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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis

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Abstract

This article explores the scope and nature of diplomatic immunity *ratione materiae* under the Vienna Convention on Diplomatic Relations (VCDR) by comparing this immunity with state immunity and immunity *ratione materiae* of ordinary state officials in general international law. It is argued that diplomatic immunity *ratione materiae* is distinct from immunity *ratione materiae* of ordinary state officials because 'functions' of a mission member should not be treated as 'state functions' in general but should be understood within the framework of Article 3(1) of the VCDR, which sets out the functions of a diplomatic mission as a whole. This means that the immunity cannot be upheld for serious violation of international law. On the other hand, diplomatic immunity *ratione materiae* is also different from state immunity both in scope and in nature. Therefore, the immunity must be understood as a unique concept which includes both the substantive issue of non-personal-liability and the procedural issue of immunity from jurisdiction. This hybrid nature of diplomatic immunity *ratione materiae* is the corollary of the functional emphasis of the Vienna Convention.

Keywords: diplomatic immunity; immunity *ratione materiae*; state immunity; substantive/procedural distinction; Vienna Convention on Diplomatic Relations

1. Introduction

In recent years, the increasingly strained relationship between immunity *ratione materiae* of state officials and serious crimes in international law has caused authors to reflect on the nature and theoretical premise of this immunity.[1] Immunity *ratione materiae* protects a state official from foreign court proceedings for official acts performed on behalf of the state. Traditionally, this immunity is regarded as an extension of state immunity which primarily servers the purpose of ensuring that a state is not indirectly impleaded by a proceeding against its officials.[2]

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[1]D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2011) 21 EJIL 815; R. van Alebeek, 'National Courts, International Crimes and the Functional Immunities of State Officials', (2012) 59 NILR 5; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', (2002) 13 EJIL 853; M. Frulli, 'On the Existence of A Customary Rule Granting Functional Immunity to State Officials and Its Exceptions: Back to Square One', (2015) 26 *Duke Journal of Comparative and International Law* 479.

[2]See commentary to Art. 2(1)(b)(v) of the Draft Articles on Jurisdictional Immunities of States and Their Property, 1991 YILC, Vol II (Part Two), at 18. See also, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] ICJ Rep. 177, at 242, para. 188; H. Fox, *The Law of State Immunity* (2008), at 708–9.

But the gradual separation of the two immunities in recent domestic jurisprudence[3] has featured the argument that immunity *ratione materiae* represents not only a procedural bar to the jurisdiction of the forum court but also a substantive exemption of individual liability.[4] As a result, immunity *ratione materiae* cannot be upheld for crimes which attract individual responsibility in international law, even though these crimes may be regarded as official in nature.[5]

It is not uncommon that reference is made to diplomatic immunity *ratione materiae* under the VCDR[6] when authors are dealing with immunity *ratione materiae* in general international law.[7] But the nature and scope of diplomatic immunity *ratione materiae* has received very little attention in literature. Very often this immunity is simply labelled as immunity for official acts.[8] Others equate the immunity with state immunity for the same reason that immunity *ratione materiae* in general international law is regarded as state immunity.[9] There is no denying that diplomatic immunity *ratione materiae*, immunity *ratione materiae* of ordinary state officials, and state immunity are closely related concepts. Indeed, diplomatic immunity *ratione materiae* for former diplomats under Article 39(2) of the VCDR merely represents the codification of a pre-existing general rule which grants (absolute) state immunity to all state officials when they have acted on behalf of their state.[10] Yet the exact extent to which these immunities are comparable has not been subject to detailed examination. This article explores the nature and scope of diplomatic immunity *ratione materiae* by examining whether, and if so, to what extent, this immunity is a concept distinct from state immunity and immunity *ratione materiae* of ordinary state officials.

There are four Articles under the VCDR which concern diplomatic immunity *ratione materiae*. Article 39(2) provides that a former diplomatic agent enjoys residual immunity for acts performed 'in the exercise of his functions as a member of the mission'.[11] Article 38(1), on the other hand, speaks of the immunity of an incumbent diplomat with the nationality or permanent residency of the receiving state for 'official acts performed in the exercise of his functions'.[12] Article 37(2) and (3) provide that subordinate members of a diplomatic mission enjoy immunity for acts performed 'in the course of their duties'.[13] Lastly, Article 31(1) grants immunity to otherwise non-immune activity if the activity has been performed 'on behalf of the sending state',[14] or inside a diplomat's official functions.[15]

Section 2 of this article deals with the preliminary problem in wording and discusses whether the formula 'in the exercise of functions' in Article 39(2) and Article 31(1)(c) are the practical equivalent of 'in the course of duties' in Article 37. Section 3 goes on to explore the relationship between diplomatic immunity *ratione materiae* and immunity *ratione materiae* of ordinary state

[3]*Samantar v. Yousuf*, 560 U.S. 305 (Sup.Ct. 2010); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. Cf. *Jones v. Saudi Arabia* [2006] UKHL 26.

[4]*Prosecutor v. Tihomir Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-17/1-T, Appeals Chamber, 29 October 1997, para. 38; Akande and Shah, *supra* note 1, at 826; Cassese, *supra* note 1, at 863.

[5]Alebeek, *supra* note 1, at 36; Cassese, ibid., at 864.

[6]1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95 (hereafter VCDR).

[7]Fox, *supra* note 2, at 709; R. O'Keefe, *International Criminal Law* (2015), at 453; H. F. van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', (1964) 13 ICLQ 1193, at 1206.

[8]C. J. Lewis, *State and Diplomatic Immunity* (1990), at 2; I. Brownlie, *Principles of Public International Law* (1998), at 361; Y. Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', (1966) 15 ICLQ 76, at 83; M. Buckley, 'The Effect of the Diplomatic Privileges Act 1964 in English Law', (1965) 41 BYIL 321, at 351.

[9]A. Aust, *Handbook of International Law* (2010), at 136; I. Roberts (ed.), *Satow's Diplomatic Practice* (2009), at 139.

[10]See commentary to Art. 18 of the Harvard Draft Convention on Diplomatic Privileges and Immunities, (1932) 26 AJIL 15, at 99 (hereafter Harvard Convention). See also Dinstein, *supra* note 8, at 79.

[11]VCDR, *supra* note 6, Art. 39(2).

[12]Ibid., Art. 38(1).

[13]Ibid., Art. 37(2) and (3).

[14]Ibid., Art. 31(1)(a) and (b).

[15]Ibid., Art. 31(1)(c).

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officials and examines whether the former is available for serious violation of international law. Section 4 concerns the relationship between diplomatic immunity *ratione materiae* and state immunity. It is argued that the two immunities are distinct both in scope and in nature. Section 5 provides the conclusion of this article.

2. Preliminary problems with wording

Under the VCDR, the majority of provisions concerning diplomatic immunity *ratione materiae* ties immunity to acts performed in the exercise of functions. Yet the wordings employed are not necessarily the same. Whereas Article 39(2) and Article 31(1) use the formula 'in the exercise of functions', Article 37(2) and (3) use 'in the course of duties' to denote immunity. There is a discussion in literature as to whether the two formulae are one and the same.[16] This section briefly examines the issue by looking at the drafting history of the articles and its subsequent state practice.[17]

2.1 Duties of a subordinate member

On its face, the formula 'in the course of duties' concerns not only the contents of 'duties', which are not defined under the VCDR, but also the question what constitutes an act performed 'in the course of' a particular duty?. The scope of 'duties' has received very little attention in literature, but in practice it has on occasion been interpreted in a rather restrictive manner. For instance, in a diplomatic note sent to the Canadian High Commission in Australia, the Australian Government commented on a case involving an administrative and technical staff member of the Canadian High Commission and stated that:

> Given that a member of the administrative and technical staff of a mission is defined in terms of the administrative and technical services he or she performs, it follows that immunity is accorded, "*only in respect of acts performed in the course of those administrative and technical services* . . . " [The employee] is entitled to immunity from the civil jurisdiction of the courts only in respect of those acts performed in the course of his administrative and technical duties.[18]

A priori this statement leads to a related argument that a service staff member enjoys immunity only for acts performed in the course of domestic service. But the problem is that, in practice, subordinate members of a diplomatic mission may well be required to perform tasks which do not pertain to their own duties *stricto sensu*. The purpose of immunity is not to facilitate the performance of the official duties of individual categories of mission staff, but to facilitate the performance of diplomatic functions *as a whole*.[19] This means that, under the VCDR, no meaningful distinction can be drawn between 'duties' of subordinate members and 'functions' of diplomatic agents. The manner in which diplomatic functions are carried out is largely a matter of internal administration of a foreign mission.[20] Thus, if a mission cook is instructed by the

[16]See *infra* notes 26 and 27.

[17]The formulae 'on behalf of the sending State' and 'official acts performed in the exercise of functions', provided for under Article 31(1)(a) and (b) and Article 38(1) respectively, are clearly captured by the formula 'in the exercise of functions' and will thus be examined in subsequent sections.

[18]S. Roberts, 'Australian Practice in International Law (1995)', (1996) 17 AYIL 345, at 381 (emphasis in original). Silva also seems to hold a similar view when he says that the difference between the duties of administrative and technical staff and that of service staff 'lies in the nature of their functions': G. E. D. N. Silva, *Diplomacy in International Law* (1972), at 146.

[19]VCDR, *supra* note 6, Preamble.

