

# Official Acts and Beyond: Towards an Accurate Interpretation of Diplomatic Immunity *Ratione Materiae* under the Vienna Convention on Diplomatic Relations

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## Abstract

This article explores the scope of diplomatic immunity *ratione materiae* under the Vienna Convention on Diplomatic Relations. The difficulty regarding the topic lies in the interpretation of what constitutes an act performed “in the exercise of” diplomatic functions. Based on a critique of differing views, it is argued that diplomatic immunity *ratione materiae* covers not only official acts *stricto sensu*, but also certain private acts ancillary or incidental to the performance of diplomatic functions. In practice, the availability of the immunity is heavily dependent on the factual end of a case. Therefore, instead of using general exceptions or standards to denote the scope of the immunity, it is better to determine the immunity on a case-by-case basis in light of the seriousness of an act and the connection between the act and the functions performed.

## I. Introduction

1. Immunity *ratione materiae* of State officials in general international law has received much attention since the British House of Lords’ landmark decision

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in *Pinochet*.<sup>1</sup> The determination of this immunity, which normally protects a State official from a foreign jurisdiction for official acts performed, has proved particularly difficult with regard to international crimes. These crimes are in most cases performed in an official capacity,<sup>2</sup> yet authors have argued that, due to their extreme gravity, these crimes should never be covered by immunity *ratione materiae* because they either form an exception to the immunity, or, alternatively, exceed ordinary State functions to the extent that they should not be taken as an official act in the first place.<sup>3</sup>

2. Much less explored, albeit no less controversial, is immunity *ratione materiae* for diplomatic staff, which is nowadays enshrined in the Vienna Convention on Diplomatic Relations (VCDR).<sup>4</sup> Diplomatic immunity *ratione materiae* differs from diplomatic immunity *ratione personae* (which is granted to incumbent diplomats who do not possess the nationality or permanent residency of the receiving State) in that it covers only acts performed in the exercise of official functions.<sup>5</sup> Under the VCDR, three categories of mission members enjoy immunity of this kind. Firstly, according to Article 37(2) and (3) of the VCDR, subordinate members of a diplomatic mission are entitled to immunity for acts performed “in the course of their duties”.<sup>6</sup> Secondly, serving diplomats with the nationality or permanent residency of the receiving State only enjoy immunity for “official acts performed in the

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1 Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (UK HL 1999).

2 See for example, art. 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture as an act that is performed “in an official capacity”, 1465 UNTS 85, art. 1(1).

3 See in particular, the joint separate opinion of Judge Higgins, Kooijmans and Buergenthal in Arrest Warrant, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, 3, 88, para.85 (sep. op. Judges Higgins, Kooijmans and Buergenthal). See also, Andrea Bianchi, Denying State Immunity to Violators of Human Rights, 46 Austrian JPIL (1993/94), 195.

4 Vienna Convention on Diplomatic Relations, 500 UNTS 95.

5 Article 37(2) and (3) speak of immunity for acts performed “in the course of duties”, whereas Article 39(2) employs the formula “in the exercise of functions”. But the drafting history of the two articles reveal that they are essentially the same. For academic support of the equation, see Ian Brownlie, Principles of Public International Law (5th edn., OUP 1998) 361-2; Clifton E. Wilson, Diplomatic Privileges and Immunities (The University of Arizona Press 1967), 161; Ludwik Dembinski, The Modern Law of Diplomacy: External Missions of States and International Organizations (Dordrecht; London: Nijhoff and UNITAR 1988), 188.

6 VCDR, above n.4, art. 37(2) and (3).

exercise of his functions”.<sup>7</sup> Thirdly, former diplomats are protected under Article 39(2) of the VCDR by immunity for “acts performed in the exercise of his functions as a member of the mission”.<sup>8</sup>

3. In practice, however, it is not always easy to tell whether an act has been performed in the exercise of functions. On the one hand, acts performed in the exercise of functions could mean official acts in the strictest sense (such as the issuance of a visa).<sup>9</sup> On the other hand, however, it is also possible that the formula “in the exercise of” encompasses certain ancillary or incidental acts necessary for the performance of official functions. Following this line, renting a house in the vicinity of the embassy building would be taken as an act performed in the exercise of functions, and a diplomatic agent who violates traffic regulations while driving to the Ministry for Foreign Affairs of the receiving State is likely to enjoy immunity *ratione materiae* after his or her term of office expires.<sup>10</sup>

4. It is therefore the purpose of this article to answer the question of what constitutes an act performed in the exercise of functions in diplomatic law. Section II will compare two standards which have been forwarded in literature to determine diplomatic immunity *ratione materiae* and assess them in turn. Whereas the narrower view states that the immunity protects merely official acts *stricto sensu*, the broader interpretation extends the remit of immunity to all acts that are attributable to the sending State in accordance with rules of attribution of State responsibility. Based on a critique of these two standards, Section III sets out a more nuanced approach which takes into account both the interests of the sending State and that of the receiving State. It is argued that diplomatic immunity *ratione materiae* can only be determined on a case-by-case basis in light of the seriousness of an act and the connection between the act and the functions performed.

5. Before proceeding to the following sections, two preliminary caveats need to be made. In the first place, this article proceeds on the presumption that “functions of a diplomat”, which are used to denote the remit of diplomatic immunity *ratione materiae* in Article 39(2) and Article 38(1), should be understood within the framework of Article 3(1) of the VCDR, which sets

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7 Ibid., art. 38(1).

8 Ibid., art. 39(2).

9 See below Section II.A.

10 See below Section III.A.

out the functions of a diplomatic mission.<sup>11</sup> It has been argued that “functions of a diplomat” should be broader in scope than Article 3(1) and include official instructions by the sending State in general.<sup>12</sup> However, in light of the non-exhaustive nature of Article 3(1),<sup>13</sup> as well as post-VCDR State practice which maintains a clear distinction between diplomatic acts and official acts of the sending State in general,<sup>14</sup> this understanding seems neither necessary nor justified. Indeed, a review of the *travaux préparatoires* indicates that drafters of the VCDR have understood the two sets of functions as the same.<sup>15</sup>

6. Secondly, in the following analysis, reference will often be made to consular immunity, which covers, according to Article 43(1) of the Vienna Convention on Consular Relations (VCCR), “acts performed in the exercise of consular functions”.<sup>16</sup> The relevance of the VCCR lies in the fact that provisions concerning consular immunity are directly patterned on articles of diplomatic immunity *ratione materiae* in the VCDR.<sup>17</sup> Thus, rules on

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11 VCDR, above n.4, art. 3(1).

12 Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (3rd edn., OUP 2008), 307; Jean Salmon, *Manuel de Droit Diplomatique* (Brulant Delta 1994), 465; James R. Crawford, *Brownlie’s Principles of Public International Law* (8th edn., OUP 2012), 408.

13 The phrase “inter alia” indicates that the article is not an exhaustive enumeration of diplomatic functions. VCDR, above n.4, art. 3(1).

