EUROJUST

European Union Agency for Criminal Justice Cooperation

The ARGO Case

Diplomatic immunity in a cross-border terrorism case

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Criminal justice across borders

Contents

1. Introduction

A terrorist attack, planned to take place in France on 1 July 2018, was prevented through the actions of the Belgian authorities and their partners in Germany, France and Luxembourg. Based on information from their security services, the law enforcement services initiated an investigation at the end of June, on the basis of which arrests were made in Belgium, Germany and France. On the occasion of the arrests, an explosive device was found and dismantled a day before the planned attack.

This case, which led to the prosecution and conviction of four suspects, is an important example of cross-border cooperation in a terrorism case, the consequences of which could have been very serious, including the loss of lives. Following a request from the Belgian authorities, the European Union Agency for Criminal Justice Cooperation (Eurojust) facilitated the issuance and execution of multiple judicial instruments, both European Arrest Warrants (EAWs) and European Investigation Orders (EIOs), and the coordination among authorities on complex legal issues.

At both the arrest stage and that of the coordination of investigative measures, as well as during court proceedings, this case was heavily influenced by the fact that one of the targets held a diplomatic passport and claimed diplomatic immunity. Considering the complexities that the possible diplomatic status of the target brought with it, the Belgian prosecution service presented extensive arguments on diplomatic immunity and on state immunity issues related to diplomatic officials before the court of first instance. These topics were touched upon further in the judgment of the court of first instance of 2 February 2021.

As a result of the cooperation between the Belgian Federal Public Prosecutor's Office and Eurojust, this report provides a summary of the case and presents the arguments brought forward by the prosecution service in reply to the diplomatic immunity claims of one of the four accused, along with the findings of the court of first instance on this topic. The findings on diplomatic immunity are limited to those of the court of first instance, as the defendant in question withdrew his appeal. However, the report also refers to the appeal proceedings and the subsequent developments in the case. As the case was among the important cross-border terrorism cases handled at Eurojust, the report dedicates a section to the cooperation and coordination support provided by Eurojust to all countries involved. The report ends with some key findings extracted from the judgment of the court of first instance.

The report is based on the written arguments of the prosecution service (*conclusies*) and the judgment of the court of first instance. For ease of reference and further study of diplomatic immunity issues in this context, some sources referenced in the written arguments of the prosecution service have been included as footnotes. Provisions taken from the Vienna Convention on Diplomatic Relations of 1961 have been included for easy reading. Where open sources have been referenced, this has been done in consultation with the Belgian Federal Public Prosecutor's Office.

Eurojust expresses its gratitude towards the representatives of the Belgian Federal Public Prosecutor's Office, for their willingness to cooperate on this report and their invaluable contribution of expertise and materials, without which this document could not have been produced.

2. Summary of the case

On 4 February 2021, the Court of First Instance of Antwerp convicted three men and a woman of participation in the activities of a terrorist organisation and attempted murder by an attempted terrorist attack. Through these acts, they intended to kill, with terrorist intent, participants at a rally organised by the exiled People's Mojahedin Organization of Iran/National Council of Resistance of Iran in the French town of Villepinte in June 2018.

The Belgian State Security Service received information that the first and second defendants, a Belgian–Iranian couple, were possibly involved in an (attempted) act of violence in France. Some days later, surveillance and wiretaps showed that the first and second defendants were moving towards Luxembourg, where they were in contact with the fourth defendant. A day later, the first defendant was in contact with the fourth defendant, using code language for the bomb and planned activities.

After further surveillance, the first and second defendants were stopped and arrested in the vicinity of Brussels. A bomb found in the car later detonated when it was being dismantled, which revealed the potential damage the attack could have caused. During house searches in Belgium, EUR 35 690 in cash was found. The third defendant was arrested by the French police on the same day and was immediately surrendered to Belgium. The fourth defendant was arrested in Germany a day later and was subsequently surrendered to Belgium. He invoked his diplomatic immunity, holding a diplomatic passport and being accredited to the Iranian state in Austria. The court held that the acts for which the fourth defendant was accused, attempted murder by an attempted terrorist attack and participation in the activities of a terrorist organisation, were not covered by diplomatic immunity and sentenced him to 20 years of imprisonment. The first, second and third defendants were sentenced to 15, 18 and 17 years of imprisonment, respectively, and were deprived of their Belgian nationality. A car and assets of more than EUR 500 000, including in several bank accounts, were confiscated.

