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Articles

Invisible children, untouchable cases? States' legal obligation to protect diplomat children

States' legal obligation to protect diplomat children

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Bjørnsen, Ragnhild Holmen, Köhler-Olsen, Julia, Fauske, Halvor, and Fadnes, Jan: Invisible children, untouchable cases? States' legal obligation to protect diplomat children

Diplomat children – right to protection and child welfare – state obligation – diplomatic immunity – Tthird Ceulture Kkids

Example3Begin

This article discusses the scope of legal obligation for contracting states to the United Nations Convention on the Rights of the Child 1989 to realise children's right to protection from all forms of violence in diplomat families, while simultaneously acknowledging diplomatic immunity. Based on an in-depth, qualitative study consisting of 43 written and oral accounts of former Norwegian Foreign Services children from 2015 to 2019, we show that children growing up in diplomat families experience infringement of their rights with little attention being paid to their situation by public authorities, neither in a receiving nor a sending state. The effect of being invisible to the authorities of either state is intensified by the legal framework of the Vienna Convention on Diplomatic Relations 1961 granting diplomat families and their children immunity from jurisdiction in a receiving state. The UN Convention on the Rights of the Child, however, requires that measures are taken by contracting states. We suggest certain types of actions by the receiving and sending state that are in line with the legal status of immunity of diplomat families, while still supporting the realisation of human rights of diplomat children.

Example3End

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Introduction

This article discusses the scope of legal obligation for contracting states to the United Nations Convention on the Rights of the Child 1989 (UNCRC) to realise children's right to protection from all forms of harm and neglect in diplomat families. The first aim of this article is to account for the social and legal status of diplomat children due to diplomat families' immunity. The second aim is to suggest ways in which receiving and sending states can realise diplomat children's right to protection from all forms of harm and neglect while also acknowledging the children's legal status as members of diplomat families with legal immunity.[1] To do so, we present an interdisciplinary study on diplomat children's social status and legal privilege as members of families with legal immunity.

Diplomat children (children in diplomat families) are members of families in which one or both parents are employed by a sending state. The parent(s) represent(s) the *sending state* either in another state, the so-called *receiving state*, or represent(s) the sending state in an international organisation. The immunity of diplomatic representatives and their families is based on the Vienna Convention on Diplomatic Relations of 18 April 1961 (VCDR; the Vienna Convention), ensuring the efficient functioning of diplomatic relations by protecting diplomat families from external threats. International organisations were accorded diplomatic immunity in 1967, increasing the actors protected under this legal privilege. Children are subjected to harm and neglect across socio-economic class, including children in affluent and high-status families such as diplomat families.[2] In cases in which the threat to a diplomat child is from within the child's own family, what would normally be considered a legal privilege can become a major barrier for these children in the realisation of their rights, placing the children inside an impenetrable family fortress. Currently, children in families who have diplomatic immunity represent a quantitatively significant group from a global perspective.[3]

Within the research fields of psychology, education and the social sciences, diplomat children have been grouped together with other children referred to as 'Third Culture Kids' (TCKs). These are children whose parents are often employed by international organisations or companies who require their employees to be globally mobile.[4] Thus, there is minimal knowledge about diplomat children's particular circumstances and childhood experiences.[5]

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[1] The article is limited to children of diplomat parents, excluding the children of administrative and technical staff of a foreign embassy, due to different rules of immunity applying to administrative and technical staff compared to serving diplomats, the former having a more limited immunity than the latter.

[2] C Bernard and T Greenwood, 'Recognising and addressing child neglect in affluent families' (2019) 24 *Child and Family Social Work* 340.

[3] According to the Office of Foreign Missions in the US State Department, there are currently more than 2,000 foreign missions in the United States that employ nearly 70,000 staff and close to 90% of them are entitled to some degree of diplomatic or consular immunities. The number of children will be in addition to these functioning diplomats: https://www.state.gov/about-us-office-of-foreign-missions/, last accessed 4 September 2022. In *A Local Authority v AG (No 2)* [2020] EWHC 1346 (Fam), [2020] 2 FLR 747, [17i] and [17iii], Mostyn J argues that diplomatic immunity might apply to 23,000 people (including many children) in the UK.

[4] The initial article that introduced the term 'Third Culture Kids' (TCK) is by RH Useem, 'Third Culture Kids' in CS Brembeck and W Hill (eds), *Cultural challenges to education* (DC Heath & Co, 1973). The term was later popularised by DC Pollock and RE Van Reken, *Third Culture Kids: Growing Up Among Worlds* (Intercultural Press, 2000). The body of research on TCKs has mainly focused on emotional, relational and identity development, see EC Tan, KT Wang and AB Cottrell, 'A systematic review of third culture kids empirical research' (2021) 82 *International Journal of Intercultural Relations* 81.

[5] Two recent studies have addressed this knowledge gap by collecting retrospective accounts of former diplomat

Likewise, there has been minimal legal research on the legal status of diplomat children.[6] We find an absence of research on the upbringing of diplomat children in relation to child protection law and law on diplomatic relations. This is a serious concern, as a recent study of TCKs and Adverse Childhood Experiences (ACE) suggests that the subgroup of diplomat children also scores highly on potentially traumatic experiences associated with parental abuse or neglect.[7]

This article provides research that identifies and addresses the knowledge gap on diplomat children's social and legal status. The main argument this article makes is that the 'invisibility' of diplomat children in actual cases, as well as in social sciences and legal studies, can be associated with them belonging to socio-economically affluent families, their upbringing as serial migrants with high mobility, and with diplomatic immunity.

