standards described in the uniformity component should only be alleviated by a limited number and range of exculpatory claims.

By applying the comparative method with the concept of diplomatic immunity regarding personal immunity as the variable and the theory of equality before the law as the independent variable one can discern a few conclusions. The most relevant of the three components to this comparative analysis is the presumptive-identity one. The presumptive-identity component is a mean of ensuring equality before the law and declares that the law as a human being instead of the different definitions separating people.¹¹⁷ According to this component all persons, despite of enjoying diplomatic status, should be perceived as equals before the law. By giving some of the citizens the status of diplomatic agent, and thereby according them diplomatic immunity, the presumptive-identity component is disregarded. This disregard challenges the existence of the other components due to the trio's coherent impact within a legal system. If one component fails to live up to its purpose the entire coherence becomes unbalanced.¹¹⁸ One can hereby make the conclusion that by awarding some persons of the society diplomatic immunity the entire legal system is negatively affected. This negative affect on the legal system should not be minimalized because it questions the credibility of that legal system. A legal system where there a distinction is made between the different recipients of the general and objective standards has to qualify as unjust.

3.4 Conceptual comparison: Duty of State

Pogge's theory, which has been described more thoroughly in the theory section, provides the idea that government, institutions and other official agents are the main duty bearers of human rights and have therefore the main responsibility to provide resources so that the population may enjoy their human rights and to prevent the occurrences of any human-rights violations within the State.¹¹⁹ As stated in the previous chapter diplomatic immunity regarding personal

¹¹⁶ Lucy, William "Equality Under and Before the Law", University of Toronto Law Journal, 2011, p. 413

¹¹⁷ Ibid p. 415

¹¹⁸ Ibid p. 414

¹¹⁹ Pogge, Thomas "How Should Human Rights be Conceived?", *The Philosophy of Human Rights*, ed. Hayden, Patrick, 2010, p. 187-205

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immunity can be considered as an unjust concept since it allows certain persons of the population to evade prosecution. If one apply the comparative method using the concept of diplomatic immunity regarding personal immunity and the theory presented by Pogge complemented by the “respect, protect and fulfill” concept presented in various international treaties one may discern three different conclusions: the unjust concept of diplomatic immunity can be considered as a human right violation to the victims; the government’s actions, those who are accepting the concept on diplomatic immunity regarding personal immunity as customary law, can therefore be considered as a form of human-right violation because it’s maintaining this unjust system; the state’s organization and the structure surrounding personal immunity is inadequate because it prevents all members to access their human rights.

The conclusion that the concept of diplomatic immunity regarding personal immunity is an unjust concept, stated in the previous section, because it prevents equal treatment among the citizens of a population and makes an unfair distinction between citizens before the law. The concept is therefore not compatible with article 7 in UDHR. This conclusion opens up the assumption that this unjust concept can be considered as a form of human-right violation in the aspect that it makes a distinction between different persons of the population and determinates that all persons are not equals before the law but that some people stand above the law. This is in the heart of the structure of the society, since the Vienna Convention on Diplomatic Immunity and the concept of diplomatic immunity regarding personal immunity is a product of the organization of the current society, and, according to Pogge’s theory, when the structure of a society does not organize itself in a manner that those not secure equality among its citizens violates the negative duty of justice specifically not to impose unjust social institutions on its members.¹²⁰ The conclusion that this is an unjust concept was stated previously and one can here make the conclusion that governments is actually, by maintaining this unjust social institution, violating the citizens’ human rights. Considering that some persons are not even considered as the official state agent but a family member of such a person the privilege is even more unjustifiable.

Pogge’s previously used quote will here be repeated and applied in order to provide a deeper context to the conclusion.

¹²⁰ Ibid.

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By postulating a person P's right to X as a human right we are asserting that P's society ought to be (re)organized in such a way that P has secure access to X and, in particular, so that P is secure against being denied X or deprived of X officially: by the government or its official agents¹²¹

P's right to equality before the law without distinctions (X) makes the assertion that P's society ought to be (re)organized in such a way so that P has access to the rights to equality before the law so that P is secure against being denied or deprived of the right to equality before the law officially: by the government or its agents. As one can conclude by implementing the concept of diplomatic immunity regarding personal immunity the governments are in one way committing human right violation towards their citizens by making distinctions between the citizens and allowing some to evade prosecution.

