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The Siege of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State

1. Introduction

States establish diplomatic missions and send both diplomatic and non-diplomatic staff abroad in order to represent and protect their interests and those of their nationals. Such missions and personnel are granted different privileges and immunities in the receiving states so that they can perform their official functions as independently and efficiently as possible. These guarantees are supposed to prevent attacks on diplomatic missions and their staff by both public officials and private persons and are intended to avoid any other obstacles to performance of their official functions. In reality, there is not often need for such a protection — states refrain from interfering, as they are interested in mutually friendly relations and wish their own diplomatic missions and the staff thereof to have the widest possible freedom to operate in the respective receiving states. The principle of reciprocity is the most effective means against breaches of diplomatic law. Nevertheless, there are still occasions on which the privileges and immunities provided become indispensable to ensuring the normal functioning of a diplomatic mission and the physical safety of its staff. The danger may originate from local authorities as well as from private persons or their groups, acting independently or under the order of the receiving state. Sometimes the receiving state chooses to ignore completely its obligations and allows the threatening situation to continue. The Estonian embassy in Moscow, which was subjected to threats, attacks, and blockade from 27 April to 5 May 2007, serves as an excellent example in this context. The incident in question illustrated that Russia sometimes displays a rather unusual understanding of the content and meaning of diplomatic privileges and immunities and of the obligations of the receiving state where the protection of a diplomatic mission and its staff is concerned. That incident was hardly an everyday happening; it will more likely serve in future textbooks as an example of flagrant breaches of diplomatic law. The present article discusses the nature and scope of the protection of the diplomatic mission and its staff and the obligations of the receiving state in ensuring such protection. Attention is focused on aspects of physical protection (obviously lacking in this incident), leaving aside judicial immunity and other privileges guaranteeing freedom of action. The article assesses the events in the vicinity of the Estonian embassy in Moscow in the light of diplomatic law as well as that of state and court practice.

2. Background

The siege began because the Estonian government decided to move a problematic war memorial from the middle of Tallinn. The Bronze Soldier has a turbulent and contradictory history. It was originally erected to honour Soviet soldiers who had ‘liberated’ Tallinn and fallen in the Great Patriotic War against Nazi Germany. The Soviet theme was revised when Estonia regained its independence; the monument was dedicated to all those who had fallen in the Second World War.

After Estonia regained independence, the monument did not receive much attention. However, in more recent years, the Bronze Soldier had gained significant symbolic value for the local Russian community of post-war immigrants, symbolising the Soviet victory over Nazi Germany and their claim to rights in Estonia. By contrast, Estonians considered the monument to be a symbol of the Soviet annexation and its repressive regime. Since 2006, several intense quarrels (although not violent) took place between Estonians and Russians around the Bronze Soldier. There were strong calls to remove the Soviet monument from the middle of the capital of Estonia. The positions of the Estonian and Russian communities on the question were sharply divided. Finally, in April 2007, the Estonian government started preparations to exhume the remains of the Soviet soldiers buried under the monument and to rebury them in a more fitting place (because of the surface design, people were walking on the unmarked graves) and also to relocate the monument itself to the cemetery of the Estonian Defence Forces. The police surrounded the area on 26 April. The disagreement over these activities led to two-day massive protests, riots, and looting — the worst Estonia has ever seen — mostly by ethnic Russians. In the wake of these and related events, the Estonian government decided to remove the monument immediately, in contrast to the more methodical approach originally intended. The Bronze Soldier with its accompanying stone wall was removed on 27 April and the monument re-erected on 30 April (the stone wall was rebuilt later). DNA profiles were taken from exhumed remains and handed over to the Russian embassy so that relatives could reclaim the remains and rebury them elsewhere. Relatives claimed four sets of remains. Unclaimed remains were reburied at the military cemetery close to the Bronze Soldier.

As a protest, several youth organisations staged a virtual siege on the Estonian embassy in Moscow. For nine days, the protestors disturbed the peace of the embassy, prevented staff and visitors from entering or leaving the embassy, and physically attacked the embassy and the ambassador. The flagrant breaches of diplomatic law were possible on account of the toleration of these acts by the Russian authorities.

3. Different aspects of physical protection

According to long-established and universally recognised practice, receiving states must guarantee certain privileges and immunities to the diplomatic missions established in their territories and to diplomatic and non-diplomatic staff sent there. Such privileges and immunities are codified in the Vienna Convention on Diplomatic Relations (1961).^{*1} It stresses that the purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions representing states.^{*2} Indeed, if a diplomatic mission and its staff were subject to the jurisdiction of the receiving state in the same manner as everyone else and therefore completely dependent on its goodwill, their actions potentially would be influenced to such an extent that the performance of the functions entrusted to them by the sending state is hampered. However, the privileges and immunities are necessary not only when the staff is exercising official functions but also, at least to some extent, in regard of their private actions, as the receiving state can influence their independence equally through their private life. For a similar reason, family members are considered an extension of a member of diplomatic or non-diplomatic staff and must also be protected.^{*3}

From the perspective of physical protection, there are three important guarantees:

1. Inviolability of the premises
2. Personal inviolability
3. Freedom of movement

¹ Vienna Convention on Diplomatic Relations, 18.04.1961, entered into force on 24.04.1964, 500 UNTS 95 (hereinafter: the Vienna Convention).

² *Ibid.*, preamble.

