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**MBROJTJA NDËRKOMBËTARE E PERSONELIT DIPLOMATIK DHE
KEQPËRDORIMI I IMUNITETIT TË TYRE**

**МЕЃУНАРОДНА ЗАШТИТА НА ДИПЛОМАТСКИ ПЕРСОНАЛ И
ЗЛОУПОТРЕБА НА НЕГОВИОТ ИМУНИТЕТ**

**INTERNATIONAL PROTECTION OF DIPLOMATIC PERSONNEL
AND ABUSE OF ITS IMMUNITY**

Abstract

The international protection of diplomatic personnel is of particular importance, which aims to establish and maintain peace between states and international organizations, as subjects of international law. Therefore, the diplomatic relations between states are important, which means that they should be always according to international rules without violating them between states.

In international law practice, there are different cases which have a direct connection with diplomatic protection, and for such cases, have provided data by different authors as well as in international and national institutions. However, through this paper is elaborated what the notion of international protection and diplomatic immunity actually contains, the international acts that regulate this matter, including as well as some well known international cases that have to do with diplomatic personnel, namely, the violation of their privileges and immunities, which they enjoy in the receiving state and in international organizations, etc.

Therefore, the protection of diplomatic personnel should always be within the competences of the state and international bodies, in order to carry out official duties as easily and without obstacles, i.e. in the performance of diplomatic activities..

Keywords: *case, convention, protection, organization, state.*

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Introduction

During the performance of the duties the diplomatic personnel must enjoy more comprehensive protection or otherwise recognized in international law as the international protection of diplomatic personnel. In this case, it is more than important to mention that the diplomatic personnel should enjoy this protection at all times and circumstances. Undoubtedly, the receiving state or international organization must provide for this protection in the first place.

There are a number of international conventions that regulate the matter in question, which in their provisions contain a series of rights and obligations for diplomatic personnel, starting from diplomatic representatives, etc. But, on the other hand, the internal laws of the states should not be overlooked, which also provide different rules and which has to be respected by diplomatic representatives, including their personnel, but always referring to the immunity that they enjoy.

This research as a whole contains several sub-chapters which refer to the notion and importance of international protection, respectively to diplomatic protection. At the same time, the diplomatic protection contributes to the development of bilateral relations between states, as well as to the establishment of peace between two sovereign states that are mainly related to state immunity.

In addition to diplomatic protection, also are elaborated at several international cases which as a result have the violation of diplomatic immunity that enjoys diplomatic representatives either in the receiving state or in the international organization. However, the immunities and privileges are generally very similar to those accorded to diplomatic agents, but with rather greater emphasis on the functional basis of the privileges and immunities.²

It is important to emphasize that in all cases related to diplomatic immunity, namely to the abuse of diplomatic immunity, have been initiated before the International Court of Justice, to which are made different assessments resulting in different decisions depend on cases.

1. The notion and importance of the diplomatic protection

In international law, as well as in the theory and practice of interstate communication, such concepts as “*diplomatic protection*” and “*consular assistance*” are used (which is also called “*consular assistance*” or “*consular protection*” in the literature).³ The Vienna Convention provides for varying

² Amerasinghe, Ch. F. (2005). *Principles of the Institutional Law of the International Organizations*, Cambridge, p. 338.

³ Ведель И.А. (2018). *Дипломатическая защита и консульское содействие в международном праве. Diplomatic protection and consular assistance in international law*, Moscow, p. 8.

degrees of immunity, which are dependent on the status of the person concerned. There are five main categories of person each attracting differing degrees of immunity: the head of the mission (the ambassador or *charge d'affaires*); the members of the diplomatic staff; the members of the administrative and technical staff; the members of the service staff; private servants.⁴ Meanwhile, the phrase diplomatic personnel is not a term of art. At its most basic, the term diplomatic personnel simply denotes diplomatic agents. Such individuals are defined in the Vienna Convention on Diplomatic Relations, 1961 as the head of the mission or a member of the diplomatic staff of the mission, which latter category includes members of the staff of a diplomatic mission having diplomatic rank.⁵ Otherwise, in the Vienna Convention on Diplomatic Relations, 1961, it is provided: "*The head of the mission*" is the person charged by the sending state with the duty of acting in that capacity".⁶ Also, related to the staff of the mission, it is provided "*The members of the diplomatic staff are the members of the staff of the mission having diplomatic rank*".⁷