First, we describe the data and methodology applied before continuing to present conceptual understanding and qualitative data on the ways diplomat children can become 'invisible children', followed by a discussion on certain aspects of a diplomat childhood analysed in accordance with Article 19 of the UNCRC. An account is provided ~~an account~~ of the status quo of legal sources regarding the question of balancing the legal immunity of diplomat families with the rights of the child. We then suggest ways in which states can develop international law and national practice aimed at realising diplomat children's rights while simultaneously ensuring the legal status of immunity for diplomat families, before finally concluding the article with summarising perspectives.

Methodology

The empirical basis for our analysis and discussion consists of two datasets. The first set comes from a qualitative anthropological study which collected autobiographies of former Norwegian Foreign Service children. The second dataset is a collection of the few known cases on the right to diplomatic immunity and children's rights.

It is exceedingly difficult to obtain first-hand accounts from diplomat children who experience neglect or abuse by members of their family. As will be addressed in this article, the upbringing of diplomat children is characterised by 'invisibility' on many levels. Coupled with this challenge, when studying themes that question parents' ability as caregivers, researchers face the problem of parents as gatekeepers. One way to address this empirical barrier is to collect retrospective accounts. The anthropological study which was the starting point for this article collected 43 written and oral autobiographies of former Norwegian Foreign Service children from 2015 to 2019. The dataset comprises 12 narrative interviews and 31 written autobiographical texts. The participants were aged from 19 to 79 and two-thirds of them were female.

children. One is the empirical study on which this article is based: RH Bjørnsen, *A privileged childhood? Autobiographies of growing up in the Norwegian Foreign Service* (2021) Doctoral Dissertation, Inland Norway University of Applied Sciences: https://brage.inn.no/inn-xmlui/handle/11250/2775421. The second study is by SA Hiorns, *Diplomatic Families and Children's Mobile Lives: Experiences of British Diplomatic Service Children from 1945 to 1990* (Routledge, 2021).

[6] A Vermeer-Künzli, 'As if: The Legal Fiction in Diplomatic Protection' (2017) 18 *European Journal of International Law* 37; S Striling-Zanda, 'The Privileges and Immunities of the Family of the Diplomatic Agent', in P Behrens (ed), *Diplomatic Law in a New Millennium* (Oxford University Press, 2017); C Barker, '*Re P (Minors)* child abduction and international immunities – balancing competing policies' [1998] CFLQ 211.

[7] T Crossman and L Wells, 'Caution and Hope: The Prevalence of Adverse Childhood Experiences in Globally Mobile Third Culture Kids' (7 June 2022). Retrieved from: www.tcktraining.com/research/caution-and-hope-white-paper, last accessed 21 June 2022.

Retrospective accounts have their limitations. As they are reconstructions of childhood, they can be subjected to processes of false or distorted memory.[8] Autobiographies also have a self-serving bias, as the writer/teller accords narrative space to self-defining memories in order to create an individual-centred life story.[9] However, there are processes that assist autobiographical remembering which argue for the trustworthiness and usefulness of autobiography as data for the social sciences. 'Life scripts' are culturally defined ways in which we believe our life 'ought to be', and these scripts structure our remembering. We remember life events that correspond well with our expectations, but also when there is a strong mismatch between our expectations and our actual experiences.[10] Emotions and moods are typically strong sources of memory, and the repetition of similar events over time will be imprinted as memory schemata.[11] Autobiographical accounts provide phenomenological and embodied recollections that here represent rare insights into the *child perspective* of diplomat children. Further, the accounts provide 'thick descriptions' of collective consciousness and practice within a diplomatic community, as well as reflective insights into what these childhood experiences have meant for the informants in a life course perspective.[12]

Because the Norwegian Foreign Service is a small community, it has been necessary to significantly anonymise persons and render cases non-identifiable. The study has been approved by the Norwegian Centre for Research Data. Bjørnsen provides a detailed overview of the methods applied and methodological limitations.[13] While compiling this data, we also conducted conversations and email correspondence from 2017 to 2020 with relevant stakeholders. These include the Norwegian Ministry of Foreign Affairs' human resources department; psychologists holding seminars on 'Third Culture Kids' at the Ministry; UD-partnerne (a network for the accompanying spouses of functioning diplomats); and a representative of the Norwegian Ombudsperson for Children.

During analysis, questions regarding access to children's rights arose as stories of childcare and child–parent relationships highlighted areas of concern, particularly in questions of emotional neglect and substance disorders. These accounts represent a minority in the dataset. They are neither representative of the population of diplomat children as a whole, nor do they provide any information on the frequency of such occurrences. However, the quotes and themes raised illustrate the particular challenges that diplomat children may face in their specific circumstances. The diplomat children's experiences are analysed in the light of UNCRC Article 19 on the right of the child to be free from all forms of violence and General comment no 13 on the right of the child to freedom from all forms of violence.[14]

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[8] C Laney and EF Loftus, 'Recent advances in false memory research' (2013) 43 *South African Journal of Psychology* 137.

