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**ANALYSIS OF IMMUNITY BASED ON THE
VIENNA CONVENTION ON CONSULAR
RELATIONS WITHIN THE CONTEXT
OF THE NATIONAL INTERESTS OF THE
REPUBLIC OF UZBEKISTAN**

**ANALIZA IMMUNITETU W OPARCIU
O KONWENCJĘ WIEDEŃSKĄ W STOSUNKACH
KONSULARNYCH W KONTEKŚCIE
INTERESÓW NARODOWYCH
REPUBLIKI UZBEKISTANU**

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Abstract:

This article examines the extent to which state officials are subject to prosecution in foreign domestic courts for international crimes. We consider the different types of immunity that international law accords to state officials, the reasons for the conferment of this immunity and whether they apply in cases in which it is alleged that the official has committed an international crime.

Keywords: consular relations, diplomatic immunity, convention, consular immunity, functions, sending state, receiving state, responsibility, international relations, public international law

Streszczenie:

W tym artykule przedstawiono, w jakim stopniu urzędnicy państwowi podlegają ściganiu w zagranicznych sądach krajowych za zbrodnie międzynarodowe. Zostały rozważone różne rodzaje immunitetu, jakie prawo międzynarodowe przyznaje urzędnikom państwowym, powody przyznania tego immunitetu i czy mają zastosowanie w przypadkach, w których zarzuca się, że urzędnik popełnił przestępstwo międzynarodowe.

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Słowa kluczowe: Stosunki konsularne, immunitet dyplomatyczny, konwencja, immunitet konsularny, funkcje, kraj wysyłający, kraj przyjmujący, odpowiedzialność, stosunki międzynarodowe, międzynarodowe prawo publiczne

Statement of the problem in general outlook and its connection with important scientific and practical tasks

Whilst it is commonly accepted that state officials are immune in certain circumstances from the jurisdiction of foreign states, (1) there has been uncertainty about how far those immunities remain applicable where the official is accused of committing international crimes. Examining the rationale for the conferment of each of these types of immunity, as well as their scope, this article determines whether they remain applicable in criminal proceedings in which a consular official is accused of committing a crime under international law.

International law confers on certain state officials immunities that attach to the office or status of the official. These immunities, which are conferred only as long as the official remains in office, are usually described as ‘personal immunity’ or ‘immunity *ratione personae*’. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states. In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations, (2) and other officials on a special mission in foreign states. (3) The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level. International relations and international cooperation between states require an effective process of communication between states. It is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states. (4) As the International Court of Justice (ICJ) has pointed out, there is ‘no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies’. (5) In short, these immunities are necessary for the maintenance of a system of peaceful cooperation and co-existence among states. (6) Increased global cooperation means that this immunity is especially important.

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Analysis of latest research where the solution of the problem was initiated

It has long been clear that serving Heads of State, Heads of Government, and diplomats possess immunity *ratione personae*. In the Arrest Warrant case, the ICJ held – without reference to any supporting state practice – that immunity *ratione personae* also applies to a serving Foreign Minister. Questions remain about whether this type of immunity applies to other senior government members. In describing the rule according to immunity *ratione personae* in the Arrest Warrant case, the ICJ stated it applies to ‘diplomatic and consular agents [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’. The use of the words ‘such as’ suggests that the list of senior officials entitled to this immunity is not closed.

In that case, Foreign Ministers were held to be immune because they are responsible for the international relations of the state and ‘in the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position to do so freely whenever the need should arise’. However, justifying this type of immunity by reference to the international functions of the official concerned would make it difficult to confine the immunity to a limited group of state officials. A very wide range of officials (senior and junior) are charged with the conduct of international relations and need to travel in the exercise of their functions. Ministers other than those specifically designated as being responsible for foreign affairs often represent their state internationally. They may have to conduct bilateral negotiations with other governments or may represent their governments at international organizations or at international summits. Indeed, it is difficult to think of any ministerial position that will not require at least some level of international involvement. Where officials represent their states at international organizations they will usually be accorded immunity by treaty.