³ See Article 37 (1)–(3) of the Vienna Convention. The family members enjoy the same privileges and immunities as the respective member of diplomatic or non-diplomatic staff with the exception of the family members of a member of service staff who do not enjoy any privileges and immunities.

The first two of these were considered so important by the signatory states that the Vienna Convention does not include any exceptions from these inviolabilities.⁴ They constitute basic norms that are respected by all civilised nations and that rarely are violated; even when they are violated, the problem stems from extreme circumstances or, at worst, unawareness on the part of the actor concerned or the responsible person. The International Court of Justice has emphasised in the *Teheran* case that such obligations “are not merely contractual obligations [under the Vienna Convention], but also obligations under general international law”.⁵

3.1. Inviolability of the premises

The inviolability of the premises is an undeniably established norm of international law according to which the premises of a diplomatic mission physically present in the territory of the receiving state are not subject to the jurisdiction of the receiving state in the same manner as other property is.⁶ In the present context, there are two important aspects of inviolability of the premises: 1) the agents of the receiving state may not enter the premises of the mission, except with the consent of the head of the mission⁷, and 2) the receiving state has a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.⁸

3.1.1. Prohibition to enter the premises of the mission

The prohibition from entering the premises of the mission imposes a negative obligation — to refrain from corresponding action. The inviolability of the premises is absolute, meaning that the premises of the mission may not be entered even by the police chasing a criminal or by fire-fighters if there is a fire on the premises of the mission. Entry is not even allowed if the receiving state has serious reason to believe that the premises of the mission are being used in a manner incompatible with the functions of the mission.⁹ For example, if the premises of the mission are used for smuggling weapons or narcotics or for organising terrorist attacks, the receiving state may merely ask for the assistance of the sending state to stop such activities occurring at its diplomatic mission. The first draft of the Vienna Convention included a right of the receiving state to enter the premises of a mission in cases of extreme emergency in order to eliminate serious threat to human lives, public health, or property or to defend the national security of the receiving state. This proposed text was eventually left out, as there was very little supporting state practice and allowing such a right would be likely to cause more problems than would denying it.¹⁰ Indeed, if it had been adopted, a malicious receiving state could simply have created a situation that would then justify entry to the premises of the mission. For instance, it is, on the one hand, very easy to claim that the national security of the receiving state necessitates entry while, on the other hand, it is very difficult to prove the contrary. Moreover, the practice should be that the head of the mission weighs the specific circumstances carefully when deciding whether to allow entry. There have been a number of example cases in which the head of a mission has denied entry in the circumstances mentioned above. Spain broke off diplomatic relations with Guatemala in February 1980 after the police entered the premises of the mission in order to free them from the peasants who had taken the ambassador and several other staff of the mission hostage, even though the head of the mission had refused them entry.¹¹

Perhaps the most drastic example concerns the April 1984 shooting incident surrounding the Libyan People’s Bureau (Libya’s preferred term for an embassy). The opponents of Colonel Qaddafi’s regime had for some time already been holding regular protests in front of the Libyan mission. The day before a planned demonstration, Libyan diplomats requested the British authorities to prevent the demonstrations and also warned that they would otherwise not be responsible for the consequences. On the day of the demonstration, 17 April, someone opened fire on the protestors from the premises of the mission. As a consequence, several of them

⁴ The International Court of Justice has stated that “the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime” of diplomatic law. *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)*, Judgment. – ICJ Reports 1980 (3), paragraph 86.

⁵ *Ibid.*, paragraph 62.

⁶ The inviolability of the premises of the mission was originally derived from the personal inviolability of the head of the mission, but during the drafting process of the Vienna Convention, the International Law Commission formulated a new position that such inviolability is instead an attribute of the sovereignty of the sending state by reason of the fact that the premises are used as the headquarters of its mission. See *Yearbook of the International Law Commission*. Vol. II. New York: United Nations 1958, p. 95.

⁷ Article 22 (1) of the Vienna Convention.

⁸ Article 22 (2) of the Vienna Convention.

⁹ Article 41 (3) of the Vienna Convention prohibits the use of the premises of the mission in any manner incompatible with the functions of the mission as laid down in the Vienna Convention or by other rules of general international law or by any special agreements in force between the sending and receiving state.

¹⁰ *Yearbook of the International Law Commission*. Vol. I. New York: United Nations 1957, p. 56.

¹¹ B. Sen. A Diplomat’s Handbook of International Law and Practice. 3rd revised edition. Dordrecht: Martinus Nijhoff 1988, p. 113.

were seriously injured and a female constable protecting the mission was killed. The police did not return fire, but the Libyan authorities in Tripoli were immediately asked to instruct those inside the mission to leave the building and to allow the premises to be searched by the police for weapons and explosives. Unsurprisingly, the request was refused. Instead, the British embassy in Tripoli was the scene of hostile demonstrations and some British nationals were unjustifiably arrested. The United Kingdom did not breach the inviolability of the mission, although such a possibility was considered (self-defence was mentioned as a potential justification). However, it was concluded finally that, according to the meaning and *travaux préparatoires* of Article 22, the premises of the mission do not lose inviolability in the event of inappropriate use of the premises and therefore it was necessary to utilise other measures.^{*12} As the parties were not able to settle their dispute, the United Kingdom (after some further violent acts) terminated diplomatic relations and ordered all members of the Libyan People's Bureau to leave by the end of April. The British authorities then entered the premises, in the presence of a representative of the Saudi Arabian embassy, and found weapons and relevant forensic evidence.^{*13}