3. Diplomatic immunity

The case gave rise to important questions of public international law concerning the applicability of diplomatic immunity in cases of serious cross-border crimes, such as those in the case at hand, i.e. terrorist offences. In addition to other matters of substance and procedure, the written arguments of the prosecution and the judgment of the court of first instance contained elaborated considerations that addressed the claims of the defence on diplomatic immunity and state immunity. As the diplomatic status and the related immunity claims were the basis for the discussion, the arguments of the defence are here presented first, followed by the considerations by the prosecution and the findings of the court of first instance.

3.1. The role of the defendant claiming diplomatic immunity

The fourth defendant (hereinafter 'defendant AA') who claimed diplomatic immunity, was arrested in Germany on 1 July 2018, on the basis of an EAW and was surrendered to Belgium on 10 October 2018.

The first and second defendants had met the defendant AA for the first time in Germany in the summer of 2015. The defendant AA had explained that he was assigned to the Iranian embassy in Vienna and had given the first and second defendants an email address to be used for further communication.

He had also given them an envelope with EUR 4 000 to cover their expenses. When the first and second defendants travelled to Iran in November that same year, they met with the defendant AA and another officer of the security services. The first and second defendants were asked to collect information about a site of the People's Mojahedin Organization of Iran in France.

In the following years, the first and second defendants met with the defendant AA several times, in various European destinations. According to their own testimonies, the first and second defendants were paid quite regularly in this period. The cooperation between the defendant AA and the first and second defendants basically consisted of four areas of activity: communication, meetings, jobs to be carried out and payments for executed jobs. Statements of the first and second defendants further showed that at meetings in March 2018, the defendant AA discussed the planting of a device that would be detonated during the conference in Villepinte.

On 28 June 2018, the defendant AA met with the first and second defendants in Luxembourg, where the couple was given an explosive device and instructions for its detonation on 30 June 2018. The defendant AA continued from there with his family to Liège, Belgium, where he had booked a hotel. The intention of the defendant AA was to meet with the first and second defendants for a debriefing in Cologne, Germany, on 1 July 2018, the day after the intended detonation of the device. For this purpose, the defendant AA stayed in a hotel some 15 km from the city of Cologne. While the first and second defendants were arrested by the police in Belgium on 30 June 2018, the defendant AA tried in vain to contact them on 1 July and then decided to drive back to Austria with his family. His vehicle was intercepted by the police in Germany on the same day.

3.2. Arguments of the defence

The considerations of the defence were summarised in the written arguments of the prosecution. According to this document, the defence argued that the defendant AA was a diplomatic official and enjoyed immunity in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereinafter '1961 Vienna Convention'). In addition, the defence held that the defendant AA could not be arrested in Germany and surrendered to Belgium, in light of the same convention. This also meant that he should not be tried by a Belgian court, or, in other words, the Belgian court could not exercise jurisdiction.

Vienna Convention on Diplomatic Relation

Article 1
For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
[…]

(e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission[.]

The defence further argued that that the court did not have jurisdiction to try facts that took place in Austria, nor in Germany, France, Luxembourg or Italy, considering the diplomatic immunity held by the defendant, which according to the defence was to be considered absolute. With regard to the application of diplomatic immunity before courts in third countries, i.e. countries others than the receiving state, the defence held that this was not regulated by the 1961 Vienna Convention, and, thus, with regard to this specific question, one has to revert to customary international law.

3.3. Arguments of the prosecution

3.3.1. Diplomatic immunity

In its written statement to the court, the Public Prosecution Service (hereinafter 'prosecution') submitted elaborated arguments on the matter.

The prosecution contested the arguments brought by the defendant AA, referring to the provisions and application of the 1961 Vienna Convention, academic literature and case-law. According to the prosecution, the aim of granting special protection rights to diplomats in accordance with 1961 Vienna Convention is to guarantee the efficient performance of the functions associated with diplomatic missions. The protective rights and immunities are not aimed at benefiting individuals. With regard to the defendant AA, the prosecution held that there is no such thing as 'the efficient performance of the functions associated with diplomatic missions', as in reality the defendant AA was active as an intelligence officer in the in the Internal Security Directorate of Iran's MOIS intelligence service, while holding a diplomatic passport.

