Arrest and Detention of the Iranian Diplomat: What Is the Response of International Law?

Ali Masoudian Varzaneh[*] and Mohammadjavad Aghabagheri[**]

DOI: 10.22034/IRUNS.2023.168480

Received: 2021-08-31 Accepted: 2022-07-07

Abstract

The arrest of a diplomat of the Islamic Republic of Iran by the German police, which took place on 1 July 2018, became a news-making event; as a result, the 1961 Vienna Convention on Diplomatic Relations, and in particular its Article 40, turns out to be the matter of debate. Mr. Assadollah Assadi's car was stopped on his way back to his office in Vienna while crossing through a third country in Germany, where he was arrested on certain charges. The investigation process of the case took two years, and finally on 15 July 2020, the case was delivered to a court in Belgium. This article focuses on three main issues. First, it assesses the scope and content of Article 40 of the Vienna Convention on Diplomatic Relations as well as the requirements set forth in this article. To this end, various similar cases in different jurisdictions will be explored. Second, it addresses the applicability *vel non*e of the State responsibility, and third, it refers to the dispute settlement mechanism to which Iran might resort in order to protect the rights of its diplomat. This article argues that, concerning the case of Mr. Asssadollah Assadi, Germany and Belgium have violated the relevant principles of diplomatic law and, accordingly, these States must be held internationally responsible for their internationally wrongful acts.

Keywords: Assadollah Assadi, Iranian diplomat, 1961 Vienna Convention on Diplomatic Relations, duties of third States, transit.

[*] Master Student of Public International Law, Allameh Tabataba'i University.
[**] PhD in Criminal Law, Edalat University.

Introduction

Mr. Assadollah Assadi was the Third Counsellor of the Embassy of the Islamic Republic of Iran in Vienna. He left Austria with his family on leave. On 1 July 2018, after touring several neighbouring European countries, due to the official visit of the President of Iran,[1] Hassan Rouhani, to Austria, he started to return to Vienna with his family (wife and two sons), as he needed to be present at the Iranian Embassy during President Rouhani's visit.

Around two hours after leaving, German police arrested him on the A3 motorway in south-east Germany. The move was prompted by a European arrest warrant issued by a Belgian court,[2] which was based on the statements[3] made by two defendants arrested in Belgium.[4] On 3 July 2018, the Austrian Federal Ministry for Foreign Affairs summoned the Iranian ambassador to Vienna and requested Iran to waive the immunity of Assadollah Assadi within 48 hours. However, the Islamic Republic of Iran did not accede to the request. *A contrario*, on 4 July 2018, the Iranian Government summoned the French and Belgian ambassadors and Germany's *Chargé d'Affaires* to Tehran in order to protest over the arrest of the Iranian diplomat in Germany. In a press release, the Iranian Foreign Ministry stated:

In a meeting with the French ambassador and the German *Chargé d'Affaires*, Iranian Deputy Foreign Minister, Abbas Araqchi, expressed Tehran's strong protest over the detention of the Iranian diplomat. Araqchi, while mentioning that diplomats enjoy immunity under the Vienna Convention, called for the immediate and unconditional release of Assadi. He then dismissed the move as a scenario aimed at undermining Iran-Europe relations, saying the move was timed to coincide with Iranian President Hassan Rouhani's

[1] Austria to Revoke Immunity of Iranian Diplomat Linked to Bomb Plot, Available at: www.english.aawsat.com//home/article/1319546/austria-revoke-immunity-iranian-diplomat-linked-bomb-plot.

[2] Germany charges Iranian diplomat with spying, conspiracy to murder opposition group in France, Available at: www.dw.com/en/germany-charges-iranian-diplomat-with-spying-conspiracy-to-murder-opposition-group-in-france/a-44630682.

[3] The two mentioned persons, Saadouni and Naami, claimed that Mr. Assadi had given them the bomb and ordered them to do so.

[4] Iranian diplomat faces extradition from Germany over 'bomb plot', Available at: www.bbc.com/news/world-europe-45705799.

trip to Europe and comes on the threshold of a foreign ministerial meeting between Iran and the P4+1 group of countries.

In the meeting, the French and Belgian ambassadors as well as the German *Chargé d'Affaires* stressed that they would promptly notify their respective governments of Iran's objection. No heed was, however, given to the objection. On 6 July 2018, the German Federal Prosecutor General of the Federal Court of Justice charged Assadi, *inter alia*, with spying and conspiracy to murder. In a statement, the Federal Prosecutor General said:

> Since 2014, Assadollah Assadi has been accredited as a Third Counsellor at the Iranian Embassy in Vienna. According to the findings, he was an employee of the Iranian Ministry of Intelligence 'MOIS (Ministry of Intelligence and Security)'. The tasks of the 'MOIS' primarily include the intensive observation and fight against opposition groups inside and outside of Iran.The accused was brought before the investigating judge of the Federal Court of Justice on 9 July 2018, who read the arrest warrant to the accused and ordered his pre-trial detention. The investigation and the warrant of the investigating judge of the Federal Court of Justice do not preclude the requested extradition of the accused to the Belgian law enforcement authorities.[5]