This prohibition was not breached in the case of the Estonian embassy in Moscow. Entry by the Russian authorities to the premises of the mission would have been an obvious and very serious breach of the Vienna Convention that cannot be justified even for self-defence under customary international law.^{*14} Self-defence as an exception must be interpreted restrictively. As both the International Law Commission^{*15} and the majority of the states participating in the Vienna Conference^{*16} stressed, the nature of the inviolability of the premises should be unqualified. Accordingly, they refrained from adding exceptions even for cases of emergencies; the possibility of appealing to self-defence should be treated with utmost caution. In any case, pretexts such as 'in the interest of national security' and 'there are serious suspicions' are certainly not enough to trigger applicability of the right of self-defence. When the incident at the Libyan People's Bureau was analysed later in the British parliament, it was noted that a few shots fired from a mission, even if they caused an injury or a death, would not warrant entry to the premises of the mission under self-defence.^{*17} This does not mean that self-defence is completely out of the question^{*18}; however, first it must be demonstrated that there is "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".^{*19}

3.1.2. Duty to protect the premises of the mission

The duty to protect the premises of the mission imposes a positive obligation that has a much less clear content and allows differing interpretations. The performance of this duty may actually result in contradictions with fundamental rights and freedoms (for example, freedom of speech, assembly, and movement) laid down in constitutions and international agreements. There were no problems when the relevant provision of the Vienna Convention was drafted, as this duty had been firmly established in customary international law and was considered obvious.

A special duty means that the receiving state must do more for the protection of the premises of the mission than it would normally do to ensure public order. This duty is a positive obligation that requires active contribution from the receiving state. However, this is not an absolute duty, as "all appropriate steps" denotes that all measures taken must be proportional to the risk and dangers threatening the premises of the mission.^{*20} Therefore, it is unreasonable to assume that the receiving state shall assign a 24-hour large police unit to guard every diplomatic mission. However, if the receiving state is aware, for example, of potential dangers to the mission or hostile demonstrations to be organised near the mission or if the head of the mission informs the receiving state of, for instance, an act of trespassing or an attack in progress, then the receiving state is obliged to offer the mission protection that corresponds to the actual threats. For example, if a protestor is trying to enter the premises of the mission, throwing pamphlets there, damaging the building of the mission, or acting in any other hostile manner, he must be immediately made to cease and arrested if necessary.

¹² E. Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*. 2nd edition. Oxford University Press 2004, p. 124.

¹³ R. Higgins. *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*. – *American Journal of International Law* 1985 (79), pp. 643–644.

¹⁴ See J. S. Beaumont. *Self-defence as a Justification for Disregarding Diplomatic Immunity*. – *Canadian Yearbook of International Law* 1991 (29), pp. 391–402 for a detailed discussion on the possibility to use self-defence.

¹⁵ *Yearbook of the International Law Commission (Note 10)*, pp. 55–56; *Yearbook of the International Law Commission*. Vol. I. New York: United Nations 1958, pp. 128–129.

¹⁶ See E. L. Kerley. *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*. – *American Journal of International Law* 1962 (56), pp. 102–104.

¹⁷ J. S. Beaumont (Note 14), p. 394.

¹⁸ The International Law Commission has referred to such a possibility. See *Yearbook of the International Law Commission (Note 6)*, p. 97.

¹⁹ *British Foreign and State Papers 1840–1841 (29)*, p. 1138.

²⁰ Lord Gore-Booth (ed.). *Satow's Guide to Diplomatic Practice*. 5th edition. London: Longman 1979, p. 111.

Some states have deemed it necessary to adopt special measures in order to prevent attack against and damage to the premises of the mission, as well as any disturbance of the peace of the mission and impairment of its dignity. For example, the United States Congress adopted a joint resolution (i.e., a resolution of the House of Representatives and the Senate together) that made it unlawful to display any flag, banner, placard, or other such devices meant to intimidate, coerce, or bring into public odium any foreign diplomat within 500 feet of a diplomatic mission within the District of Columbia.^{*21} Of course, such restrictions do not mean that organisation of political demonstrations is forbidden altogether. This would be very complicated — more likely impossible — to achieve in democratic states, as freedom of speech and assembly are fundamental freedoms or human rights guaranteed in national constitutions and international agreements. The receiving state simply has a duty to make sure that demonstrations do not get out of control and the privileges and immunities of diplomatic missions and their staff are not violated because of such demonstrations.

Beginning in 1982, regular demonstrations had taken place in front of the South African High Commission in London against the apartheid regime. Suddenly, in summer 1984, the police commander who was responsible for controlling the situation ordered all of the protestors to move away from the mission on the pretext that their activities disturbed the performance of official function by the mission and impaired its dignity. Everyone who refused to move was arrested. It is interesting to point out that never in the preceding two years had protestors been asked to move away from the mission or arrested for taking part in a demonstration. In addition, the police commander acted without consulting the Foreign and Commonwealth Office first.^{*22} A judge later ordered the arrested persons to be released and found that an appeal to impairment of dignity requires there having been abusive or insulting behaviour toward the mission, and that a peaceful political demonstration does not amount to such.^{*23} United States courts have frequently had a chance to examine whether the above-mentioned restrictions on demonstrations in the vicinity of diplomatic missions are constitutional. These debates were stopped (at least for now) by the Supreme Court with a somewhat controversial decision.^{*24} The Supreme Court confirmed the constitutionality of prohibition of congregation within 500 feet of a mission, provided that such gatherings are reasonably believed to threaten the security or peace of the mission. On the other hand, the prohibition to display a flag, banner, placard, or other such devices meant to intimidate, coerce, or bring into public odium any foreign diplomat was found to be unconstitutional, since it was a content-based restriction on political speech in a public forum and not an action narrowly tailored to serve a compelling state interest. Nevertheless, similar restrictions are provided, with slightly changed wording, in the United States Code^{*25}, making it a crime to intimidate, coerce, threaten, or harass a foreign official or to obstruct him in the performance of his duties^{*26} and to congregate within 100 feet of any diplomatic mission with an intention to threaten the peace and security of said mission.