[9] T Habermas, 'Identity, emotion, and the social matrix of autobiographical memory: A psychoanalytical narrative view' in D Berntsen and DC Rubin (eds), *Understanding Autobiographical Memory* (Cambridge University Press, 2012).

[10] D Berntsen and DC Rubin, 'Cultural life scripts structure recall from autobiographical memory' (2004) 32 *Memory & Cognition* 427; R Fivush, 'Speaking silence: The social construction of silence in autobiographical and cultural narratives' (2010) 18 *Memory* 88.

[11] BA Van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Viking, 2014); P Morgan, 'Towards a developmental theory of place attachment' (2010) 30 *Journal of Environmental Psychology* 11.

[12] P Thompson, *Voice of the Past: Oral History* (Oxford University Press, 2000).

[13] Bjørnsen, above n 5.

[14] UN Committee on the Rights of the Child, General comment No 13 (2011), 'The right of the child to freedom from all forms of violence', CRC/C/GC/13, 18 April 2011.

The second dataset consists of three court cases and one case that was never tried before a court. In all four cases the right to diplomatic immunity in family matters is at stake. The cases discussed in this article are from the USA, the UK and the Netherlands. These national court decisions should not be understood as sources of international law. They have no legal precedent. Yet, as examples they provide insight into how public authorities and courts reconcile themselves with a conflict between children's rights and the diplomat families' immunity. Although this article focuses on child protection situations, one of the national court decisions concerns child abduction. This case is relevant since it discusses children's rights and the legal status of immunity. The exercise to balance considerations supporting diplomat immunity with those supporting child's rights are similar in cases of child abduction and child protection.

Diplomat children and their right to protection from all forms of violence

The 'invisibility' of diplomat children: social status and global serial migration

General indicators of neglect and abuse are poverty and material deprivation.[15] Children of diplomat families, and more generally TCKs, belong to the socio-economic middle or upper classes, with a high level of education. Based on these characteristics, there is little evidence to suggest that these children are subject to forms of abuse or neglect within their families. From the outside, it seems that these families are a good environment for children to grow up in. However, abuse and neglect of children take place in families across all socio-economic strata.[16] Often, the challenges that children from affluent families face relate to isolation from their parents, and emotional abuse or neglect.[17] Their parents might be absent, physically or emotionally. This is mainly attributable to family–work conflicts, mental illness, and substance use disorders, all of which have higher rates among expatriates than in the general population.[18] Existing mental illness and substance abuse are known to deteriorate during expatriation due to lack of familiarity, as well as emotional, professional and relational demands abroad, resulting in a higher incidence of affective and adjustment disorders.[19]

A study of German diplomats documents how the participants scored lower on self-reported health-related quality of life than the average German population, including emotional

[15] LH Pelton, 'The continuing role of material factors in child maltreatment and placement' (2014) 41 *Child Abuse and Neglect* 30.

[16] Bernard and Greenwood, above n 2; M Aadnanes, 'Social workers' challenges in the assessment of child abuse and maltreatment: intersections of class and ethnicity in child protection cases' (2017) 5 *Critical and Radical Social Work* 335.

[17] SS Luthar and BE Becker, 'Privileged but Pressured: A Study of Affluent Youth' (2002) 73 *Child Development* 1593; SS Luthar and SJ Latendresse, 'Children of the Affluent: Challenges to Well-Being' (2005) 14 *Current Directions in Psychological Science: A Journal of the American Psychological Society* 49.

[18] SD Truman, DA Sharar and JC Pompe, 'The Mental Health Status of Expatriate Versus US Domestic Workers' (2011) 40 *International Journal of Mental Health* 50; H De Cieri and M Lazarova, 'Your health and safety is of utmost importance to us: A review of research on the occupational health and safety of international employees' (2021) 31 *Human Resource Management Review* 100790.

[19] MF Foyle, MD Beer and JP Watson, 'Expatriate mental health' (1998) 97 *Acta Psychiatrica Scandinavica* 278; I Anderzén and BB Arnetz, 'Psychophysiological reactions to international adjustment. Results from a controlled, longitudinal study' (1999) 68 *Psychother Psychosom* 67.

functioning.[20] Anne Coles shows how serial relocation can also negatively impact affective health in the trailing spouses of British diplomats, as they also face having to compromise their own careers.[21] A study of the US State Department's initiatives to assist its families finds that relocation-related stress is related to general uncertainty, reduced control and increased ambiguity.[22] The results of the first survey (N=1904) of TCKs that measures ACE suggest that these experiences among TCKs are predominantly due to emotional abuse, emotional neglect, a member of the household with mental illness or substance abuse, or sexual abuse.[23] The sub-group of diplomat children reported that 27.1 percent had an ACE score of 4 or more, which is considered high risk.

