Proposal to the Executive Council of the International Law Association (ILA) for the Establishment of a Committee on "Diplomatic and Consular Immunities, Privileges and Inviolabilities in a Comparative Perspective"

Proposed to be established in November 2023.

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Summary of the work program

1. In recent decades, there has been growing academic interest in domestic judicial practices, with domestic courts increasingly applying international law. [1] William Burke-White and Anne-Marie Slaughter have even argued that "the future of international law is domestic."[2] This proposal seeks to establish an ILA Committee focused on domestic courts' interpretation and application of international norms concerning diplomatic and consular immunities, privileges, and inviolabilities.

2. Presently, domestic judicial decisions on international law matters surpass international courts' rulings. [3] Domestic courts' judgments, embedded within states' jurisdiction, may significantly impact international law enforcement – perhaps even more than international jurisdictions' decisions.[4] Accordingly,

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[1] INTERNATIONAL LAW ASSOCIATION. Final Report: Mapping the Engagement of Domestic Courts with International Law, Co-Rapporteur Antonios Tzanakopoulos, Study Group on Principles on the Engagement of Domestic Courts with International Law, Johannesburg Conference. 2016; AUST, Helmut Philipp & NOLTE, Georg (Org.). **The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence**. Oxford: Oxford University Press, 2016; SCHWARTZ, Osnat Grady. Changing the Rules of the (International) Game: How International Law is Turning National Courts into International Political Actors. **Washington International Law Journal**, v. 24, n. 1, p. 99-135, 2015; KANETAKE, Machiko e NOLLKAEMPER, Andre. The Application of Informal International Instruments Before Domestic Courts. **George Washington International Law Review**, v. 46, p. 765-807, 2014; BENVENISTI, Eyal. Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts. **American Journal of International Law**, v. 102, no. 2, p. 241-274, 2008; SCHERMERS, Henry G. The Role of Domestic Courts in Effectuating International Law. **Leiden Journal of International Law**, v. 3, n. 3, p. 77-85, 1990.

[2] SLAUGHTER, Anne-Marie e BURKE-WHITE, William. The Future of International Law is Domestic (or, the European Way of Law). **Harvard International Law Journal**, v. 47, n. 2, p. 327-352, 2006.

[3] NOLLKAEMPER, André. **National Courts and the International Rule of Law**. Oxford: Oxford University Press, 2011. p. 7.

[4] Loc. cit.

quantitative and qualitative analyses have emerged to explore how specific topics or international legal instruments are addressed by domestic courts. Examples include research on the Convention on the Elimination of All Forms of Discrimination against Women[5] and crimes against humanity.[6] However, no such study exists on international diplomatic and consular law, particularly regarding immunities, privileges, and inviolabilities, underscoring the need for the proposed Committee[7].

3. ILA's pivotal role and academic excellence in International Law research and development are indisputable. The proposed Committee will positively influence the clarification and advancement of international rules on diplomatic and consular immunities, privileges, and inviolabilities.

Statement of the Problem

1. The 1961 Vienna Convention on Diplomatic Relations (VCDR) and the 1963 Vienna Convention on Consular Relations (VCCR) sought to codify, among other topics, the immunities, privileges, and inviolabilities conferred upon diplomatic and consular agents. However, the *travaux préparatoires* of these two treaties and their final texts indicate several ambiguous provisions and legal gaps[8] on the subject, being points of significant divergence among domestic courts' interpretations. Therefore, there is no universal agreement on the extent and limits of some relevant immunities, privileges, and inviolabilities that diplomatic and consular agents are entitled to under these conventions. For this reason, a comparative study of these divergences would be highly relevant to clarifying the international rules in question.

2. The VCDR and the VCCR structure also highlights the significance of domestic judicial practice in the standardization of the interpretation and application of their provisions, especially given the absence of an autonomous monitoring treaty body. Few States have ratified the Additional Protocols[9] that

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[5] MCCRUDDEN, Christopher. CEDAW in National Courts: A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context. In: ROBERTS, Anthea et al. (Org.). **Comparative International Law**. Oxford: Oxford University Press, 2018. p. 459-500.