As regards the territorial scope (ratione loci) of the rights provided for by the 1961 Vienna Convention, the prosecution argued that this, in principle, is limited to the receiving state, in this case Austria. The 1961 Vienna Convention does not provide for general personal immunity (*ratione personae*) in criminal cases in respect of all states. The prosecution here referred to the legal maxim inclusio unius est exclusio alterius. That the applicability of the protective rights is limited to the receiving state is a matter of course, as neither the receiving state nor a third state, i.e. a state to which the diplomat is not accredited, can impose obligations that derive from the sovereign rights of the receiving state. The protective rights, thus, do not extend to the sending state, nor to the territory of a third state.

Article 31(1)
A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction [...]

Article 39(1)
Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

The prosecution rejected the argument of the defence that diplomatic immunity before the courts of third states is not governed by the 1961 Vienna Convention, but by customary international law. The prosecution held that the 1961 Vienna Convention is considered a codification of international customary law and referred to the 'Arrest Warrant case' of the International Court of Justice ([1]). In any case, the prosecution held that it is for the defendant, who invokes a rule of customary international law, to show the existence of such a rule by adducing evidence of state practice and opinio juris. According to the prosecution, there is no basis in national legislation or case-law that broader immunity encompassing third states would be granted to diplomats.

([1]) 'A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law.' Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), judgment, International Court of Justice, 14 February 2002, p. 21, para. 52.

The prosecution further noted that the extent to which states can exercise jurisdiction is determined by their own domestic law, within the limits of international law. Thus, the argument of the defence that Belgium could not exercise jurisdiction due to the fact that the Iranian Penal Code reserves jurisdiction to Iranian courts is not correct.

The attempt by the defence to draw a parallel between diplomatic immunity and the immunity ratione personae of Heads of State or Government and ministers for foreign affairs did not convince the prosecution. The underlying rationale of this latter form of immunity is different. Importantly, these three categories of persons represent their state wherever they go, whereas diplomats only represent their state in the receiving state. In the 'Arrest Warrant' case, the arguments concerning immunity ratione personae were not broadened to include diplomats.

3.3.2. 'Official acts performed in the exercise of his functions'

In addition to rejecting the arguments of the defence concerning diplomatic immunity in third states, the prosecution addressed the question whether the defendant AA could even enjoy diplomatic immunity in the receiving state of Austria. The prosecution noted that, according to Article 38 of the 1961 Vienna Convention, diplomatic immunity and inviolability only apply to 'official acts performed in the exercise of his functions'. The question was raised of whether the activities of an intelligence officer or the running of a European informant network from the embassy in Vienna for several years, along with plotting a deadly attack and using an explosive device transported in a diplomatic suitcase via commercial airliner from Tehran, Iran, could qualify as such official acts as provided for by the 1961 Vienna Convention. The activities in question, which constitute a blatant infringement of the sovereignty of third states, do not fall under one of the functions attributed to a diplomat under Article 3 of the 1961 Vienna Convention.

In addition, the activities of the defendant AA carried out in Belgium, Germany, France and Luxembourg do not fall under the functions listed in Article 3, as the defendant AA was not accredited to these states.

Article 38(1)
Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

Article 3(1)
The functions of a diplomatic mission consist, inter alia, in:
(a) Representing the sending State in the receiving State;

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

3.3.3. Obligations of third states under Article 40

> **Article 40(1)**
> 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. [...]

As third states, Belgium, Germany, France and Luxembourg only have to comply with Article 40(1) of the 1961 Vienna Convention, which provides that, with regard to a diplomatic agent, a 'third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return' when the diplomatic agent passes through a third country for the purpose of taking up or returning to his post as a diplomatic agent. With regard to this matter, the prosecution referred to the decision of 2 January 2019 of the Court of Cassation in the context of the pretrial detention in this case. According to the Court of Cassation, Article 40(1) should be interpreted strictly. The return of a diplomat from a third country, where he spent his holiday, to his diplomatic post does not constitute transit under Article 40(1). (For further details on the decision of the Court of Cassation, see the findings of the court of first instance.)

Based on the arguments set out above, the prosecution concluded that diplomatic immunity could not be invoked by the defendant AA in this case. The defendant could be prosecuted and tried for facts that occurred in Belgium and abroad, including in Austria.