[20]As the ICTY Appeals Chamber indicated in *Blaskic*, 'customary international law protects the internal organization of each sovereign state: it leaves it to each sovereign state to determine its internal structure and in particular to designate the individuals acting as state agents or organs. Each sovereign state has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations . . . The general rule has been implemented . . . primarily with regard to . . . the fight of a state to demand for its organs functional immunity from foreign jurisdiction'. *Blaskic*, *supra* note 4, para. 41.

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ambassador to deliver an important document, or if a mission technician is tasked with processing some visa applications, the receiving state must recognize their diplomatic immunity *ratione materiae* even though the acts performed do not pertain to their respective duties in a strict sense, for it is the *process* of performing diplomatic functions that is protected, not the person who actually performs them.

This expansive reading of 'duties' echoes with the so-called 'unity of function' theory, which denies the existence of a rigid line between different categories of mission staff. This theory commanded wide support within the International Law Commission (ILC) at the drafting stage of Article 37;[21] it also embeds the Vienna Convention on Consular Relations (VCCR), which is largely patterned on the VCDR and which recognizes, in Article 43(1), that consular immunity extends to consular employees who, according to Article 1(1)(e), are employed in the administrative or technical service of a consular post.[22]

State practice after the adoption of the VCDR also seems to support this understanding of 'duties'. In cases where a subordinate member was either expelled or prosecuted, the acts involved almost invariably concerned those which would normally lead to an expulsion even if they were performed by a serving diplomat.[23] On the contrary, when a subordinate staff has performed some extra but acceptable duties for the mission, the receiving state's attitude has tended to be quite lenient. In a 1981 circular note addressed to the Chiefs of Missions in Washington DC, the US Department of State stated that those security personnel of foreign missions who perform 'both protective and administrative functions' will be lifted to the status of administrative and technical staff and thus enjoy the immunity under Article 37(2).[24] Given the US Government's willingness to grant full immunity from criminal proceedings to those who perform both the duties of service staff and the duties of administrative and technical staff, it seems unlikely that a US court would deprive a security staff member of his or her immunity simply because he or she has performed an administrative duty on an *ad hoc* basis. Indeed, the post-VCDR practice of concluding bilateral agreements to extend full immunity to all mission members is strong evidence that states do not treat 'duties' of subordinate members and 'functions' of diplomatic agents differently, for if a mission member is only allowed to perform his or her specific duties, full immunity is hardly necessary from a functional perspective.[25]

2.2 Relationship between 'in the course of' and 'in the exercise of'

More controversial in literature, however, is the relationship between 'in the course of' and 'in the exercise of'. Unlike authors who treat the two formulas as the same,[26] authors who uphold a broader scope of 'in the course of duties' immunity often argue that, in addition to strictly official acts, the formula also covers incidental acts such as driving to an appointment or renting accommodation in the receiving state.[27]

[21]1957 YILC, Vol I, at 128, para. 67 (Sandström), para. 70 (Spiropoulos), para. 65 (Fitzmaurice), para. 69 (Yokota).

[22]1963 Vienna Convention on Consular Relations, 596 UNTS 261, Art. 1(1)(e) (hereafter VCCR).

[23]See, for example, 'India Expels Pakistani Embassy Worker for Espionage', *Agence France Presse*, 25 October 2006; E. A. Roy, 'US Diplomat Ejected from New Zealand after Police Fail to Get Immunity Waived', *Guardian*, 19 March 2017.

[24]M. N. Leich (ed.), *Cumulative Digest of United States Practice in International Law (1981-1988)* (1993), at 914.

[25]For bilateral agreements concluded between the US and other states see ibid., at 1047, 1164–8. For British practice see L. Frey and M. Frey, *The History of Diplomatic Immunity* (1999), at 490.

[26]Brownlie, *supra* note 8, at 361–2; J. Salmon, *Manuel de Droit Diplomatique* (1994), at 391, 437; C. A. Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', (1992) 41 ICLQ 848, at 853–4; C. E. Wilson, *Diplomatic Privileges and Immunities* (1967), at 161.

[27]J. Brown, 'Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations', (1988) 37 ICLQ 53, at 77; Roberts, *supra* note 9, at 165; E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (2016), at 333.

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The formula of 'in the course of duties' was first proposed by Ago during the ILC 1957 discussion of the topic.[28] The purpose of the formula is to replace an earlier amendment submitted by Bartos, which stated that subordinate members should enjoy immunity for 'acts performed in the exercise of their functions in the mission'.[29] Ago held the view that his formula was broader in scope than Bartos' formula.[30] Bartos, on the contrary, thought that Ago's formula merely clarified, rather than expand, his own formula.[31] Despite this apparent disagreement, the ILC adopted Ago's proposal without much discussion. As a result, when the article was presented to states at the Vienna Conference, no consensus existed on the accurate meaning of the formula 'in the course of duties'.

State delegates at the Vienna Conference did not specifically discuss the meaning of the formula. Yet there was a strong indication, from comments made and amendments submitted during the meeting, that states had understood 'in the course of duties' and 'in the exercise of functions' to mean the same. A 19-state amendment for which Italy, represented by Ago, was a sponsor, sought to limit subordinate members' immunity from jurisdiction to 'acts performed in the exercise of their functions'.[32] A three-state amendment, on the other hand, spoke of 'in the course of duties' immunity for those subordinate members who do not perform confidential duties.[33] Yet, in spite of the difference in wording, states from both camps supported each other's amendment to the extent that the amendment restricted immunity to acts relating to official duties.[34]

At a later stage, a ten-state amendment sought to strike a compromise between the 19-state amendment and the text adopted by the Committee of the Whole (which granted full diplomatic immunity for all subordinate members) by providing for 'in the course of duties' immunity from civil and administrative proceedings only.[35] The difference in wording did not provoke any dispute throughout the discussion; quite the contrary, some states observed in clear terms that they understood the two formulas as referring to the same range of activity.[36] The representative of Soviet Union, in particular, pointed out that 'in the course of duties' immunity is 'precisely' the purpose of the 19-state amendment (which used the formula of 'in the exercise of functions').[37] The ten-state amendment was finally adopted by the conference and became Article 37(2).

In considering the topic of Status of the Diplomatic Courier, the ILC also took the chance to shed light on the relationship between 'in the course of duties' and 'in the exercise of functions'. In its commentary to Article 18(2) of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, which grants diplomatic couriers immunity *ratione materiae* for acts performed in the exercise of functions, the ILC indicated that this formula takes the same functional approach as the formula of 'in the course of duties' under Article 37(2) of the VCDR, which excludes, *inter alia*, acts such as 'the renting of a hotel room'.[38]

The better understanding, therefore, seems to be that the formula 'in the course of' is the equivalent of 'in the exercise of'. In addition to the conclusion drawn under Section 2.1, this means that, in spite of the distinct wording, the formulae for diplomatic immunity *ratione materiae* under Article 31(1)(c), Article 37(2) and (3), and Article 39(2) are essentially the same. The scope and nature of this immunity will be explored next.

[28]1957 YILC, Vol I, at 133, para. 53 (Ago).
[29]Ibid., at 130, para. 9 (Bartos).
[30]Ibid., at 133, para. 53 (Ago).
[31]Ibid., at 133, paras. 57, 59 (Bartos).
[32]UN Doc. A/CONF.20/L.13 and Add.l, at Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vol II, at 77.
[33]UN Doc. A/CONF.20/L.9/Rev.l, ibid., at 76–7.
[34]Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vol I, at 32, paras. 40, 44.
[35]UN Doc. A/CONF.20/L.21 and Add.2, at Official Records of Diplomatic Conference, *supra* note 32, Vol II, at 78.
[36]Official Records of Diplomatic Conference, *supra* note 34, Vol I, at 39, para. 37 (Soviet Union); at 47–8, para. 8 (Vietnam).
[37]Ibid.
[38]1989 YILC, Vol II (Part Two), at 30, paras. 6–7.

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3. Diplomatic immunity *ratione materiae* as a distinct concept from immunity *ratione materiae* of state officials in general international law

3.1 Diplomatic functions are not state functions

Immunity *ratione materiae* of individuals (diplomatic staff or ordinary state officials) generally protects acts performed in the exercise of official functions. Thus, for authors who understand diplomatic immunity *ratione materiae* as the equivalent of immunity *ratione materiae* in general international law, the former protects not only performance of diplomatic functions prescribed under Article 3(1) of the VCDR, but also acts following instruction of the sending state[39] or acts which are in general attributable to the sending state in accordance with rules of attribution of state responsibility.[40] However, the term 'official functions' may entail distinct meanings and theoretic underpinnings in different contexts. For acts performed by a state agent in his or her home state, official functions are the equivalent of 'state functions',[41] and immunity *ratione materiae* attached to these functions is in effect based on the sovereignty of the state over its own territory. Diplomatic immunity (as a whole), on the other hand, is based on consent. In essence, this immunity constitutes a voluntary concession of part of the receiving state's jurisdiction which is made in order to facilitate the performance of functions *recognized* by that state.[42] This element of recognition means that the receiving state would have much more say on the scope of 'official functions' than is the case when an official act has been performed in the territory of a foreign state; and a survey of post-VCDR practice suggests that, in assessing the nature of activities of a foreign mission or mission member, receiving states tend to maintain a distinction between diplomatic functions on the one hand and other official functions of the sending state on the other. Thus, in *Re P*, the British Family Court rejected diplomatic immunity *ratione materiae* of a former US diplomat who had been accused by his wife of illegally transferring their children from the UK to the US.[43] For the court, although the transfer was in response to a direct order from the US government and thus governmental in character, it cannot be regarded as 'in fulfilment of a diplomat's functions' under Article 39(2) of the VCDR.[44] In a similar vein, the US government stated in a circular note to diplomatic missions in Washington D.C. that it would no longer recognize the diplomatic status of those accredited diplomats who mainly act as a representative of the state to an international organization, because the functions performed by them are 'necessarily collateral and subordinate to' their diplomatic functions.[45] Article 3(1) of the VCDR sets out the contents (and limits) of the licence for a sending state to conduct official business in the receiving state. Therefore, it is only logical that the scope of 'official functions', and hence the scope of diplomatic immunity *ratione materiae*, is interpreted in accordance with the article. Indeed, for drafters of the VCDR, Article

[39]J. R. Crawford, *Brownlie's Principles of Public International Law* (2012), at 408. Denza's position is less clear in this respect. In the context of Art. 31(1)(c) of the VCDR, which provides that a diplomat does not enjoy immunity for commercial or professional activity performed 'outside his official functions', Denza takes the view that a diplomat's functions should be broader in scope than Art. 3(1) and encompass any superior instruction as long as such instruction does not exceed the 'bounds of proper activity'. In the context of Art. 39(2), however, she states that reference should be made to Art. 3(1): Denza, *supra* note 27, at 254, 364.