Likewise, under Articles 29 and 31 of the UN Convention on Special Missions 1969 the person of any official abroad on a special mission on behalf of his or her state is inviolable, with the result that he or she may not be arrested or detained. Furthermore, Article 31 of that Convention provides that ‘the representatives of the sending State in special mission and the members of its diplomatic staff are immune from the criminal jurisdiction of the receiving State’. These are treaty-based conferrals of immunity *ratione personae* which extend the category beyond the Head of State, Head of Government, and Foreign Minister. However, the policy underlying the immunity is, in all cases, consistent with that enunciated by the ICJ. These treaty-based con-

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ferments of immunity are intended to facilitate the conduct of international relations. Although the Convention on Special Missions is in force, only a small number of states have become a party to it. The question arises whether the immunity provisions in that Convention represent rules of customary international law. If they do, then immunity *ratione personae* is available to a much broader group that was mentioned by the ICJ in the Arrest Warrant case. Although the International Law Commission was of the view that the immunity of special missions was established as a matter of international law, a US Federal District Court doubted that these provisions represented customary international law. However, the US Executive Branch has taken a different view and has asserted that foreign officials only temporarily in the United States on 'special diplomatic mission' are entitled to immunity from the jurisdiction (criminal and civil) of US courts. What is of particular interest is that such assertions of immunity have covered people who are not the Head of State, Head of Government, or Foreign Minister. For example, the US government suggested immunity in a case brought against the Chinese Minister of Commerce and International Trade. Governments and courts in other countries are also willing to accept the customary law status of the rule granting immunity to members of Special Missions. In the Mutual Assistance in Criminal Matters case, Djibouti relied on the Special Missions Convention in its written pleadings although neither it nor France was a party to that Convention. The UK government and UK courts have also recognized the immunity of special missions on the basis of customary international law. In *Re Bo Xilai*, a magistrates' court in England was willing to grant immunity to the same Chinese Minister of Commerce on the ground that this was required by customary international law since he was part of a special mission. Likewise, Germany declined to arrest the Chief of Protocol to the President of Rwanda (Rose Kabuye) when she was on an official visit to the country in April 2008, acknowledging that she was immune, although she was subject to a French-issued arrest warrant on terrorism charges. The customary international law basis of special missions immunity was accepted by the Criminal Chamber of the German Federal Supreme Court in the *Tabatabai Case*, where it stated: irrespective of the [UN Special Missions Convention], there is a customary rule of international law based on State practice and *opinion juris* which makes it possible for an *ad hoc* envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys

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to be placed on a par with the members of the permanent missions of State protected by international treaty law.

There are two further justifications for immunity *ratione personae*, beyond the 'functional' rationale discussed above, which may be of use: (1) symbolic sovereignty and (2) the principle of 'non-intervention'. It is worth pointing out here that none of these rationales can be taken as the sole justification for the rule of immunity *ratione personae*. They must be read together to give a convincing account of why the rule of immunity still exists. First, it has been argued that the rule according to Heads of State immunity 'reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler'. A Head of State is accorded immunity *ratione personae* not only because of the functions he performs but also because of what he symbolizes: the sovereign state. The person and position of the Head of State reflect the sovereign quality of the state⁴¹ and the immunity accorded to him or she is in part due to the respect for the dignity of the office and of the state which that office represents. The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State. The principle is the 'corollary of the principle of sovereign equality of states',⁴² which is the basis for the immunity of states from the jurisdiction of other states (*par in param non habet imperium*). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government and that other states are not empowered to intervene in this matter. Where the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests, such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence. Another important statement is that 'Head-of-State immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of sovereign State. Without the guarantee that they will not be subjected to trial in foreign courts, Heads of State may simply choose to stay at home rather than assume the risks of engaging in international diplomacy'.

The same may be said of others entitled to immunity *ratione personae*. As it was mentioned by Gordon Brown (2010), the prime minister of the UK, 'there is already growing reason to believe that some people are not prepared to travel to this country

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for fear that such a private arrest warrant - motivated purely by political gesture - might be sought against them. These are sometimes people representing countries and interests with which the UK must engage, if we are not only to defend our national interest but maintain and extend an influence for good across the globe', 'Britain must protect foreign leaders from private arrest warrants' ('The Guardian', 2010). Although practice on the point is not clear and although the Head of Government was not in the past considered as having the same 'majestic dignity' as the Head of State or as symbolizing the state (7) there are good reasons for extending to the former the absolute immunity from criminal jurisdiction granted to the latter (8).

Aims of paper. Methods

This paper aims to investigate the extent to which state officials are subject to prosecution in foreign domestic courts for international crimes. Thus, the analytical method will be helpful to solve chosen problem and by selecting an appropriate process the solution will be implemented.