3.4. Findings of the court of first instance

3.4.1. Diplomatic immunity

The Court of First Instance of Antwerp first noted the diplomatic immunity claim of the defendant AA, based on the 1961 Vienna Convention, along with the argument that he could not be arrested in Germany and subsequently surrendered to Belgium, considering his personal inviolability, to which he was entitled in accordance with the same treaty. The court further noted the argument by the defendant AA that in light of this immunity, he could not be prosecuted before a Belgian court.

The court held that at the time of his arrest, the defendant AA was part of the diplomatic staff and accredited to the state of Iran in Austria. This was not contested. The defendant AA held a diplomatic passport and could be considered a diplomatic official until the date on which his status as a diplomatic official was withdrawn by Austria.

The court explained that Belgian criminal law is applicable to all crimes committed on Belgian territory, regardless of the nationality of the perpetrator. This includes crimes that have been committed partially in Belgium and partially abroad, along with those perpetrators who, from abroad, participate in a crime committed in Belgium.

As regards international law, the court stated that its basis is the sovereignty of independent states, all of which are treated equally. The 1961 Vienna Convention is a special arrangement when it comes to this sovereignty and regulates the way in which states treat diplomatic personnel. The court held that the way in which this treaty was established and the subsequent interpretation of its provisions clearly show that this treaty codified customary law concerning diplomatic personnel, and that all (important) rules are contained in this treaty. As provisions on diplomatic exchange are bilateral arrangements between the sending state and the receiving state, the court held that the 1961 Vienna Convention should be interpreted in a restrictive manner. These arrangements do not create obligations on other states that are foreign to the bilateral arrangements between the sending and receiving states, with the exception of Article 40 of the 1961 Vienna Convention (see above).

The court then referred to Article 31 (see above) and held that the immunity acquired by the diplomat is only immunity from prosecution in the receiving state, i.e. immunity from execution (*uitvoeringsimmuniteit*). It is thus possible that a diplomat commits criminal offences in another country than the receiving state (in this case Austria) and can be prosecuted for these offences in that other state. The court thus concluded that the crimes the diplomat committed as a co-perpetrator from Austria can also very well be prosecuted in Belgium. Exactly because of the sovereignty of independent states, Austria (in this case) cannot offer immunity from prosecution in another country.

Article 9(1)
The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending Stale shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

The court took note of the fact that Austria had withdrawn the immunity of the defendant AA after his arrest, a possibility provided for by Article 9 of the 1961 Vienna Convention (*machtigingsimmuniteit*). This withdrawal, however, only concerns possible prosecution in Austria for criminal offences for which the Austrian judicial authorities have jurisdiction. In the present case, however, the court found this not to be of relevance, considering that the case concerned 'Belgian' offences, partially committed in Belgium and partially in other EU Member States, including Italy and Luxembourg. This meant that the present case was completely unrelated to the immunity the defendant AA enjoyed in Austria. The court concluded that the defendant AA did not enjoy any form of immunity from prosecution of criminal (participatory) offences in Belgium.

3.4.2. Obligations of third states under Article 40

The court subsequently addressed the claim by the defendant AA that he was wrongly arrested in Germany, based on Article 40 of the 1961 Vienna Convention. Due to the allegedly wrongful arrest in Germany, the defendant AA argued that his surrender to Belgium was wrongful, which also meant that his being brought before the court was to be considered wrongful.

The court cited earlier court decisions in this case on that specific matter. On 18 December 2018, the Indictments Chamber (*Kamer van Inbeschuldigingstelling*) of Antwerp held that, based on the case file, the defendant AA was on holiday in Belgium and Germany at the time in question and was on his way to his diplomatic post in Austria when he was arrested in Germany on 1 July 2018. The Indictments Chamber held that the defendant AA did not enjoy diplomatic immunity at this time. His arrest and detention, as well as the arrest warrant, were legitimate.

The court also quoted the judgment of 2 January 2019 of the Court of Cassation in the context of the pretrial detention in this case. In that decision, the Court of Cassation clarified that 'transit' under Article 40(1) of the 1961 Vienna Convention only means transit related to the exercise of the diplomatic mission of a diplomat, in particular travel from the country of origin to the diplomatic post or travelling back to the home country. It may also concern travel from the diplomatic post to the country where the diplomat has to fulfil a diplomatic mission and back to the country where the diplomat is posted. Travel back to the diplomatic post from a third country in which the diplomatic spent his holidays is foreign to the exercise of the diplomatic mission and, thus, is not 'transit' under Article 40(1) of the 1961 Vienna Convention.