[40]Salmon, *supra* note 26, at 465. For a discussion of the applicability of rules of attribution of state responsibility for the determination of diplomatic immunity *ratione materiae* see X. Shi, 'Official Acts and Beyond: Towards an Accurate Interpretation of Diplomatic Immunity Ratione Materiae under the Vienna Convention on Diplomatic Relations', (2019) 18 *Chinese Journal of International Law* 669, at 678.

[41]According to draft Arts. 2(f) and 6 provisionally adopted by the ILC in the project 'Immunity of State Officials from Foreign Criminal Jurisdiction', immunity *ratione materiae* protects acts performed 'in the exercise of State authority'. The ILC explains that 'State authority' refers generally to 'acts performed by State officials in the exercise of their functions'. UN Doc. A/71/10, at 355.

[42]R. Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', (1985) 79 AJIL 641, at 641.

[43]*P (Diplomatic Immunity: Jurisdiction), Re*, [1998] 2 FCR 525.

[44]Ibid.

[45]M. L. Nash (ed.), *Digest of United States Practice in International Law 1978* (1980), at 537.

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3(1) is necessary exactly because it provides guidance for the determination of diplomatic immunity *ratione materiae*.[46]

It is true that the five main functions listed in the article may not, on their face, capture all official duties performed by diplomatic agents in the sending state. But it must be noted that, rather than prescribing an exhaustive list of specific functions, the very purpose of the article is to establish a general framework which sets out core diplomatic functions but leaves states to figure out the details in practice.[47] Further, some of the five main functions, if properly interpreted, are entirely capable of enclosing ordinary official functions of diplomatic agents. Thus, in *Arab Republic of Egypt* v. *Gamal-Eldin*, the English Employment Appeal Tribunal held that the functions performed by the medical office of the Egyptian Embassy fall into the remit of Article 3(1) because the office had acted as a representative of the sending state.[48] Unlike state functions in general international law, diplomatic functions as explained in this section are in essence a *consensual* concept subject to constant exchange of views between the two states. Article 3(1) as a framework is entirely efficacious in accommodating the flexibility inherent in the concept. But it also, as it will be explained below, serves the important purpose of circumscribing the scope of diplomatic immunity *ratione materiae*, in particular with regard to serious violations of international law.

3.2 Diplomatic immunity ratione materiae is not available for serious violation of international law

Current debate concerning the relationship between immunity from jurisdiction and serious violations of international law has mostly focused on immunity *ratione materiae* of ordinary state officials. Since the landmark decision by the British House of Lords in *Pinochet*, more and more states and authors are now in favour of an exception to the immunity based on violations of international criminal law or human rights law.[49] Yet there does not seem to be sufficient (or consistent) state practice in support of such an exception.[50] Thus, the draft Article 7 proposed by the ILC Special Rapporteur, which sets out several exceptions to immunity *ratione materiae*,[51] has been subject to great controversy both within the ILC and at the Sixth Committee.[52]

Underlying this controversy is a lack of consensus on whether 'state functions' (or 'state authority') may entail serious violations of international law, which are usually committed in an official capacity. In the context of diplomatic law, however, the link between diplomatic immunity *ratione materiae* and Article 3(1) of the VCDR is crucial to ensuring that this immunity can never be upheld for these violations.

In the first place, Article 3(1) has an in-built mechanism for preventing abuses. Although the text of the article suggests that only the function of protection under Article 3(1)(b) has a requirement of compliance with international law, an examination of the drafting history of the article reveals that state parties at the Vienna Conference generally agreed that all diplomatic functions must accord with international law.[53] The purpose of the phrase, 'within the limits permitted by international law', in Article 3(1)(b), which was not added to the Article until the Vienna

[46]1957 YILC, Vol I, at 50, para. 63 (El-Erian), para. 71 (Zourek).

[47]ILC commentary to the 1958 draft of Art. 3(1), 1958 YILC, Vol II, at 90.

[48]*Arab Republic of Egypt v. Gamal-Eldin*, 104 ILR 673 (Employment Appeal Tribunal of England 1995).

[49]Comments from states can be found at legal.un.org/ilc/guide/4_2.shtml#govcoms.

[50]For an assessment of state practice see S. D. Murphy, 'Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?', (2018) 112 *AJIL Unbound* 4.

[51]C. E. Hernández, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction', UN Doc. A/CN.4/701, at 99.

[52]For a summary of ILC debate see UN Doc. A/72/10. For a summary of debate at Sixth Committee see UN Doc. A/CN.4/713.

[53]See, e.g., the statement made by the representative of Soviet Union, France, Tunisia, United Kingdom, United States, Hungary, Official Records of Diplomatic Conference, *supra* note 34, Vol I, at 80–1.

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Conference,[54] is to reassure states which had been subject to illegal interference in the pre-VCDR era that the function of protection would not be performed as a pretext of foreign interference; it does *not* imply that other functions need not to fall inside the remit of international law. In light of the Preamble of the VCDR, which emphasizes the importance of the maintenance of international peace and security as well as the promotion of friendly relations among states, it would be difficult to argue that serious violations of international law could be interpreted as one of the functions of a diplomatic mission.

Further, if an act violates a *jus cogens* prohibition, it would be impossible to recognize diplomatic immunity *ratione materiae* because the recognition would bring Article 3(1) of the VCDR into direct conflict with the *jus cogens* rule. As explained above, Article 3(1) is a framework within which specific diplomatic functions can be developed. Since the scope of diplomatic immunity *ratione materiae* is linked to the framework, the process of determining immunity is simultaneously a process of (re)interpreting the scope of Article 3(1). For instance, if a diplomat has tortured a political dissident in the mission premises under the instruction of the sending state,[55] the precondition of granting diplomatic immunity *ratione materiae* is that Article 3(1) is interpreted as encompassing official torture. Similarly, for an ambassador who has negotiated with the receiving state to conspire to commit genocide to enjoy diplomatic immunity *ratione materiae*,[56] the function of negotiation under Article 3(1)(c) must be interpreted as permitting complicity in genocide.

On the other hand, however, the very legal effect of *jus cogens* rules is that conflicting treaty provisions would be invalidated.[57] This means that Article 3(1) cannot be interpreted in a way that contradicts *jus cogens* rules.[58] Therefore, diplomatic immunity *ratione materiae*, which is determined by reference to Article 3(1), cannot be upheld in case of violation of *jus cogens*. Immunity from jurisdiction has in the past been labelled as a procedural construct which does not conflict with the substantive prohibition of *jus cogens*.[59] However, when the scope of immunity directly hinges upon the contents of a substantive treaty provision setting out official functions, and when these functions have an inherent 'legal' element, one may wonder whether the procedural/substantive distinction is as clear-cut as it is in cases relating to state immunity[60] or immunity *ratione personae*.[61] For the sake of this section, however, it suffices to conclude that diplomatic immunity *ratione materiae*, as a distinct concept from immunity *ratione materiae* of state officials in general international law, is not available in cases concerning serious violations of international law.

[54]Following an amendment proposed by Mexico, UN Doc. A/CONF.20/C.1/L.33, at Official Records of Diplomatic Conference, *supra* note 32, Vol II, at 11. Explaining the amendment, the Mexican representative stated, *inter alia*, that 'the Mexican amendment was intended not to alter but to clarify the concept'. Ibid., Vol I, at 80.

[55]A similar situation can be found in the brutal killing of Saudi journalist Jamal Khashoggi in the Saudi consulate in Istanbul; see A. Callamard, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi', UN Doc. A/HRC/41/CRP.1. For the *jus cogens* nature of the prohibition of torture see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 422, para. 99.

[56]For the *jus cogens* nature of the prohibition of genocide see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, [2006] ICJ Rep. 6, para. 64.

[57]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.

[58]See, on this point, Conclusion 42 of the ILC study on the Fragmentation of International Law, 2006 YILC, Vol II, Part Two, at 184, para. 42.

[59]*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99, para. 93. For the substantive aspect of diplomatic immunity *ratione materiae* see below Section 4.2.

[60]Ibid.

[61]*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, para. 60.