Important to mention is also the duties declared in the international treaties, more specifically, the states' duty to respect, protect and fulfill the human rights. One can argue that by allowing certain members of the population to evade prosecution due to diplomatic immunity when another citizen who committed a similar felony is convicted to jail this person is discriminated and they are de facto not equals before the law. Have not the State hereby failed to respect, protect and fulfill the human rights of this citizen? This thesis argues that the State certainly has failed to respect, protect and fulfill the citizen's human right to have equality before the law, declared in article 14 in ICCPR and article 7 in UDHR.¹²²

The conclusion that the governments practicing diplomatic immunity regarding personal immunity are committing a form of human-right violation is of great importance when further discussing the concept of diplomatic immunity because it declares a need for an institutional alteration of the structure of concept, the Vienna Convention on Diplomatic Relations or the implementation of such a structure.

4. Conclusions

In the introduction a purpose and a main question was created and in this section the questions presented and the main question will be responded. The purpose was to scrutinize the concept

¹²¹ Pogge, Thomas "How Should Human Rights be Conceived?", *The Philosophy of Human Rights*, ed. Hayden, Patrick, 2010, p. 200

¹²² International Covenant on Civil and Political Rights 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368, 1967, art. 14 And Universal Declaration of Human Rights, UN General Assembly, 10 December, 217 A (III), 1948, art. 7

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of diplomatic immunity from four areas: *structure, implementation, conceptual comparison: Equality before the law, conceptual comparison: Duty of State.*

What does the concept of personal immunity entail? When analyzing the structure of the concept of diplomatic immunity regarding personal immunity the definitions of different actors enjoying personal diplomatic immunity was presented. The most questionable agent possessing the privilege of diplomatic immunity is the members of the families of diplomatic agents. There is no existing definition of family in the Vienna Convention other than “members of the family [...] forming that part of his household”¹²³. Since the concept of family differs among different societies it may be difficult to determine a distinct definition, with that stated though, one must recognize the structural weakness of the concept by its non-existing precise definition of family. This non-existing definition creates a window of possibilities for exploitation of diplomatic immunity. For example, a diplomatic agent may, even though it is not ethical, include several distant family members in his or hers definition of family and thereby granting them, somewhat undeserving, diplomatic immunity. These family members may then commit crimes without having to face any prosecution.

What problems exist with the concept in action? In the analysis of the implementation of the concept of diplomatic immunity i.e. the implementation of the Vienna Convention on Diplomatic immunity, the ICJ case the “arrest warrant case (Congo vs. Belgium)” was interpreted to provide a picture of how the concept is used in action. The case illustrated a clear problem with the distinction between *ratione materiae* and *ratione personae*. The personal immunity protects the agent for all acts, private or official, and functional immunity is limited to those acts carried out on behalf of the state.¹²⁴ The Court fails to distinguish between private and official acts and thereby reinforced that its plication of immunity was personal rather than functional. This statement also declares that Yeodia enjoyed immunity even for all acts committed before entering office. The Court thus compound the two distinct categories of immunity and the Court merged personal immunity, which covers all acts (official and private) while the minister is in office, with functional immunity, which negated individual liability and instead attributes all official acts to the state itself. The result is that Yeodia hold no liability for international core crimes. Since international core crimes are

¹²³ The Vienna Convention on Diplomatic relations, 1961, Art. 37(1)

¹²⁴ Cassese, Antonio “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo vs. Belgium Case”, 2002

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almost never committed as private acts but rather the nature of these crimes is that there are committed by governments, militaries or other institutional organizations this non-existing distinction between acts committed in a private or official capacity. As stated in the analysis, the ICJ ruling offers a non-sufficient response to the problem of attribution; either a former foreign minister's acts are considered official acts and are attributed directly to the state or they are considered private acts and the state is not accountable for the ministers' crimes.¹²⁵ Whatever the answer may be the fact that the question ever had to be made gives a hint to the flaws with the implementation and interpretation of the concept.