However, as Stefan Talmon points out, "The fact that he was working for the Iranian Ministry of Intelligence and Security was immaterial for the question of him enjoying diplomatic immunity. Intelligence officers regularly work under the cover of diplomatic immunity."[6]

Before the Court of First Instance, the Supreme Court and the Constitutional Court, Mr. Assadi's lawyer argued that the arrest of his client violated Article 40 of the Vienna Convention on Diplomatic Relations ("VCDR"), but this was not accepted.[7] Finally, on 2 October 2018, Mr. Assadi was extradited to Belgium.[8]

---

[5] Stefan TALMON, Arrest of an Iranian diplomat over alleged bomb attack in France, Available at: www.gpil.jura.uni-bonn.de/2018/07/arrest-of-an-iranian-diplomat-over-alleged-bomb-attack-in-france/.
[6] Supra note 5, Stefan Talmon.
[7] Ibid.
[8] Iranian diplomat faces extradition from Germany over 'bomb plot', Available at: www.bbc.com/news/world-europe-45705799.

Mr. Assadi's Belgian lawyer reiterated the same arguments concerning the violation of Article 40 of the 1961 VCDR[9] in order to prove the illegality of both the European arrest warrant issued by Belgium and the subsequent detention of the diplomat by Germany. Nevertheless, these arguments were not ultimately accepted because of his being on-leave status. On 4 February 2021, Assadi was sentenced to 20 years of imprisonment by a Belgian court for attempted murder and involvement in terrorism.[10]

The material aim of this study is to examine whether the duty of third States under Article 40(1) of the 1961 VCDR is exclusively applied in respect of those diplomats who are in "direct" transit between the sending and receiving countries. Can a diplomat, who is on holiday in a third country and then travels to his or her own country or workplace, be fallen within the scope of Article 40 of the Convention? Another question concerns the way in which Article 40 of the VCDR must be interpreted. Reference must, therefore, be made to relevant State practice, as done by a few scholars such as Professor Eileen Denza.[11] This interpretative approach raises an important question: has the arrest of the Iranian diplomat violated Article 40 of the VCDR?

Following this, the article will assess the notion of international responsibility, the two constitutive elements of which are attribution

[9] Antwerp: Start of the terrorist process – the Iranian accused invokes diplomatic immunity, Available at: https://www.de24.news/en/2020/11/antwerp-start-of-the-terrorist-process-the-iranian-accused-invokes-diplomatic-immunity.html.

[10] Belgian court sentences Iranian diplomat to 20 years over bomb plot, Available at: https://www.theguardian.com/world/2021/feb/04/assadollah-assadi-belgian-court-sentences-iranian-diplomat-20-years-french-bomb-plot.

[11] Eileen DENZA, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th eds, (England: Oxford University Press, 2016) p 367. As She has noted, "The opinions of writers on diplomatic law had long been divided on the questions of whether a diplomat proceeding to or returning from his post was entitled to a right of innocent passage through third States, and secondly on whether when in transit through a third State he was entitled to some or all of the privileges and immunities accorded to him in the receiving State. Clear customary rules did not emerge because there were so few cases where a diplomat encountered difficulties in transit States, or where it mattered whether baggage privileges were extended to him as a matter of courtesy on production of his diplomatic passport or on a basis of law.''

and violation of (an) international obligation(s). Apart from theory, a practical suggestion will be given following a breach, which is essentially consistent with the main purpose of the VCDR. Finally, it will examine some potential accessible remedies for the Islamic Republic of Iran. What is the procedure to complain over an alleged violation of Vienna Convention on Diplomatic Relations? How and could the case be brought before the International Court of Justice?

I. Analysis on the Clear Wording of Article 40 of the 1961 VCDR

The first paragraph of this Article provides:

> If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.[12]

The phrase "to return to his post" is a clear-cut generic expression and is independent of the origin of the journey. In other words, it is not the diplomat's starting point that matters but the country to which he is returning.[13] The immunity granted to diplomats, as reflected in the VCDR, is of *ratione materiae*[14] nature, the purpose of which is to "ensure the efficient performance of the functions of diplomatic missions as representing States."[15]

In addition, as pointed out by Stefan Talmon,[16] it does not seem logical to afford this immunity only when the third State is regarded as a direct transit State between the sending and receiving States. Neither are there any words entailing that immunity shall not be granted when a diplomat returns from vacation or when he or she was

[12] Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95(entered into force on 24 April 1964) [VCDR], Art (1).
[13] Supra note 11, p 371.
[14] In English, it is often referred to as "functional immunity".
[15] Supra note 12, preamble, para 4.
[16] Supra note 5, Stefan Talmon.

on leave. Stefan Talmon has framed this thesis in the following terms:

The purpose of his journey was irrelevant for the application of Article 40 of the VCDR. Assadi could have been on holiday in Luxembourg, or he could have been delivering official papers or explosives there. Article 40, paragraph 1, of the VCDR stipulates only three conditions for its application: (1) the person in question must be duly accredited as a diplomatic agent in a receiving State; (2) he must pass through or be in the territory of a third State; that is to say, a State that is neither the sending nor the receiving State; and (3) he must – at the time of arrest – be proceeding to return to his post in the receiving State. Whether or not a diplomatic agent is proceeding to return to his post is a question of fact. Diplomatic agents vacationing in a third State or present there for personal reasons are not covered by Article 40, paragraph 1, of the VCDR. It was pointed out that regard should be given to normal routes of transit. However, much will depend on the circumstances of each case. Assadi was arrested at a rest area on the A3 motorway in south-east Germany. The A3 motorway is one of three motorways in Germany leading to Austria. There is thus a strong presumption that Assadi was on his way to return to his post.[17]

Taking into consideration the general rules of interpretation and whether a narrow or broad interpretation of the aforementioned Article shall be given, it is appropriate to refer to Articles 31 of the 1961 VCDR.[18] Article 31(1) provides, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[19]

The second paragraph adds that for the interpretation of a treaty, apart from the text, its context, i.e., the Preamble and annexes, shall

[17] Ibid.

[18] It should be mentioned that general rules of interpretation, as included in the 1969 VCLT, have been crystalized into customary international law; thus, these rules can be understood to have retroactive effect. This has been repeatedly highlighted by international courts and tribunals, and finds strong basis in state practice. For example, in its 1991 Judgment on Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal give reference), the International Court of Justice stated that general rules of interpretation in Articles 31 and 32 of the 1969 VCLT are considered as the codification of customary international law. Importantly the customary nature of these articles finds support in case-law of other international tribunals such as ITLOS, ECtHR, ECJ, Dispute Settlement Bodies of the WTO and other arbitral institutions.

[19] Vienna Convention on the Law of Treaties, 23 May 19691115 UNTS 331, (entered into force on 27 January 1980) [VCLT], Art. 31(1).

be taken into account.[20] Accordingly, one must consider the purpose of granting diplomatic immunity, as reflected in the VCDR.

The fourth paragraph of the Preamble of this Convention clearly indicates the purpose of affording the privileges and immunities in the Convention. It states that the purpose is not to benefit the individuals, but to guarantee the efficient performance of the functions of diplomatic missions as representing States.[21] Besides, the Preamble has referred to other teleological items such as the main principles and purposes of the Charter of the United Nations related to sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations between States.[22]

The third paragraph of the Preamble also provides that "privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems."[23] These purposes can only be realised when a broad interpretation of diplomatic immunity can be rendered, extending it to cases when a diplomat returns from vacations (no matter where) to his or her post. Accordingly, it may be argued that Germany's act regarding the arrest of Mr. Assadi contravenes the relevant principles of diplomatic law set out in Article 40 of the VCDR and undermines the promotion of friendly relations between States, while, at the same time, it is contrary to *bona fide*[24]. Likewise, by its continuation of the act of detaining Mr. Assadi, Belgium can be said to have violated the same article.

In addition, the jurisprudence of third States can be of great significance here. This is because the real cases of Article 40 are rare given that the 1961VCDR, for the most part, is a codification of customary international law.[25] In other words "clear customary rules

[20] Ibid., Art. 31(2).
[21] Supra note 12, preamble, para 4.
[22] Ibid, para 2.
[23] Ibid. para 3.
[24] 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' VCLT, Art. 26.
[25] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) [2001] ICJ Rep 3.

did not emerge because there were so few cases where a diplomat encountered difficulties in transit States, or where it mattered whether baggage privileges were extended to him as a matter of courtesy on production of his diplomatic passport or on a basis of law."[26]

II. Jurisprudence of Third States Concerning the Application of Article 40(1) of the 1961 VCDR

The former Professor of International Law, Eileen Denza,[27] describes the duties of third States in pages 367 *et seq* of her book, "*Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*". As she has put it:

> "The obligations imposed on transit States by Article 40 arise only where the beneficiary is in the course of direct passage to the receiving State or to the home State, though it is not essential that the passage should be between these two States."28

In support of this view, she describes several cases. This section will discuss these and some other relevant cases.

a) Lack of Necessity for the Direct Transit Between Sending and Receiving States

The position that, for one to be able to rely on Article 40(1) of the Convention, transit is not required to be directly between sending and receiving States, was confirmed in a 1977 Case concerning *Jarrett-Thorpe* in the UK.[29]

Jarrett-Thorpe was the husband of a diplomat in the Embassy of Sierra Leone in Rome, Italy. His wife had travelled to London to buy furnishings for the embassy, and it was intended that her husband would join her there to help her with luggage and to return to Rome. When he arrived, he received a message that his wife had already left for Rome. He was arrested on criminal charges while awaiting a

[26] Supra note 11, p 367.
[27] Thanks are due to Eileen Denza, formerly Visiting Professor at University College London, for comments and suggestions on the draft.
[28] Supra note 11, p 367.
[29] R v Guildhall Magistrates Court, ex Parte Jarrett-Thorpe Times Law Report 6 October 1977.

flight to Rome at Heathrow airport. The Divisional Court held that he was "travelling separately in order to join" his wife and that he was, therefore, entitled to immunity under Article 40.1 of the Vienna Convention. Importantly, the Court rejected the argument that Article 40 applies only to transit between sending and receiving States. Concerning the arrest of the Diplomat of Islamic Republic of Iran, Mr. Assadi, it may likewise be argued that the mere act of returning to his post, Austria, was sufficient for him to be afforded diplomatic immunity; he was not required to be in transit between Iran and Austria, so as to enjoy this special protection.