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4. Diplomatic immunity *ratione materiae* as a distinct concept from state immunity

There is no denying that diplomatic immunity *ratione materiae* and state immunity are closely related concepts. Sending states perform official functions in the receiving state through individual mission members. In order to prevent the official acts of a sending state from being scrutinized by the receiving state, it is natural that state immunity is extended to the protection of mission members when they act on behalf of the sending state. Thus, immunity *ratione materiae* under the VCDR has been perceived as not strictly pertaining to diplomatic immunity but are in fact state immunity itself.[62] However, a detailed examination of the drafting history of the VCDR and subsequent state practice reveals that the two immunities are distinct both in scope and in nature.

4.1 Difference in scope

4.1.1 Diplomatic immunity ratione materiae covers not only official acts but also private incidental acts

The transition from traditional absolute immunity theory to restrictive immunity theory means that state immunity in current international law is to a large extent dependent on the nature of an act. The principle *par in parem non habet imperium* has been interpreted as granting immunity for acts of sovereign nature (*acta jure imperii*) but not acts of private nature (*acta jure gestionis*). In practice, an important standard for domestic courts in their determination of *acta jure imperii* and *acta jure gestionis* is whether the act concerned may also be performed by a private person. As the US Supreme Court indicated in *Republic of Argentina* v. *Weltover*, what matters is not the aim of an act but its nature as the '*type* of actions by which a private party engages in "trade and traffic or commerce"'.[63] Based on this reasoning, Argentina's act of issuing bonds as part of its currency stabilization plan were taken as commercial in character and thus denied immunity. For those who treat immunity *ratione materiae* of individual officials as state immunity itself, the central argument is that 'official acts' covered by the former are the practical equivalent of *acta jure imperii* covered by the latter.[64]

There is no doubt that diplomatic immunity *ratione materiae* overlaps to a great extent with state immunity in respect of acts in strict application of diplomatic functions. But diplomatic immunity *ratione materiae* covers not only official acts *stricto sensu* but also certain private incidental acts performed in the exercise of diplomatic functions. A comparison between Article 38(1) of the VCDR, which provides that a diplomatic agent with the nationality or permanent residency of the receiving state enjoys immunity for 'official acts performed in the exercise of his functions'[65] and Article 39(2) evinces that an official/private distinction exists within the formula 'in the exercise of functions'. At the drafting stage of the two articles, three formulas had emerged in the ILC discussion. The first one, 'in the exercise of functions', was proposed by Verdross to denote the immunity under Article 38(1) but was later replaced by the more qualified formula of 'official acts performed in the exercise of functions', in order to allay the concern of certain members that the former formula is susceptible to abuse.[66] On the other hand, a third formula, 'during the performance of functions', which appears to cover all acts performed while a diplomat is on duty, was proposed to denote the immunity of former diplomats but was rejected for being too broad.[67] Therefore, acts performed 'in the exercise of functions' seem to situate somewhere between official acts *stricto sensu* at the one end and all acts performed during the performance of functions at the

[62]L. Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations* (1988), at 202–3.

[63]*Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (Sup.Ct. 1992), at 614.

[64]See, for instance, commentaries to Art. 2(1)(b)(v) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 1991 YILC, Vol II, Part Two, at 18, para. 18.

[65]VCDR, *supra* note 6, Art. 38(1).

[66]1957 YILC, Vol I, at 103, para. 64 (François).

[67]Ibid., at 142, para. 35 (Matine-Daftary).

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other. This means that diplomatic immunity *ratione materiae* protects, in addition to *acta jure imperii*, certain private acts ancillary or incidental to the performance of official functions.

In practice, official acts and private incidental acts can be distinguished by examining whether an alleged illegality derives from the official function itself or from the private wrongdoing of the diplomat. For instance, a diplomat cannot be sued for rejecting the visa application of a citizen of the receiving state because (non)issuance of visas is *per se* an official function. However, if the diplomat verbally attacked the applicant while reviewing the application, diplomatic immunity *ratione materiae* would then depend on whether the verbal attack, which is in essence a private act of the diplomat, can be assimilated into the performance of the official function. If it can, it would then be protected by immunity as a private incidental act. Otherwise, it would be taken as an unprotected private act performed 'during the performance of functions'.

How then, should diplomatic immunity *ratione materiae* for private incidental acts be determined? In the first place, it must be noted that, unlike immunity *ratione materiae* for official acts *stricto sensu*, which broadly corresponds to state immunity for *acta jure imperii* and is thus based on the principle *par in parem non habet imperium*, diplomatic immunity *ratione materiae* for private incidental acts is based solely on the principle of functional necessity. Disputes concerning these private acts should, by any measure, be properly adjudicated in the receiving state. The only reason that this is not so is because exercise of jurisdiction may disrupt the smooth performance of diplomatic functions. In this sense, diplomatic immunity *ratione materiae* for private incidental acts is similar to personal diplomatic immunity for private acts.

However, whereas the functional necessity principle has been translated into the almost absolute nature of personal diplomatic immunity along the logic that exposure to court proceedings in the receiving state is per se sufficient to disrupt a diplomat's performance of functions, the VCDR provides no guidance as to how this principle may be applied to determine diplomatic immunity *ratione materiae* for private incidental acts, in particular considering that those who enjoy this immunity may well be exposed to court proceedings for purely private activities. This leaves wide discretion for domestic courts to assess whether a private incidental act may be covered by immunity. A survey of post-VCDR practice reveals, however, that national courts, in determining diplomatic immunity *ratione materiae*, generally examine whether a private incidental act is closely connected to the official function performed, although they may choose to lay emphasis on distinct aspects of the connection. Thus in *Abusabib* v. *Taddese*, the British Employment Appeal Tribunal indicated, with respect to an employment dispute between a Sudanese diplomat and his domestic servant, that the test is whether the employee is mainly tasked with helping the diplomat deal with official business.[68] By comparison, the Court of Appeal of Brussels, in denying the diplomatic immunity *ratione materiae* of a mission chauffeur who had killed his ambassador due to dissatisfaction with the working conditions, pointed out that the act was neither a 'natural consequence' of his duties nor performed in furtherance of the mission's interests, although it happened on the premises of the embassy during the chauffeur's working hours, and despite the sending state (Mali) officially claiming immunity on his behalf.[69] Whether there is a close connection between a private incidental act and the function performed is nonetheless heavily dependent on the factual end of a case. An act of speeding, for instance, may be taken as 'in the exercise of functions' if it is necessary for a diplomat to attend an urgent meeting but as purely private act if no such necessity exists. Viewed from this perspective, academic debate on whether specific categories of activities may or may not be covered by diplomatic immunity *ratione materiae* seems to have missed the point.[70] By their very nature private incidental acts are not subject to general conclusion.

[68]*Abusabib v. Taddese*, (2013) ICR 603, para. 31.

[69]*Ministère Public and Republic of Mali v. Keita*, 77 ILR 410 (Court of Appeal of Brussels 1977), at 411–12.

[70]For instance, authors dispute whether violation of traffic regulations can be covered by diplomatic immunity *ratione materiae*. Brownlie, *supra* note 8, at 361; cf. Denza, *supra* note 27, at 339.

On the other hand, the importance of this discretion lies in the fact that it allows domestic courts to engage in a weighing of conflicting interests while determining immunity, an exercise which is usually not permitted in cases concerning personal diplomatic immunity or diplomatic immunity *ratione materiae* for strictly official acts. This would prove particularly useful when serious offences are concerned. Unlike the VCCR, which clearly prescribes that certain consular functions must accord with local law,[71] nothing in the VCDR prevents serious acts from being covered by immunity *ratione materiae*. Article 41(1) imposes an obligation to respect local laws and regulations on foreign mission members, but this obligation is without prejudice to their privileges and immunities.[72] Like state immunity in general, the seriousness of an official act *stricto sensu* should not affect the determination of diplomatic immunity *ratione materiae*, so long as the official function performed does not exceed the limits of Article 3(1).[73] For private incidental acts, however, domestic courts, in exercising their discretion, may well balance the benefit to performance of diplomatic functions accrued through the granting of immunity against the damage done to the victim or the society as a whole. This does not mean, of course, that a mere allegation by the plaintiff is sufficient for the court to reject diplomatic immunity *ratione materiae*, but it does suggest that, when an allegation is corroborated by credible evidence, minor offences are much more likely to be covered by immunity than serious offences.[74] In recent years, domestic servants of foreign diplomats have brought suits in the receiving state against their employers for employment-related disputes which sometimes concern serious offences such as human trafficking.[75] These suits invariably involve diplomatic immunity *ratione materiae* under Articles 31(1)(c) and 39(2) of the VCDR.[76] With regard to the formula 'in the exercise of functions', courts have consistently held that employment of domestic servants, who mainly perform household chores, does not have a close connection with the official functions of diplomatic agents.[77] In light of the above, nevertheless, it would seem that, even if a diplomat specifically employs a servant to help him or her deal with official business, diplomatic immunity *ratione materiae* may be rejected if an employment-related act amounts to a serious offence. After all, unlike employment of subordinate mission staff on behalf of the sending state, in which case disputes should be resolved by suing the sending state rather than the diplomat personally,[78] employment of domestic servants is the private act of the diplomat.

So much for the scope of the formula 'in the exercise of functions'. But if an employee intends to sue his or her employer diplomat under Article 31(1)(c), it must also be demonstrated that the dispute concerns 'commercial activity'. Questions arise as to whether this term could be interpreted in light of rules of state immunity in general international law.

4.1.2 Commercial activities are not acta jure gestionis

As mentioned above, domestic courts in determining diplomatic immunity *ratione materiae* generally have no difficulty in ruling that an employment of domestic staff is not an act performed in the exercise of official functions. However, they do manage to produce conflicting judgments

[71]VCCR, *supra* note 22, Art. 5(a), (c), (f), (g), (h), (i), (j), (m).