What problems with diplomatic immunity can be found when viewed upon from an 'equality before the law' perspective? The comparative analysis demonstrated that since the legal system created as a consequence of diplomatic immunity is unjust. The system is unjust in the sense that the concept of diplomatic immunity does not comply with the first component of 'equality before the law', presumptive-identity component. Since the concept of diplomatic immunity makes a distinction between persons of the society the recipients of the law cannot be described as being identical in the two respects that they are regarded as if they are the same in terms of capacities. The application of the comparative method enabled the conclusion that a legal system using the concept of diplomatic immunity can be described as unjust.

What problem with diplomatic immunity can be found when analyzing the concept of diplomatic immunity from the theory presented by Thomas Pogge that human rights claim should be understood as asserting that each society ought to be organized so that all members may enjoy full access to those rights and the theory that the State has a duty to respect, protect and fulfill all human rights? Three conclusions were able to be made when analyzing the concept of diplomatic immunity regarding personal immunity: the unjust concept of diplomatic immunity can be considered as a human right violation to the victims; the government's actions, those who are accepting the concept on diplomatic immunity regarding personal immunity as a customary law, can therefore be considered as a form of human-right violation because it is maintaining this unjust system; the state's organization and the structure surrounding personal immunity is inadequate because it prevents all members to access their human rights.

¹²⁵ Spinedi, Marina, "State Responsibility v. Individual responsibility for International Crimes: Teritum Non Datur?" 2002, p. 899

What problems with the concept of Diplomatic immunity can be revealed by analyzing the *structure*, by making an analysis of the Vienna Convention on Diplomatic Relations; *implementation*, by analyzing an ICJ case concerning diplomatic immunity; *conceptual comparison: equality before the law*, through comparative method analyze the concept diplomatic immunity from an ‘equality before the law’ perspective: *conceptual comparison: Duty of State?*

- The non-existing definition of members of family
- The confusion of the distinction between *ratione personae* and *ratione materiae*
- The concept of diplomatic immunity creates an unjust legal system due to the lack of equality before the law
- The concept of diplomatic immunity can be considered as a human right violation to the victims because it is unjust because the governments are maintaining an unjust legal system.

5. Discussion

This last part will consist of a more general discussion on diplomatic immunity, thoughts on the conclusions made in this thesis and other occurring views or thoughts. The purpose of this discussion is mainly to bring forth ideas and thought created during the work of the thesis and may be of interest if further research on the subject is made.

An arousing eye-opener during the course of the conduction of this study was the discrimination part of the thesis and the fact that the concept of diplomatic immunity is not compatible with the idea of equality before the law. An unsure prejudice of this knowledge was formed prior to the creation of the thesis but its confirmation still came as a surprise. The fact that the majority of the citizens are not equals before the law because they do not possess diplomatic immunity. Even though they are as guilty as the person possessing diplomatic immunity they will not be judged by the same standards before the law, can this legal system be defined as fair or just? Can one truly justify a distinction between citizens before the law?

The purpose of this study was to yield some of the difficulties with the concept of diplomatic immunity regarding personal immunity. The conclusions brought forward could be further analyzed separately because they all reveal mayor issues within the concept. The four

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different areas of study provided good perspective leading to different conclusions but due to the limited space a deeper discussion or analysis of each component could not be made. Interesting would be to analyze the perspectives separately and thereby giving a more thorough perception of each problem.

Finally one should also mention the significance of the ICJ case “The arrest warrant case (Democratic Republic of the Congo vs. Belgium). The judgment of the case, though providing an important critic of the concept of diplomatic personal immunity, has opened the discussion surrounding the concept of diplomatic immunity and allowing further research into the basic components of the concept. By making such as radical judgment the ICJ opened a window of concern and perhaps making people realize that weaknesses even exists in concepts and terms as old as the concept of diplomatic immunity. An important lesson in this instance is not to take any concept for granted and to have the courage to question concepts that has been established during centuries because they may many hidden flaws ready to be acknowledged.

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