The gap in knowledge about child neglect or abuse amongst diplomat children reflects how children from socio-economically middle- and upper-class families generally receive minimal attention from public authorities such as child protection services, compared to children from poor or working-class backgrounds. The challenges these children face often 'go under the radar', and can best be understood through a conceptual lens of how children become 'invisible':

> 'In this context (of child protection), "invisible children" are those who become "unthought" about and not "held in mind" by workers and systems.'[24]

In the sense of what we see, the problems themselves are more 'invisible' than material deprivation and physical violence. A study of child protection caseworkers in Norway found that parents in affluent families are greatly concerned about keeping family issues hidden due to social taboos, and are reluctant to seek help from public authorities.[25] They use private care providers to replace the roles that parents otherwise play, making abuse or neglect even harder to notice.[26] Also, children themselves are often 'professional' guardians of their dysfunctional families, and children of affluent families may actively perform the role of the 'privileged child' to signal to the outside world that there is nothing wrong at home.[27] Yet the 'invisibility' of children does not stop at what we are (un)able to see. Child protection caseworkers have a higher intervention threshold when interacting with affluent families, and the parents are given the benefit of the doubt when allegations of abuse and neglect emerge.[28] Caseworkers are faced with a menacing atmosphere, where they must deal with the ability of these parents to question their professional skills, often reinforced by the parents' lawyers. This results in caseworkers taking the position of 'underdog'.[29] Consequently, a distancing

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[20] H Fliege et al, 'Diplomats' quality of life: The role of risk factors and coping resources' (2016) 51 *International Journal of Intercultural Relations* 14.

[21] A Coles, 'Making Multiple Migrations: The Life of British Diplomatic Families Overseas' in A Coles and A Fechter (eds), *Gender and family among transnational professionals* (Routledge, 2018).

[22] A Wilkinson and G Singh, 'Managing stress in the expatriate family: A case study of the State Department of the United States of America' (2010) 49 *Public Personnel Management* 169.

[23] Crossman and Wells, above n 7.

[24] H Ferguson, 'How Children Become Invisible in Child Protection Work: Findings from Research into Day-to-Day Social Work Practice' (2017) 47 *British Journal of Social Work* 1007. 1010?

[25] Aadnanes, above n 16.

[26] Bernard and Greenwood, above n 2.

[27] RH Bjørnsen, 'The assumption of privilege? Expectations on emotions when growing up in the Norwegian Foreign Service' (2019) 27 *Childhood* 120.

[28] Bernard and Greenwood, above n 2; Aadnanes, above n 16.

[29] BH Kojan, '«Underdog»? Barnevernarbeideres erfaringer fra å møte høystatusfamilier' (transl. 'Underdog?

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takes place on a systemic level, both physically and emotionally, between caseworkers and children, resulting in the 'invisible', or rather, 'the unheld child':

> '… it is the absence of intimate practice that involves eye-to-eye contact, talk, active listening, play, touch and close observation that result in crucial aspects of their experiences remaining unknown.'[30]

Such distancing makes it exceedingly challenging to document and define a child's situation, and active measures are not taken. Problems at home generally manifest in the children when they reach adolescence, through various forms of relational difficulties, mental challenges such as anxiety, depression, eating disorders and substance abuse. Thus, children of dysfunctional affluent families have publicly posed the following questions to child welfare services: 'Where were you?' and 'Why did you not intervene sooner?'.[31]

The 'invisibility' of children can also be the result of high mobility, whether inside or across countries.[32] Child protection services are familiar with low-income dysfunctional families who relocate both within and across national borders to escape their attention. The knowledge that children also face harm and neglect in more affluent families should be seriously addressed in transnational child protection as the numbers of serial migrant TCKs increases with globalisation. Child protection casework and the implementation of necessary support structures require a child to stay in one place over time. Therefore, an employer institution who regularly relocates families across borders creates its own systemic way in which children can become 'invisible' and 'unthought of'. If a family also has diplomatic immunity according to the VDCR Article 37, it is likely to be impossible for child protection services to intervene in the diplomat family's matters as the receiving state's authorities do not have jurisdiction in respect of acts performed by diplomats and members of their families. The children have become not only systematically 'invisible', but also 'an untouchable case' as child protection services do not have jurisdiction to approach them or enter their homes.

The right to protection – accounts of former Norwegian Foreign Service children

The anthropological study of former Norwegian Foreign Service children shows a small minority of cases in which parents' substance disorders and/or emotional neglect were present in their children's lives. In this section, we will describe three cases that highlight different scenarios relating to children's 'invisibility'.

Silje was born abroad and relocated several times during her childhood. Silje had several periods during adulthood when she needed professional psychological support. In cases of serial mobility, a child's only constant relationship may be with its nuclear family. This puts

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Child protection caseworkers' experiences of meeting high-status families') (2010) 2 *Fontene Forskning* 50.

[30] Ferguson, above n 24.

[31] A Bitsch, *Går du nå, er du ikke lenger min datter (trans: If you leave now, you're no longer my daughter)* (Spartacus, 2018).

[32] Children and Families Across Borders, *Safeguarding children in need of protection who travel abroad* (CFAB, 2018), available at: https://assets.website-files.com/5f35add6489ebf598108eb78/60f4e0aa7df7314b57ef24c2_Safeguarding%20Children%20in%20Need%20of%20Protection%20Who%20Travel%20Abroad.pdf, accessed 12 September 2022; H Lidén, A Bredal and L Reisel, *Transnasjonal oppvekst – Om lengre utenlandsopphold blant barn og unge med innvandrerbakgrunn (trans: Transnational childhood – About longer stays abroad among children and youth of ethnic minority background)* (2014), available at: https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmlui/handle/11250/2440455, accessed 12 September 2022.

children in a potentially vulnerable situation as they can only rely on family members for support. Yet these very same persons may be those who are abusing or neglecting them, and the family becomes hermetically sealed from the children's everyday social environment, such as school:

> Silje: 'There was no one who picked up on it – but it makes sense – it's hard to notice anything when the child is there for two–three years and then disappears …'

Frequent relocations can lead to problems in the home becoming more 'invisible' to others compared to families that live in the same place over time. When children arrive at a new location, the barrier to telling anyone about challenges at home will be higher, as they have not built trusting relationships with other adults or peers over time:

> Silje: 'There I was, insecure, with a [parent] who was [substance disorder] and no safe environment at home … at home, I just had to adjust myself to [the parent] all the time … When I think back to that period, I had friends, but I felt constantly alone … It was because of what happened at home.'