[72]VCDR, *supra* note 6, Art. 41(1).

[73]See above Section 3.1.

[74]In a similar vein, editors of *Oppenheim's International Law* point out that, whereas 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': R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992), at 1145.

[75]*Reyes v. Al-Malki and another* [2017] UKSC 61.

[76]*Swarna v. Al-Awadi*, 622 F 3d 123 (US Court of Appeals 2010); *Wokuri v. Kassam* [2012] EWHC 105 (English High Court 2012).

[77]*Reyes*, *supra* note 75, para. 4; *Swarna*, ibid., at 138.

[78]For instance, in *Benkharbouche v. Embassy of the Republic of Sudan*, the UK Supreme Court held that customary international law does not recognize state immunity for employment of those mission staff who only perform subordinate duties: *Benkharbouche v. Embassy of the Republic of Sudan*, [2017] 3 WLR.

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regarding the interpretation of 'commercial activity'. The Supreme Court of Cassation of Italy in particular has consistently determined diplomatic immunity *ratione materiae* by reference to rules of state immunity and treated 'commercial or professional activity' under Article 31(1)(c) as the practical equivalent of *acta jure gestionis*, which clearly encompass employment of domestic servants.[79] By contrast, the US courts have in general upheld immunity for employment disputes, although the 'commercial activity' exception to state immunity under the US Foreign Sovereign Immunities Act has been interpreted as anything that a private party may engage in.[80]

As a matter of principle, it must be pointed out that the difference in rationale between diplomatic immunity and state immunity speaks strongly against the cross-reference between the two regimes. Restrictive state immunity ensures that a sovereign state stands on an equal footing with a private party while engaging in market practice. Yet diplomatic immunity (as a whole) proceeds on the assumption that mere exposure to court proceedings in the receiving state is detrimental to the performance of official functions, regardless of the cause of a proceeding. The reason for this is that diplomatic agents, who conduct official business on behalf of the sending state in the receiving state, are particularly vulnerable to local authority – a vulnerability which may be exploited by an ill-intentioned receiving state to elicit important information but which is not shared by the sending state as an abstract entity.[81] Thus, whereas an expansive interpretation of 'commercial activity' seems fair in the field of state immunity, the same interpretation would likely defeat the whole construct of diplomatic immunity from civil proceedings under the VCDR because, save for official acts *stricto sensu*, almost all acts of a diplomat in the receiving state could be taken as *acta jure gestionis* and subject to court proceedings. This explains why, with the exception of Italy and Portugal, the expansive approach has been consistently rejected by national courts.[82]

How 'commercial activity' under Article 31(1)(c) should be interpreted in individual cases, on the other hand, is a different matter. In *Reyes* v. *Al-Malki*, which concerns an employment dispute between a Saudi diplomat and his domestic servant who was allegedly a victim of human trafficking, the Law Lords disputed whether human trafficking may be characterized as a commercial activity under Article 31(1)(c). Lord Sumption, joined by Lord Neuberger, held that the term pertains to 'continuous' participation in commercial business in violation of a diplomat's duties under Article 42, but excludes contractual relationships in daily life.[83] The fact that the diplomat had made financial gain by underpaying the employee did not make the employment a commercial activity.[84] On the other hand, Lord Wilson, with whom Lady Hale and Lord Clarke agree, took the view that the diplomat's conduct, being an integral part of trafficking, 'contains a substantial

[79]*Papavassilopoulos v. Barone*, Appeal Judgment, Case no 27044, ILDC 1343 (IT 2008) (Supreme Court of Cassation of Italy 2008); *Rohitha v. Embassy of the Republic of Korea to the Holy See*, Final Appeal Judgment, Case no 11848/2016, ILDC 2697 (IT 2016) (Supreme Court of Cassation of Italy 2016). The court also conflated consular immunity and state immunity in a recent case. *Tedeschi v. Pullano*, Final Appeal Judgment, Case no 2200/2016, ILDC 2696 (IT 2016) (Supreme Court of Cassation of Italy 2016). A similar approach was followed by the Supreme Court of Portugal. *Fonseca v. Larren* (Supreme Court of Portugal 1991), relevant part reprinted at *Reyes v. Al-Malki*, [2015] EWCA Civ 32 (Court of Appeal of the UK 2015), para. 27.

[80]*Sabbithi v. Al Saleh*, 605 F Supp 2d 122 (US District Court of Colombia 2009). For the application of Section 1605 of the US Foreign Sovereign Immunities Act (concerning commercial activity exception) see *Weltover*, *supra* note 63.

[81]As Lord Sumption pointed out in *Reyes*, 'human agents have a corporeal vulnerability not shared by the incorporeal state which sent them'. *Reyes*, *supra* note 75, para. 28.

[82]See, *Reyes*, *supra* note 79; *Albert Brahimllari v. Consulate General of Greece in Korçë*, Appeal Judgment, No 00-2011-2204 (569), ILDC 2508 (Al 2011) (Supreme Court of Albania 2011); *Pfarr v. Anonymous*, Appeal Judgment, 17 Sa 1468/11, ILDC 1903 (De 2011) (Higher Regional Court of Berlin 2011); *Mohamed X v. Fettouma Z*, 11/01255 Legifrance (Court of Appeal of Montpellier 2012); *In the Marriage of M T and I J De Andrade*, 19 Family Law Reports 271 (Family Court of Australia 1984); Decision of the Supreme Court of Czech Republic on 14 November 2013, Case no 22 Cdo 2537/2012, available at www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/A67FCA1C3A641B0EC1257C31002060D1?openDocument&Highlight=0.

[83]*Reyes*, *supra* note 75, para. 21. Art. 42 provides that 'A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.'

[84]Ibid., para. 46.

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commercial element of obtaining domestic assistance without paying for it properly or at all'.[85] Reference was made to state immunity, which is not available for employment contracts.[86] It was also pointed out that granting immunity for purely private acts sits at odds with the object and purpose of diplomatic immunity.[87]

The analogy to state immunity does not seem pertinent, given the differences between the two sets of rules and the danger of equating commercial activity with *acta jure gestionis*. But one may wonder whether Lord Sumption's interpretation is not too restrictive. It is true that state parties at the Vienna Conference had intended Articles 31(1)(c) and 42 to be coextensive, which in turn suggests that immunity would be stripped only when a diplomat has violated the prohibition in Article 42. Yet it is questionable whether in practice receiving states would strictly prohibit all commercial activities of foreign diplomats. As pointed out by Denza, many receiving states would not want to discourage foreign diplomats from making local investments, and ordinary business activities are not likely to come the attention of the authority of the receiving state.[88] An important practical consideration in this respect is that receiving states are not particularly concerned with personal activities of foreign diplomats *as long as* they would not exploit their diplomatic status to gain unfair advantage. Commercial activities in the receiving state certainly damage the dignity of a diplomat, and they indirectly harm the performance of diplomatic functions by taking away the diplomat's time and energy; but these are largely the concern of the sending state. So long as the diplomat does not enjoy immunity for disputes relating to the activities, and so long as he or she is not exempt from tax exemption under Article 34(d), the receiving state may be less motivated to raise the issue with the sending state, let alone expelling the diplomat. It is likely that this practical consideration would result, or has resulted, in a gradual division between Articles 31(1)(c) and 42, although state practice in this respect is scant, as issues like this are rarely subject to public discussion between the two states.[89]

The standard of continuity is also a difficult construct. Notably, it raises the question how continuous an activity must be for it to fall within the remit of Article 31(1)(c). A diplomat who imported a duty-free vehicle into the receiving state and sold it for profit would not be regarded as having performed a continuous commercial activity, but what if he had imported five vehicles?[90] Further, with respect to acts which have some temporal duration, the continuous nature heavily depends on how a particular claim is framed. For example, if a diplomat purchased an immoveable property as an investment but was involved in a dispute while reselling it,[91] the continuous nature of the activity would depend on whether sale is understood as part of the overall investment or as a commercial transaction independent of the prior purchase. The same problem exists for almost any act of investment.

So far, domestic cases concerning the application of Article 31(1)(c) are mostly resolved by examining whether the activity in question is 'for personal profit',[92] a phrase which appears in Article 42 but not in Article 31(1)(c). This is understandable, given the parties' intention regarding the relationship between the two articles; and it is usually easy to demonstrate that a diplomat who

[85]Ibid., para. 62.

[86]Ibid., para. 63–5.

[87]Ibid., para. 66.

[88]Denza, *supra* note 27, at 387. See also Lewis, *supra* note 8, at 131.

[89]The attitude of the UK was mentioned, albeit briefly, during the House of Commons debate on 14 March 1986. See, HC Deb 14 March 1986 vol 93 c601W.

[90]See, for instance, *Artwohl v. United States*, 56 ILR 518 (Court of Claims of United States 1970), which concerns several mission members of the US embassy in Brazil who made considerable profit from selling duty-free vehicles imported from the US to local citizens.

[91]See, *De Andrade*, *supra* note 82, in which the Family Court of Australia briefly rejected the claim of the plaintiff that the purchase of a house as investment and the collection of rent from tenants are commercial activity under Art. 31(1)(c).

[92]*Tabion v. Mufti*, 73 F 3d 535 (4th Cir 1996), at 537; *Sabbithi*, *supra* note 80, at 128.