After the Libyan People's Bureau incident, both the British parliament and the national government reviewed the rights and obligations deriving from the Vienna Convention. In its response to the report of the parliamentary Foreign Affairs Committee, the government stated that the duty to protect the premises of the mission is fulfilled if the functioning of the mission is not impaired, its staff do not feel threatened, and its staff and visitors are able to freely arrive at and leave the mission.^{*27} Too loud a noise may constitute a disturbance of peace. In Germany, harassment of a mission and its staff by means of noise, loudspeakers, or megaphones is not permissible. In addition, round-the-clock demonstrations impair the dignity of a mission.^{*28}

In the case of the Estonian embassy in Moscow, it was seen that the Russian authorities did not fulfil the obligations deriving from the Vienna Convention to protect the premises of the mission from intrusion or damage and to prevent disturbance of the peace of the mission or impairment of its dignity. Shortcomings were obvious, and they were pointed out by several states and organisations.^{*29} From 27 April to 5 May, the Estonian embassy

²¹ Joint Resolution to Protect Foreign Diplomatic and Consular Officers and the Building and Premises Occupied by Them in the District of Columbia, Public Resolution No. 79, 15.02.1938. See *American Journal of International Law (Supp.)* 1938 (32), pp. 100–101 for the text (it is actually more specific and broader in scope).

²² R. Higgins (Note 13), p. 651.

²³ *Regina v. Roques*, Bow Street Magistrates Court, June 1984.

²⁴ *Boos v. Barry*, 485 U.S. 312 (1988), United States Supreme Court, Judgment, 22.03.1988. See D. Thompson. *Boos v. Barry: Balancing Diplomatic Inviolability with the Freedom of Speech*. – *Temple International and Comparative Law Journal* 1989 (3), pp. 109–111 for a detailed analysis of the decision.

²⁵ 18 United States Code § 112 (b).

²⁶ The Supreme Court referred to this provision as a better phrased alternative. There remains the question the prohibition in the United States Code is really better in essence or is it actually a cosmetic difference, that is, the provision does not specifically touch upon the sensitive issue of the freedom of speech and the First Amendment.

²⁷ Cmnd 9497, Misc. No. 5 (1985), paragraph. 39.

²⁸ E. Denza (Note 12), p. 145.

²⁹ See, for example, “Tensions in Estonian-Russian Relations”, United States State Department Press Statement, 2.05.2007, No. 2007/363. Available at www.state.gov/r/pa/prs/ps/2007/may/84181.htm (22.09.2007); “NATO statement on Estonia”, NATO Press Release, 3.05.2007, No. (2007)044; A. Lobjakas. Euroopa Liit asus kaitsma Eesti diplomaate Moskvast (EU Started to Protect Estonian Diplomats in Moscow). – *Eesti Päevaleht Online*, 3.05.2007. Available at www.epl.ee/artikkel/384418 (22.09.2007) (in Estonian).

in Moscow was blockaded mainly by members of two Russian youth organisations — Nashi and Molodaya Rossiya. Because the mission is situated between two small streets, the round-the-clock demonstration was taking place on two sides of the mission. It was estimated that there were about 600 persons continuously present.^{*30} The protestors threw stones and paint at the mission, causing material damage and impairing its dignity.^{*31} Offensive and provoking slogans, such as ‘We reached Berlin; we will also reach Tallinn’, were painted on the walls of the mission.^{*32} At one point, the youth organisations threatened to demolish the mission and were sure that they could find legal justification for such an extreme action.^{*33} Such malicious activities do not constitute, in any manner, an acceptable demonstration near a diplomatic mission. Although the police kept people to a distance of a couple of metres from the mission and ordered a 3.5-metre-high wooden barrier to be erected on the one side of the mission and a barbed-wire fence to be built on the other, four activists succeeded in crossing these defences and tore down the Estonian flag from a flagpole on the premises of the mission.^{*34} These acts show clearly that the protection of the premises of the mission was inadequate and that the receiving state did not fulfil its obligations under the Vienna Convention. The situation did not improve, despite repeated requests by Estonia and promises by Russia that the security of the mission would be improved and conditions for normal performance of diplomatic and consular function would be guaranteed.^{*35} The receiving state has a separate obligation to fully facilitate the performance of official functions by the mission.^{*36} Although the latter is a very vague provision, it can be applied as an additional argument to support the request by the sending state. The functioning of the mission was disturbed in several respects, which means that the steps taken by the Russian authorities for guaranteeing protection were once again inadequate. Firstly, loud music playing around the clock from loudspeakers disturbed the functioning of the mission and impaired its dignity as discussed above.^{*37} Secondly, the protestors hindered entry to and leaving from the mission by both Estonian diplomats^{*38} and nationals^{*39} and also by other diplomats.^{*40} Estonian Foreign Minister Urmas Paet commented on the situation of the Estonian diplomats by saying that they were completely surrounded and were, in essence, being held hostage.^{*41} Because of the disturbance to the functioning of the mission, the consular section was closed.^{*42} Estonian nationals who were in Russia and in need of consular assistance were advised to contact the mission by telephone.^{*43} As mentioned above, the possibility of freely entering and leaving the premises of the mission is one important aspect of protection of the mission.