The court (of first instance) noted that the German judicial authorities, both at the arrest and in the further proceedings leading to the surrender of the defendant AA, also came to the conclusion that the defendant was on holiday and did not hold a diplomatic function in Germany, and thus could not invoke his diplomatic status.

Due to the fact that the defendant AA raised the same argument as he had brought before the Court of Cassation in the context of pretrial detention, the court decided to completely concur with the decision of the Court of Cassation on this matter.

Additional elaboration was provided by the court concerning the fact that diplomatic relations and all rights and responsibilities (for the diplomat) flowing from these relations are based on bilateral agreements between the sending and receiving states, as laid down in the 1961 Vienna Convention. The treaty does not require a direct transfer between the sending and receiving states. It allows for passage through a third country to go to the diplomatic post in the receiving state or to return to the sending state. The court noted that this is an exception to the rule on a bilateral agreement between a sending state and a receiving state. The treaty provides that third countries that are not part of the diplomatic relations between the sending and receiving states have to allow for passage of diplomatic officials and, thus, in a way have to respect the immunity/personal inviolability of the diplomatic official. The court held that this exception is to be interpreted restrictively, and thus passage is strictly limited to the specific transfer set out above or to the transfer to another country than the receiving state for the purpose of a specific diplomatic mission.

This brought the court to the finding that a diplomat does not enjoy immunity when staying in a third country purely for personal reasons. In the case at hand, observation, the roadside check, the renting of the vehicle and the itinerary, which included Liège in Belgium, Germany, Luxembourg and the Netherlands, undeniably showed that the defendant AA was on holiday with his family. Accordingly, he was not on a diplomatic mission or a diplomatic trip.

In this context, the court also dismissed the argument of the defendant AA that his immunity as a diplomat is comparable to the total immunity of foreign heads of state and ministers in all countries. The court held that such an argument cannot be deduced from any international rule, case-law or customary law. Such a wide scope of diplomatic immunity is not defined anywhere.

3.4.3. 'Official acts performed in the exercise of his functions'

To conclude its findings on diplomatic immunity, the court briefly considered official acts of a diplomat, as laid down in Article 38 of the 1961 Vienna Convention, in relation to the defendant AA ([2]). The court pointed to the argument by the prosecution, according to which the defendant AA was believed not to actually be a diplomat, but an Iranian intelligence officer acting as a runner for his European informants. According to the prosecution claim, his status as a diplomat was possibly being misused to be able to commit criminal offences elsewhere in Europe, and even to smuggle an explosive device from Iran to Europe under diplomatic cover. The court noted that the defendant AA was accused of being a (co)organiser of a possible, foiled deadly attack in France. According to the court, these acts cannot possibly be regarded as (normal) diplomatic activities that are performed in the exercise of his function.

The actual activities of which the defendant AA was accused, if proved, are even contrary to Article 3 of the 1961 Vienna Convention. Specific reference was made to the provision in Article 3(b), according to which one of the functions of a diplomatic mission consists of 'protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law'. The court found that the unofficial activities of the defendant AA, of which he was accused, do not at all fit within the permitted limits of public international law, and it cannot have been the intention of the parties to the treaty to cover the actions of which the defendant AA was accused by diplomatic immunity.

([2]) See above, section 3.3.2.April 2000 (Democratic Republic of the Congo v. Belgium), judgment, International Court of Justice, 14 February 2002, p. 21, para. 52.

4. Diplomatic officials and state immunity

4.1. Arguments of the defence

The defence argued that the Belgian court did not have jurisdiction to rule on the involvement of the Iranian government in this case or on that of one of its organs. According to the defence, such state immunity would not allow the Belgian court to conclude, on the basis of the case file, that the facts took place not only with the knowledge of but also under the impetus of MOIS Department 312. The defence also argued that there is a general rule in international customary law that provides for absolute immunity ratione materiae, offering functional immunity before courts of third countries to all government representatives in the exercise of their official tasks ([3]).

4.2. Arguments of the prosecution

Presenting its counterarguments, the prosecution first noted that, throughout the investigation, the defendant AA had not only denied his involvement in the events, but also that of the state of Iran. According to the prosecution, it seemed that the arguments presented by the defence concerning state immunity were based on the assumption that, while Iran acknowledges and takes responsibility for the acts committed by its intelligence officer, an attribution to Iran would not be possible because of the doctrine of state immunity. At the same time, neither the state of Iran, nor the MOIS, nor department 312, to which the defendant AA belonged, were prosecuted by the Belgian prosecutor.