Exposition of main material of research with complete substantiation of obtained scientific results. Discussion

Consular Immunity –Understanding the Consular Immunity and its similarities with Diplomatic Immunity. First of all, we would like to point out that, consular relations are based on the Vienna Convention on Consular Relations, signed on 24 April 1963 and entered into force four years later, in March of 1967. The decision for the adoption of the Convention was taken by the General Assembly of the United Nations which in 1961 he decided to be held two years later in Vienna, a codification conference which will continue its work based on the Convention of 1961 on diplomatic relations.

The preamble of the Convention on Consular Relations as content as well as form is very similar to the diplomatic convention as part stems from it. It stipulates that the rules of customary international law will regulate matters that are not explicitly rejected by the provisions of this Convention.

The Vienna Convention of 1963 as it of diplomatic relations establishes bases and consular relations ruining in the principle of mutual consent, which stated in its Article 2. In paragraph 2 of this Article is determined that the agreement on establishing diplomatic relations that includes establishing consular relations, unless otherwise specified in the relevant agreement between the states. While section 3 of the same

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article, provided that the termination of diplomatic relations does not have ipso facto result in the termination of consular relations.

This Convention is very detailed. It is divided into three chapters: the first chapter deals with consular relations in general and in two other chapters regulate the consular offices are headed respectively by career consuls (chapter two) and they honor (chapter three).

Peoples have recognized the special status of foreign representatives already since ancient times and therefore some of the fundamental principles concerning such representatives, for example, personal inviolability, are as old as the first civilizations. Since then, diplomatic law has continuously developed and also changed, but the vital principles have survived that evolution. Nowadays diplomatic law has, in many respects, become a unique part of public international law. A vast majority of states, if not all, apply its rules every single day, as they are in diplomatic relations with one another. But when taking into consideration such wide and extensive application of diplomatic law, it is surprising to learn how exceptionally high the level of law-obedience is among the relevant states. (9)

Why is that? Firstly, the rules of diplomatic law had long been stable and established before they were codified into the Vienna Convention. Secondly, the simple principle of reciprocity represents effective protection against the breaches of diplomatic law by states. As most states are normally both sending and receiving states, they can respond to any inappropriate actions from another state towards its diplomatic agents with similar measures against the diplomats of the offending state. Therefore, the principle of reciprocity with common interests of states guarantees the efficient application of diplomatic law and also general obedience. (10) But at the same time, this principle can block desirable changes and innovations in connection with diplomatic immunity from criminal jurisdiction —states cannot initiate an emergence of new customary international law to deal with new developments.

As the concept of diplomatic immunity renders it virtually impossible for any local authority to exercise its power over duly appointed diplomatic agents, it has naturally caused many social problems. The general understanding is that diplomatic status does not in any way give diplomatic agents permission to violate the laws and regulations of the receiving state (11) and the overwhelming majority of diplomats are indeed law-obedient. Thus occasional abuses of their privileged status, for example, drunk-driving or causing a car accident, which is brought to public attention, tend to receive a disproportional amount of publicity compared to other similar cases, where

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the person concerned is without such special status, and therefore serve to prejudice public attitude toward the practice of personal inviolability and diplomatic immunity. However, regardless of the severity of offenses, states have so far refrained from serious retaliatory actions due to several factors. Firstly, states maintain a substantial number of diplomatic agents abroad and they do not want to endanger the situation of their diplomats in different and not always particularly safe countries. Secondly, there may be a mentionable community of expatriates of the receiving state in the sending state and therefore the extent to which receiving states will avail themselves of the opportunities for response to abuse of diplomatic status depends in large measures upon whether that expatriated community is perceived to be at risk. For example, in the serious Libyan People's Bureau incident the United Kingdom restrained itself from more harsh reactions as it was concerned with the security and well-being of some 8,000 Britons resident in Libya. (12)

Occasionally it has been suggested that diplomatic and consular agents should enjoy their immunity only in connection with actions forming part of their official functions. (13) Therefore, any illegal acts, which are private acts in character or committed in connection with private activities, are under the jurisdiction of the receiving state and the latter can adjudicate over the offending diplomat. On the one hand, this can cause serious problems when deciding whether this or that action falls under acts performed in a private capacity or as part of official functions.