When commenting on the situation surrounding the Estonian embassy, the spokesman of the Russian Ministry of Foreign Affairs said that Russia had completely fulfilled all of its obligations under the Vienna Convention.^{*44} This is doubtful — and it is not correct even if one points merely to the fact that demonstrations are allowed in Moscow only in daytime. Even if the events taking place were lawful under domestic Russian law, this does not release Russia from a duty to follow the Vienna Convention as international law preventing a state from invoking its internal law as justification for its failure to comply with a treaty.^{*45} In explanation of events concerning the Estonian embassy, the Russian Ministry of Foreign took the position that Estonia was to be blamed for everything.^{*46}

³⁰ Noorteühendused on Moskva Eesti saatkonna blokeeritud (Youth Organisations Have Blocked Estonian Embassy in Moscow). – Postimees Online, 30.04.2007. Available at www.postimees.ee/300407/esileht/siseuudised/258003.php (22.09.2007) (in Estonian).

³¹ Foreign Minister strongly denounces the continued inactivity of the Russian authorities. Estonian Ministry of Foreign Affairs Press Release, 29.04.2007, No. 84-E.

³² Noorteühendused on Moskva Eesti saatkonna blokeeritud (Note 30).

³³ Vene noorteühendused ähvardavad lammutada Eesti saatkonna (Russian Youth Organisations Threaten to Dismantle Estonian Embassy). – Postimees Online, 29.04.2007. Available at www.postimees.ee/290407/esileht/valisuudised/257870.php (22.09.2007) (in Estonian).

³⁴ Estonian Flag Torn off Estonian Embassy in Moscow. Estonian Ministry of Foreign Affairs Press Release, 1.01.2007, No. 93-E.

³⁵ Noorteühendused on Moskva Eesti saatkonna blokeeritud (Note 30).

³⁶ Article 25 of the Vienna Convention.

³⁷ Noorteühendused on Moskva Eesti saatkonna blokeeritud (Note 30).

³⁸ Moskvas piirati Eesti suursaadiku autot (Estonia's Ambassador's Car Blocked in Moscow). – Eesti Päevaleht Online, 27.04.2007. Available at www.epl.ee/uudised/383735 (22.09.2007) (in Estonian).

³⁹ Foreign Minister strongly denounces the continued inactivity of the Russian authorities (Note 31).

⁴⁰ I. Taro. Saatkonna piirajad pääsesid lipu kallale (Besiegers of the Embassy Got Hold of the Flag). – Postimees, 2.05.2007 (in Estonian).

⁴¹ Statement by the Foreign Minister, Estonian Ministry of Foreign Affairs Press Release, 1.05.2007, No. 95-E.

⁴² M. Šmutov. Eesti saatkond Moskvas lõpetas konsulaartöö (Estonian Embassy in Moscow Discontinues Consular Work). – Postimees Online, 2.05.2007. Available at www.postimees.ee/020507/esileht/siseuudised/viimased_sundmused/258231.php (22.09.2007) (in Estonian).

⁴³ Noorteühendused on Moskva Eesti saatkonna blokeeritud (Note 30).

⁴⁴ Kamõnin: Venemaa ei ole diplomaatiliselt tava rikkunud (Kamynin: Russia not in Breach of Diplomatic Practices). – Eesti Päevaleht Online, 2.05.2007. Available at www.epl.ee/artikkel/384379 (22.09.2007) (in Estonian).

⁴⁵ Vienna Convention on the Law of Treaties, 23.05.1969, entered into force on 27.01.1980, 1155 UNTS 331, Article 27.

⁴⁶ Venemaa: Eesti saatkonna ümber toimuv on süüdi eestlased ise (Russia: Estonians Themselves at Fault for Situation around the Estonian Embassy). – Postimees Online, 2.05.2007. Available at www.postimees.ee/020507/esileht/valisuudised/258376.php (22.09.2007) (in Estonian).

3.2. Inviolability of the person

Personal inviolability is without doubt the cornerstone of diplomatic law, as even in ancient times people had to understand that reaching agreements and achieving mutual intercourse is difficult if envoys are killed when arriving or negotiating. By the time of the conclusion of the Vienna Convention, the principle of personal inviolability was so strongly established in customary international law that the commentary of the International Law Commissions on the respective article is clearly more than laconic if one takes into consideration its importance. At the same time, the commentary did include a very importance element; namely, it stated that the principle of personal inviolability does not exclude, in respect of the diplomatic agent, either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.^{*47} Personal inviolability has two important aspects: 1) a diplomat is not to be subjected to any form of arrest or detention, and 2) the receiving state must treat a diplomat with due respect and take all appropriate steps to prevent any attack on his person, freedom, or dignity.^{*48}