Another relevant case concerns the apprehension of *Mauricio Rosal*[30] over a charge of smuggling narcotics in New York in 1960. He was the Guatemalan Ambassador to Belgium and the Netherlands.[31] The Accused claimed that he was *en route* to his homeland, via receiving States and from the United States, and therefore, should be immune from arrest. The Divisional Court of New York held that the accused was in New York on 3 October 1960 and did not intend to fly to Guatemala, while he had reserved his return ticket not back to his post but to Paris on 4 October 1960. He had travelled to New York to fulfil some personal affairs; his travel had nothing to do with diplomatic matters. On this basis, the Court held that he was not therefore "within the rule of international law granting immunity to a diplomat *en route* between the official post and his homeland". It should be stressed that during the drafting of the 1961 Convention (maybe as a result of the abovementioned Case), the United States tried to limit the scope of Article 40.1 only to immediate and direct transit, however, no support was given to its

[30] United States of America v. Mauricio Rosal et al. (United States District Court S. D. New York)
(2 December 1960).
[31]DIPLOMAT SEIZED AS POLICE CRACK HEROIN RING HERE; Mexican Envoy to Bolivia Arrested With 2 Others in Smuggling Conspiracy; 3 COUNTRIES COOPERATE; $13.5 Million in Narcotics Recovered by Authorities in City and Montreal, Available at: https://www.nytimes.com/1964/02/22/archives/diplomat-seized-as-police-crack-heroin-ring-here-mexican-envoy-to.html.

viewpoint.[32] Therefore, this Article had a wider application, as already described. The next section will clarify why the *ratio decidendi* used by the national courts cited in this paper may assist us in reaching our conclusions in the case of Assadi, the Iranian diplomat.

b) Inclusion of "Return from Leave to the Serving Post" on Article 40.1 of the Convention

On 7 April 2012, *Amelework Wondemagegne*, an Ethiopian diplomat in Washington, was arrested at Heathrow Airport and found to be in possession of large quantities of cannabis. She had booked a flight to Washington for 17 April and had applied for a UK visa for a family visit and intended to visit Italy and France before returning to the US. The Crown Court held that she was at the material time a visitor and not passing through the UK to resume her diplomatic duties in Washington. Immunity was denied and she was jailed for thirty-three months.[33]

In the case of *Vafadar* in 1979,[34] the wife of the Ambassador of Afghanistan to India was denied immunity by the Court of Cassation in Belgium when she was arrested on criminal charges while passing through Belgium in order to visit her sick mother in Moscow. The Court of Cassation agreed with the lower court that she "was not accompanying the diplomatic agent, was not travelling in order to join him and did not return to his country".[35] She therefore had no immunity under Article 40.1 of the VCDR. In other words, if she was accompanying the diplomatic agent, or was travelling to join him or return to her country, she, as a member of the family of the diplomatic agent, would be entitled to immunity. Notwithstanding,

[32]United Nations Conference on Diplomatic Intercourse and Immunities, UN Doc. A/Conf. 20/C 1/L 276 (1961); United Nations Conference on Diplomatic Intercourse and Immunities, UN Doc. A/Conf. 20/14 (1961) pp 209–10.
[33] Ethiopian Amelework Wondemagegne jailed on drugs charges, Available at: https://www.bbc.com/news/world-africa-19099443#:~:text=A%20court%20in%20London%20has,cannabis%20at%20London's%20Heathrow%20airport.&text=The%20court%20ruled%20Wondemagegne%20was%20not%20entitled%20to%20diplomatic%20immunity.
[34] Vafadar [82 ILR 97].
[35] Supra note 11, p 372.

according to the wording of Article 40 of the VCDR, the lower scope of protection is usually afforded to the family of diplomatic agents compared to the agent himself or herself which does seem reasonable and in line with common sense. Hence, it is obvious that the diplomatic agent, when returning to his post, should be afforded diplomatic immunity.