A vital point which needs to be considered in relation to immunity *rationemateriae* is whether the position of the former diplomat is the same as that of other state officials. The position of the former diplomat deserves separate consideration because, unlike the case with other state officials, the immunity *rationemateriae* is set out in a treaty provision: Article 39(2) of the Vienna Convention on Diplomatic Relations 1961. This provision states that a former diplomatic agent will continue to be immune even after he leaves office 'with respect to acts performed ...in the exercise of his functions as a member of the [diplomatic] mission'. Whilst some have argued that the immunity *rationemateriae* of the diplomat is simply a reflection of the general immunity *rationemateriae* available to other state officials, this view has been rejected by other authors and by the German Constitutional Court. This question is important for at least two reasons. First, the question arises whether any exceptions to immunity *rationemateriae* for state officials (particularly the exception for international crimes) also apply to former diplomats. Secondly, the question arises whether the immunity *rationemateriae* of former diplomats applies *erga omnes*, i.e., in relation to states other

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than the state to which the diplomat was accredited.

It has been argued that acts which amount to international crimes cannot amount to acts performed in the exercise of diplomatic functions because the definition of diplomatic functions in Article 3 of the VCDR limits them to acts within the limits of international law. This provision states that the functions of a diplomatic mission are, *inter alia*:

- (a) Representing the sending state in the receiving state;
- (b) Protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the government of the receiving state;
- (d) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state;
- (e) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural, and scientific relations.

On a textual analysis of this provision, international law is only a restriction to two of the five functions listed. Other functions, such as representing the sending state in the receiving state and negotiating with the government of the receiving state, are not so limited. 162 So, if in the course of negotiating on behalf of his state with the receiving state, the Ambassador were to conspire to commit genocide, the text of Article 3 does not indicate that this is not an act performed in the exercise of his diplomatic function. Beyond this textual analysis, the reasons for rejecting the argument that acts contrary to international law are not official acts of other state officials discussed above apply with equal force to diplomats. Thus the German Constitutional Court confirmed in the Former Syrian Ambassador case, 'diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law'.

As the immunity *rationemateriae* of former diplomats is treaty-based and there is no evidence to suggest that the VCDR has fallen into disuse, it is difficult to argue that this immunity is superseded by the emerging customary international law rule according to universal jurisdiction. It would, therefore, appear that the state to which a former diplomat was accredited is bound to respect his or her immunity *rationemateriae*, even if the diplomat is charged with having committed an international crime. However, the treaty rule according to diplomatic immunity *rationemateriae* does not

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apply with respect to third states. With respect to those states, the position of the former diplomat is the same as that of other officials: he or she is entitled to the general immunity *rationemateriae* of state officials which derives from state immunity. Therefore, when in a third state, a former diplomat is not entitled to immunity *rationemateriae* with respect to prosecutions for international crimes. (14)

In this regard, it is important to point out that, consular immunity is much similar to diplomatic immunity, especially from the theoretical point of view. Consular Immunity is a set of special rights which are recognized to consuls in order to successfully perform his duties. Vienna Convention on Consular Relations despite that treats the consular immunity in particular in the second chapter and its third chapter, also in its preamble says: “the purpose of privileges and immunities is not the creation of the privileged status of a person, but ensuring efficient performance of the functions of consular posts on behalf of their respective countries”.

Consular immunity is similar to diplomatic immunity, which was recognized to diplomatic representatives, as both follow the same order so that the exercise as efficiently to diplomatic and consular functions. At their base lies the principle of functionality. (15)

Also, consular immunities as diplomatic immunities will be enjoyed by every member of the consulate since the moment of arrival in the territory of the host state in order to start the service, or if there is, from the start of the function at the consulate. When user functions of the consular end, even privileges, and immunities of it end. However, between consular and diplomatic immunity there are significant changes related mainly to the content. In this sense diplomatic immunity involves a broader category of rights in comparison with consular immunity, and this because of the different nature of their functions.

Consular immunity consists of:

- personal integrity;
- exemption from the jurisdiction;
- inviolability of the premises;
- inviolability of documents and official correspondence.

Below we will make their detailed treatment.

a. Personal inviolability (Article 40, 41, 42)

The right to personal inviolability is granted also to the consuls, but not absolutely. (16) Consular Convention provides that:

consular functionaries cannot be arrested or detained, unless they commit a serious

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offense and only by decision of the competent judicial body;
in addition to the above case, consular officials cannot be imprisoned and subjected to any form of restriction of personal freedom, but with a final decision;
if it starts criminal proceedings against him, he must be submitted to the competent authorities;

in the event of his arrest or detention, the receiving State is obliged to notify the head of the consular office or the State addressed.