14 The UK Government, for example, stated in its 1985 Report that it would no longer recognise the diplomatic status of foreign tourists offices even though they could be regarded as governmental in character. See *Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to ‘The Abuse of Diplomatic Immunities and Privileges’*, 1984/85 Cmnd. 9497, para.39(c). For a similar attitude of the US regarding the diplomatic status of those diplomats who mainly perform official functions as a representative of the sending State to an international organisation, see Marian L. Nash (ed.), *Digest of United States Practice in International Law* (1978) (Washington: US Government Printing Office 1980), 537.

15 The concept of “functions of a diplomat” as distinct from the functions of a diplomatic mission has never been subject to any serious debate within the ILC. On the contrary, many ILC members have used “functions of a diplomatic mission” and “functions of a diplomat” indistinctly. See for example, ILCYB (1957), vol I, 50, para.63 (El-Erian), para.69 (Scelle).

16 Vienna Convention on Consular Relations, 596 UNTS 261, art. 43(1).

17 See in particular, the ILC’s commentary on the different wording between article 43(1) and article 71(1) of the VCCR, ILCYB (1961), vol II, 127. The connection between two immunities is also recognised in State practice, see for example, Rubin, below n.43.

consular immunity constitute “relevant rules of international law” in the interpretation of the VCDR.<sup>18</sup> However, despite the similarities between the two immunities, it is worth pointing out that the functions of a consul are different from the functions of a diplomatic agent. As a result, consular immunity and diplomatic immunity *ratione materiae* have the same scope only with regard to the contents of the formula “in the exercise of”, viz. whether an act that has happened during the performance of a particular function can be regarded as “in the exercise of” that function. The distinction between the two immunities will be taken into account when analogy is made in the following sections.

## II. Acts performed “in the exercise of” diplomatic functions: arguments and assessment

7. The difficulty regarding the determination of immunity *ratione materiae* lies in the fact that the formula “in the exercise of” is open to many distinct interpretations. Whereas the broader interpretation would enclose anything performed in an official capacity into the protection of immunity *ratione materiae*, the narrower view holds that only strictly official acts should be covered by the immunity. These two interpretations will be assessed in turn.

### II.A. “Official acts” and “in the exercise of functions”: are they necessarily the same?

8. A central argument for proponents of the narrower view is that Article 39(2) of the VCDR, which uses the formula of “in the exercise of functions”, is the practical equivalent of Article 38(1) of the VCDR, which protects a serving diplomat with the nationality or permanent residency of the receiving State for “official acts performed in the exercise of his functions”.<sup>19</sup> The editor of *Satow’s Diplomatic Practice*, for example, points out that there is no difference of substance between Article 39(2) and Article 38(1) and that both articles exclude “incidental acts performed during the working day, or necessary for the conduct of life in the receiving State”.<sup>20</sup> In a similar vein, Dinstein indicates that, since Article 39(2) only protects acts in strict

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18 Vienna Convention on the Law of Treaties, 1155 UNTS 331, art. 31(3)(c).

19 VCDR, above n.4, art. 39(2) and art. 38(1).

20 Paul Gore-Booth (ed.), *Satow’s Guide to Diplomatic Practice* (5th edn., London: Longman 1979), 131.

application of diplomatic functions, the term “official acts” in Article 38(1) simply serves to clarify the meaning of the formula “in the exercise of functions”.<sup>21</sup>

9. But a critical assessment of the argument reveals that Article 38(1) is in fact narrower in scope than Article 39(2).

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

11. The original provision proposed by the Special Rapporteur in his first report provided that a diplomat who is a national of the receiving State enjoys only immunity from criminal proceedings.<sup>22</sup> But this provision proved unacceptable to most members of the ILC because full immunity from criminal jurisdiction was deemed too broad. As a result, two variants emerged. The restrictive one, championed by El-Erian, provided that a local diplomat should enjoy immunity only to the extent specifically granted by the receiving State.<sup>23</sup> The broader view, on the other hand, held that if a receiving State does not oppose the appointment of a local diplomat, it must grant the diplomat a certain degree of immunity to enable his or her performance of functions.<sup>24</sup>

12. The broader view later turned out to be favoured by the majority of the ILC members and the provision proposed by Verdross, which originally read “a diplomatic agent who is a national of the receiving State shall enjoy the privilege of immunity only in respect of acts performed in the exercise of his diplomatic functions”,<sup>25</sup> was accepted in principle. However, many members made their acceptance conditional on further drafting changes which would narrow down the scope of the provision. François, for example, stated that the

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21 Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione materiae*, 15 ICLQ (1966), 80-1. See also, Denza, above n.12, 441; Charles J. Lewis, *State and Diplomatic Immunity* (3rd edn., London: Lloyd’s 1990), 144; Jonathan Brown, *State Practice under the Vienna Convention on Diplomatic Relations*, 37 ICLQ (1988), 76; Wilfried Bolewski, *Diplomatic Privileges in Practice*, 78 Australian LJ (2004), 790.

22 ILCYB (1955), vol II, 12.

23 ILCYB (1957), vol I, 98, para.9 (El-Erian). See also, para.16 (François); para.24 (Tunkin).

24 *Ibid.*, 98, para.7 (Verdross); 126, para.22 (Sandström); 100, para.32 (Spiropoulos); 124, para.6 (Fitzmaurice); 126, para.28 (Bartos).

25 Verdross, *ibid.*

only reason he opposed Verdross's proposal was that it might lead to abuse.<sup>26</sup> For him, the formula "in the exercise of functions" was so broadly worded that it would even "preclude action being taken against a diplomatic agent who was guilty of criminal negligence when taking a communication from his mission to the ministry of foreign affairs by car".<sup>27</sup> The Special Rapporteur also pointed out in a similar vein that "acts performed in the exercise of his diplomatic functions" are broader in scope than "des actes de sa fonction diplomatique" (acts of his diplomatic function).<sup>28</sup> As a result, the phrase "official acts" was added to the redrafted version of Verdross's proposal; and the formula of "official acts performed in the exercise of functions" was later adopted by the Vienna Conference.

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

14. Further, the ILC justified the immunity in Article 38(1) on the ground that it is the "irreducible minimum" for a diplomatic agent to carry out functions satisfactorily<sup>29</sup>; but the same consideration did not feature in either the ILC discussion of, or its commentaries to, Article 39(2). An irreducible minimum of immunity seems to concern acts which are in strict application of diplomatic functions, for otherwise the effect would be as if a diplomat is not allowed to perform these functions. An incident between Iran and Australia may be recalled to illustrate this point. In 1983, Iran expelled two Australian diplomats from Tehran because they had "insulted the Iranian Constitution by insisting that women be photographed for visas and passports without their traditional headdress".<sup>30</sup> The Australian Government, holding that the policy on passports and visas was internationally recognised, expelled two Iranian diplomats in retaliation.<sup>31</sup> In this case, the very function of the diplomats was

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26 Ibid., 103, para.64 (François).