Indeed, it is clear from the terms of the Vienna Convention itself that this limited definition of what constitutes diplomatic personnel is rather too narrow, as the range of privileges and immunities accorded to diplomatic agents in the Convention are provided also to a broader variety of individuals. Thus, while diplomatic privileges and immunities are expressed in the Vienna Convention as applying to diplomatic agents.⁸ Namely, the Vienna Convention on Diplomatic Relations, provides that: "*The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in articles 29 to 36*".⁹ The phrase is not defined.¹⁰ For this issue, the writers had always stressed that the privileges and immunities given to members of the family were derivative-his wife and children were regarded as extensions of the person of the diplomat, and their protection was equally necessary in order to ensure his independence. But only close members of the family living in the diplomat's household were regarded in this way. The words which were introduced by the International Law Commission "*forming part of his household*" corresponded to general practice. The majority of states did not define with precision which members of the family, they would accept as entitled to

⁴ Hiller, T. (1998). *Sourcebook on Public International Law*, London & Sydney, p. 317.

⁵ Barker, J. Craig. (2006). *The Protection of Diplomatic Personnel*, Hampshire & Burlington, p. 17.

⁶ Vienna Convention on Diplomatic Relations, 1961, article 1, paragraph 1.

⁷ Article 1, paragraph 4.

⁸ Barker, J. Craig. (2006). *The Protection of Diplomatic Personnel*, Hampshire & Burlington, p. 17.

⁹ Vienna Convention on Diplomatic Relations, 1961, article 37, paragraph 1.

¹⁰ Aust, A. (2007). *Modern Treaty Law and Practice*, Cambridge, p. 242.

privileges and immunities, but preferred to retain some flexibility and to settle difficult or unusual cases by agreement with individual diplomatic missions.¹¹

However, the mentioned articles, i.e. articles 29 to 36 in their provisions contain the inviolability of the person of a diplomatic agent, that can not be liable to any form of arrest or detention and the receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.¹² Also, other articles contain for the inviolability of the private residence of a diplomatic agent; inviolability of his papers, correspondence, his property. A diplomatic agent also enjoys immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; and for an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

It is imported to be emphasized that the diplomatic agent is not obliged to give evidence as a witness and the diplomatic agent is exempt from all dues and taxes, personal or real, national, regional or municipal, except: indirect taxes of a kind which are normally incorporated in the price of goods or services; dues and taxes on private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; estate, succession or inheritance duties levied by the receiving state, subject to the provisions of paragraph 4 of article 39;¹³ dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving state; charges levied for specific services rendered; registration, court or

¹¹ Denza, E. (2016). *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations*, Oxford, p. 319.

¹² It implies that the receiving state is obliged to afford a higher degree of protection to the person of the diplomatic agent than is accorded to a private person. It is the duty of the government to which the envoy is accredited to take all necessary measures to safeguard the inviolability of the diplomatic agent. For more, see: Sen, B. (1965). *Diplomat's Handbook of International Law and Practice*, The Hague, p. 90.

¹³ The article 39, paragraph 4 of the Vienna Convention on Diplomatic Relations, provides: "*In the event of the death of a member of the mission not a national of or permanently resident in the receiving state or a member of his family forming part of his household, the receiving state shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving state was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission*".

record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23.¹⁴

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

Similarly, in terms of article 37, paragraph 2 of the Vienna Convention: *“Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in Articles 29 to 35¹⁵ except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 1 of article 31¹⁶ shall not extend to acts performed outside the course of their duties. They shall also enjoy the privy-leges specified in article 36, paragraph 1¹⁷ in respect of articles imported at*

¹⁴ Please see article 23, paragraph 1 and 2 of the Vienna Convention on Diplomatic Relations: *“The sending state and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving state by persons contracting with the sending state or the head of the mission”*.

¹⁵ Barker, J. Craig. (2006). *The Protection of Diplomatic Personel*, Hampshire&Burlington, p. 18.

¹⁶ See: article 31, paragraph 1 of the Vienna Convention on Diplomatic Relations: *“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions”*.