Other similar cases in which the immunity was not found to be granted to a diplomat being in a third State, were all because of the fact that the diplomat was not in the way to return to his or her official post i.e., the receiving State. For instance, in 1984, the District Court of Haarlem in *Public Prosecutor v JBC*[36] held that a diplomatic agent in the Zambian Embassy in Kenya, who was travelling to The Netherlands for purposes other than taking up his post or returning to his own country, must not enjoy immunity from a charge of smuggling heroin. Stefan Talmon has also made similar observations. As he mentioned:

> If Assadi had passed through Germany, while proceeding from Luxembourg to return to his post in Austria, he would have been entitled to inviolability and such other immunities as may be required to ensure his transit or return. The fact that he was working for the Iranian Ministry of Intelligence and Security was immaterial for the question of him enjoying diplomatic immunity. Intelligence officers regularly work under the cover of diplomatic immunity.[37]

Attending an interview about the arrest and detention of the Iranian diplomat, Eileen Denza also pointed out:

> On the information given to me, Mr. Assadi was a member of the diplomatic staff of the Iranian Embassy to Austria, and at the time of his arrest he was in transit through Germany in order to return to his post. Under Article 40 of the Vienna Convention on Diplomatic Relations he was therefore entitled to 'inviolability and such other immunities as may be required to ensure his transit or return.' Germany was therefore not entitled to arrest him.[38]

[36] Public Prosecutor (Netherlands) v. JBC [94 ILR 339].
[37] Supra note 5, Stefan Talmon.
[38] Global Research, The June 2018 Arrest in Germany of Iranian Diplomat Assadollah Assadi. Violation of International Law? (Interview with Professor Eileen Denza on 27 October 2020).

Accordingly, an assessment of the judgments concerned, together with the main purpose of the VCDR and the wording of its Article 40, suggests that Germany violated international law when it arrested Mr. Assadi, especially given that he was *en route* to Vienna. The same is true of Belgium when it decided to exercise its jurisdiction over the Iranian diplomat by detaining and prosecuting him as well as convicting him to 20 years of imprisonment.

III. Interrelation of Diplomatic Immunity and Immunity of States Based on the ILC's work

At this stage, it will be pointed out that the arrest and detention of the Iranian diplomat by Germany following the issuance of a European Arrest Warrant can also be legally analysed under the most recent developments of the work of the International Law Commission ("ILC"). Indeed, the ILC started to perform a thorough research titled "Immunity of States Officials from Foreign Criminal Jurisdiction." Since 2008, the ILC has prepared eight reports on this very crucial subject-matter.[39]

To this end, several aspects of the same issue must be addressed. First, whether the Iranian diplomat, Assadollah Assadi, may be qualified as a "State Official" within the meaning of the ILC's work. Second, whether he was entitled to immunity *ratione materiae* when he was arrested in Germany. In the first report, the ILC does not limit the notion of "States Officials" only to high-ranking authorities. The ILC's wording is quoted in the following:

It is generally recognized that all State officials enjoy immunity from foreign criminal jurisdiction in respect of acts performed by them in their official capacity, or immunity *ratione materiae*. As noted by Lord Browne-Wilkinson in the Pinochet No. 3 case, "[i]mmunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting

[39] Analytical Guide to the Work of the International Law Commission, Immunity of State officials from foreign criminal jurisdiction, Available at: https://legal.un.org/ilc/guide/4_2.shtml.

or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity.[40]

State officials enjoy such immunity regardless of the level of their post. For instance, the French Court of Cassation in 2004 recognized the immunity from criminal jurisdiction of the head of the Malta Ship Registry in connection with acts performed by him in his official capacity.[41]

Another issue to consider is that Assadi, at the time arrested, enjoyed *immunity ratione materiae*; Assadi was performing an act in an official capacity when driving back to Austria. The latest ILC draft

[40] Pinochet No. 3, ILM, vol. 38 (1999), pp 580, 594. A similar rationale for the need to extend immunity *ratione materiae* to all State officials was given by an English court in Propend Finance Pty Ltd. v. Sing: "The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or, as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself." High Court, Queen's Bench Division, 14 March 1996, reproduced in ILR, vol. 11, p 611. In Jones No. 1, Lord Philipps noted: "The dignity of a state may also be affronted if those who are or where its officials are impleaded in relation to the conduct of its affairs before the courts of another state. In those circumstances the state can normally extend the cloak of its own immunity over those officials. It can be said that to implead those official's amounts, indirectly, to impleading the state" (para. 105). Lastly, in Jones No. 2 (see footnote 71 above), Lord Bingham of Cornhill noted that there was "a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents" (para. 10). According to Wickremasinghe, "[i]t appears that under the doctrine of State immunity, other State officials [other than heads of State, heads of government and ministers for foreign relations] enjoy immunity ratione materiae for their official acts from the jurisdiction of the courts of other States, where the effect of proceedings would be to undermine or render nugatory the immunity of the employer" ("Immunities enjoyed by officials of States and international organizations", pp 409–410). See also: Forcese, "De-immunizing Torture: Reconciling Human Rights and State Immunity", pp138, 139.