27 Ibid., 99, para.19 (François).

28 Ibid., 100, para.29 (Sandström).

29 Commentaries to draft article 30, ILCYB (1957), vol II, 141-2.

30 Donald W. Greig (ed.), *Australian Practice in International Law (1981-1983)*, 10 *Australian YIL* (1983), 507-9.

31 Ibid., 507.

to issue Australian visas in accordance with *Australian* laws. Thus, if the two Australian diplomats were Iranian nationals, Article 38(1) of the VCDR must be able to protect their acts in spite of the incompatibility between Australian visa regulations and the Iranian Constitution. If this were not the case, the effect would be that the diplomats were not allowed to perform the function of issuing visas, because they would be punished by the Iranian law for every single visa that they issued.

15. On the other hand, acts which merely *facilitate* the performance of diplomatic functions are likely to fall outside the scope of this “irreducible minimum”. These acts may benefit the performance of diplomatic functions; but non-immunity for them would not necessarily lead to the impossibility of performing functions.<sup>32</sup> Thus, immunity for these acts can hardly be perceived as “irreducible”.

16. Yet in State practice after the adoption of the VCDR, it is exactly these ancillary or incidental acts that are likely to be regarded by domestic courts as “in the exercise of functions”. In *Portugal v. Goncalves*, the Civil Court of Brussels, in holding that a Portuguese diplomat was in the exercise of his functions when he commissioned the plaintiff to provide translation service for the Portuguese Embassy,<sup>33</sup> indicated that “Article 3 [of the VCDR] sets out the general framework for diplomatic functions and must be interpreted as also covering all other incidental actions which are indispensable for the performance of those general functions listed in the Article”.<sup>34</sup> In the British case of *Abusabib v. Taddese*, the Employment Appeal Tribunal also held that Article 39(2) would apply if a former diplomat has employed a personal assistant to help him/her deal with official business.<sup>35</sup> In a similar case concerning consular immunity, the Italian Court of Cassation upheld the immunity of a Cameroon consul for a parking offence and pointed out, *inter alia*, that “in the exercise of functions” immunity covers not only acts in strict application of official functions, but also acts that are “closely linked” to the performance

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32 See, for example, *Querouil v. Breton*, 70 ILR 388 (Court of Appeal of Paris 1967), in which the Court of Appeal of Paris held that article 38(1) of the VCDR does not protect a diplomat from a dispute concerning the lease of his private residence.

33 This case concerns a serving diplomat. According to article 31(1)(c) of the VCDR, a diplomat would enjoy immunity for professional or commercial activities if the activities have been performed “inside” his or her official functions. VCDR, above n.4, art. 31(1)(c).

34 *Portugal v. Goncalves*, 82 ILR 117 (Civil Court of Brussels 1982).

35 *Abusabib v. Taddese*, [2013] ICR 603, para.23 (UK EAT 2012).



of these functions.<sup>36</sup> All these cases concern acts which may be said to facilitate the performance of official functions. Yet it seems clear that a lack of immunity for these acts would not result in a diplomat (or consul) being unable to perform his or her functions. This in turn suggests that, like the drafting history of Article 38(1), State practice also supports a broader scope of “acts performed in the exercise of functions”.

17. In fact, although the ILC did not state explicitly, in the context of the VCDR, that Article 38(1) is narrower in scope than Article 39(2), it did so several years later—in the context of consular immunity. Article 43(1) and Article 71(1) of the VCCR apply the same formulas as Article 39(2) and Article 38(1) of the VCDR; and the ILC made clear in its 1961 commentaries that the former is patterned on the latter.<sup>37</sup> With regard to the difference between the two formulas, it was pointed out in the commentary to Article 71(1) that,

Since the present article applies to the nationals of the receiving State, it uses, unlike article 43, the expression “official acts”, the scope of which is more restricted than the expression used in article 43: “acts performed in the exercise of consular functions”.<sup>38</sup>

In its commentary to draft Article 43 (on consular immunity), the ILC also indicated that it did not use the phrase “official acts” to qualify consular immunity because the phrase might be used to “weaken the position of” a consul.<sup>39</sup>

18. The government of Sweden in its comments to the 1961 Draft took note of the difference and argued that no discrimination should be made between consuls who are nationals of the receiving State and consuls who are not.<sup>40</sup> Netherlands also proposed during the Vienna Conference on Consular Relations to use the same wording for both articles.<sup>41</sup> However, neither suggestion was adopted and the different wording persisted.

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36 *Hesse v. Prefect of Trieste*, 77 ILR 610 (Italian Court of Cassation 1977).

37 ILCYB (1961), vol II, 127.

38 *Ibid.* An examination of the ILC discussions also reveals that ILC members were fully aware of the difference in scope between the two formulas when they drafted the text. See, for example, ILCYB (1961), vol I, 120, para.19 (Yasseen); 191, para.22 (Verdross).

39 ILCYB (1961), vol II, 117, para.3.

40 *Ibid.*, 159. Similar comments were also made by Philippines and Norway, see 154 and 151 respectively.

41 Official Records of the United Nations Conference on Consular Relations, vol I, 374, para.33.

19. The Italian Court of Cassation has on several occasions dealt with the difference between Article 43(1) and Article 71(1) of the VCCR.<sup>42</sup> In *Rubin v. Consul of the Republic of Panama*, the court held that the formula of “in the exercise of functions” contains, in addition to official acts *stricto sensu*, acts that are “etiologically connected with the consular functions”.<sup>43</sup> As a result, “Article 43 covers an area of activity more extensive than that which relates solely to ‘official acts’”.<sup>44</sup> The exact scope of the formula of “in the exercise of functions” will be dealt with in subsequent sections. For the sake of current discussion, however, the Italian court’s decision is clearly supported by the drafting history of both the VCDR and the VCCR.

20. The evidence above leads to the conclusion that, under the VCDR, an official/private distinction exists within the formula of “in the exercise of functions”. This in turn suggests that diplomatic immunity *ratione materiae* protects not only official acts *stricto sensu*, but also certain private acts ancillary or incidental to the performance of official acts.

## II.B. Rules of attribution of State responsibility as a standard for the determination of diplomatic immunity *ratione materiae*?

21. Proponents of the broader interpretation, on the other hand, often take the view that the determination of immunity *ratione materiae* should be aligned with the rules of attribution of State responsibility.<sup>45</sup> The latter rules are nowadays largely enshrined in the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>46</sup> Under the ARSIWA, acts

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42 Rubin, *infra*; See also, *Consul-General of Belgium in Naples v. Esposito*, 101 ILR 376 (Italian Court of Cassation 1986); *Church v. Ferraino and Others*, 101 ILR 370 (Italian Court of Cassation 1986).

43 *Rubin v. Consul of the Republic of Panama*, 77 ILR 594 (Italian Court of Cassation 1977).

44 *Ibid.*, 595.