Members of the consulate may be called to testify in a judicial or administrative process. As a rule, they are forced to testify in this case the competent authority must show respect to them and not to hinder the exercise of functions. This means that when it is possible the statement can also be obtained at the residence of the consul, in his office or can accept a written statement. However, the consul is not obliged to testify on facts relating to its functions or show official correspondence or documents relating to it.

b. Exclusion of jurisdiction (Article 43)

Consular officials are not subject to civil jurisdiction, criminal and administrative courts of the receiving state for acts committed in the exercise of consular functions. This means that unlike diplomatic representatives, they enjoy functional immunity consular and not personal (Luzzatto, 2003, p. 216).

Immunity from civil judiciary about a consular functionary ruled in two cases:

if the lawsuit has begun under a contract that has been done by a consular official, not expressly state as his envoy;

if the claim is filed by a third person for compensation for damage caused by a vehicle, vessel or aircraft of the sending State in the receiving state.

c. The inviolability of premises (Article 31)

Building and consular premises are inviolable. This means that local authorities cannot enter there without permission of consular representation. However, unlike diplomatic immunity provided that in case of fire or other disaster requiring urgent measures consent of consular officeholder is presumed.

d. Inviolability of documents and official correspondence (Article 33, Article 35)

Consular archives and documents shall be inviolable at any time and wherever they may be. Also, the official correspondence is immune. These documents include consular relations with its government, local authorities and the diplomatic representative of his country and the citizens of his country.

From all that was said above, the building's integrity and that of official correspond-

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ence and documents, form the core of consular immunity.

In the case of immunity from the judiciary and personal integrity, the sending State may waive its immunity to consular representatives. Immunity, in this case, is final and the decision should be communicated in writing to the receiving state.

For performing consular functions, particular importance has consular office communication with the host country authorities and the citizens of the sending state. For this purpose, to the consuls is recognized the freedom of communication. Article 36 of the Consular Convention provides that consular officials should have the freedom of communication with the citizens of their own country. Also, the competent authorities of the receiving State shall immediately notify the consular post of the sending State for the arrest, detention or imprisonment of its citizens if it is in the territory consular and requires. The person concerned has the right to give the competent authority of the state receiving a report that the latter submit to the consular office. On this basis, consular officials can come to help these citizens, by visiting them and keeping correspondence, taking appropriate measures for the person to be legally represented, etc. All these actions must be carried out within the limits of the laws of the receiving state.

That having been said above has to do with the very essence of the implementation of consular functions, namely the protection of the interests of citizens of the sending State in the receiving state. Even most of the consular practice has to do precisely with these cases envisaged by Article 36. (17)

A concrete example of the practice is the decision of the International Court of Justice, which accepted the request of the German state about violations by the US official, Article 36 of the Convention on Consular Relations. As a result of the violation of this article, based on a decision of the death penalty, they have executed two German nationals. Procedures against them were conducted without informing that they had the right to consular assistance. The International Court of Justice affirmed the coherent character of Article 36 of the Vienna Convention of relations consular fees. (18)

Conclusions

Presently, we have to conclude that the possibilities to prosecute diplomatic and consular agents who have committed serious crimes but enjoy personal inviolability and diplomatic immunity are very much limited, both in number and effectiveness. As amendments to the Vienna Conventions are unlikely to be achieved either through

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treaties or custom, so far we have to hope for greater readiness of sending states, in co-operation with receiving states, to ensure prosecution of serious criminals. Besides ensuring prosecution, receiving states should also attribute more importance to the prevention of such crimes by asking sending states to provide general and possible criminal background information on the diplomat and explanations about why the person left prior postings (if not because of normal termination of functions) and also by contacting those countries where the diplomat in question has served prior terms and inquire as to whether any problems arose involving that person.

The diplomatic and consular rights have evolved with the development of diplomatic and consular relations, since their early appearance until today. One such development is affected by the international situation, integrating multiple processes and the state as the international community's fundamental actor.

Despite the postmodern characteristics that present consular relations today, their fundamentals remain "Vienna Convention on Consular Relations" of 1963. Here it is pertinent to highlight the need for renewal of this convention, in order to have the proportion between the consular relations with their legal basis.

Diplomatic and consular protection it should not be confused with each other. Among them, there are differences as to the nature, structure and the launch of the procedure. Consular protection is mandatory, while diplomatic protection is an act with discretionary character.

Given that the trend today is to combine diplomatic with consular functions, we think that narrowing the differences between the diplomatic and the consular immunity would be important and right.

In the case of commission of a crime or other serious offense as by consular representatives, immunity must be removed in any case and procedures must take place in the country where the violation is done.

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