'Invisibility' can also be the result of children actively concealing the truth about what is going on at home:

> Interviewer: 'This kind of problem can be difficult for others to detect …'
>
> Silje: 'The children don't want it to be detected either …'

As is common in families where parents have low capacity for care, older siblings assume the role of emotional caregivers for their younger siblings.[33] Silje also grew up in such a sibling subsystem:

> Silje: '[Siblings] took care of me, but no one took care of them …'

The barrier for others to report a concern for the children was too high:

> Silje: 'No one said or did anything … Why? What were they thinking?'

Several other accounts are testimony to a lack of parental presence, both physically and emotionally. Catherine was born in Norway. Her family moved abroad when she was three months old, and she relocated six times during her childhood:

> Catherine: 'I've had many psychologically challenging periods in my life. It was hard to be a child and feel all alone even when your parents were there. I've had periods when, emotionally, it felt as if I had no parents.'

As is starting to be acknowledged by research on affluent, high-status families and child protection, the same affluence that allows for children's material needs and education can also be the root of what causes the 'invisibility' of children's experience of parental emotional absence:[34]

> Catherine: 'Perhaps we looked privileged to people from the outside who heard about our life as the children of an ambassador … We always lived in big and beautiful houses, but without any feeling of home. The ambassador's residence in [location] is about 1000 m², we had a chef, butler, cleaner and porter. We received visits from prominent people … But the privileges we had are not what

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[33] C Katz, D Tener and OY Sharabi, '"Blood Pact": Professionals' Perceptions on the Sibling Subsystem in the Context of Child Abuse' (2021) 4 *International Journal on Child Maltreatment* 175.

[34] Bernard and Greenwood, above n 2; Aadnanes, above n 16.

> children need, for what can children get out of grand residences, servants and fancy cars? I was lonely and needed my parents, but they were not there the way I needed them and when I needed them. But I looked up to them both and thought that they were beautiful and happy. I savoured the moments when I was allowed to be with them, even though the focus was not on me. But there were times when I was so sad, for why should these people get all their time?'

Informants explained how, in their parents' absence, they grew attached to professional caregivers, however temporary, as the caregivers did not follow when the family relocated:

> Catherine: 'My mother has said it was impossible to combine the role of young mother with that of the wife of an ambassador. Nannies came and went …'

Another characteristic of serial migrant TCKs such as diplomat children is how they are at a great distance from extended family. Their grandparents, aunts, uncles, and cousins live in other countries, and distance makes these children's situation 'out of sight, out of mind'. Extended family may only see glimpses of internal family troubles and misinterpret these as being the children's fault. The children were ascribed a 'privileged' status due to the situation of affluence abroad. This can prompt children to practice self-censorship on their emotions, increasing the 'invisibility' (and silence) of their situation at home towards the outside world, even towards extended family:[35]

> Catherine: 'I noticed how people treated me differently when they were told that my father was an ambassador. I noticed early on that this was something "special", that my parents were something "special", and that I was "lucky". I wasn't happy, but why would I have any reason not to be? I felt like this throughout my childhood: Surely, I had "no reason to complain?" I never showed anyone how I really felt. No one.'

Diplomat children have also applied emotional self-censorship when being sent to boarding school. Parents sent their children to boarding school to become socialised into 'Norwegian culture' and to receive 'a proper education'. Victoria has also needed support from psychologists in several periods during adulthood. She describes being sent to boarding school in Norway at the age of 12, after a childhood which, until then, had been spent abroad:

> Victoria: 'I was a postal package being sent '"here and there" … I remember walking the streets of [location in Norway], looking into the windows of apartments and houses, thinking: "I wish that was my family. I wish that was my home. I wish I had a home".'

The colonial tradition of sending children to boarding school was institutionalised in the diplomatic services, religious missions and the armed forces, resulting in what Buettner coined the 'Orphans of Empire'.[36] A culture of 'family sacrifice' (separation between parents and children) became part of standard institutional practice.[37] Although the Norwegian Foreign Service stopped sending children to boarding schools systematically in the 1970s, this is still widely practised in other diplomatic circles.[38]

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[35] Bjørnsen, above n 27.

[36] E Buettner, *Empire Families. Britons and Late Imperial India* (Oxford University Press, 2004), 112.

[37] Ibid.