It may well happen that the police stop a diplomat in good faith, but as soon as it has been established that this person has diplomatic status, he must be released immediately. The diplomat may not be searched or, for example, forced to take a sobriety test. However, personal inviolability does not imply that the diplomat need not pass a security check, either manual or electronic, before boarding an aeroplane. If the diplomat refuses to submit to such a check, the airline company is not obliged to serve him. For example, the United Kingdom informed all diplomatic missions that airline companies have a complete right to check also diplomats in order to ensure the safety of persons on board. Diplomats were asked to co-operate fully with the security services of airlines.^{*49} According to the Vienna Convention, personal inviolability is unqualified: there are no explicitly mentioned exceptions, even for cases of emergencies. Certain limited exception may be derived from the right of self-defence and potentially also from the need to protect human lives. The possibility of the first exception has been confirmed by both the International Law Commission and the International Court of Justice, which stated that a diplomat caught in the act of committing an assault or other offence may, on occasion, be detained briefly by the police of the receiving state in order to prevent commission of the specific crime in question.^{*50} In 1947, the Moscow police were forced to, as a last resort, tie up a Brazilian diplomat in order to prevent him destroying the furniture in his hotel room. The Brazilian government did protest, but this was not justified in view of the circumstances.^{*51}

When discussing the protection of diplomats, the Vienna Convention does not explain the concepts 'all appropriate steps' and 'attack'. Unfortunately, these notions are not elaborated on, even in the later Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973).^{*52} What steps are appropriate depends, naturally, on the threatening dangers, and one has to take in account also reasonability and proportionality. In addition, the general conditions in the receiving state may be of noteworthy importance.^{*53} In Colombia, regarded as a very dangerous posting for diplomats, the government provides armed guards for all ambassadors and first secretaries and suggests special security advice.^{*54} Certain acts, such as murder, taking hostage, kidnapping, and threats, along with attempts to commit such acts, are clearly forbidden.^{*55} In German practice, round-the-clock demonstrations are considered to not only impair the dignity of the mission but also infringe personal inviolability.^{*56} The special duty to protect diplomats means that the receiving state must do more for the protection of the premises of the mission than it would normally do for ordinary people.

In the case of the Estonian embassy in Moscow, the most telling example of the violation of personal inviolability was an attack by a Nashi activist, during a press conference, against the person of the Estonian ambassador, Marina Kaljurand. According to the spokesman for the Estonian Ministry of Foreign Affairs, the ambassador was hit by a pepper-spray attack.^{*57} Then, when the ambassador was returning from the press conference, she was caught in an ambush. Two cars that had been waiting cut off the road so that the ambassador's car was not able to move forward and Nashi activists could surround her car, at the same time demanding that she leave

⁴⁷ Yearbook of the International Law Commission (Note 6), p. 97.

⁴⁸ Article 29 of the Vienna Convention.

⁴⁹ G. Marston. United Kingdom Materials on International Law. – British Yearbook of International Law 1986 (57), pp. 550–551.

⁵⁰ United States Diplomatic and Consular Staff in Teheran (Note 4), paragraph 86.

⁵¹ G. E. Silva. Diplomacy in International Law. Leiden: A. W. Sijthoff 1972, p. 93.

⁵² Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14.12.1973, entered into force on 20.02.1977, 1035 UNTS 167.

⁵³ See also Gore-Booth (Note 20), p. 122.

⁵⁴ E. Denza (Note 12), p. 216.

⁵⁵ See Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

⁵⁶ E. Denza (Note 12), p. 145.

⁵⁷ Estonian Ambassador to Moscow was Attacked. Estonian Ministry of Foreign Affairs Press Release, 2.05.2007, No. 97-E.

the country. The special force OMON arrived five minutes later and dissolved the blockade and escorted the ambassador to the mission, freeing the road.^{*58} Also, the car of the Swedish ambassador was attacked when it was parked in front of the Estonian embassy; the flag and a mirror were torn off.^{*59} On a number of occasions, the duty to treat a diplomat with due respect and to prevent attacks on his person, freedom, or dignity was not fulfilled. For example, there were numerous dishonoured photos of the ambassadors and a banner suggesting that she should “return to [her] fascist country”.^{*60} Drawing a parallel with the protection of the premises of the mission, it may be said that the duty to protect diplomats is breached if they feel threatened. If one takes into consideration living and working under siege, continuous loud music and offensive chanting, attacks against the mission, and threats to demolish the mission, it may be easily concluded that necessary protection was not provided.

3.3. Freedom of movement

The ability to travel freely in the territory of the receiving state is very important for the performance of diplomatic functions. The protection of the interests of the nationals of the sending state is seriously hindered without such a freedom because diplomats cannot meet with their country’s nationals. Protection of the interests of the sending state is equally hampered if diplomats are not able to meet with local authorities or diplomats from other missions. Lack of the freedom of movement affects also the ability of a diplomat to assess conditions and developments in the receiving state and to report thereon to the sending state.^{*61} In order to obtain a full and accurate picture of the prevailing conditions and ongoing developments in the receiving state, diplomats must have an opportunity to travel in different regions of the receiving state. If they are residing only in the capital, which usually is more developed than the rest of the receiving state, it is inevitable that the knowledge and understanding gained of the receiving state are incomplete.