The prosecution acknowledged that, pursuant to state immunity, a state cannot exercise authority over its equal, considering the sovereign equality of states. However, this does not mean that the Belgian court cannot conclude from the case file that the defendant AA committed the acts in the performance of his duties as an officer in a department of an Iranian intelligence agency and not on his personal initiative.

The prosecution further held that, contrary to the opinion of the defence, nowhere does legal doctrine show that there is a general rule in international customary law that provides for functional immunity that is absolute. Reference was first made to academic literature, according to which such a rule of international customary law does not exist ([4]). Second, the prosecution referred to an article according to which international customary law provides for a rule regarding the functional immunity of state organs from foreign jurisdiction. This rule, however, is not at all absolute, and there are at least two exceptions to this rule, which concern in particular:

1. the commission of international crimes; and

2. the commission of clandestine activities ([5]).

([3]) Arguments as summarised in the written arguments of the prosecution.

([4]) Frulli, M., 'On the existence of a customary rule granting functional immunity to state officials and its exceptions: Back to square one', Duke Journal of Comparative & International Law, Vol. 26, No 3, 2016, pp. 479–502 (481, 483), https://scholarship.law.duke.edu/djcil/vol26/iss3/2.

([5]) Ronzitti, N. 'The immunity of state organs – A reply to Pisillo Mazzeschi', Questions of International Law, Vol. 2, 2015, pp. 59–67 (60, 62–63), http://www.qil-qdi.org/the-immunity-of-state-organs-a-reply-to-pisillo-mazzeschi/.

Another article cited by the prosecution referred to what, in the opinion of the prosecution, were the same exceptions to state immunity, i.e. violations of the laws of war and gross violations of the sovereignty of third states. In this article, the author noted that there is a tendency in international law not to give state immunity primacy over prosecution of crimes against life (*levensdelicten*) ([6]). In an article concerning international immunities in Belgian case-law, the authors stated that when it comes to foreign government officials, the question of immunity is, first and foremost, a question of the imputability of their acts to the foreign state concerned. The authors held that when the officials act in their capacity as organs of the state, the act is not imputable to them, but to the state concerned. The authors, however, doubted whether this rule also applies in criminal cases. At least in cases of serious offences in the forum state, it would seem that this rule is not applicable. The authors referred to two convictions in criminal cases in which government officials had acted on behalf of their state, the Rainbow Warrior case and the Lockerbie case ([7]).

To conclude its arguments on state immunity, the prosecution made reference to these cases tried by foreign courts, as well as to a case by a Belgian court, in which state organs or natural persons were convicted in a third state of a criminal offence committed at the behest of their government. In the Rainbow Warrior case, France affirmed its responsibility for the acts of its secret agents. Nevertheless, the secret agents were convicted in New Zealand ([8]). In the same vein, the prosecution referred to the Lockerbie case, in which a Libyan agent was convicted ([9]). In a case before the Court of Appeal of Ghent of 30 April 2019, the accused was convicted of participation in an association of criminals for acts of espionage. The court considered his relationship with the Russian intelligence service SVR (previously KGB), Line N, and elaborated in detail on the tasks, organisation and activities of this department of the intelligence service, along with the concrete role of the accused in all this. Based on these arguments, the prosecution held that the Belgian court could judge the actions of the defendant AA, carried out in his capacity as an intelligence officer of the Internal Security Department of the Iranian MOIS.

4.3. Findings of the court of first instance

The court noted that the defendant AA did not invoke immunity as a state official since, according to him, he enjoyed immunity as a diplomat. However, he held that the court did not have jurisdiction to decide on the involvement of the Iranian state or one of its organs, for instance the MOIS or Department 312, based on the public international law principle of state immunity. Here the court referred to its earlier discussion on the assumption of the sovereignty of states in international law. All states are equal and are not to judge each other, and in this respect international law relies on state immunity. This state immunity does not only relate to the national state, but also to its organs and possibly even to state officials. Originally, this state immunity under international law was interpreted absolutely, but due to, among other things, the increase in trade in which states have participated, exceptions to this principle have arisen. However, in this case neither the Iranian state, nor the intelligence service MOIS, nor Department 312 of the Iranian intelligence service was on trial, which according to the court meant that the principle of state immunity was not violated.