[41] According to the French court of cassation, "… *la coutume internationale qui s'oppose à la poursuite des Etats devant les juridictions pénales d'un Etat étranger s'étend aux organes et entités qui constituent l'émanation de l'Etat ainsi qu'à leurs agents en raison d'actes qui, comme en l'espèce, relèvent de la souveraineté de l'Etat concerné*". Arrêt de la Cour de Cassation, chambre criminelle, 23 Novembre 2004, published in Bulletin Criminel 2004, No. 292, p 1096. The text of the ruling is available (in French and in English translation) Available at: https://www.legifrance.gouv.fr/initRechJuri.Judi.do.

articles on immunity of State officials from foreign criminal jurisdiction, which was provisionally adopted by the Commission in 2020, expand on this issue.[42] Concerning the scope of Draft Article, Article 1 provides that:

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Draft Article 2 refers to some important definitions:

"For the purposes of the present draft articles: … (e) "State official" means any individual who represents the State or who exercises State functions; (f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority."

With regard to immunity *ratione materiae* and its scope, Article 5 and 6 reads as follows:

Draft article 5

"State officials acting as such enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction."

Draft article 6

1. "State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.
2. Immunity ratione materiae with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

[42] 72nd session of the International Law Commission (2021), Texts and titles of draft articles 8, 9, 10, 11 and 12 provisionally adopted by the Drafting Committee, Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/121/82/PDF/G2112182.pdf?OpenElement

3. Individuals who enjoyed immunity ratione personae in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office."

The abovementioned draft articles are known as the abstract of the latest developments of the ILC's work regarding the immunity of States officials from foreign criminal jurisdiction. Article 1 clarifies that the case of Assadollah Assadi may be within the scope of this Draft, since the criminal jurisdiction of both Germany and Belgium has been involved. The term "any individual", as used in draft Article 2, indicates that the first report of the ILC was concurrent with its last report, meaning that, in the given situation, Mr. Assadi will retain his status as a State official. The authors share the view that draft Articles 2(f), 5 and 6 must be read in conjunction with Article 40(1) of the VCDR. If passing through the third State to the receiving State had not been considered as "an act performed with an official capacity", Article 40(1) would have not granted immunity to that diplomat. Therefore, Assadi was performing an act in his official capacity when he was in the way to his office in Vienna.

IV. The International Responsibility of Germany and Belgium

According to Article 1 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"),[43] any wrongful act committed on the part of a state will imply the international responsibility of the violating State.

It should be noted that, on several occasions, the ARSIWA has been cited by some international institutions and many domestic courts as authoritative; this may be taken as an indication that ARSIWA's articles are part of customary international law. Among these, Noble Ventures, Inc. v Romania Case in ICSID can be cited, which has affirmed the binding character of the ILC Draft Articles.[44]

[43] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [ARSIWA]. UN Doc, A/56/10 (2011).

[44] Noble Ventures, Inc. v Romania (ICSID Case No. ARB/01/11), Award of 12 October 2005, para 69. Here, the Tribunal observed: "Regarding general international law on international responsibility, reference can be made to the Draft

Similarly, there has also been another case in the same Tribunal where it was held that the Draft Articles were of customary nature.[45] Moreover, the International Court of Justice has reflected on some specific Articles of the ILC Draft Articles as possessing the status of customary international law.[46] And hence, it will be binding upon all States in international community under Article 38(1)(b) of the Statute of the International Court of justice.

As to the customary nature of the Draft Articles and relevant State practice, it is important to refer to the sixty-fifth session of the UN General Assembly on 19 October 2010, which discussed the question whether there is a need for a new convention, or rather the existing customary rules are adequate. In this debate, Germany, the responsibility of which is of relevance here, stated that there is no need for a convention because the courts are invoking it.[47]

Following the establishment of the binding character of Draft Articles, it is time to mention the requirements of State responsibility. In this regard, Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts provides that "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[48]

Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 […]. While those Draft Articles are not binding, they are widely regarded as a codification of customary international law. The 2001 ILC Draft provides a whole set of rules concerning attribution […]."

[45] Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006, para 149.

[46] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999, pp 62, 87, para 62. "Referring to the 'well-established rule of international law' that 'the conduct of any organ of a State must be regarded as an act of that State', the Court went on to observe that the rule was of 'a customary character', and that it was 'reflected' in one of the provisions of the ILC's draft which eventually became Article 4."

[47] Legal Committee Delegates Differ on Applying Rules for State Responsibility: Convention Needed, or Customary Law Adequate? Available at: https://www.un.org/press/en/2010/gal3395.doc.htm.

[48] Supra note 43, Art. 2.

It has to be mentioned that the International Court of Justice precedes the proof of the "attribution" element to the commission of the unlawful conduct. In the case concerning the *United States of America Diplomatic and Consular Staff in Tehran*, the Court held that:

> The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[49]

On this basis, the reference shall be first made to the element of attribution and second, to the violation of international obligation.

a) "Attribution" Element

Regarding the issue of attribution, it is obvious that the State, as a legal entity, acts through natural persons. In fact, governments can only act through their representatives and agents.[50] The general rule is that the only behaviour attributed to the State at the international level is the behaviour of its organs, or individuals who have acted under the direction, instigation or control of their respective State.[51]

---

[49] United States Diplomatic and Consular Staff in Tehran, Order on Indication of Provisional Measures, 1979
ICJ Reports 7 and Judgment, 1980 ICJ Reports 3. para 56.