[38] SA Hiorns, above n 5. See also: '£100m public school benefits of diplomats and spies' *The Guardian* 23 January 2005, available at: www.theguardian.com/politics/2005/jan/23/uk.schools, accessed 12 September 2022: https://afsa.org/have-you-considered-boarding-school; https://washdiplomat.com/boarding-schools-offer-

States' obligation to protect children from all forms of violence – implications of the autobiographies

The experiences of Silje, Catherine and Victoria describe situations which children have the legal right to be protected from. The legal status of diplomat children is defined by the VCDR, yet also by the UNCRC. Article 19 of the UNCRC requires states to protect children from all forms of physical or psychological violence. In 2011, the UN Committee on the Rights of the Child (the Committee) published General comment no 13 on the right of the child to freedom from all forms of violence.[39] A key feature of the Committee's interpretation of Article 19(1) is that states are obliged to legally protect a child from all forms of violence, either physical or mental violence, however light, intentional or not.[40] Thus 'violence' against children has come to be understood as encompassing far more than physical violence. Violence is understood on a continuum, including physical violence, neglect of care, psychological abuse, emotional neglect/absence, and fear-inducing behaviour. All can have major consequences for child development as it disrupts secure attachment.

Psychological and emotional neglect is defined as violence against children and points to situations in which a child experiences a lack of emotional support and love, chronic inattention, caregivers being 'psychologically unavailable' by overlooking young children's cues and signals, and exposure to intimate partner violence, drug or alcohol abuse.[41]

Another form of violence, covered by Article 19(1) of the UNCRC, is institutional and systemic violations of child rights. In General comment no 13, the Committee exemplifies such violations of child rights as when the state responsible for the protection of children from all forms of violence directly or indirectly causes harm because there is no effective means of implementing the obligations under the Convention. Thus, inadequate and insufficient provision of material, technical and human resources and the capacity to identify, prevent and react to violence against children amounts to an infringement of a child's right to protection from violence.[42]

By moving families back and forth between a sending state and a receiving state, living in large residencies, being cared for by employees rather than parents, or sending children to a boarding school far away from their parents, a sending state can fail to prevent a troubled upbringing. The cases referred to above illustrate how the system and set-up of the diplomatic lifestyle can violate the rights of children and therefore constitutes violence within the scope of Article 19(1). The right to protection against all forms of violence includes states' obligation to implement preventive measures against all forms of harm against the child.

The Committee emphasises that frequency, severity of harm and intent to harm are not prerequisites for the definition of violence in Article 19(1). Intervention strategies by states may refer to factors of frequency, severity and intent, thereby providing proportional forms of intervention. Yet, these definitions and characteristics of violent acts must in no way erode the child's absolute right to human dignity and physical and psychological integrity by

home-away-from-home/, last accessed 21 June 2022. A culture of family sacrifice still lingers in the Norwegian Foreign Service, albeit in less formal ways, see IB Neumann, *At Home with the Diplomats: Inside a European Foreign Ministry* (Cornell University Press, 2012), 105.

[39] UN Committee on the Rights of the Child, *General comment no 13* (2011) UN CRC/C/GC/13, 18 April 2011.

[40] Ibid, 4 and 17.

[41] Ibid, 20(b).

[42] Ibid, 32.

describing some forms of violence as legally and/or socially acceptable.[43] When an employer institution defines a child and family's life to such a great extent, violence towards a child can be caused by the parents' employment conditions rather than parents acting out violently. In the case of diplomat children, 'children's invisibility' as defined above at the systemic level as 'unthought of' and 'unheld' has roots in a long tradition and is part of formal and informal institutional practices. It is unrealistic to imagine a world without embassies or international organisations. It is equally unrealistic to imagine that parents cannot work as diplomats at embassies or be foreign delegates to organisations. However, the acceptance of diplomat families living abroad must not result in states legally and socially accepting the possible violation of the rights of diplomat children. Article 19(1) of the UNCRC requires states to develop and implement intervention strategies proportionate to the problem at hand.

Intervention strategies are framed by the context in which these strategies will play out. The legal status of diplomatic immunity has consequences for the possible strategies for intervening measures of UNCRC contracting states to ensure a child's right to protection from all forms of violence. The relationship between diplomatic immunity and legal child protection is presented and analysed in the following section.

Diplomatic immunity and legal child protection

The sovereign equality of states and diplomatic immunity

Diplomat children's right to protection against all forms of physical and psychological violence is highly marked by the fundamental principle of international law on the sovereign equality of states. Anthony Cassese states that it 'is unquestionably the only principle on which there is unqualified agreement and which has the support of all groups of States'.[44] Sovereign equality is the basis for the whole body of international legal standards and the fundamental premise on which all international relations rest.[45] Regulations of diplomatic relations support the principle of state sovereignty.

The Vienna Convention on Diplomatic Relations of 1961 may be claimed to be the most successful of the instruments drawn up under the United Nations framework due to the near-universal participation by sovereign states, the high degree of observance among state parties and the influence it has had on the international legal order.[46] Much of its success can be traced to the international law principle of the sovereign equality of states, the long stability of the basic rules of diplomatic law for over 200 years, and to the effectiveness of reciprocity as a sanction against non-compliance.[47]

The VCDR regulates the establishment, maintenance and termination of diplomatic relations on the basis of consent between sovereign states. The Convention entails rules regarding privileges and immunities enabling diplomatic missions to act without fear of coercion or harassment through the enforcement of local laws and to communicate securely with their sending governments. Article 31(1) of the Vienna Convention states that diplomats are to be immune from the criminal, civil and administrative jurisdiction of the receiving state. Hence,

[43] Ibid, 17.

[44] A Cassese, *International Law* (Oxford University Press, 2001), 88.

[45] Ibid.