The court dismissed the idea that a violation of state immunity would arise if the court, on the basis of a case file in criminal proceedings, established that there is certain involvement of a foreign state, its organs or its officials. Naturally, the court cannot convict the Iranian state or its organs, but they were not on trial here, either. The court stressed that judging differently in this case would lead to a limitation of the sovereignty of the Belgian constitutional state, which in itself would go against state immunity.

([6]) Bothe, M. 'Die strafrechtliche Immunität fremder Staatsorgane', Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht), Vol. 31, 1971, pp. 252–253 (257, 270), https://www.zaoerv.de/31_1971/31_1971_1_2_a_246_270.pdf.
([7]) Wouters, J. and Naert, F., 'Internationale immuniteiten in de Belgische rechtspraktijk', Working Paper, No 34, October 2002, Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid, Instituut voor Internationaal Recht, p. 22, https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP34n.pdf.
([8]) R. v. Mafart and Prieur, High Court (New Zealand), Auckland registry, 22 November 1985, 74 I.L.R., pp. 241–256.
([9]) High Court of Justiciary (Scotland), Case No 1475/99, 31 January 2001, confirmed by the Appeal Court, High Court of Justiciary, Appeal No C104/01, 14 March 2002, https://www.scotcourts.gov.uk/search-judgments/lockerbie-trial.

Here the court took note of the fact that the defendant AA did not invoke his immunity as a state official. He invoked his diplomatic immunity, which, as concluded above, was not applicable in the criminal case at hand. For the sake of completeness, the court stated that the defendant AA could not have invoked immunity as a state official. The defendant AA was on trial for his personal criminal involvement. While this involvement can be personal, it can also fit within a certain illegal task, as commissioned, for instance, by people within the intelligence services. The immunity of state officials of a foreign state in criminal matters could naturally only apply to criminal acts that the state official carries out within the framework of the exercise of his official government duties (functional immunity).

In the case at hand, the defendant AA was accused of organising, or at least of having taken the operational lead in planning, a terrorist offence in France, with possible fatalities. The court held that it may be assumed that this activity is not part of the official activities of an official of the Iranian state in general or of the intelligence service in particular. It would certainly not be part of the tasks of a diplomatic official, nor of the official tasks of the intelligence services, which in principle only need to collect, analyse and process intelligence. In addition, neither the Iranian state nor any other organ within the state apparatus has attributed to itself the activities of which the defendant AA was suspected. At no point in time has the Iranian state admitted that these activities were part of the official function of the defendant AA, and the Iranian state has never admitted to having wanted to carry out an attack on a conference of the Iranian opposition on 30 June 2018.

The court also asked the question whether state immunity can be invoked for terrorist activities. The right to life is an absolute fundamental right of a citizen, anywhere in the world. Infringements on this universal fundamental right through terrorist activities can hardly be shielded by state immunity. International terrorist offences should be regarded as crimes falling under jus cogens. The fight against these crimes, which according to the court should be a priority in the fight against crime in every country, constitutes an exception to the principle of state immunity. The court concluded that it would be difficult to accept that exceptions to state immunity are allowed for commercial reasons but that this does not apply to crimes that harm a person's absolute right to life.

5. The appeal proceedings and subsequent developments

All four defendants appealed their convictions. However, the defence counsel of the defendant AA later withdrew AA's appeal at the first hearing before the Court of Appeal of Antwerp. The withdrawal of the appeal was confirmed by the court of appeal. In light of the fact that diplomatic immunity was only invoked by the defendant AA, the court of appeal did not address these matters in its judgment of 10 May 2022.

On 8 December 2022, following a petition from certain individuals and an association, including some of those acting as civil parties in the case against the defendant AA and his co-defendants, the Constitutional Court rendered a decision on the suspension of Article 5 of a law adopted on 30 July 2022, enacting certain bilateral treaties between Belgium and other countries. Article 5 of this law concerned the treaty between Belgium and the Islamic Republic of Iran of 11 March 2022 on the transfer of convicted persons. The requesting parties argued that Article 5 of the abovementioned law, i.e. the treaty between Belgium and Iran, is incompatible with the right to life of the victims of persons who have been convicted by the courts of having committed terrorist offences with the support of Iran, as this provision makes it possible to transfer such convicted persons to Iran.