Diplomats have not always been guaranteed freedom of movement. In Byzantium, the envoys sent to the emperor were met at the border and escorted to the capital via a specially prepared route. The purpose was to impress the foreigner with the powerfulness of Byzantium and to ensure that the envoy did not see things he was not meant to see. Moreover, the envoys were not allowed to freely choose a place of residence but had to live in a specially designed area where they were again impressed by various means of economic and military power of Byzantium. After the Second World War, the Soviet Union prohibited the members of diplomatic missions from travelling further than 50 kilometres from Moscow without a special permit. The latter were difficult to obtain, and diplomats who succeeded in receiving one remained under the constant surveillance of the police. Similar restrictions were imposed by Eastern European socialist countries and a little later by the People’s Republic of China.^{*62} Such restrictions on the freedom of movement clearly were at odds with customary international law and were a subject of serious criticism from a variety of Western countries, some of which decided to impose the same restrictions in return. However, it was made known at the same time that these restrictions would be lifted as soon as the original restrictions were lifted.^{*63}

The Vienna Convention was expected to guarantee freedom of movement as clearly and broadly as possible. The issue was discussed by the International Law Commission, with the majority supporting the inclusion of a corresponding article in the convention (the most persistent objector was the Russian representative, Professor Grigory Tunkin^{*64}) but also wanting to make sure that the receiving state could restrict entry into certain areas for reasons of national security. Thus, the receiving state must ensure all members of a diplomatic mission freedom of movement and travel in its territory, except for those areas for which entry is prohibited or regulated for reasons of national security.^{*65} Certain restrictions are understandable because there are always areas that even local people are prohibited from entering, not to mention foreigners, on account of interests of national security. In addition, some areas may simply be dangerous, for example, because of riots or epidemics, so, as the receiving state has a duty to protect diplomats, they may be forbidden to travel to such areas.

However, making an exception to freedom of movement on grounds of national security is dangerous, as the latter is a very elastic notion that can cover very many and different situations if supported with skilful rhetoric. In any case, the creation of forbidden areas for different reasons may not render the freedom of movement

⁵⁸ Naši blokeeris Marina Kaljuranna auto (Nashi Blocked Marina Kaljuranna’s Car). – Eesti Päevaleht Online, 2.05.2008. Available at www.epl.ee/artikkel/384271 (22.09.2007) (in Estonian).

⁵⁹ A. Lobjakas (Note 29).

⁶⁰ Moskvas piirati Eesti suursaadiku autot (Note 38).

⁶¹ Article 3 (1) (d) of the Vienna Convention.

⁶² *Revue générale de droit international publique* 1953 (57), p. 444.

⁶³ Gore-Booth (Note 20), p. 118.

⁶⁴ Yearbook of the International Law Commission (Note 10), pp. 85–86.

⁶⁵ Article 26 of the Vienna Convention.

illusory.*⁶⁶ The Soviet Union's prohibition of travel further than 50 kilometres from the capital makes this freedom merely a beautiful declaration. The Soviet delegation informed other states at the Vienna Conference that Article 26 does not force the Soviet Union to give up its prevailing practice.*⁶⁷

In the case of the Estonian embassy in Moscow, the freedom of movement was repeatedly hindered for diplomats. This was discussed to some extent above, in connection with the inviolability of the premises of the mission. On the first day of the siege, the ambassador left the mission in order to give an interview to a television crew, but her car was blocked from moving, about 100 metres from the mission. The ambassador was locked in the crowd for half an hour before the OMON reached an agreement with the leader of Nashi and the car was reversed slowly back to the garage (this operation was accompanied by continuous scurrility).^{*68} Such behaviour directly prevented the ambassador from performing her official functions,^{*69} especially from representing and protecting the interests of the sending state by explaining to the public the situation back in Estonia. Hampering of the movement of the ambassador's car occurred several times. During the blockade, the diplomats of other missions were not able to enter the Estonian embassy.*⁷⁰

4. Russia's involvement in the events and its responsibility

The statements by the Russian authorities and other sources provide grounds to believe that Russia actually controlled what was happening around the Estonian embassy and fostered the continuation of the siege. Russia used the youth organisations for activities it did not want to carry out through agents of governmental authorities. It is public knowledge that the organisations behind the demonstrations have direct links with the Russian government and that the protestors were paid 550–1000 roubles per day for their presence around the Estonian embassy and participation in the demonstration.*⁷¹ Also, the law enforcement bodies allowed the protestors to decide who could enter or leave the mission. It was the latter who checked people's documents, while the police watched and admitted that Nashi were the ones with control over the situation.*⁷² The members of the Russian State Duma delegation that visited Estonia through the mediation of the European Union's Presidency declared that, if there were a political will, the police could clear the vicinity of the Estonian embassy in three minutes. However, the police had been given orders to provide only minimal protection.*⁷³ The ability of the law enforcement organs to guarantee order at will was well demonstrated when the OMON quickly dissolved activists who tried to hamper the movement of a police car.*⁷⁴ The police, among their other offences, did not react to the fact that the protestors ignored the rule that public gatherings and sanctioned demonstrations are allowed only during daytime in Moscow.

Taking into consideration the conduct of the protestors and the indifference or passive support of the law enforcement organs, a legitimate question arises about the responsibility of Russia for the events in the vicinity of the Estonian embassy. A state becomes responsible if the conduct 1) is attributable to that state under international law and 2) constitutes a breach of an international obligation of that state.*⁷⁵ Traditionally a state is not held responsible for the conduct of private persons or their groups if they are not exercising elements of governmental authority.*⁷⁶ Nevertheless, there are occasions on which the conduct of private persons or their groups is attributable to a state even if there exists no official link between them and that state. The level of responsibility depends on the kind of control the state has over these private actors.*⁷⁷ The International Court of Justice found in the *Nicaragua* case that 'effective control' must be proved — that is, the state controlled or enforced the conduct in question.*⁷⁸ This test imposes a quite unrealistic obligation on the other state to provide evidence of specific instructions or directions regarding specific conduct. The International Criminal

⁶⁶ Yearbook of the International Law Commission. Vol. II. New York: United Nations 1957, p. 137.