¹⁷ See: article 36, paragraph 1 of the Vienna Convention on Diplomatic Relations: *“The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on: articles for the official use of the mission; articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment”*.

the time of first installation".¹⁸ Thus, such individuals are entitled not only to the privilege of inviolability, but are also entitled to benefit from the special duty of protection. Accordingly, such individuals can properly be counted as falling within the concept of diplomatic personnel for the purposes of the present discussion.¹⁹

2. Diplomatic protection

The protection of diplomatic relations between states also aims to establish the peace of states. However, these rules indirectly affect the rules of state immunity, which can be bypassed by the actions of state bodies and persons acting on behalf of the state and in accordance with its jurisdiction. Meanwhile, the rules on diplomatic and consular immunities are codified in two well-known conventions, such as the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963.²⁰

The diplomatic protection as a concept of international law has two aspects. The first aspect is the diplomatic protection enjoyed by persons who enjoy the status of a diplomat. In this protection, diplomats enjoy certain privileges, such as that from criminal prosecution before the courts of another state, as well as regarding to the inviolability of the diplomatic bag when they are exercising their functions. These rights are defined in detail in the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963. The principle of diplomatic immunity for the diplomatic corps and senior state officials such as the head of state, head of government and ministers are considered at the same time as part of customary international law.

However, here the protection of the rights of citizens by the state will be addressed through the instrument of diplomatic protection by bringing a case before the international judicial institutions, such as the International Court of Justice in defence of the violated rights of one of their citizens. There are a several cases which are initiated before this court based on this instrument of international law as well as the fact that the International Court of Justice has the jurisdiction to refer the case based either on an agreement between the two respective states or through the acceptance by the states of the binding jurisdiction of this court, under the article 36, paragraph 2 of its statute. Also, a number of cases have been initiated before the Court based on the Protocol of the Vienna Convention on Consular Relations. In these recent

¹⁸ Vienna Convention on Diplomatic Relations, 1961, article 37, paragraph 2.

¹⁹ Barker, J. Craig. (2006). *The Protection of Diplomatic Personnel*, Hampshire & Burlington, p. 18.

²⁰ Kloth, M. (2010). *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights*, Leiden & Boston, p. 119.

cases, the main issue has been the non-notification of persons on their possibility to contact the consular office and to benefit from it for legal protection during the criminal proceedings against them.²¹

3. International cases of abuse of diplomatic immunity

In connection with diplomatic privileges and immunities the question has been raised whether certain instances of abuse of such privileges and immunities require a change in the law. Equally, in the case of international privileges and immunities the possibility of abuse exists. One problem is to define abuse for this purpose.²² Furthermore, in cases of serious abuse of immunity, it is possible for the receiving state to declare the diplomatic agent *persona non grata*.²³ On the other hand, the issue of diplomatic immunities is one of the most accepted and less discussed topics in international law, because it is in the interest of states to maintain a balance in diplomatic relations, although not all states adhere to this rule. In international practice, there are a different cases, such as: *United States diplomatic and consular staff in Tehran (United States of America v. Iran)*; *Certain questions concerning diplomatic relations (Honduras v. Brazil)*; *Status vis-à-vis the host state of a diplomatic envoy to the United Nations (Commonwealth of Dominica v. Switzerland)*; *Jurisdictional immunities of the state (Germany v. Italy: Greece intervening)*; *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights; Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations; Immunities and criminal proceedings (Equatorial Guinea v. France)*; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. It is important to mention that in all these cases has decided the International Court of Justice.²⁴

United States diplomatic and consular staff in Tehran (United States of America v. Iran) - The case was brought before the Court by an application by the United States following the occupation of its Embassy in Tehran by Iranian militants on 4 November 1979, and the capture and holding as hostages of its diplomatic and consular staff. On a request by the United States for the indication of provisional measures, the Court held that there was no more fundamental prerequisite for relations between states than the inviolability of diplomatic envoys and embassies, and it indicated provisional measures for ensuring the immediate restoration to the United States of the embassy premises and the release of the hostages. In its decision on the merits of the case, at

²¹ Zyberi, G. (2011). *E drejta ndërkombëtare e të drejtave të njeriut*, Tirana, pp. 261-262.

²² Amerasinghe, Ch. F. (2005). *Principles of the Institutional Law of the International Organizations*, Cambridge, p. 350.

²³ Hiller, T. (1998). *Sourcebook on Public International Law*, London & Sydney, p. 318.

²⁴ Shaw, M. N. (2008). *International Law*, Cambridge, p. 751.