[50] German Settlers in Poland, Advisory Opinion, 192, 3, P.C.I.J., Series B, No. 6, p 22.

[51] See: e.g., Ian BROWNLIE, System of the Law of Nations: State Responsibility, Part I (Oxford, Clarendon Press, 1983), pp 132-166; David D. CARON, "The basis of responsibility: attribution and other trans-substantive rules", The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility, Richard B. LILLICH and Daniel B. MAGRAW, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p109; Luigi CONDORELLI, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", Recueil des cours…, 1984–VI (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p 9; Haritini Dipla, La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation (Paris, Pedone, 1994); Alwyn V. FREEMAN, "Responsibility of States for unlawful acts of their armed forces", Recueil des cours…, 1955–II (Leiden, Sijthoff, 1956), vol. 88, p 261; and Franciszek PRZETACZNIK, "The international responsibility of States for the unauthorized acts of their organs", Sri Lanka Journal of International Law, vol. 1 (June 1989), p 151.

More importantly, for example, the behaviour of some institutions that perform public functions and powers (such as the police) is attributable to the State, even if these institutions are considered autonomous and independent of the executive government under its domestic law.[52] It does not, thus, seem challenging to attribute the arrest and detention by the German and Belgium police agents to those States.

The section related to the analysis of the scope of application of Article 40 of the VCDR will examine the second element, i.e., the commission of a wrongful conduct, as that section concerns the violation of diplomatic immunity of a diplomat when in transit.

In sum, by arresting the diplomat of the Islamic Republic of Iran, Mr. Assadollah Assadi, on his way back to his place of work and issuing a European arrest warrant for that diplomat, prosecuting him, and failing to act to end his detention status, Germany and Belgium may respectively be seen as internationally responsible for their wrongful acts violating the 1961 VCDR.

Belgium is thus obliged to stop its violation and give assurances to Iran that this will not be repeated.[53] In addition, in view of Mr. Assadi's three-month detention in Germany and subsequent detention in Belgium for approximately two years which is currently continuing, both States must be sought full reparation.[54] The ARSIWA enumerates the various scenarios of full reparation (both material and moral): restitution, compensation and satisfaction, either singly or in combination.[55]

Therefore, it appears that the commission of the wrongful act will be ceased by the release of Mr. Assadi, which is the responsibility of the Belgian Government. On the other hand, the obligation to compensate the material and moral damages inflicted on him, as well

[52] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, p 39.
[53] ARSIWA, Art. 30.
[54] Ibid., Art. 31.
[55] Ibid., Art. 34.

as to satisfy him with the restoration of his dignity, will be incumbent on both Germany and Belgium.

V. Dispute Settlement Mechanism Under the 1961 VCDR

First and foremost, there has been a well-established practice among States not to settle their diplomatic disputes, i.e., the disputes arising out of the interpretation or application of the Vienna Convention, by adjudication or reference of the situation to an arbitral tribunal.[56] Most of these disputes relate to the matters which must be settled instantaneously by the Ministry of Foreign Affairs or other related official authorities of the receiving State "in determining whether criminal proceedings may be brought, by national courts when diplomatic immunity is pleaded, or by governments in deciding on whether a member of mission should be recalled or more generally on the level at which they wish to maintain diplomatic relations."[57] As Eileen Denza has stated:

> Many of the ambiguities in the Convention have over the last thirty years been clarified by decisions of national courts or by systematic state practice. The Convention offers a series of remedies for perceived abuse or violations, and States have made good use of them. Reciprocity remains fundamental to the structure of diplomatic relations, but for the most part retaliation has been used as a threat to secure observance of Convention rules.[58]

Eileen Denza has referred to a remarkable exception made in the *Case concerning the United States of America Diplomatic and Consular Staff in Tehran.*[59] In that case, the US based the jurisdiction of the Court upon 4 different treaties,[60] two of which were the 1961

[56] Supra note 11, p 420.
[57] Ibid.
[58] Ibid.
[59] United States Diplomatic and Consular Staff in Tehran, Order on Indication of Provisional Measures, 1979
ICJ Reports 7 and Judgment, 1980 ICJ Reports 3.
[60]

1. The Vienna Convention on Diplomatic Relations of 1961, and Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes of that Convention;
2. The Vienna Convention on Consular Relations of 1963, and Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes of that Convention;

and 1963 Conventions, where it invoked the Optional Protocol similarly applicable to them.[61] It is worth noting that there have been six other cases in which the Applicant State similarly invoked the above-mentioned Optional Protocol as a jurisdictional basis to resort to adjudication.[62]

This mechanism is enshrined in the Optional Protocol to the Convention on Diplomatic Relations, Article 1 of which stipulates that:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice 'and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.[63]

By acceding to this Optional Protocol, it is clear that Iran,[64] Germany[65] and Belgium[66] have accepted the compulsory settlement of disputes in the International Court of Justice. No reservations have been made on behalf of the said States containing the potential of

---

3. Article XXI (2) of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and lran of 1955, and
4. Article 13 (1) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

[61] Application Instituting Proceedings submitted by the Government of the United States of America, (United States of America v. Islamic Republic of Iran), p 3.