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employs a servant[93] or rents a residence[94] is not acting 'for personal profit'. The standard of continuity, on the other hand, is more likely to be put to test in cases where a diplomat, on an *ad hoc* basis, has made financial gain either by selling items or by providing service to others. It remains to be seen how 'commercial activity' would be interpreted by domestic courts in the future. The danger of excessively exposing diplomats to local court proceedings remains a valid reason to maintain a strict distinction between commercial activity under Article 31(1)(c) and *acta jure gestionis* in state immunity regime. However, in exploring the exact contour of the term, one may wonder whether exposure to civil proceedings, which usually entail no coercive measures, is as threatening in modern diplomacy as it was at the time of the conclusion of the VCDR, when diplomatic agents were routinely harassed in certain states and thus particularly vulnerable to local authority.

4.2 Difference in nature

So much for the difference in scope between diplomatic immunity *ratione materiae* and state immunity. But the two immunities also differ in nature. State immunity has been recognized as a procedural matter which does not conflict with the substantive rules in international criminal law or human rights law.[95] However, as will be argued below, diplomatic immunity *ratione materiae* is in many aspects a substantive matter.

4.2.1 Diplomatic immunity ratione materiae as a mechanism of allocating domestic civil liabilities

Article 31(1)(a) and (b) set out two exceptions based on private immovable property and succession to diplomatic immunity *ratione personae*. Diplomatic agents only enjoy immunity *ratione materiae* if they have acted 'on behalf of the sending state'. However, an examination of the drafting history of the two provisions reveals that immunity *ratione materiae* is merely a mechanism of allocating domestic civil liabilities between a diplomatic agent and the sending state.

The immovable property exception has been recognized in customary international law long before the adoption of Article 31(1)(a).[96] The rationale behind the exception is the pre-eminence of *lex loci rei sitae* – disputes over an immovable property situated in the receiving state may never be resolved if the court of the receiving state is unable to assume jurisdiction due to diplomatic immunity.[97] This emphasis of the exclusive jurisdiction of the receiving state over immovable property situated in its territory logically permits no exception. Thus, the proviso 'on behalf of the sending state' did not feature in either pre-VCDR state practice[98] or the ILC Special Rapporteur's original draft of Article 31(1)(a).[99]

However, during the ILC discussion of the exception in 1957, Tunkin raised a practical issue where immovable property used for the purposes of a mission was held in the name of the ambassador because local law did not permit the property to be acquired by a foreign state.[100] For him,

[93]Ibid.

[94]*Logan v. Dupius*, 990 F Supp 26 (US District Court of Columbia 1997).

[95]*Jurisdictional Immunities of the State*, *supra* note 59.

[96]In his report on diplomatic immunities and privileges to the League of Nations, the Special Rapporteur pointed out that the exception of real property is 'consistent with generally recognized custom'. M. Diena, 'Report of the Sub-Committee on Diplomatic Privileges and Immunities', League of Nations doc (C 196 M 70 1927 V), at 81.

[97]Commentaries to Art. 29(1)(a) of the 1958 draft of the VCDR, 1958 YILC, Vol II, at 98, para. 5.

[98]The legislation of Colombia, for example, excepted from diplomatic immunity only 'actions in rem, including possessory actions, which relate to movable or immovable property situated within the territory'. 'Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities', 7 *UN Legislative Series* (1958) 65. See also the legislation of India, Czechoslovakia, Austria, and Switzerland at 167, 82, 15, 308 respectively. For judicial decisions see, for example, *Agostini v. De Antueno*, 17 ILR 295 (District Court of New York 1950).

[99]1955 YILC, Vol II, at 11–12, Art. 20(1)(a).

[100]1957 YILC, Vol I, at 94, para. 5 (Tunkin).

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the diplomatic agent should enjoy immunity in this scenario because 'he was the owner only in name'.[101] This concern was shared by many members of the ILC. Pal in particular argued that the diplomat in this situation was merely a name-lender or a trustee, since he was holding the premises on behalf of his government who is the beneficial owner.[102] Other ILC members, while reluctant to admit any exception to the overriding jurisdiction of the receiving state with respect to immovable property,[103] recognized the practical necessity of a proviso in this regard.[104] Following an amendment proposed by Fitzmaurice,[105] the formula of 'on behalf of the sending state' was added to the exception and later adopted by the Vienna Conference.

The above review of the history of the proviso in Article 31(1)(a) shows that the ILC members have intended to limit the scope of 'on behalf of the sending state' to the narrow scenario in which a diplomat holds mission premises in his or her own name because local law does not permit acquisition of immovable property by a foreign state. The sending state itself bears the rights and obligations of the immovable property; and the diplomat in this case is in fact holding the property in the name of the sending state.

The practical relevance of this narrow construction of 'on behalf of the sending state' is fully illustrated by the case of *Rahimtoola* v. *Nizam of Hyderabad*.[106] In this case, an official of the government of Nizam transferred, without authority, some money into the account of the serving High Commissioner of Pakistan in the UK, who received the money upon the clear instructions of Pakistan. The government of Nizam later brought action against the High Commissioner and the bank holding the money for recovery. The House of Lords dismissed the action by upholding the state immunity of Pakistan, but the reasons given by individual Lords were distinct.[107] Lord Denning, in particular, took note of the question whether the legal title of the money, which was transferred to an account named 'Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)', lay with the Commissioner personally or with the state of Pakistan.[108] For Lord Denning, the description in the bracket signified the Commissioner's office and the fact that he had been acting in an official capacity, but the legal title of the money still lay with the person of the Commissioner rather than the sending state, because 'if Pakistan had desired to have the legal title in itself, it should have taken care to have the account transferred into its own name, but it did not do so and must take the consequences'.[109]

The opinion of Lord Denning was not shared by other Lords; but the problem with legal title in this case mirrors exactly the concern of the ILC members when they were drafting Article 31(1)(a) of the VCDR. By adding the phrase 'on behalf of the sending State' to the Article, the ILC members intended to make it clear that when a diplomat registers mission premises under his or her own name in order to comply with local laws, the effect is as if the premises have been registered in the name of the sending state.

Yet this is not a matter of immunity from jurisdiction. Rather, it concerns domestic agency law which allocates civil liability between a principal and its agent. A diplomatic agent is exempt from a proceeding concerning mission premises not because of the 'immunity' he or she enjoys under Article 31(1)(a), but for the simple reason that he or she is not the true holder of civil rights and obligations. In this case, the rationale behind the immovable property exception – that the exclusive jurisdiction of the state in which an immovable property is situated overrides *any* kind of

[101] Ibid.
[102] Ibid., at 94, para. 13 (Pal).
[103] Ibid., at 95, para. 23 (Sandström).
[104] Ibid., para. 35 (Spiropoulos).
[105] Ibid., para. 25 (Fitzmaurice).
[106] *Rahimtoola v. Nizam of Hyderabad and Another* [1958] AC 379 (HL).
[107] Ibid., at 380.
[108] Ibid., at 412–13.
[109] Ibid.

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immunity from jurisdiction[110] – remains intact. 'Immunity' in Article 31(1)(a) is used as an expedient to free a serving diplomatic agent from any civil liability relating to mission premises he or she holds on behalf of the sending state; it does not compromise the exclusive jurisdiction of the receiving state over the premises.

Ideally, situations like this are better resolved by domestic civil procedural law relating to choice of correct defendants. In the case of *Arab Republic of Syria* v. *Arab Republic of Egypt*, for example, the Syrian Ambassador to Brazil sued in front of the Brazilian Supreme Court the Egyptian Ambassador to Brazil for repossession of mission premises which were registered under the name of Syria in the land registry but occupied by Egypt following the dissolution of the United Arab Republic in 1961.[111] The Egyptian Ambassador claimed immunity, whereas Syria held that the ambassador was not protected because of the exception in Article 31(1)(a) of the VCDR. The court, following submissions made by the Deputy Attorney-General on behalf of the Brazilian Government, dismissed the proceeding against the Egyptian Ambassador and held that the real defendant should be the Egyptian state.[112] As a result, the case was decided on the basis of state immunity.

It seems clear that if a judgment had been rendered along the line of Article 31(1)(a), diplomatic immunity *ratione materiae* would have been upheld, for in this case the ambassador was holding the mission premises not as a private person but on behalf of the Egyptian state. By dealing with the issue as one of determining the real party in interest, the Brazilian Supreme Court has achieved the very purpose of 'immunity' under Article 31(1)(a), viz. that any proceeding relating to mission premises must be directed at the sending state itself.

A similar usage of 'immunity' can be found in Article 31(1)(b). The phrase 'as a private person and not on behalf of the sending state' was not added to the article until the Vienna Conference, following an amendment proposed by Spain.[113] In his response to the objection raised by the Swiss representative, who argued that the phrase would 'provide immunity for a state inheriting property and wishing to take possession of it',[114] the Spanish representative explained, *inter alia*, that:

> The object of the first of his delegation's amendments (L.221) was to exclude from the jurisdiction of the courts of the receiving states actions relating to a succession in which the diplomatic agent acted on behalf of his government. In that case, it was the sending state which was the heir, and not the diplomatic agent.[115]

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

The objection by Switzerland was based on the understanding that diplomatic immunity *ratione materiae* is state immunity from civil proceedings itself – if a diplomatic agent enjoys immunity for acts performed on behalf of the sending state, the sending state itself would necessarily enjoy the same immunity, and this was unacceptable to Switzerland. The upshot of Spain's proposal, however, was that a diplomatic agent is not the real party in interest when he or she has inherited some property on behalf of the sending state. It is immaterial whether the sending state would be protected by state immunity if sued in the receiving state. Rather, the proposal is aimed at protecting the diplomat from being held personally liable for acts of the sending state. This is not strictly a matter of immunity from jurisdiction, for if the diplomat is not perceived as the true heir, he or she should be exempted from the succession proceeding even if immunity does not

[110]Commentaries, *supra* note 97.