a time when the situation complained of still persisted, the Court, in its judgment of 24 May 1980, found that Iran had violated and was still violating obligations owed by it to the United States under conventions in force between the two countries and rules of general international law, that the violation of these obligations engaged its responsibility, and that the Iranian Government was bound to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States Government. The Court reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations. It pointed out that while, during the events of 4 November 1979, the conduct of militants could not be directly attributed to the Iranian state - for lack of sufficient information-that state had however done nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages. The Court noted that, after 4 November 1979, certain organs of the Iranian state had endorsed the acts complained of and decided to perpetuate them, so that those acts were transformed into acts of the Iranian State. The Court gave judgment, notwithstanding the absence of the Iranian Government and after rejecting the reasons put forward by Iran in two communications addressed to the Court in support of its assertion that the Court could not and should not entertain the case. The Court was not called upon to deliver a further judgment on the reparation for the injury caused to the United States Government since, by Order of 12 May 1981, the case was removed from the List following discontinuance.²⁵ For instance, breaches of diplomatic and consular law entitle the aggrieved state to restrict or withdraw immunities afforded to diplomatic and consular agents of the wrongdoer state.²⁶ On the other hand, there is also a case of violation of the Vienna Convention on diplomatic relations, which Washington used successfully against Tehran in the 1979 hostage case, because US police often fail to inform foreign citizens under arrest of their consular rights.²⁷

Certain questions concerning diplomatic relations (Honduras v. Brazil)

- On 28 October 2009, the Ambassador of Honduras to the Netherlands filed in the Registry of the Court an application instituting proceedings against Brazil in respect of a “*dispute between the two States relating to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any state, a principle incorporated in the Charter of the United*

²⁵ Handbook of the International Court of Justice, (2018). *The Registrar of the International Court of Justice*, The Hague, p. 127.

Also, please see: www.icj-cij.org/en/case/64 (30.08.2023).

²⁶ Hazel, M. F. “*Reparations and state responsibility: claims against Iraq arising out of the invasion and occupation of Kuwait*”, edited by: Rowe, P. (1993). *The Gulf War 1990-91 in International and English Law*, London & New York, pp. 245-246.

²⁷ Thakur, R. (2006). *The United Nations, Peace and Security*, Cambridge, p. 124.

Nations". At the end of the application the Court was requested "to *adjudge and declare that Brazil does not have the right to allow the premises of its Mission in Tegucigalpa to be used to promote manifestly illegal activities by Honduran citizens who have been staying within it for some time now and that it shall cease to do so*". To found the Court's jurisdiction, Honduras invoked article 31 of the American Treaty on Pacific Settlement, signed on 30 April 1948 and, under the terms of article 60 thereof, officially called the "*Pact of Bogotá*", ratified without reservation by Honduras on 13 January 1950 and by Brazil on 9 November 1965. An original copy of the application was sent to the Government of Brazil on 28 October 2009. The Secretary General of the United Nations was also informed about the filing of that application. By a letter dated 30 April 2010, received in the Registry on 3 May 2010, Mr. Mario Miguel Canahuati, Minister for External Relations of Honduras, informed the Court that the Honduran Government was "*not going on with the proceedings initiated by the application*" and that it "*accordingly withdraws this application from the Registry*". Consequently, the President of the Court made an Order on 12 May 2010 in which, after noting that Brazil had not taken any step in the proceedings in the case, he recorded the discontinuance by Honduras of the proceedings and ordered that the case be removed from the List.²⁸

Status vis-à-vis the host state of a diplomatic envoy to the United Nations (Commonwealth of Dominica v. Switzerland) - On 26 April 2006, the Commonwealth of Dominica filed an application instituting proceedings against Switzerland concerning alleged violations by the latter of the Vienna Convention on Diplomatic Relations, as well as of other international instruments and rules, with respect to a diplomatic envoy of Dominica to the United Nations in Geneva.²⁹ In the application proceedings by the Commonwealth of Dominica, is stated that: "*Mr. Roman Lakschin, has been accredited to the United Nations, its Specialized Agencies and to the World Trade Organization (WTO) since March 1996 as a member of the Permanent Mission of Dominica to the United Nations in Geneva (first as a Counselor, later as a Chargé d'affaires and Deputy Permanent Representative with the rank of ambassador)*". In its application, Dominica insists that this accreditation was "*effected to the organizations and not to Switzerland*" but that nevertheless Switzerland has "*claimed the right to withdraw the accreditation*" of the said envoy, "*stating that he is a "businessman" and as such he would have no right to be a diplomat*".³⁰ By letter of 15 May 2006, the Prime Minister of the Commonwealth of Dominica informed the Court that his Government "*did not wish to*

²⁸ Handbook of the International Court of Justice, (2018). *The Registrar of the International Court of Justice*, The Hague, pp. 223-224.

Also, please see: www.icj-cij.org/en/case/147 (01.09.2023).

²⁹ *Ibidem*, p. 207.