45 Salmon, above n.12, 467-8. See also, Roger O’Keefe, *International Criminal Law* (OUP 2015), 433, 458; Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar 2012), 273. For similar arguments regarding consular immunity, see, for example, Bhagevutula S. Murty, *The International Law of Diplomacy: the Diplomatic Instrument and World Public Order* (New Haven 1989), 434-6.

46 ILCYB (2001), vol II, part two, 31-143. The ARSIWA itself is a combination of codification and progressive development of international law, but its customary law status has been repeatedly recognised in State practice since its adoption in 2001. For a compilation of decisions made by both domestic courts and international tribunals, see the UN Secretary-General’s 2007 report on responsibility of States for

performed by a State official “in an apparently official capacity, or under colour of authority” would be attributed to the State even if the official in acting as such “may have had ulterior or improper motives or may be abusing public power”.<sup>47</sup>

22. The “apparent authority” standard determines that *ultra vires* acts would also be attributed to the State.<sup>48</sup> In *Francisco Mallén (United Mexican States) v. United States of America*, questions arose as to the extent to which the US should be responsible for the two assaults committed by a Texan deputy constable against a Mexican consul.<sup>49</sup> The first assault happened on a Sunday night, when the deputy constable beat the consul after coming across him in the street. The second one took place in a street car operating between the Mexican city of Ciudad Juárez and the American city of El Paso. When the constable saw the consul on the car, he jumped on board and told the conductor that he would “get” the consul as soon as the car entered into Texas. Once the car crossed the frontier, the constable brutally struck the consul before taking him to the El Paso county jail. Both these assaults had been committed by the constable as a result of his personal aversion to the consul, which seemed to derive from the non-extradition by Mexico of a man who had been suspected of murdering the constable’s brother-in-law. Yet both the tribunal and the two States involved held the view that only the second assault could be attributed to the US. The constable’s showing of his badge to assert authority, as well as the detention of the consul at the local jail, had rendered the assault an act of the US even though the act seemed to be “a private act of revenge which was disguised”.<sup>50</sup> The first assault, on the other hand, was merely “a malevolent and unlawful act of a private individual who happened to be an official”.<sup>51</sup>

23. The “apparent authority” standard under the ARSIWA stresses the objective “link” between a State official and the State. It is irrelevant for the determination of the link whether the official has intended to fulfil his or her

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internationally wrongful acts, UN Doc A/62/62; UN Doc A/62/62 Add. 1. See also, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Reports 2007, 202, 207, 209, 211, 217.

47 ARSIWA, *ibid.*, 42, para.13.

48 ARSIWA, above n.46, art. 7.

49 *Francisco Mallén (United Mexican States) v. United States of America* (1927), UNRIIAA vol IV, 173-90.

50 *Ibid.*, 176-7, para.7.

51 *Ibid.*, 174, para.4.

functions, or whether the State has actually benefitted from his or her acts—as long as the formal nexus of “capacity” is established, all acts performed in that capacity would be attributed to the State.

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

25. Diplomatic agents are different. As representatives of the sending State, they are involved in all kinds of activities, ranging from providing medical service to the nationals of the sending State<sup>52</sup> to negotiating a treaty with the government of the receiving State,<sup>53</sup> such that it is difficult to determine whether an act has been performed in their official capacity. Whereas the US constable’s act of assaulting the Mexican consul in a street on Sunday can be easily regarded as a private act of revenge, an ambassador’s comments during a private dinner may well be taken as representing the political stance of the sending State and thus provoke harsh reaction on an interstate level.<sup>54</sup> This in turn highlights the difficulty with the “apparent authority” standard—in a broad sense, a diplomatic agent is always in an apparent authority; and the application of this standard would in effect render diplomatic immunity *ratione materiae* the equivalent of diplomatic immunity *ratione personae*.<sup>55</sup>

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

53 VCDR, above n.4, art. 3(1)(c).

54 See, for example, the Bernard incident, in which derogatory remarks against Israel made by the incumbent French Ambassador to the UK during a private dinner party triggered reactions by the office of the Israeli Prime Minister. Ewen MacAskill, *Israel Seeks Head of French Envoy*, *The Guardian*, 20 Dec 2011.

55 In a similar vein, Tomonori argues that if immunity *ratione materiae* (including that of diplomats and consuls) covers *ultra vires* acts, the immunity could potentially become the equivalent of full personal immunity. Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 *Denver JILP* (2001), 283.

26. The apparent authority test seems to have been applied by the Supreme Court of Austria in the case of *Heirs of Pierre S v. Austria*.<sup>56</sup> In ruling that the Austrian Ambassador to Yugoslavia was in the exercise of his functions when he accidentally shot dead the French Ambassador in an official hunt invited by the president of the receiving State, the court held that, since fostering personal contacts with the president of the receiving State is a condition for the exercise of the ambassador's function of representation, acts performed in fulfilment of and bearing "a sufficiently close internal and external relationship to" the condition must be regarded as in the exercise of functions and thus attributed to the sending State.<sup>57</sup>

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

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

29. During the 1957 ILC discussion on Article 39(2) (draft Article 25(2)) of the VCDR, Matine-Daftary proposed to replace "in the exercise of his functions" prescribed in the Special Rapporteur's draft with "during the exercise of his functions".<sup>58</sup> If this formula had been adopted, the effect would have been the same as the application of the "apparent authority" standard—that a former diplomat would enjoy immunity for all acts that have happened in the temporal scope of the "exercise of functions". However, this proposal was not supported by most members of the ILC. The response of the Special Rapporteur, in particular, suggests that the ILC members did not intend to give a former diplomat immunity for such a wide range of activities.<sup>59</sup>

30. An alignment between "apparent authority" and "in the exercise of functions" is not supported by post-VCDR State practice either. In *Baoanan*

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56 *Heirs of Pierre S v Austria*, 86 ILR 546 (Supreme Court of Austria 1982). In the British case of *Estrada v. Al-Juffali*, the court seems to take a similar view of article 38(1) when it held that the immunity protects a diplomatic agent "while" he or she is exercising his official functions. See *Estrada v. Al-Juffali*, [2017] 1 FLR 669, para.67 (UK CA 2016).

57 *Heirs*, *ibid.*, 548.

58 ILCYB (1957), vol I, 142, para.35 (Matine-Daftary).

59 The Special Rapporteur pointed out that "immunity should subsist *only* in respect of acts performed in the exercise of diplomatic functions". *Ibid.*, para.38 (emphasis added).