[6] BASSIOUNI, M. Cherif. **Crimes against Humanity - Historical Evolution and Contemporary Application**. New York: Cambridge University Press, 2011. p. 649-723.

[7] There are several notable commentaries on the Vienna Convention on Diplomatic Relations, such as DENZA, Eileen. **Diplomatic Law**. 3. ed. Oxford: Oxford University Press, 2008; SALMON, Jean. **Manuel de Droit Diplomatique**. Bruxelles: Bruylant, 1994; SILVA, Geraldo Eulálio do Nascimento e. **A Convenção de Viena sobre relações diplomáticas**. Brasília: Ministério das Relações Exteriores, 1978.TELES, Patrícia Galvão (Coord.). **Convenção de Viena sobre Relações Diplomáticas de 1961: comentada**. Lisboa: Instituto Diplomático do Ministério dos Negócios Estrangeiros, 2020. However, it's important to note that these works do not adopt the Comparative International Law approach proposed in our research.

[8] For examples of ambiguous provisions and legal gaps, please refer to paragraph 3.

[9] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en> and <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3> (Accessed on 10 March 2023

provide for the jurisdiction of the International Court of Justice (ICJ) to hear disputes arising from the Vienna Conventions, limiting the ICJ's opportunities to interpret these Conventions.[10] In this context, in which international instruments are ambiguous and international bodies' clarifications are scarce, turning to domestic courts is critical to understanding how the VCDR's and VCCR's provisions on diplomatic and consular immunities, privileges, and inviolabilities are interpreted and applied.

3. The vagueness of terms contained in the VCDR and the VCCR, such as "grave crime", "official functions", "as a private person", and "on behalf of the sending State", are examples of generic terms deliberately adopted by the International Law Commission (ILC) when drafting these Conventions, given the lack of consensus on their meanings among the States that participated in the debates at that time. Thus, the ILC chose to leave the elucidation of these terms to the practice of States. This is the endeavor that is now proposed by the creation of this Committee: to examine if and to what extent the judicial practice of States has contributed to clarifying these obscurities and even if a subsequent practice in the sense of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties has been developed.

4. The need for these clarifications is particularly urgent in the field of consular relations. While significant literature on immunities, privileges, and inviolability regarding diplomatic relations has been produced, little has been produced focusing on the VCCR.

5. Thus, the relevance of the proposed Committee is to promote research aimed at clarifying the interpretations of domestic courts concerning immunities, privileges, and inviolabilities enjoyed by diplomatic and consular agents under the VCDR and the VCCR, especially given the developments in international relations from the conclusion of these Conventions in the 1960s to today.

Mandate

6. The proposed Committee aims to conduct a comprehensive study utilizing the methodology of Comparative International Law. This research will focus on identifying ambiguous provisions and legal gaps within the Vienna Convention

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[10] The ICJ has had a few exceptional opportunities to address the Vienna Conventions on Diplomatic and Consular Relations, including: INTERNATIONAL COURT OF JUSTICE. **Immunities and Criminal Proceedings** (Equatorial Guinea v. France). The Hague, 2016. Available at: https://www.icj-cij.org/en/case/163. Accessed on: 15 September 2023. INTERNATIONAL COURT OF JUSTICE. **United States Diplomatic and Consular Staff in Tehran** (United States of America v. Iran). The Hague, 1980. Available at: https://www.icj-cij.org/en/case/64. Accessed on: 15 September 2023; 1. INTERNATIONAL COURT OF JUSTICE. **Jadhav** (India v. Pakistan). The Hague, 2017. Available at: <https://www.icj-cij.org/en/case/168>. Accessed on: 15 September 2023; INTERNATIONAL COURT OF JUSTICE. **LaGrand** (Germany v. United States of America). The Hague, 1999. Available at: <https://www.icj-cij.org/en/case/104>. Accessed on: 15 September 2023; INTERNATIONAL COURT OF JUSTICE. **Avena and Other Mexican Nationals** (Mexico v. United States of America). The Hague, 2003. Available at: <https://www.icj-cij.org/en/case/128>. Accessed on: 15 September 2023.

on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR) pertaining to diplomatic and consular agents' immunities, privileges, and inviolabilities. Subsequently, the Committee will examine domestic court decisions that address these ambiguities and gaps. Through a systematic compilation and analysis of varying interpretative approaches from domestic judicial practices across the globe, the Committee will seek to provide greater clarity and coherence in the application of these international conventions.