³⁰ <https://www.icj-cij.org/public/files/case-related/134/134-20060426-PRE-01-00-EN.pdf> (07.09.2023).

go on with the proceedings instituted against Switzerland” and requested the Court to make an Order “officially recording [their] unconditional discontinuance” and “directing the removal of the case from the General List”. By letter of 24 May 2006, the Swiss Ambassador in The Hague advised the Court that he had informed the competent Swiss authorities of the discontinuance as thus notified. Accordingly, on 9 June 2006, the Court made an Order in which, after noting that the Government of the Swiss Confederation had not taken any step in the proceedings in the case, it recorded the discontinuance of the proceedings by the Commonwealth of Dominica and ordered that the case be removed from the List.³¹

Jurisdictional immunities of the state (Germany v. Italy: Greece intervening) - On 23 December 2008, the Federal Republic of Germany instituted proceedings against the Italian Republic, requesting the Court to declare that Italy had failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts seeking reparation for injuries caused by violations of international humanitarian law committed by the Third Reich during the Second World War. In addition, Germany asked the Court to find that Italy had also violated Germany’s immunity by taking measures of constraint against Villa Vigoni, German state property situated in Italian territory. Finally, Germany requested the Court to declare that Italy had breached Germany’s jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which had given rise to the claims brought before Italian courts. Germany referred in particular to the judgment rendered against it in respect of the massacre committed by German armed forces during their withdrawal in 1944, in the Greek village of Distomo in the Distomo case. As basis for the Court’s jurisdiction, Germany invoked article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, ratified by Italy on 29 January 1960 and by Germany on 18 April 1961.

The Memorial of Germany and the Counter-Memorial of Italy were filed within the time-limits fixed by the Order of the Court of 29 April 2009. In its Counter-Memorial, Italy, referring to article 80 of the Rules of Court, made a counter-claim “with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”. The Court found that the counter-claim presented by Italy was inadmissible, because the dispute that Italy intended to bring before the Court by way of its counter-claim related to facts and situations existing prior to the entry into force as between the parties of the European Convention for the

³¹ Handbook of the International Court of Justice, (2018). *The Registrar of the International Court of Justice*, The Hague, pp. 207-208
See, also: www.icj-cij.org/en/case/134 (08.09.2023).

Peaceful Settlement of Disputes of 29 April 1957, which formed the basis of the Court's jurisdiction in the case (Order of 6 July 2010).

On 13 January 2011, Greece filed an application requesting permission to intervene in the case. In its application, Greece stated that it wished to intervene in the aspect of the procedure relating to judgments rendered by its own courts on the Distomo massacre and enforced (exequatur) by the Italian courts.³² The Court, in an Order of 4 July 2011, considered that it might find it necessary to consider the decisions of Greek courts in the Distomo case, in light of the principle of state immunity, for the purposes of making findings with regard to Germany's submission that Italy had breached its jurisdictional immunity by declaring enforceable in Italy decisions of Greek courts founded on violations of international humanitarian law committed by the German Reich during the Second World War. This permitted the conclusion that Greece had an interest of a legal nature which might have been affected by the judgment in the case and, consequently, that Greece could be permitted to intervene as a non-party "*in so far as this intervention is limited to the decisions of Greek courts (in the Distomo case)*".

In its Judgment rendered on 3 February 2012, the Court first examined the question whether Italy had violated Germany's jurisdictional immunity by allowing civil claims to be brought against that state in the Italian courts. The Court noted in this respect that the question which it was called upon to decide was not whether the acts committed by the Third Reich during the Second World War were illegal, but whether, in civil proceedings against Germany relating to those acts, the Italian courts were obliged to accord Germany immunity. The Court held that the action of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations. It stated in this connection that, under customary international law as it presently stood, a state was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict. The Court further observed that, assuming that the rules of the law of armed conflict which prohibited murder, deportation and slave labour were rules of *jus cogens*, there was no conflict between those rules and the rules on state immunity. The two sets of rules addressed different matters. The rules of state immunity were confined to determining whether or not the courts of one state could exercise jurisdiction in respect of another State. They did not bear upon the question whether or not the conduct in respect of which the proceedings were brought was lawful or unlawful. Finally, the Court examined Italy's argument that the Italian courts were justified in denying Germany immunity, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. The Court found no basis in the relevant domestic or international practice that

³² Ibidem, p. 219.

international law made the entitlement of a state to immunity dependent upon the existence of effective alternative means of securing redress.

The Court then addressed the question whether a measure of constraint taken against property belonging to Germany located in Italian territory constituted a breach by Italy of Germany's immunity. It noted that Villa Vigoni was being used for governmental purposes that were entirely non-commercial, that Germany had in no way consented to the registration of the legal charge in question, nor allocated Villa Vigoni for the satisfaction of the judicial claims against it. Since the conditions permitting a measure of constraint to be taken against property belonging to a foreign state had not been met in this case, the Court concluded that Italy had violated its obligation to respect Germany's immunity from enforcement.