[62] The cases in chronological order are as follows:

1. *Vienna Convention on Consular Relations* (Paraguay v. United States of America)
2. *LaGrand Case* (Germany v. United States of America)
3. *Avena* and Other Mexican Nationals (Mexico v. United States of America)
4. *Jahdav* (India v. Pakistan)
5. *Immunities and Criminal Proceedings* (Equatorial Guinea v. France)
6. *Relocation of the United States Embassy to Jerusalem* (Palestine v. United States of America)

[63] Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes 18 April 1961500 UNTS 241 (entered into force on 24 April 1964), Art. I.

[64] Iran has signed the Optional Protocol on 27 may 1961 and has ratified on 3 February 1965.

[65] Germany has signed the Optional Protocol on 18 April 1961 and has ratified on 11 November 1964.

[66] Belgium has signed the Optional Protocol on 23 October 1961 and has ratified on 2 May 1968.

endangering the pillars of instituting the proceedings before the International Court of Justice.[67]

As to Germany's and Belgium's measures against the Iranian diplomat, it is therefore argued here that the possibility of bringing a claim before the International Court of Justice is fully and definitively available to the Islamic Republic of Iran, given that all local remedies in the judicial system of both these two States were exhausted but proved ineffective. Notwithstanding, this mere possibility is absolutely without prejudice to other diplomatically appropriate measures and policies usually followed by States. Similarly, the authors do believe that, in light of the main purpose of the Vienna Convention of 1961on promotion of friendly and amicable relations between States Parties, a much better way could be the resolution of the disputes by conciliation,[68] as provided for in Article III of the Optional Protocol Concerning the Compulsory Settlement of Disputes. In doing so, when a State is of the opinion that a dispute exists, it must inform the other party of such an existence.[69] Afterwards, there will be a two-month-period for the parties in order to reach an agreement concerning the adoption of a conciliation procedure.[70] However, this conciliatory means of dispute resolution will not be final, leaving the possibility for either party to resort to the International Court of Justice to adjudicate the case.[71] This, also, must be done in a specified time limit (i.e., 2 months) by either party.[72]

Conclusion

[67] Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en#3.
[68] Supra note 63, Art. III (1).
[69] Ibid., Article II.
[70] Ibid., Article III (1).
[71] Ibid., Art III(2).
[72] Ibid.

The arrest of a diplomat of the Islamic Republic of Iran in Germany, as took place in July 2018, has been among rare cases regarding the application of Article 40(1) of the 1961 Vienna Convention on Diplomatic Relations. Indeed, it is notable that there is a lacuna in the legal doctrine in this specific area and hence, we have to rely on general rules of application. However, an examination of the text and meaning of Article 40, as well as the use of the evidence presented in the few cases available, make it possible to argue that Germany's and Belgium's actions regarding the arrest of the Iranian diplomat were illegal.

The VCDR was created to ensure the effective and efficient performance of the diplomatic agents of the States. It is based on the promotion of friendly relations, an important point that should be taken into consideration when interpreting the relevant articles of the Convention.

Regarding the arrest of the Iranian Diplomatic, it thus seems clear that Germany's treatment of Mr. Assadi, who had completed his leave and was on his way back to work in the host country, is entirely inconsistent with both the expansion of friendly relations between the States and the performance of diplomatic duties.

In addition, an assessment of Article 40(1), together with the distinction made between transit and return to the post, leads us to conclude that what matters most is the mere return to the post and the need to ensure the returning for the fulfilment of diplomatic duties. It therefore follows those questions such as where was the starting point of the diplomat, whether the diplomat was on leave, and whether there was a direct or indirect transit, are not determinative as to the application of immunity over the status of the diplomat.

Very few instances in which Article 40 of the Vienna Convention was applied would mean that it is very difficult, if not impossible, to find cases similar to the arrest of the Iranian diplomat. Yet, as demonstrated throughout this article, an examination of State practice through the channel of the *ratio decidendi* in the relevant judgments[73] would strongly suggest that when it is established that a diplomat has

[73] Supra notes, 29, 30, 33, 34 and 36.

returned to his/her place of work, he or she must be afforded the diplomatic immunity.

Therefore, the arrest of Mr. Assadollah Assadi, the Third Counsellor of the Embassy of the Islamic Republic of Iran in Vienna, who was on his way from Germany to Vienna, appears to fall short of conforming to the requirements of Article 40 of the 1961 VCDR, State practice and the latest developments of the ILC's work. For this reason, the Iranian State will have the right to bring a claim against both Germany and Belgium in accordance with the mechanism set out in the Optional Protocol to the Convention, that is, to the International Court of Justice.