*v. Baja*, a domestic worker brought an employment-related action against her former employer, a Philippine diplomat who had left his post by the time of the proceeding.<sup>60</sup> The main question of the case was whether the employment of domestic service falls into the scope of “in the exercise of functions”.<sup>61</sup> The diplomat based his assertion of diplomatic immunity on two grounds: first, the employment benefitted not only his private life but also the Philippine mission, as the claimant had on occasions helped prepare and clean up diplomatic parties held inside the Philippine mission; second, the claimant was the only domestic servant working in the Philippine mission, and all the contracted services and alleged acts had happened inside the premises of the Philippine mission.<sup>62</sup> Both these points were nonetheless rejected by the court. Applying the principle proclaimed in *Swarna v. Al-Awadi*,<sup>63</sup> the court held that the tangential benefit of the employment to the Philippine mission was not sufficient to attract residual immunity under Article 39(2) of the VCDR.<sup>64</sup> With regard to the second ground, the court was of the view that the official appearance of the employment did not mean that the employment was in substance an act performed in the exercise of functions. What really mattered, according to the court, was the extent to which the employment had actually benefitted the Philippine mission.<sup>65</sup>

31. It is clear that the court’s interpretation of “in the exercise of functions” is much more restrictive than the “apparent authority” standard: not only was it necessary to establish an actual (as opposed to formal) connection between the act and the State, the connection itself must also be substantial (as opposed to tangential) in order to attract immunity. The same restrictive understanding of “in the exercise of functions” has also featured in other domestic cases concerning the application of Article 39(2) of the VCDR.<sup>66</sup>

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60 *Baoanan v. Baja*, 627 F. Supp. 2d 155 (US District Court of New York 2009).

61 The defendant was the Philippine representative to the United Nations who enjoyed diplomatic immunity. The court applied article 39(2) of the VCDR to render the judgment.

62 *Baoanan*, above n.60, 167.

63 *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (US District Court of New York 2009).

64 *Baoanan*, above n.60, 168.

65 *Ibid.*, 169.

66 See, for example, *Wokuri v. Kassam*, 152 ILR 557 (UK High Court Chancery Division 2012); *Al-Malki v. Reyes*, [2015] EWCA Civ 32 (UK CA 2015); *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122 (US District Court of Colombia 2009); *Abusabib*, above n.35.

32. State practice with regard to consular immunity also indicates that domestic courts, in determining whether an act has been performed in the exercise of functions, often consider elements that are completely alien to rules of attribution of State responsibility in ARSIWA. Thus, in *Gerritsen v. de la Madrid Hurtado*, the District Court of California, in granting consular immunity to two Mexican consuls who had verbally warned and threatened a protestor outside the Mexican Consulate, took into account the “subjective intent” of the consuls, the seriousness of the acts, and the actual benefits of the acts to consular functions.<sup>67</sup> Similarly, in *L v. The Crown*, the Supreme Court of Auckland rejected the immunity of a foreign consul who had indecently assaulted a woman who came to his office for renewal of her passport.<sup>68</sup> For the court, although the assault happened during the exercise of consular functions, “it was not one required of him in the exercise of his functions”.<sup>69</sup>

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

### III. Finding the middle ground: elements to be considered in the determination of diplomatic immunity *ratione materiae*

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

35. In the first place, the scope of the immunity has a direct bearing on the performance of diplomatic functions, which is primarily, though not exclusively, a concern of the sending State. For those serving subordinate members of an embassy who only enjoy immunity *ratione materiae*, the scope of the immunity has a direct impact on their ability to perform official functions without harassment. For a serving diplomatic agent who enjoys immunity

67 *Gerritsen v. Escobar Y Cordova*, 721 F. Supp. 253, 259 (US District Court of California 1988).

68 *L. v. The Crown*, 68 ILR 175 (Supreme Court of Auckland 1977).

69 *Ibid.*, 177.

*ratione personae*, on the other hand, the prospect of being sued in the receiving State may also have an impact on his or her performance of functions, especially if he or she plans to return to the receiving State after leaving the office.<sup>70</sup>

36. Meanwhile, the conclusion reached above—that a distinction can be made between official acts *stricto sensu* and other acts performed in the exercise of functions—suggests that certain extra-official activities, albeit not strictly diplomatic in nature, may nonetheless still be protected by immunity *ratione materiae*.<sup>71</sup> Thus, from the perspective of the sending State, the first inquiry concerning the determination of “in the exercise of functions” immunity is the extent to which private ancillary/incidental acts may be protected.

37. On other hand, however, it should be noted that underlying the very notion of diplomatic immunity is the presumption that the interests of ensuring an unimpeded performance of diplomatic functions outweigh the interests of holding a diplomatic mission member responsible in domestic law.<sup>72</sup> Reflected in the realm of diplomatic immunity *ratione materiae*, this presumption means that certain illegal ancillary/incidental acts may be tolerated because the interests of punishing the perpetrator do not match the damage caused to the performance of diplomatic functions by the punishment.

38. Yet this presumption is not absolute. There are cases in which the act of a mission member is so serious that the damage caused to the receiving State might outweigh the interests of ensuring the efficient performance of diplomatic functions. The VCDR recognises the legitimate interests of the receiving State in this regard. Thus in Article 41(1), the convention imposes an obligation to respect local laws on all persons enjoying immunities and privileges.<sup>73</sup> Similarly, according to Article 9(1), the receiving State may deal with any abuse of immunity by expelling the perpetrator.<sup>74</sup>

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70 Bröhmer also justifies the functional importance of article 39(2) by arguing that the immunity serves to guarantee the unrestricted exercise of diplomatic functions by succeeding diplomats in the receiving State. Jürgen Bröhmer, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*, 12 *Leiden JIL* (1999), 369.

71 Above Section II.A.

72 In the words of Grotius, “the security of ambassadors outweighs any advantage which accrues from a punishment”. Hugo Grotius, *De Jure Belli ac Pacis* (translated by FW Kelsey, Oxford: Clarendon Press 1925), 443. See also, Ruth Wedgwood, *Immunity and Prescription*, 14 *Yale JIL* (1989), 498-9.

73 VCDR, above n.4, art. 41(1).

74 VCDR, above n.4, art. 9(1).



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

40. These two perspectives will be addressed in turn.

### III.A. Private acts ancillary or incidental to the performance of functions

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

42. Further, with regard to certain functions, a seemingly ancillary or preliminary act may be crucial to the fulfilment of the functions themselves. Behrens, for example, points out that the diplomatic function of observation,<sup>75</sup> viewed in the light of Article 26 of the VCDR (freedom of movement),<sup>76</sup> necessarily implies that certain information-collecting activities must be allowed, for otherwise the function would be reduced to the meaningless exercise of passively receiving information.<sup>77</sup>

43. However, it should be noted that whether an act has been performed in the exercise of functions *in a general sense* is quite a distinct inquiry from whether an act has been performed in the exercise of functions *for the sake of immunity*. The question of immunity arises only when an act has (allegedly) violated local laws, and this fact itself has excluded a wide range of legal activities which can be regarded as in the exercise of functions *in a general sense*. Buying a newspaper is certainly indispensable for the fulfilment of the function of observation, but it is not an ancillary/incidental act that concerns immunity—nobody would argue that buying a newspaper is an illegal act. What if, however, the diplomatic agent refuses to pay for the newspaper? This is an act that is likely to raise the issue of immunity, but the underlying inquiry is completely different—here the inquiry is no longer whether buying a newspaper is an ancillary/incidental act necessary for the performance of functions, but whether the refusal of payment is such a necessary ancillary/incidental

75 VCDR, above n.4, art. 3(1)(d).

76 VCDR, above n.4, art. 26.

77 Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing 2016), 67.

act. In the context of immunity *ratione materiae*, the phrase “acts performed in the exercise of functions” has an implication of illegality; but this is simply not the case for acts performed in the exercise of functions *in a general sense*.