Finally, the Court examined the question whether Italy had violated Germany's immunity by declaring enforceable in Italy civil judgments rendered by Greek courts against Germany in proceedings arising out of the massacre committed in the Greek village of Distomo by the armed forces of the Third Reich in 1944. It found that the relevant decisions of the Italian courts constituted a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

Accordingly, the Court declared that Italy must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which Germany enjoyed under international law cease to have effect.³³

Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights - By a letter dated 7 August 1998, the Secretary - General of the United Nations officially communicated to the Registry Decision 1998/297 of 5 August 1998, by which the Economic and Social Council requested the Court for an advisory opinion on the legal question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations to a Special Rapporteur of the Commission on Human Rights, and on the legal obligations of Malaysia in that case. The Special Rapporteur, Mr. Kumaraswamy, was facing several lawsuits filed in Malaysian courts by plaintiffs who asserted that he had used defamatory language in an interview published in a specialist journal and who were seeking damages for a total amount of 112 million US \$. However, according to the United Nations Secretary - General, Mr. Kumaraswamy had been speaking in his official capacity as Special Rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention.

Written statements having been filed by the Secretary-General and by various states, public sittings were held on 7, 8 and 10 December 1998, during which the Court heard oral statements by the representative of the United

³³ Ibidem, pp. 220, 221. Also, see: www.icj-cij.org/en/case/143 (22.09.2023).

Nations and three States, including Malaysia. In its advisory opinion of 29 April 1999, having concluded that it had jurisdiction to render such an opinion, the Court noted that a Special Rapporteur entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations.³⁴ In this regard, it is said: “*Experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations*”.³⁵ Also, in this aspect is important to mention that the representatives of the Members of the United Nations and officials of the “*Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization*”.³⁶

It emphasized that it was the Secretary General, as the chief administrative officer of the Organization, who had the primary responsibility and authority to assess whether its agents had acted within the scope of their functions and, where he so concluded, to protect those agents by asserting their immunity. The Court observed that, in the case concerned, the Secretary General had been reinforced in his view that Mr. Cumaraswamy had spoken in his official capacity by the fact that the contentious article several times explicitly referred to his capacity as Special Rapporteur, and that in 1997 the Commission on Human Rights had extended his mandate, thereby acknowledging that he had not acted outside his functions by giving the interview. Considering the legal obligations of Malaysia, the Court indicated that, when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they must immediately be notified of any finding by the Secretary General concerning that immunity and that they must give it the greatest weight. Questions of immunity are preliminary issues which must be expeditiously decided by national courts in *limine litis*. As the conduct of an organ of a State, including its courts, must be regarded as an act of that state, the Court concluded that the Government of Malaysia had not acted in accordance with its obligations under international law in the case concerned.³⁷

³⁴ Ibidem, p. 271. See: www.icj-cij.org/en/case/100 (30.09.2023).

³⁵ Convention on the Privileges and Immunities of the United Nations, 1946., article 6, Section 22b.

³⁶ United Nations Charter, 1945, article 105, paragraph 2.

³⁷ Handbook of the International Court of Justice, (2018). *The Registrar of the International Court of Justice*, The Hague, pp. 271-272.

Also, see: www.icj-cij.org/en/case/100 (06.10.2023).

Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations - On 24 May 1989, the Economic and Social Council of the United Nations (ECOSOC) adopted a resolution whereby it requested the Court to give, on a priority basis, an advisory opinion on the question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Mr. Dumitru Mazilu, Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. Mr. Mazilu, a Romanian national, had been entrusted, by a resolution of the Sub-Commission, with the task of drawing up a report on "*Human Rights and Youth*" in connection with which the Secretary-General was asked to provide him with all the assistance he might need. Mr. Mazilu was absent from the 1987 session of the Sub-Commission, during which he was to have filed his report, and Romania lets it be known that he had been taken into hospital. Mr. Mazilu's mandate finally expired on 31 December 1987, but without his being relieved of the task of rapporteur that had been assigned to him. Mr. Mazilu was able to get various messages through to the United Nations, in which he complained that the Romanian authorities were refusing him a travel permit. Moreover, those authorities, further to contacts initiated by the Under Secretary General for Human Rights at the request of the Sub-Commission, had let it be known that any intervention of the United Nations Secretariat would be considered as interference in Romania's internal affairs. Those authorities subsequently informed the United Nations of their position with regard to the applicability to Mr. Mazilu of the Convention on the Privileges and Immunities of the United Nations, asserting, *inter alia*, that the Convention did not equate rapporteurs, whose activities were only occasional, with experts on missions for the United Nations that they could not, even if granted some of that status, enjoy anything more than functional immunities and privileges, that those privileges and immunities began to apply only at the moment when the expert left on a journey connected with the performance of his mission, and that in the country of which he was a national an expert enjoyed privileges and immunities only in respect of actual activities relating to his mission.