[111]*Arab Republic of Syria v. Arab Republic of Egypt*, (1982, Supreme Court of Brazil) 91 ILR 288.

[112]Ibid.

[113]UN Doc. A/CONF.20/C.1/L.221, at Official Records of Diplomatic Conference, *supra* note 32, Vol II, at 30.

[114]Ibid., Vol I, at 167, para. 33 (Bindschedler). The same question was raised by the representative of Netherlands during the plenary meeting. See ibid., Vol I, at 19, para. 36 (Riphagen).

[115]Ibid., para. 34 (de Erice y O'Shea).

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exist. By adopting the Spanish proposal, however, states at the Vienna Conference have implicitly employed the term 'immunity' as an expedient mechanism of allocating domestic civil liability between a diplomatic agent and the sending state in case of succession disputes.

The above analysis necessarily points to the conclusion that diplomatic immunity *ratione materiae* under Article 31(1)(a) and (b) is in fact a matter of non-civil-liability in domestic agency law. In principle, whether a diplomat should be responsible for the civil act of his or her employer state, or whether he or she should stand on trial for the activity, are issues to be regulated by domestic civil law or civil procedural law. However, the 'immunity' in the two provisos does have the effect of reducing the chance of a diplomat being sued in the receiving state due to that state's domestic legislation, and in this sense, it may be said to broadly accord with the functional basis of immunity. The consideration behind Article 31(1)(a) and (b) is purely pragmatic, but the usage of 'immunity' is unfortunate.

4.2.2 Diplomatic immunity ratione materiae as a mixture of immunity from jurisdiction and non-personal-liability

Diplomatic immunity *ratione materiae* for acts performed in the exercise of diplomatic functions, on the other hand, has both a substantive and a procedural element.

In the first place, diplomatic immunity *ratione materiae* for private incidental acts does not exempt a mission member from personal liability and is thus purely procedural in character. These acts have some connection with official acts *stricto sensu*, but in essence they are private acts of the individual mission member. Therefore, disputes relating to these acts usually arise from the personal wrongdoing of the individual rather than from the actual performance of diplomatic functions. A diplomat who employs a personal secretary to help deal with official business certainly incurs personal liability if he or she breaches the employment contract, even though the employment may be covered by diplomatic immunity *ratione materiae*.[116] Similarly, when diplomatic immunity *ratione materiae* is granted to a mission member for an act of drunk-driving, that does not mean that the mission member bears no responsibility for the violation of traffic regulations.[117] These are not official acts of the sending state. Rather, they are personal wrongdoing committed during the performance of official acts. Diplomatic immunity *ratione materiae* ensures that important information relating to official functions will not be compromised by subjecting a mission member to court proceedings, but it does not exempt the mission member from individual responsibility in domestic law.

Diplomatic immunity *ratione materiae* for official acts *stricto sensu*, on the other hand, represents not only a procedural exemption from judicial process but also a substantive exemption of individual liability. This can be explained from two perspectives.

Firstly, the very definition of 'official acts *stricto sensu*' leaves little room for personal fault. The issue of immunity arises only when an act has (allegedly) violated the law of the receiving state. In the case of official acts in the exercise of diplomatic functions, however, any such violation is likely to result from the (illegal) nature of the function itself. In situations like this, it is impossible for a diplomatic mission member to comply with local laws while carrying out official functions – very often, he or she would be faced with the impossible choice between violating the law of the receiving state and violating the law of the sending state. Since the mission member does not have a genuine choice of performing functions in accordance with local laws, he or she should not take the blame for the act in law. Immunity in this regard serves the important purpose of ensuring that

[116] *Abusabib*, *supra* note 68, para. 31.

[117] In *Public Prosecutor v. A. d. S.F.*, the Supreme Court of Netherlands upheld the diplomatic immunity *ratione materiae* of a service staff member of the Italian Embassy who had driven under the influence of alcohol. For the court, the fact that driving a car may occur in the performance of the official duties of a servant means that 'acts contrary to road traffic provisions are committed in the performance of such duties'. *Public Prosecutor v. A. d. S.F.* (1975), reprinted at L. A. N. M. Barnhoorn (ed.), 'Netherlands Judicial Decisions Involving Questions of Public International Law, 1974 – 1975', (1976) 7 NYIL 303.

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the mission member does not incur personal liability for official acts performed on behalf of the sending state.

The case of *Rissmann* may be recalled to illustrate this point.[118] In this case, a German consul was prosecuted in the receiving state (Italy) for assisting a minor, by issuing her with passports and other travel documents, to return to Germany to join her father. According to German law, the minor was a German national and had been entrusted by a German court to the guardianship of her father. According to Italian law, however, she was an Italian national and had been entrusted by an Italian court to her mother, an Italian citizen resident in Genoa. The German Government officially invoked the consul's immunity under Article 43(1) of the VCCR. In particular, it was pointed out that any responsibility for the act lay solely with the German state because the act had been directly dictated by German law. This position was accepted by the Italian Court of Cassation. For the court, since the consul had performed consular functions in accordance with the law of the sending state, consular immunity in this respect was 'based on a principle of substantive law' and therefore 'not merely procedural' in nature.[119]

The German consul in this case has performed no personal wrongdoing – the very act that was called into question in the Italian court was directly dictated by the German law. The two states reached the consensus that the consul had no personal liability under Italian law. Yet it is equally clear that the consul would not be held responsible once he returned to Germany, for he had been performing consular functions by strict adherence to German law. Immunity *ratione materiae* in this case was simply a disguise of the fact that the consul had no personal liability for acts in strict application of official functions. Disputes relating to acts of this kind should be resolved on an interstate level.

In fact, considering that diplomatic immunity *ratione materiae* is not an innovation of the VCDR but represents a codification of pre-existing customs, ample evidence in support of this substantive understanding of immunity can be found in pre-VCDR state practice or *travaux préparatoires* of the VCDR. The Harvard Draft Convention on Diplomatic Privileges and Immunities, which was based on a comprehensive survey of state practice and which was heavily relied upon by drafters of the VCDR, provides in Article 18 (Non-liability for Official Acts) that 'a receiving state shall not impose liability on a person for an act done by him in the performance of his functions'.[120] According to its commentary, 'immunity for official acts is an exemption from both the jurisdiction *and the law* of the receiving state'.[121] Similarly, Switzerland pointed out in its response to the League of Nations' report on diplomatic immunities and privileges that 'Switzerland adhered firmly to the principle that the diplomatic agent was not personally responsible for acts done in his official capacity'.[122] At the drafting stage of the VCDR, Verdross, in explaining his proposal which later became Article 38(1), stated that acts covered by the proposal 'were not acts for which the diplomatic agent could himself be held responsible; they were the acts of the sending state'.[123] During the Vienna Conference on Consular Relations, state delegates also made it clear that immunity *ratione materiae* has an inherent substantive element of non-personal-liability.[124]

[118] *Re Rissmann*, (1970, Court of Cassation of Italy) 71 ILR 577

[119] Ibid., at 581.

[120] Harvard Convention, *supra* note 10, at 97, Art. 18.

[121] Ibid., at 137. See also Fiore's Draft Code, Section 465, which states that diplomats must be 'completely and absolutely immune so far as concerns their personal responsibility in the performance of their functions'. Ibid., at 159.

[122] 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities: Memorandum Prepared by the Secretariat', UN Doc. A/CN.4/98, at 144.

[123] 1957 YILC, Vol I, at 99, para. 21 (Verdross).

[124] For instance, the US representative pointed out that 'if the local court decided the acts complained of were performed within the scope of their official duties, then consuls were not liable as a matter of substantive law'. The Italian representative also indicated that consular immunity means that 'an individual was not personally responsible for acts performed in the exercise of his functions'. See Official Records of the United Nations Conference on Consular Relations, Vol I, at 374–5, paras. 34, 36.

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Secondly, certain official acts are likely to fall outside the *law* of the receiving state. Hardy, for instance, points out that administrative activities of the sending state are not subject to the law of the receiving state and thus immunity for these activities is substantive in character. Salmon indicates likewise that 'where foreign state activity is governed by public law or administrative law, for example the conditions for the grant of a passport, the immunity enjoyed by the staff member is not limited to jurisdiction but also to the law itself'.[125] Although diplomatic missions operate on the territory of the receiving state, administrative matters remain completely internal to the sending state and thus fall outside the legislative jurisdiction of the receiving state. If a diplomat rejects a visa application in accordance with the sending state's visa regulations, or if an ambassador dismisses a junior diplomat following the disciplinary procedures of the sending state, it is hard to imagine how these matters can be regulated by the law of the receiving state. For these acts, the incompetence of the court of the receiving state is more of a matter of jurisdiction than immunity – it is not immunity that impedes an otherwise applicable jurisdiction, but that the court does not have jurisdiction over these matters *ab initio*.[126] Individual responsibility can hardly arise if an underlying act falls outside the law of the receiving state.