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

45. One prime example in this regard is traffic offences (including traffic accidents). The question whether a traffic offence can be perceived as an act performed in the exercise of functions has proved controversial within the ILC during the drafting stage of the VCDR,<sup>78</sup> among States at the two Vienna Conferences,<sup>79</sup> and in academic materials.<sup>80</sup> In the case of *Public Prosecutor v. A. d. S.F.*, the Supreme Court of Netherlands held, with regard to the immunity of a service staff member of the Italian Embassy who had driven under the influence of alcohol, that “driving a car may occur in the performance of the duties of a servant, in which case *acts contrary to road traffic provisions* are committed in the performance of such duties”.<sup>81</sup>

46. Yet it must be questioned whether this whole debate is misplaced in the first place. A traffic offence has various forms, and a traffic accident various causes, such that it is simply impossible to state, in a general manner, whether all of them can be regarded as in the exercise of functions or not. Clearly,

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78 The drafting history of article 38(1) of the VCDR seems to suggest that traffic accidents are protected under article 39(2) but not article 38(1), but the position of the ILC is not entirely clear, as most ILC members did not express opinions on this particular point. See above n.27 and text thereto.

79 During the 1961 Vienna Conference, the Italian representative, in explaining a joint amendment which sought to grant “in the exercise of functions” immunity to subordinate members of a diplomatic mission, stated that “traffic offences” are excluded from the immunity (See Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, vol I, 36, para.68). The amendment was partly adopted (with regard to civil immunity), but this statement on traffic offences was not discussed. The UK representative in the 1961 conference held the view that traffic accidents could be deemed as acts performed in the exercise of functions (Ibid., 171, para.9); but in the 1963 conference the UK representative indicated the opposite (Official Records of the 1963 conference, above n.41, 375, para.45).

80 For support of immunity, see Brownlie, above n.5, 361, Salmon, above n.12, 437. For opposite opinions, see Denza, above n.12, 416, Brown, above n.21, 77, Lewis, above n.21, 145, Satow’s, above n.20, 145.

81 *Public Prosecutor v. A. d. S.F.* (1975), reprinted at 7 Netherlands YIL (1976), 339 (emphasis added).

driving a vehicle to the Ministry of Foreign Affairs of the receiving State is *per se* an act performed in the exercise of official functions *in a general sense*. If, for example, an offence of speeding is committed by the diplomat during the trip, two scenarios can be roughly envisaged: firstly, the diplomat has slightly exceeded the speed limit in order to catch up with an urgent official meeting; secondly, the diplomat has no urgent matter to deal with but still chooses to drive at three times the speed limit for personal pleasure.

47. From a functional perspective, it seems reasonable to maintain a dividing line between the first and the second scenario. Whereas in the former case the diplomat's act of speeding seems necessary for him/her to attend the meeting punctually, in the latter scenario there is simply no need to violate local laws.

48. Yet for authors on both sides of the traffic offence argument, this line does not exist—as long as the diplomatic agent is driving to the Ministry of Foreign Affairs, he or she is either completely immune or completely not. Similarly, for the Supreme Court of Netherlands, no distinction can be made between a parking offence and a traffic accident that kills several pedestrians—the fact that driving a car is necessary for a servant's performance of duties means that any violation of road traffic regulations would attract immunity.<sup>82</sup>

49. But this dividing line is important, for it allows for a more detailed examination of the various forms of traffic offences. It is difficult to understand why a diplomat who has slightly exceeded road speed limits in order to attend an urgent meeting should be on an equal standing with a diplomat who is drunk while driving to an official task—indeed, in this latter case, it might even be argued that intoxication is detrimental to the performance of official functions and thus runs against the purpose of immunity.<sup>83</sup>

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82 Ibid.

83 With regard to drunk-driving, the US Department of State, in explaining its practice of submitting a (apparently) drunk diplomat to a breath test, stated that this measure is “preventative” and serves to protect the diplomat's own safety. See Circular Note of 3 July 1985, reprinted at Brown, above n.21, 82. In a 1982 memorandum concerning diplomatic immunities and privileges, the Legal Bureau of Canadian Government also pointed out that “it is generally recognised in international law and practice that the principle of inviolability of the diplomatic agent should not prevent the receiving State from taking measures as necessary for [...] the protection of the diplomat himself”. See Canadian Practice in International Law During 1982, 21 Canadian YIL (1983), 309. For German practice in the same direction, see Bolewski, above n.21, 793.

50. Further, it should not be forgotten that the functional necessity of immunity is counterbalanced by Article 41(1) of the VCDR. The obligation to respect local laws and regulations means that only when an illegal act is truly necessary for the performance of official functions can a diplomat be exempt from his or her obligation under the article. Therefore, instead of looking at general exceptions such as traffic accidents or acts incidental to daily life,<sup>84</sup> it seems better to evaluate whether, in each case, an ancillary/incidental act has actually benefited the performance of official functions directly.

51. This “direct benefit” test seems to be supported by State practice. Thus, in determining whether an act of employing domestic servants can be protected by Article 39(2) of the VCDR, the court in *Baoanan v. Baja* considered, inter alia, whether the plaintiff had been employed mainly to facilitate the functions of the Philippine mission.<sup>85</sup> In a similar vein, the US Court of Appeals held in *Park v. Shin* that, in order to be protected by consular immunity, an employment of domestic service must have “a direct, not an indirect, benefit to consular functions”.<sup>86</sup> With regard to traffic offence, the Supreme Provincial Court of Bavaria held in *Yugoslav Consul Immunity* case that a traffic offence would be protected by consular immunity if “the vehicle’s use is closely and materially connected with the effective safeguarding of consular functions”.<sup>87</sup>

52. However, this direct benefit test only addresses the matter from the perspective of the sending State. The main purpose of this test is to connect an ancillary/incidental act to the performance of functions, but it does not consider the interests of the receiving State. In practice, an ancillary/incidental act that directly benefits the performance of official functions may nevertheless produce very different consequences. The question is, therefore, whether a receiving State is entitled to evaluate immunity *ratione materiae* in light of the seriousness of an act.

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84 See *Tabion v. Mufti*, in which the US Court of Appeals held that “day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat’s official functions”. *Tabion v. Mufti*, 73 F. 3rd 535 (US CA 4th Cir. 1996), 539.

85 *Baoanan*, above n.60.

86 *Park v. Shin*, 313 F.3d 1138, 1143 (US CA 9th Cir. 2002).

87 *Yugoslav Consul Immunity Case*, 73 ILR 689 (Supreme Provincial Court of Bavaria 1973).