[46] E Denza, *United Nations Audiovisual Library of International Law* (2009): https://legal.un.org/avl/ls/Denza_DCL.html# minute 1:47, last accessed 6 September 2022.

[47] Ibid.

any administrative proceedings regarding child protection cases do not fall within the realm of the receiving state's jurisdiction.

A functional reason for diplomatic immunity is the necessity to ensure the security of a diplomat when they are performing their duties.[48] A state that fails to respect a diplomat's legal immunity is considered to have committed a grave breach of international law.[49] Those who argue for extending these privileges and immunities to family members base their arguments on the same functional needs of the diplomat: 'Pressure on his family would undermine that objective as much as direct pressure on his person'.[50] Article 37(1) of the VCDR clearly states how the status of legal immunity also includes the functioning diplomat's family:

> 'The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.'

That said, there have been a few cases in which the main legal question is whether the rights of children and, in some cases, also the rights of a diplomat's spouse, fall under the rules of the Vienna Convention that protect the immunity of a diplomat family. In all these cases, the courts decided that the rights of family members should not take precedence over the rules on diplomatic immunity under the VCDR. Having established that family matters fall under diplomatic immunity, how do public authorities and courts then deal with balancing the state's obligation to realise children's rights with the immunity of diplomat families? The following section provides a short representation of these cases from the USA, the UK and the Netherlands before the cases are analysed.

Diplomatic immunity in family and child welfare proceedings

The first known case of child abuse in a diplomat family is *Re Terrence K* in 1987.[51] This case sparked a heated debate in the media as well as among researchers in international and family law about diplomatic immunity versus children's rights.[52] The father was an attaché of the Republic of Zimbabwe's permanent mission to the United States, and therefore both he and his family were entitled to diplomatic immunity according to Article 31 VCDR.

US social services alleged that the diplomat father and mother had been physically abusing their three children. On several occasions the father had bound the nine-year-old Terrence's hands and feet with wire and beaten him with an electrical extension cord. It was alleged that the child had numerous bruises and marks on his body, particularly on his chest, legs, forearms, and forehead. It was also alleged that Terence's two younger siblings had been beaten with a belt.[53] The legal guardian representing Terrence stated that his client was

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[48] PJ O'Keefe, 'Privileges and immunities of the diplomatic family' (1976) 25 *International and Comparative Law Quarterly* 329, 333.

[49] I Brownlie, *Principles of Public International Law* (Clarendon Press, 1973).

[50] O'Keefe, above n 48, 333.

[51] *Re Terrence K* 522 NY S 2d 949 [1987] NY App Div; *In the Matter of Terrence K and Others, Children Alleged to be Abused* 138 Misc 2d 611 (NY Fam Ct 1988) 524 NY S 2d 996, 27 January 1988.

[52] MS Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' (1989) 4 *American University Journal of International Law and Policy* 173; AM Castro, 'Abuse of diplomatic immunity in Family Courts: There's Nothing Diplomatic about Domestic Immunity' (2014) 47 *Suffolk University Law Review* 353.

[53] *In the Matter of Terrence K and Others*, above n 51, 612.

'terrified of his father' and wished to remain in foster care in the USA.[54] The case was appealed several times with an application for the stay of Terrence in the USA. The Appellate Division of the Supreme Court of New York found that the Family Court had properly dismissed the child abuse proceedings because the respondent's parents were entitled to diplomatic immunity pursuant to the VCDR.[55]

The case of *Re P (Children Act: Diplomatic Immunity)* in 1998 involved two children of Mr P, who was a senior American diplomat serving in the UK, and their mother, who was a German national.[56] The children's mother commenced divorce proceedings against her husband and applied to the High Court in England under section 8 of the Children Act 1989 for a residence order, specific issue and prohibited steps order, and leave to remove the children to Germany under section 13. Together with a second application from the USA, Mr P invited the court to hold that it had no jurisdiction to hear the case by virtue of the diplomatic immunity enjoyed by both Mr P and his children. The matter was considered by Stuart-White J who held that the issue of diplomatic immunity prevented the court from having jurisdiction and, thus, set aside the mother's application.

In October 2013, a Russian diplomat was arrested in The Hague on the grounds of the safety of his children.[57] We will refer to the case as *Dimitry Borodin* because this case was never tried before a court. Police entered the residence of Dimitry Borodin after having followed his car, which had allegedly been involved in a car accident. Upon arrival at the residence, the neighbours reported to the police officers that they were concerned about the safety of the diplomat's children. The police entered the residence and escorted both the father and children to the police station, despite Borodin refusing them entry to his residence, and stating that he had diplomatic immunity. A few hours later, Dimitry Borodin and his children were released, whereupon the family left the country.[58]

It is not clear why the Russian diplomatic family was released. It may have been for investigative reasons. However, in our opinion, it is also possible that the legal status of the family had influenced the decision to release the family and not proceed further with the case after Borodin and his children had left the country. Based on this assumption, the case might exemplify that the rules on diplomatic immunity would appear to take precedence over following up children's right to protection.

In the case of *A Local Authority v AG* and *A Local Authority v AG (No 2)* the question was whether the parents were immune from the jurisdiction of the Family Court by virtue of the

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[54] Ibid.

[55] *In the Matter of Terrence K, Appellant, Lydia K et al, Respondents*, Appellate Division of the Supreme Court of New York, Second Department, 31 December 1987, 135 AD 2d 857 (NY App Div 1987).