The Court rendered its advisory opinion on 15 December 1989, and began by rejecting Romania's contention that the Court lacked jurisdiction to entertain the request. Moreover, the Court did not find any compelling reasons that might have led it to consider it inappropriate to render an opinion. It then engaged in a detailed analysis of article VI, section 22, of the Convention, which relates to "*Experts on missions for the United Nations*". It reached the conclusion, *inter alia*, that section 22 of the Convention was applicable to persons (other than United Nations officials) to whom a mission had been entrusted by the Organization and who were therefore entitled to enjoy the privileges and immunities provided for in that section with a view to the independent exercise of their functions, that during the whole period of such

missions, experts enjoyed these functional privileges and immunities whether or not they travelled ; and that those privileges and immunities might be invoked against the state of nationality or of residence unless a reservation to section 22 of the Convention had been validly made by that state. Turning to the specific case of Mr. Mazilu, the Court expressed the view that he continued to have the status of the Special Rapporteur, that as a consequence he should be regarded as an expert on a mission within the meaning of Section 22 of the Convention and that that section was accordingly applicable in his case.³⁸

Immunities and criminal proceedings (Equatorial Guinea v. France) - On 13 June 2016, the Republic of Equatorial Guinea instituted proceedings against the French Republic with regard to a dispute concerning “*the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security Mr. Teodoro Nguema Obiang Mangue, and the legal status of the building which houses the Embassy of Equatorial Guinea in France*”.

As basis for the Court’s jurisdiction, Equatorial Guinea invoked the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, of 18 April 1961, and the United Nations Convention against Transnational Organized Crime of 15 November 2000.

On 29 September 2016, Equatorial Guinea filed a request for the indication of provisional measures.

Equatorial Guinea also requested the President of the Court to exercise his power under Article 74, paragraph 4, of the Rules of Court. By a letter of 3 October 2016, the Vice-President of the Court, acting as President in the case, drew the attention of France, in accordance with the said provision of the Rules, “*to the need to act in such a way as will enable any Order the Court may make on the request for provisional measures to have its appropriate effects*”.

By an Order of 7 December 2016, the Court, having heard the parties, ordered France, pending a final decision in the case, to take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability. However, with regard to Equatorial Guinea’s claim relating to the immunity of Mr. Teodoro Nguema Obiang Mangue, the Court considered that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime did not exist between the parties, and the Court thus did not have prima facie jurisdiction under that instrument to entertain Equatorial Guinea’s Request for provisional measures.

On 3 January 2017, Equatorial Guinea filed its Memorial within the time-limit fixed by the Court. On 31 March 2017, France filed preliminary

³⁸ Ibidem, pp. 267-268. Also, see: www.icj-cij.org/en/case/81 (20.10.2023).

objections to the jurisdiction of the Court and the admissibility of the application, and the proceedings on the merits were then suspended. On 31 July 2017, within the time-limit fixed by the Court, Equatorial Guinea presented a written statement of its observations and submissions on the preliminary objections raised by France. Following public hearings held in February 2018, the Court delivered, on 6 June 2018, its Judgment on the preliminary objections raised by France.

In its judgment, the Court upheld the first preliminary objection raised by France, according to which the Court lacked jurisdiction on the basis of article 35 of the United Nations Convention against Transnational Organized Crime. However, it declared that it did have jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, to entertain the application of Equatorial Guinea, in so far as it concerned the status of the building located at 42 Avenue Foch in Paris as premises of the mission, and that this part of the application was admissible.³⁹

After public hearings which were held in February 2020, the Court issued its judgment on the merits of the case on 11 December 2020. The Court found that the building at 42 avenue Foch in Paris had never acquired the status of “*premises of the mission*” within the meaning of article 1 (*i*) of the Vienna Convention on Diplomatic Relations and that France had not breached its obligations under that Convention.⁴⁰

*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*⁴¹ - In the Diallo case, where a Guinean citizen was arrested, detained and then expelled from the country and unable to enjoy his property. The Court found the Democratic Republic of Congo in violation of international law. Meanwhile, the Court found the Democratic Republic of the Congo in violation of article 13 of the International Covenant on Civil and Political Rights⁴² and article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights⁴³ which protect foreigners from arbitrary expelled, from the country where they live. Also, the Court decided that in relation to the circumstances in which Diallo was arrested and detained from 1995 to 1996

³⁹ Ibidem, pp. 246-247.