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

53. In literature and in practice, the argument that “in the exercise of functions” immunity should be determined by reference to the serious nature of an act takes several different forms. Cahier, for example, believes that any act that violates local laws should not be regarded as performed in the exercise of functions.<sup>88</sup> The UK Foreign Affairs Committee in its 1984 Report stated that terrorism and other criminal activities can never be justified by reference to diplomatic functions (in Article 3(1) of the VCDR).<sup>89</sup> In a 1977 case concerning consular immunity, the US court pointed out that, whereas a single criminal act may be perceived as “in the exercise of functions”, “a prolonged course of conduct flagrantly in violation of the criminal laws” can never be thus perceived.<sup>90</sup> Similarly, editors of *Oppenheim’s International Law* argue that, while serious crimes are certainly not to be regarded as in the exercise of functions, “there is more room for doubt where lesser offences are concerned”.<sup>91</sup>

54. In essence, all these arguments boil down to the statement that “the more serious an act, the less likely it is perceived as an act performed in the exercise of official functions”, although authors do not have consensus as to the degree of seriousness required for the deprivation of immunity.

55. To some extent, this statement is supported by State practice. In cases where immunity *ratione materiae* was upheld, the underlying act almost always concerned a less serious offence. Thus in *Propend v. Sing*, the British Court of Appeal upheld immunity under Article 39(2) of the VCDR for a

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88 Philippe Cahier, Vienna Convention on Diplomatic Relations, 37 *International Conciliation* (1967-1969), 35.

89 UK Foreign Affairs Committee, *The Abuse of Diplomatic Immunities and Privileges*, 1984/85 HC 127, para.16. The same opinion was expressed in a 1987 case concerning consular immunity, see *Gerritsen v. de la Madrid Hurtado*, 819 F. 2d 1511, 1517 (US CA 9th Cir. 1987). See also, Luke T. Lee, *Consular Law and Practice* (2nd edn., Oxford: Clarendon Press 1991), 497.

90 *Illinois Commerce Commission v. Salamee*, 54 Ill. App. 3d 465, 474 (Appellate Court of Illinois 1977).

91 Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law* (9th edn., Harlow, Longman 1992), 1145. Milhaupt also argues that criminal acts, in particular those which are *malum in se*, should never be protected by consular immunity, although the author recognises that in practice the criminal law of a receiving State may potentially conflict with an essential consular function. Curtis J. Milhaupt, *The Scope of Consular Immunity under the Vienna Convention on Consular Relations: Towards a Principled Interpretation*, 88 *Columbia LR* (1988), 861.

charge of contempt of court.<sup>92</sup> Similarly, in *Risk v. Halvorsen*, several Norwegian consular officials were granted consular immunity for an act of assisting Norwegian citizens to leave the US in violation of a court order.<sup>93</sup>

56. By contrast, immunity *ratione materiae* for serious offences have been invariably rejected by the receiving State, even if the crimes may have some connection with the official functions performed. For instance, the Court of Appeal of Brussels denied the diplomatic immunity *ratione materiae* of a chauffeur of the embassy of Mali who had killed his ambassador due to dissatisfaction with the working conditions, although the killing happened during the chauffeur's working hours.<sup>94</sup> Likewise, in rejecting the consular immunity of two US consuls who had committed the crime of abduction under the instruction of the sending State, the Italian Court of Cassation in *Abu Omar* ruled that a criminal operation cannot be regarded as acts performed in the exercise of consular functions.<sup>95</sup> For the court, consular functions had to be performed in accordance with the laws and regulations of the receiving State in most cases.<sup>96</sup> Since the act of the US consuls had constituted a "grave crime" under the Italian law, immunity must be rejected.<sup>97</sup>

57. States' attitudes towards immunity *ratione materiae* of ordinary State officials for serious violations of international law also indirectly demonstrate that serious offences cannot be regarded as official in nature for the sake of determining immunity. In their response to the ILC project on Immunity of State Officials from Foreign Criminal Jurisdiction, many States hold the view that crimes in international law cannot be protected by immunity *ratione*

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92 *Propend v. Sing*, 111 ILR 611 (UK CA 1997).

93 *Risk v. Halvorsen*, 936 F.2d 393 (US CA 9th Cir. 1991). On the question whether criminal activity can be perceived as the performance of a "discretionary function" which attracts the protection of State immunity under the US Foreign Sovereign Immunities Act, see Sienho Yee, *The Discretionary Function Exception under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?*, 93 Columbia LR (1993), 744-82. See also, *Gerritsen v. de la Madrid Hurtado*, concerning a verbal threat, above n.89. Cf. *Abu Omar*, concerning kidnapping, General Prosecutor at the Court of Appeals of Milan v. Adler and ors, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012), 29 November 2012; *L. v. The Crown*, concerning indecent assault of a woman, above n.68; *US v. Chindawongse*, concerning heroin distribution, *US v. Chindawongse*, 771 F.2d 840 (US CA 4th Cir. 1985).

94 *Ministère Public and Republic of Mali v. Keita*, 77 ILR 410 (Court of Appeal of Brussels 1977).

95 *Abu Omar*, above n.93, para.23.5. See also, *L. v. The Crown*, above n.68.

96 *Abu Omar*, above n.93, para.23.4.

97 *Ibid.*, para.23.3.

*materiae*,<sup>98</sup> even though certain crimes are by definition official acts.<sup>99</sup> Considering that the scope of diplomatic activity is even more limited than official acts in general, it is inconceivable that, in a convention which emphasises the importance of international peace and security and the promotion of friendly relations among States,<sup>100</sup> crimes such as torture or enforced disappearance could be taken as acts performed in the exercise of diplomatic functions.<sup>101</sup> In fact, an examination of the drafting history of Article 3(1) reveals that States at the Vienna Conference had consensus that diplomatic functions in general must accord with international law, although the phrase “within the limits permitted by international law” appears only in Article 3(1)(b) but not in other sub-paragraphs.<sup>102</sup>

58. On the whole, this tendency of not punishing minor offences seems justifiable from the perspective of the receiving State—as long as a minor offence is closely related to the performance of functions, it could be tolerated because the interests of leaving the mission member free from harassment outweigh the interests of punishing him/her for the act.

59. Yet this standard has its problems in practice.

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98 Spain, for example, made it clear that its domestic law on immunity no longer protects crimes of genocide, enforced disappearance, war crimes and crimes against humanity; Netherlands claimed that functional immunity does not extend to the commission of international crimes. Similar comments were also made by Poland, Czech Republic, UK, Germany, etc. Comments by governments can be found at: [legal.un.org/ilc/guide/4\\_2.shtml#govcoms](http://legal.un.org/ilc/guide/4_2.shtml#govcoms), accessed 25 May 2019. For a summary of different opinions expressed at the Sixth Committee, see UN Doc A/CN.4/713, paras.29-42.