First, the Constitutional Court found the plea by the requesting parties serious. Second, the court held that its suspension of a legal provision must make it possible to prevent a serious disadvantage for the requesting parties from arising from the immediate application of the provision. Based on the evidence provided, the Constitutional Court found it established that there was a risk of such a serious disadvantage, which would be difficult to rectify if the provision, i.e. the treaty, was applied immediately. The Constitutional Court thus suspended Article 5 of the law of 30 July 2022, which meant that the treaty could not be applied to transfers of convicted persons, including the defendant AA ([10]).

Subsequently, based on a royal decree, which referred to a serious, imminent and continuous threat to national security, the defendant AA was transferred to Iran on 26 May 2023. At the same time, several European nationals, imprisoned in Iran, were transferred from Iran to Belgium ([11]).

([10]) Decision of the Constitutional Court of Belgium, Arrest No 163/2022, 8 December 2022, ECLI:BE:GHCC:2022:ARR.163.
([11]) 'Vandecasteele terug in België na spitsvondige ruiloperatie met Iraanse terrorist', De Tijd, https://www.tijd.be/politiek-economie/belgie/federaal/vandecasteele-terug-in-belgie-na-spitsvondige-ruiloperatie-met-iraanse-terrorist/10470734.html.

6. Cooperation and coordination through Eurojust

Following the arrest of the four targets in June and July 2018, the Belgian authorities requested the support of Eurojust in coordinating the ongoing investigations and pending execution of EIOs and EAWs in Belgium, Germany, France and Austria.

Two coordination meetings were held in the autumn of 2018, which allowed the authorities to agree on a number of complex legal issues following from the international dimension of the case, the diplomatic status of one of the suspects and suspicions of espionage. While the suspects were arrested in Belgium and Germany, the planned terrorist act was to be committed in France. Due to the time limitation applicable to the EAW issued by Belgium to Germany concerning the surrender of the suspect holding diplomatic status, the parties agreed on how to ensure that a timely execution of the EAW could be achieved. Agreement was reached on the execution of EIOs already issued, on the issuance of additional EIOs and the exchange of information to the benefit of the judicial proceedings in the countries with ongoing investigations.

The coordination by Eurojust also facilitated the United States' support in the Belgian investigation. The analytical assistance from the European Union Agency for Law Enforcement Cooperation (Europol) contributed to the processing of data collected in the case.

7. Key findings from the court ruling

- The immunity acquired by a diplomat is only immunity from prosecution in the receiving state, i.e. immunity from enforcement (*uitvoeringsimmuniteit*). It is thus possible that a diplomat may commit criminal offences in another country than the receiving state and can be prosecuted for these offences in that other state.

- The 'Belgian' offences dealt with in this case, committed partially in Belgium and partially in other Member States, were completely unrelated to the immunity the defendant enjoyed as a diplomat in the receiving state. The defendant did not enjoy any form of immunity from prosecution of criminal (participatory) offences in Belgium.

- The defendant was on holiday in Belgium and Germany at the time of his arrest and was on his way to his diplomatic post in Austria when he was arrested in Germany. The defendant did not enjoy diplomatic immunity at this time. His arrest and detention, as well as the arrest warrant, were legitimate. Travel back to a diplomatic post from a third country in which the diplomat spent his holidays is foreign to the exercise of the diplomatic mission and thus does not constitute transit under Article 40(1) of the 1961 Vienna Convention.

- The 1961 Vienna Convention does not require a direct transfer between the sending state and the receiving state. It allows for passage through a third country to go to the diplomatic post in the receiving state or to return to the sending state. This is an exception to the rule in a bilateral agreement between a sending state and a receiving state and is to be interpreted restrictively.

- The unofficial activities of the defendant, i.e. the terrorist activities of which he was accused, do not at all fit within the permitted limits of public international law, and it could not have been the intention of the parties to the 1961 Vienna Convention to cover such actions through diplomatic immunity.

- State immunity does not only relate to the national state, but also to its organs and possibly even to state officials. However, in this case neither the Iranian state nor any of its state organs was on trial, and thus the principle of state immunity was not violated.

- Infringements on the right to life, an absolute fundamental right, through terrorist activities can hardly be shielded by state immunity. It would be difficult to accept that for commercial reasons, exceptions to state immunity are allowed, but that this does not apply to crimes that harm a person's absolute right to life.

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