It is true that under Article 41(1) of the VCDR, all persons enjoying privileges and immunities have an obligation to respect local laws.[127] However, a closer examination of the drafting history of Article 41(1) reveals that the Article is not intended to subject all acts of a diplomatic mission to the law of the receiving state. Indeed, the very reason for replacing the word 'comply', which was used in the 1957 draft of Article 41(1), with 'respect' was to make clear that a mission member merely needs to 'respect' those laws and regulations of the receiving state which do not apply to him or her.[128] As a result, the ILC's commentary to the 1958 draft of Article 41(1) states that the duty to respect local laws and regulations 'does not apply where the agent's privileges and immunities exempt him from it'.[129] This statement has in effect supported the proposition that certain acts of a mission member are not subject to the law of the receiving state.

Admittedly, for official acts that fall outside the law of the receiving state, immunity rules may not be strictly necessary. But immunity from law is not necessarily at odds with immunity from judicial process. Diplomatic immunity *ratione materiae* would still prove useful in protecting a mission member when a local court erroneously assumed jurisdiction over official acts that fall outside the law of the receiving state. But this does not alter the substantive element inherent in the immunity.

The argument that diplomatic immunity *ratione materiae* for certain acts represents not only a procedural bar to adjudicative jurisdiction but also a substantive exemption from liability/law may sound unpleasant to states which have been subject to abuses of diplomatic immunity, as it carries a negative implication that foreign mission members are above the law. Yet this implication is usually exaggerated. Within the framework of Article 3(1), official acts *stricto sensu* are, in most cases, lawful acts and thus unlikely to seriously infringe the interests of the receiving state. This is evidenced by the fact that post-VCDR domestic cases relating to the application of diplomatic immunity *ratione materiae* almost invariably concern private incidental acts. In addition, if one takes into account the number of individuals enjoying diplomatic immunity in the world, the abuse of diplomatic immunity is a relatively uncommon phenomenon.[130] Indeed, even for

[125]Salmon, *supra* note 26, at 606 (translation).

[126]Brownlie argues that cases in this respect are in fact a matter of 'inadmissibility' or 'non-justiciability' rather than immunity from jurisdiction. Proceedings regarding these acts would be unable to proceed even if immunity does not exist. Brownlie, *supra* note 8, at 326.

[127]VCDR, *supra* note 6, Art. 41(1).

[128]1957 YILC, Vol I, at 218, para. 41 (Tunkin). See also, at 218, para. 42 (HSU); at 219, para. 52 (Liang); para. 43 (The Chairman); para. 47 (El-Erian).

[129]1958 YILC, Vol II, at 104.

[130]In its report on the abuse of diplomatic immunity, the UK Foreign Affairs Committee surveyed serious offences committed by persons enjoying diplomatic immunity in the past ten years and concluded that the percentage of misbehaving diplomatic staff 'is in fact very small'. The Abuse of Diplomatic Immunities and Privileges, 1984/85 HC 127, para. 41.

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those abuses which have raised international attention, the underlying act normally has nothing to do with official acts *stricto sensu*.[131]

4.2.3 Implication for waiver

The effect of waiver needs some explanation in light of the analysis above. The issue is rather straightforward with regard to private incidental acts: diplomatic mission members only enjoy procedural immunity for these acts but are not exempt from personal liability. Waiver of immunity lifts the procedural bar and allows personal liability to be realized in the ordinary manner.

But things are more complicated when a mission member is substantively immune from liability for an official act. Absence of diplomatic immunity *ratione materiae* in this situation would result in the mission member being held personally liable as if the act is private in nature. If, for instance, a diplomat who holds mission premises on behalf of the sending state is involved in a dispute concerning the property, a waiver of immunity under Article 31(1)(a) would make him or her personally liable as if the property is a private asset. But that presents a logical problem, because if the property is private in nature, there would be no immunity to waive in the first place. In her comments to the *Pinochet* case, Denza, having pointed out the principle that a former diplomat cannot be held personally liable for an act performed in the exercise of functions, observes that the former diplomat may nonetheless be sued or tried in the receiving state if the sending state, 'waives his immunity or disclaims responsibility for the act in question, saying or accepting that it was not performed in the exercise of sovereign functions'.[132] The use of the phrase 'waives immunity or disclaims responsibility' seems to reflect the author's ambivalence towards the procedural implication of waiver of diplomatic immunity *ratione materiae*. But if the effect of such a statement by the sending state is to render the act in question private in nature, 'disclaimer of responsibility' is clearly a more pertinent description than 'waiver of immunity'. The latter is only meaningful if immunity actually exists.

This explains why the Harvard Draft Convention, which treats immunity for official acts as a substantive matter of non-liability, does not provide for waiver of diplomatic immunity *ratione materiae*[133] – an exercise in line with the fact that none of the pre-VCCR draft codes on consular immunity *ratione materiae* contains a provision on waiver.[134] The issue has been completely ignored by the ILC during the drafting stage of Article 32, although certain members seem to have noticed the difference between waiver of immunity *ratione personae* and waiver of immunity *ratione materiae*.[135] However, the complete absence in post-VCDR practice of waiver of immunity for strictly official acts demonstrates, at least in part, that states do not believe that the immunity can actually be 'waived'.[136] For these acts, the so-called waiver is, in fact, a testament from the sending state to the private nature of the act concerned.

[131]See, for example, the Abisinito incident, which concerned the residual immunity of former ambassador of Papua New Guinea to the US for drunk-driving which resulted in a serious traffic accident. Leich, *supra* note 24, at 997–9.

[132]E. Denza, 'Ex Parte Pinochet: Lacuna or Leap?', (1999) 48 ICLQ 949, at 952.

[133]Article 26 of the convention provides that diplomatic privileges and immunities can be waived by the sending state. But immunity for official acts is not deemed by the convention as pertaining to diplomatic privileges or immunities *stricto sensu*. Harvard Convention, *supra* note 10, at 99.

[134]Harvard Convention, ibid., at 339–40. For other pre-VCCR draft codes, see, ibid., at 376–446.

[135]Referring to the Harvard Draft Convention, Amado said at one point that 'the question [of waiver] did not relate solely to immunity from jurisdiction'. But he did not push this issue further. At a later stage, Zourek briefly mentioned that, with respect to waiver, 'a distinction should be made between acts carried out in the discharge of diplomatic functions and those which were not'. 1957 YILC, Vol I, at 111–12, paras. 30, 52.

[136]Waiver of immunity invariably occurs in disputes concerning private acts or private incidental acts. See, for example, M. E. Vandenberg, 'Diplomats Who Commit Domestic-Worker Crimes Shouldn't Get a Free Pass', *Washington Post*, 1 January 2014; D. Campbell, 'Thai Diplomat Smuggled Heroin', *Guardian*, 24 June 1992.

5. Conclusion

In sum, diplomatic immunity *ratione materiae* covers various acts of distinct nature that it must be taken as a unique concept which is different from immunity *ratione materiae* of ordinary state officials and state immunity. The above analysis leads to the conclusions that:

Firstly, functions of diplomatic agents, which are practically indistinguishable from duties of subordinate mission members, must be understood within the general framework of Article 3(1) of the VCDR. Diplomatic immunity is ultimately based on the consent of the receiving state. Thus, unlike 'state functions' in general international law, diplomatic functions are in essence a consensual concept, hence the distinction between diplomatic immunity *ratione materiae* and immunity *ratione materiae* of ordinary state officials. The framework of Article 3(1) is important to ensure that serious violations of international law cannot be protected by diplomatic immunity *ratione materiae* even if they are committed under the instruction of the sending state.

Secondly, diplomatic immunity *ratione materiae* is distinct from state immunity in terms of both scope and nature. With regard to the scope of immunity, the former protects not only official acts *stricto sensu* but also certain private incidental acts closely connected to the performance of diplomatic functions. Immunity for private incidental acts is based solely on the principle of functional necessity, although the VCDR provides no guidance as to how this principle should be applied. This gives domestic courts wide discretion and allows for a weighing of conflicting interests while determining immunity, which would prove particularly useful when serious offences are concerned. On the other hand, 'commercial activity' under Article 31(1)(c) should not be treated as *acta jure gestionis* in state immunity regime because that would defeat the whole construct of diplomatic immunity from civil proceedings. In exploring the exact contour of the term, however, one should take into account the actual impact that exposure to civil proceedings may have on the smooth performance of official functions in modern diplomacy.

With regard to the nature of immunity, diplomatic immunity *ratione materiae* differs from state immunity in that it is a mixture of procedural immunity from judicial process and substantive immunity from individual liability. Diplomatic immunity *ratione materiae* for private incidental acts is purely procedural in nature because these acts are in essence the private acts of the mission member. On the contrary, diplomatic immunity *ratione materiae* under Article 31(1)(a) and (b) is an expedient mechanism of allocating domestic civil liabilities between a diplomatic agent and the sending state and thus substantive in nature. Further, diplomatic immunity *ratione materiae* for 'official acts performed in the exercise of functions' also constitutes a substantive exemption of individual liability because responsibility for these acts lies exclusively with the sending state. For immunity which exempts a mission member from individual liability, waiver of immunity is in essence a testament from the sending state to the private nature of the act concerned.

As a final note, it bears emphasizing that immunity *ratione materiae* of individuals is a much more complicated issue than state immunity because it concerns not only the relationship between two states but also that between an official and his or her own state. This complication partly explains why the two immunities have started to take on different courses of development in recent years. But it also means that much more detailed examination is needed for immunity *ratione materiae*. Diplomatic law is a fertile ground for articulation of the boundary of this immunity because official functions of one state are subject to much closer scrutiny by another state than is the case for immunity *ratione materiae* in general international law. It is therefore hoped that the conclusions reached in this article could be a useful starting point for further study in this regard.

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