99 Torture Convention, above n.2, art. 1(1). See also, International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, art. 2

100 VCDR, above n.4, preamble.

101 Although the threat of a mission member committing these crimes in the receiving State is real, as evidenced by the killing of Jamal Khashoggi in the Saudi consulate in Istanbul. BBC News, Jamal Khashoggi: All you need to know about Saudi journalist's death, 11 December 2018 ([www.bbc.com/news/world-europe-45812399](http://www.bbc.com/news/world-europe-45812399)), accessed 5 June 2019. It is to be noted that this argument is without prejudice to the availability/unavailability of immunity *ratione materiae* for these crimes in general international law, which is still subject to controversy both within the ILC and at the Sixth Committee.

102 The phrase was added to article 3(1)(b) during the Vienna Conference in order to reassure States which had been subject to illegal interference in pre-VCDR era that the function of protection would not be performed as a pretext of foreign interference. Official Records, above n.79, 80-1.

60. In the first place, this standard is only relevant to private ancillary/incidental acts directly related to official acts, but not to official acts themselves. A diplomatic mission member should not be deprived of immunity *ratione materiae* for strictly official acts, even if the acts performed may have seriously violated local laws. Thus, in the Iran-Australia incident mentioned above, the Australian diplomats' act of issuing visas in accordance with Australian visa regulations should always be regarded as "in the exercise of functions", even though, by asking Iranian women to take off their headdresses, the diplomats had seriously violated Iranian law.<sup>103</sup> In cases like this, diplomats may have to make the impossible choice between violating the law of the sending State and violating the law of the receiving State. Thus, any dispute in this regard should be resolved on an interstate level.

61. Secondly, using the serious nature of an act as a standard risks defeating the very purpose of immunity, which is to prohibit a court from looking into the substance of the case. If immunity *ratione materiae* is based on the *alleged* seriousness of an act, the immunity would be easily circumvented by *claiming* that the act concerned is serious. On the other hand, if immunity *ratione materiae* is based on the *actual* seriousness of an act, the court would have to examine the substance of the case in order to decide whether it has jurisdiction to examine the substance. This is typical circular reasoning, and would prove particularly difficult in criminal proceedings, where a defendant is presumed to be innocent until a verdict is rendered. In practice, however, it may be possible to resolve the problem by establishing some procedural safeguards (such as a proper standard of proof) to avoid frivolous suits against foreign mission members.<sup>104</sup> Following this line, whereas a mere allegation of the seriousness of an act which aims at circumventing immunity should certainly be dismissed, it remains possible that, if the allegation is well supported by evidence, the serious nature would have an impact on the determination of diplomatic immunity *ratione materiae*. The design of these procedural safeguards is obviously beyond the scope of this study. In her 7th report on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC Special Rapporteur sets out several procedural obligations (such as the obligation to notify and the obligation to consult) to prevent abusive exercise of criminal jurisdiction over foreign officials<sup>105</sup>

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103 Above n.30 and text thereto.

104 For a similar view, see Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 19 EJIL (1999), 261-2.

105 Concepción Escobar Hernández, 'Seventh report on immunity of State officials from foreign criminal jurisdiction', UN Doc. A/CN.4/729.



(add a footnote here and make corresponding changes to the footnote numbers below: Concepción Escobar Hernández, ‘Seventh report on immunity of State officials from foreign criminal jurisdiction’, UN Doc. A/CN.4/729), but it remains to be seen how the report would be received ultimately.

62. Thirdly, it is difficult to draw a line between serious matters and non-serious matters. An act that is criminal in one State may not be so in another, and even for the same crime, different States may prescribe distinct criminal punishments. The UK, for example, defines a serious crime as any offence that might carry a custodial sentence of over 12 months.<sup>106</sup> The US definition of serious offence, on the other hand, refers to “any felony”, “any crime of violence, such as an attack with a firearm or dangerous weapon”, and “driving under the influence of alcohol or drugs, which causes injury to persons”.<sup>107</sup> Australia, for its part, considers a grave crime “any offence punishable on a first conviction by imprisonment for a period that may extend to 5 years or by a more severe sentence”.<sup>108</sup>

63. The drafting history of Article 41(1) of the VCCR, which provides that a consular officer does not enjoy personal inviolability in case of a “grave crime”,<sup>109</sup> also illustrates the difficulty of finding an international standard of serious acts.

64. In the 1960 draft of the VCCR, the ILC proposed two variants with regard to the exception of personal inviolability.<sup>110</sup> The first variant provided that personal inviolability does not apply in case of an offence “punishable by a maximum sentence of not less than five years’ imprisonment”. The second variant used the term “grave offence” without defining its meaning. The first variant was later deleted from the draft because most States commenting on the draft held the view that, due to the difference between national legislations, a precise definition of grave offence was neither possible nor necessary.<sup>111</sup> During the Vienna Conference on Consular Relations, various

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106 Jacques Hartmann et al. (ed.), *United Kingdom Materials on International Law* (2014), 85 BYIL (2016), 530.

107 Margaret S. Pickering et al. (ed.), *Digest of United States Practice in International Law* (1989-1990) ([www.state.gov/documents/organization/139393.pdf](http://www.state.gov/documents/organization/139393.pdf)), 327-8, accessed 28 December 2018.

108 *Consular Privileges and Immunities Act 1972*, section 5(2)(d) ([www.legislation.gov.au/Details/C2016C01068](http://www.legislation.gov.au/Details/C2016C01068)), accessed 28 December 2018.

109 VCCR, above n.16, art. 41(1).

110 ILCYB (1960), vol II, 167-8.

111 See, for example, comments made by Netherlands, Switzerland, and the US, ILCYB (1961), vol II, 147, 162, 167 respectively.

amendments were made in order to provide a precise meaning of “grave crime”, but none received sufficient support.<sup>112</sup>

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

#### IV. Conclusion

66. The determination of diplomatic immunity *ratione materiae* is a complicated topic because diplomatic staff are involved in such a wide range of activities that it is usually difficult to delineate a clear boundary of “acts performed in the exercise of functions”. But the topic is also a sensitive one as it concerns the determination of the official nature of an act that is performed by one sovereign State on the territory of another. The overarching purpose of diplomatic immunity is to facilitate the performance of diplomatic functions. In practice, however, whether an act is truly necessary for the successful performance of functions is heavily dependent on the factual end of the case. This in turn suggests that, instead of using general standards (such as rules of attribution of State responsibility) or exceptions (such as acts incidental to daily life), it is better to provide some criteria through which the factual end of a case could be evaluated. Based on the analysis above, it is submitted that diplomatic immunity *ratione materiae* protects not only strictly official acts, but also certain private ancillary or incidental acts that are closely related to the performance of diplomatic functions. An ancillary or incidental act should be regarded as in the exercise of functions if it directly benefits the performance of diplomatic functions. Meanwhile, although the serious nature of an act is not per se a viable criterion, it is still an important factor to be considered in the determination of immunity *ratione materiae* because it serves as a potential safeguard of the interests of the receiving State.

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112 Brazil, for example, proposed defining a grave crime as one that carries a maximum term of five years; Yugoslavia, on the other hand, thought two years should be a better solution. See Official Records of the Vienna Conference on Consular Relations, above n.41, 80, 86 respectively.