7. The research will focus on judicial decisions issued after 2000 by the superior courts of different States due to their tendency to promote domestic uniformization, greater relevance for international law development, and availability. The universal character of the VCDR and the VCCR and the substantial number of States parties to both treaties demand a comprehensive selection of jurisdictions to effectively identify domestic courts' convergences and divergences in interpreting immunities, privileges, and inviolabilities on diplomatic and consular relations. Given the significant diversity of the ILA's membership, this project is especially fitting as it can draw from various perspectives and experiences. As an outcome, the Committee shall compile the results and formulate specific recommendations and guidelines for adoption within the ILA.

8. The proposed committee aims to achieve distinct objectives, such as enhancing the understanding of the personal inviolability of diplomatic and consular agents and their immunity from criminal jurisdiction; investigating the immunity of these agents in relation to civil and labor jurisdictions; examining the tax exemptions available to them; and discussing and potentially clarifying terms used in conventions, such as "premises of the mission" and "diplomatic functions".

- <u>The personal inviolability of diplomatic and consular agents and their immunity from jurisdiction in the criminal sphere</u>

9. The Committee intends to delve into personal inviolability, which prohibits the arrest and detention of diplomatic and consular agents and protects them from attacks against their person, freedom, or dignity, and immunity from criminal jurisdiction, which prevents diplomatic and consular agents from being subjected to criminal prosecution in the receiving State.

10. These prerogatives differ considerably between diplomatic and consular agents. While the personal inviolability provided for diplomats is generally understood as absolute, consular agents' inviolability is restricted to preventive arrest or detention cases. It may be set aside when the conduct attributed to the consular agent is considered a "grave crime." A similar divergence can be observed concerning immunity from criminal jurisdiction: the diplomatic has absolute immunity, while immunity at a consular level is restricted to acts practiced in "the exercise of consular functions." Accordingly, studying the scope of "grave crimes" and "consular functions" is essential to determining these prerogatives' applicability to consular agents in specific cases.

11. Another debate that has been gaining momentum, this time within the scope of diplomatic agents' immunity from criminal jurisdiction, is the question regarding abuses and whether immunity could be exceptionally removed in situations that imply grave violations of human rights and, even of *jus cogens* norms.

12. The legal research on the topics outlined in this section aims to illuminate the differences in how immunities are applied when diplomatic and consular officials commit criminal offenses. A deeper understanding of this subject will enhance authorities' capabilities in the receiving State. This insight may enable them to conduct more effective investigations, promote greater accountability, and prevent impunity.

- The immunity of diplomatic and consular agents to civil and labor jurisdictions

13. The extension of diplomatic and consular agents' immunity for civil and labor lawsuits initiated in the receiving State is also the subject of debates before domestic courts. According to Article 31(1) of the VCDR, diplomatic agents enjoy immunity from civil and labor jurisdictions, except in three cases, which we intend to analyze in this comparative study: (a) 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; (b) 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; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

14. Despite the differences in terms adopted, all these hypotheses refer to the concept of "functional acts". The diplomatic agent's immunity persists as long as their conduct is limited to performing functions in the name and on behalf of the sending State.

15. By contrast, consular agents' civil and labor immunity is typically conditioned entirely on the concept of "functional acts." As a rule, these agents cannot be subjected to legal proceedings in these areas for 'acts performed in the exercise of consular functions.' The only exception to this rule pertains to legal actions resulting from damage caused by a vehicle, ship, or aircraft accident in the receiving State. In such cases, immunity does not apply even if the consular agent was acting within their official duties. Similarly to diplomatic agents, once a consular agent's tenure ends, their immunity persists only for acts performed in the execution of their consular functions.