⁶⁷ E. Denza (Note 12), p. 170.

⁶⁸ Moskvas piirati Eesti suursaadiku autot (Note 38).

⁶⁹ See Article 3 of the Vienna Convention for traditional diplomatic functions.

⁷⁰ I. Taro (Note 40).

⁷¹ Statement by the Foreign Minister (Note 41).

⁷² I. Taro (Note 40).

⁷³ Statement by the Foreign Minister (Note 41).

⁷⁴ I. Taro (Note 40).

⁷⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Article 2 (hereinafter: the Draft Articles).

⁷⁶ R. Jennings, A. Watts (ed.). *Oppenheim's International Law*. Vol. I. 9th edition. Harlow: Longman 1996, pp. 502–503.

⁷⁷ See Article 8 of the Draft Articles.

⁷⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits. – ICJ Reports 1984 (3), paragraph 115.

Tribunal for the former Yugoslavia has offered an alternative approach, in the *Tadić* case. Its Appeal Chamber believed that international law does not require that the control extend to the issuance of specific orders or instructions relating to specific acts and therefore it is enough if the state has 'overall control' over the private actors involved. Such control still demands more than mere financing or equipping of non-state actors and includes involvement in participation in or supervision of the planning.^{*79} The exact nature of the relationship between the Russian government and youth organisations Nashi and Molodaya Rossiya is not clear, but they have close links in that the Kremlin supports and finances their activities. Therefore, it is possible to speak of overall control by the Russian government over these organisations. It is potentially possible to hold Russia responsible for the conduct of the protestors because they were allowed to exercise certain elements of governmental authority; for example, as noted above, the protestors checked the documents of people moving in the area of the Estonian embassy and decided who was allowed to enter or leave.^{*80}

However, it is easier to hold a state responsible for its omissions. If a state has a duty to prevent certain private conduct or to refrain from supporting such conduct, the state becomes responsible for the inability to perform its duties. In this case, Russia had a duty to guarantee inviolability of the premises of the Estonian embassy as well as personal inviolability and freedom of movement for its staff. As Russia failed to secure these rights, it is responsible for its failure (indirect responsibility). This does not mean that Russia is also liable for the specific acts of the protestors (which would be direct responsibility). In November 1979, Iranian students captured the United States embassy in Teheran and took its staff hostage. The Iranian authorities neither prevented the students from doing so nor forced or persuaded them to leave the mission and release its staff.^{*81} The International Court of Justice found that Iran had completely failed to perform its duties with regard to protection of the mission and its staff (a case of indirect responsibility).^{*82} As Ayatollah Khomeini and other Iranian authorities later repeatedly and publicly approved the conduct of the students and referred to it as conduct of the Iranian nation, Iran acknowledged and adopted that conduct and became, as the situation continued, directly responsible for the acts of the students.^{*83}

5. Conclusions

According to long-established and universally recognised practice, receiving states must guarantee certain privileges and immunities to the diplomatic missions established in their territories and to diplomatic and non-diplomatic staff sent there. The purpose of these privileges and immunities is to guarantee to those person representing foreign government the maximum independence in the exercise of their official functions. Usually there is no need for such protection because states refrain from interfering, since they are interested in mutually friendly relations and wish for their own diplomatic missions and the staff thereof to have the widest possible freedom to operate in their receiving states. However, there are occasions on which the receiving state does not want to guarantee, partly or in full, these privileges and immunities, most likely as revenge or to assert pressure. One example of such behaviour is the siege of the Estonian embassy in Moscow, during which the mission was attacked (causing physical damage and impairing its dignity), the ambassador was assaulted (in both her person and her dignity) and her movement hindered outside the mission, and both the Estonian diplomats and nationals (as well as other diplomats) were prevented from freely entering and leaving the mission. These actions were carried out by several Russia youth organisations that were passively supported by the local authorities. Despite repeated reminders and requests, the law enforcement organs did little to protect the mission and its staff and to guarantee their rights. Russia maintained that it was convinced that it had done everything necessary and demanded under the Vienna Convention. An inescapable conclusion, therefore, is that the understanding of Russia of its obligations related to protection of a diplomatic mission and its staff is, at the least, weird and does not correspond to the spirit of the Vienna Convention or to relevant state and court practice. The conduct of Russia towards the Estonian embassy and its staff turned even the states that did not completely approve the moving of the Bronze Soldier against Russia. Such an attack on a diplomatic mission and its staff (especially in such a massive manner and for such a long time) is unprecedented in a civilised nation.

⁷⁹ *Prosecutor v. Duško Tadić*, Case No. IT-94-I-A, ICTY, Judgment of the Appeals Chamber, 15.07.1999, paragraph 145.

⁸⁰ Article 9 of the Draft Articles.

⁸¹ United States Diplomatic and Consular Staff in Teheran (Note 4), paragraph 66.

⁸² *Ibid.*, paragraph 68.

⁸³ *Ibid.*, paragraphs 69–74.