⁴⁰ www.icj-cij.org/en/case/163 (26.10.2023).

⁴¹ See: www.icj-cij.org/en/case/103 (27.10.2023).

⁴² See: Article 13 of the International Covenant on Civil and Political Rights: “*An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority*”.

⁴³ See: Article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights: “*A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law*”.

with a view to his expulsion, the Democratic Republic of the Congo had violated article 9, paragraphs 1 and 2 of the International Covenant on Civil and Political Rights⁴⁴ and article 6 of the African Charter on Human and Peoples' Rights⁴⁵ which protect the liberty and security of the person and prohibit arbitrary arrest. The Court also emphasized that by not informing Diallo without delay, after his detention in 1995-1996, of his rights under article 36, paragraph 1b, of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated its obligation arise for him under that point to alert him to the possibility of contacting the Guinean consular authorities.⁴⁶ Therefore, in the Vienna Convention on Consular Relations, is provided: *"if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights"*.⁴⁷

As it seems from this case, where the court has jurisdiction over such a case and depending on the obligations that the states have undertaken, a state can exercise diplomatic protection for its citizen whose rights are violated, even before the highest authorities such as the International Court of Justice. A necessary condition in this case is that the person should be a citizen of the state that initiate complain to the international judicial body. This connection of the protection with the state is a characteristic of diplomatic protection.⁴⁸

Also, in addition to the cases which were mentioned above, which were treated in more detail, in the corpus and events that have implicated diplomatic and consular rights, especially in modern times, are also the following cases:⁴⁹ The incident where the Burmese ambassador to Sri Lanka murdered his wife and burned her body on a pyre of wood within embassy premises, 1979; Shooting of a British law enforcement officer from inside the Libyan Embassy

⁴⁴ See: Article 9, paragraph 1 of the International Covenant on Civil and Political Rights: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"*. See also, paragraph 2: *"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"*.

⁴⁵ See: Article 6 of the African Charter on Human and Peoples' Rights: *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"*.

⁴⁶ Zyberi, G. (2011). *E drejta ndërkombëtare e të drejtave të njeriut*, Tirana, pp. 262-263.

⁴⁷ Vienna Convention on Consular Relations, 1963, article 36, paragraph 1b.

⁴⁸ Zyberi, G. (2011). *E drejta ndërkombëtare e të drejtave të njeriut*, Tirana, p. 263.

⁴⁹ Lau, Ch. (2005). *Diplomatic & Consular Law: Research Guide*, p. 4.

in London, 1984; Kidnapping and attempted smuggling of a former Nigerian prime minister in a “*diplomatic bag*” from a London-area airport, 1984; The waiver of diplomatic immunity for a high-ranking Georgian diplomat after killing a teenager in Maryland, 1997; The unauthorized leak and publication of U.S. State Department cables, 2010; The granting of diplomatic asylum to Julian Assange, editor-in-chief of “*Wikileaks*”, at the Ecuadorian embassy in London, 2012; The arrest of Deputy Counsel to General of the Indian Consulate in New York City, for allegedly committing visa fraud on behalf of her domestic worker, 2013.

Conclusion

In the performance of diplomatic activities, either by diplomatic representatives, including diplomatic staff, it is necessary to enjoy diplomatic protection in all cases, in order not to violate their inviolability. If we look at the international level, such a thing helps to maintain diplomatic relations and peace between states.

It is more than reasonable that in order to ensure diplomatic protection, there are various international laws that provide certain rules, in which cases such protection is applied and what actions the receiving state should take in order to ensure the inviolability of diplomatic representatives, together with its staff within a reasonable time.

As was elaborated above in the paper, there is also the situation of violation or abuse of diplomatic immunity that enjoys diplomats. It is characteristic that both cases were initiated before the International Court of Justice, and some of them were discontinued by the request of the party that had initiated such a procedure.

From the above mentioned cases, which were mainly related to the abuse of diplomatic immunity, it is the understanding of the lack of diplomatic protection in certain situations, especially when it has to do with the inviolability of diplomats. Therefore, the diplomatic protection is important and should be applied in all circumstances.

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