16. Thus, defining what constitutes acts of function is central to delimiting the scope of legal immunities of both consular and diplomatic agents. Considering that both the VCDR and the VCCR do not present a complete conceptualization for functional acts, the relevance of an investigation into domestic judicial practice regarding this issue is manifest.

17. Other related issues that have arisen before domestic courts involve immunity concerning employment disputes between individuals hired to perform domestic services in the homes of diplomatic and consular agents, diplomatic immunities in civil lawsuits involving family law, and the extent of diplomatic immunities for civil and labor jurisdictions in cases concerning the mistreatment of minors.

- Tax exemption for diplomatic and consular agents and their assets

18. One of the central aspects of international diplomatic and consular law is tax exemption, guaranteed by both the VCDR and the VCCR. This exemption covers taxes and fees levied on the properties affected by diplomatic and consular representation and taxes that State representatives would usually have to pay on a personal level. However, this tax exemption is not absolute, and its scope does not include, for example, indirect taxes that are included in the price of goods or services; the succession rights received by the sending State; and the taxes and fees that are levied on the remuneration related to specific services, among others indicated in Article 34 of the VCDR and Article 49 of the VCCR.

19. The domestic judicial practice of States is particularly relevant in determining the scope of the tax exemption. This is because the VCDR and the VCCR provisions that regulate tax exemption do not contain precise definitions. Furthermore, disparities may arise due to the diversity of treasury systems in different States and numerous bilateral treaties regulating taxes. This peculiar context makes a study of internal judicial practice especially necessary and relevant.

20. Another controversy that has already been the subject of judicial analysis is the possibility of taxing the income of diplomatic and consular agents who are nationals of the receiving State or have permanent residence there. Finally, the possibility of charging fees for public services, such as public lighting and cleaning, was also the subject of domestic court decisions.

Work plan and schedule

The Committee's mandate outlines a five-year work plan commencing in November 2023. The Committee's work will comprise an Interim Report and a Final Report. The proposed schedule is as follows:

• *November 2023:* Submission of the new Committee proposal to the ILA Executive Council.
• *February 2024:* Committee formation under the new mandate (including branch nominations); initial online meeting; task distribution for the Delphi meeting with preliminary contributions.
• At the *2024* Biennial ILA Conference in Delphi: First in-person meeting with initial findings presentations.
• *2024-2025*: Comprehensive study of domestic courts' interpretation and application of international diplomatic and consular immunities, privileges, and inviolabilities.

• *June 2025:* Hybrid meeting (location TBA) featuring member report presentations.
• *December 2025:* Circulation of the interim report's first draft among members.
• At the *2026* Biennial ILA Conference in Vienna: Presentation of the Interim Report.
• December *2027:* Circulation of the draft report on international diplomatic and consular immunities, privileges, and inviolabilities among members.
• At the *2028* Biennial ILA Conference: Presentation of the Final Report, including specific recommendations and guidelines.

Chair

The proposed chair is **Aziz Tuffi Saliba**, a professor of International Law at the Federal University of Minas Gerais (UFMG) and current Brazilian Branch president. His career at UFMG has included roles as Deputy Dean of the Law School (2015-2018) and the current Pro-Vice-Chancellor for International Affairs (since 2018). His contributions to the ILA include serving as the rapporteur of the Committee on Recognition and Non-recognition in International Law. His academic credentials feature an LL.M. from the University of Arizona (2000) and a Ph.D. from UFMG.

Rapporteur

The proposed rapporteur is **Apollin Koagne Zouapet**, an Associate Legal Officer at the International Court of Justice in The Hague, Netherlands. His academic background includes a Ph.D. in International Law from the University of Geneva and a Bachelor's degree in Law and Political Science from the University of Dschang in Cameroon. Among his accolades are the "Professor Walther Hug" prize for his doctoral thesis and a scholarship from the Fondation Ernst et Lucie Schmidheiny. His professional experience features a research fellowship at the Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law. He has published various articles on international law and provided legal consultation to governments and international organizations.