[56] *Re P (Children Act: Diplomatic Immunity*) [1998] 1 FLR 624.

[57] https://apnews.com/a2d0e702c9084306a23ce71f147b9096, last accessed 21 June 2022. https://www.themoscowtimes.com/2013/12/02/russian-diplomat-who-was-arrested-in-the-hague-leaves-the-netherlands-a30097, last accessed 21 June 2022.

[58] Vladimir Putin demanded an official apology from the Netherlands for what he called a 'rude violation of treaties on diplomatic relations'. The Dutch Foreign Ministry responded with a reserved statement: 'If it emerges from the investigation that actions were taken in conflict with the Vienna Treaty on Diplomatic Relations, the Netherlands will apologise to Russia'. The Russian Foreign Ministry claimed the allegations were 'absolutely contrived' and had taken place under 'false pretext'. The arrest happened during a time of other tensions between the two states. A few days later, a Dutch diplomat in Moscow was beaten up at home. https://www.themoscowtimes.com/2013/12/02/russian-diplomat-who-was-arrested-in-the-hague-leaves-the-netherlands-a30097, last accessed 21 June 2022; https://jblackwritings.wordpress.com/2013/10/18/russians-beat-up-dutch-diplomat-write-lgbt-on-mirror-in-russian-apartment/, last accessed 21 June 2022.

father's diplomatic status.[59] The case was appealed to the High Court, Family Division, and Sir Duncan Ouseley ruled on the question of jurisdiction in May 2021.[60] The three minor children of the family had made allegations of physical abuse in their home. The nine-year-old child said: 'Oh, I get hit with a thick belt everyday by my mum, but my dad is much worse'.[61] The local authority made applications for protective orders under sections 31 and 38 of the Children Act 1989.

This is the first case in the UK in which the court had to deal with the question of whether the immunity of a serving diplomatic agent could place the protection of children, living in the UK and allegedly being abused, beyond the reach of the courts.[62] The court stated that the question gave rise to: ' … a seemingly irreconcilable clash between two international treaties incorporated into our domestic law by statutes. These are the 1961 Vienna Convention on Diplomatic Relations, enacted by the Diplomatic Privileges Act of 1964, and the 1950 European Convention on Human Rights, enacted by the Human Rights Act of 1998'.[63] Mostyn J decided that by virtue of diplomatic immunity the case could not proceed and had to be stayed until the foreign government had decided whether to waiver the diplomatic immunity enjoyed by the family. In case that waiver would have been granted, the stay could have been lifted and the proceedings been revived.[64]

Mostyn J suggested furthermore that Articles 31 and 37 of the VCDR prevent protective measures being taken in respect of the children of diplomats who are at risk. This renders these Articles irreconcilable, and therefore incompatible, with the duties imposed on the state under Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) on the obligation to respect human rights and Article 3 on the prohibition of torture, and are probably also incompatible with the rights under Article 6 ECHR on the right to a fair trial and Article 8 on the right to respect for private and family life.[65] The local authority and the guardian therefore indicated their intention to issue a formal application for a declaration of incompatibility under section 4 of the Human Rights Act 1998. Although the facts underpinning the case no longer called for such a declaration, and would therefore just be an 'academic' declaration, Mostyn J concluded that the application should proceed.[66] He argued that the subject matter was of the utmost importance, the protection of children at risk being one of the 'first and foremost' obligations of the state, and the fact that there were 23,000 people (including many children) in the UK to whom the concept of diplomatic immunity might apply.[67] Sir Duncan Ouseley subsequently concluded that there was no conflict between the ECHR and the VDCR, and the local authority's

[59] *A Local Authority v AG and others* [2020] EWFC 18, [2020] Fam 311 and *A Local Authority v AG (No 2)* [2020] EWHC 1346 (Fam), [2020] 2 FLR 747.

[60] *Barnet London Borough Council v AG and others* [2021] EWHC 1253 (Fam), [2021] Fam 404.

[61] *A Local Authority v AG*, above n 59, 4.

[62] D Woodward-Carlton, DJ Youngs and K Archer, 'Diplomatic immunity in care proceedings' [2022] Fam Law 291, 294.

[63] *A Local Authority v AG* and *A Local Authority v AG (No 2)*, above n 59, 22.

[64] *A Local Authority v AG*, above n 59, 46.

[65] Ibid, 49.

[66] According to English law it is accepted that the court has limited discretion to hear academic claims, but that this should be exercised with caution.

[67] *A Local Authority v AG (No 2)*, above n 59, [17](i) and (iii).

application was dismissed.[68]

The outcomes of these cases seem to be in line with Eileen Denza's view on family and child protection cases, that they fall squarely within the scope of diplomatic immunity in civil proceedings.[69] Other legal scholars' opinions also coincide with the cases' outcomes. Craig Barker fully agrees with the court's view in *Re P (Children Act: Diplomatic Immunity)* that the diplomatic immunity enjoyed by the father and the children prevented the court from having jurisdiction. Neither the ECHR nor the UNCRC had effectively amended the VCDR in relation to these cases.[70] Barker further states that '… in this case, the fact that the removal of the children was allegedly wrongful in terms of the Hague Convention would not be sufficient in and of itself to remove state immunity'.[71]

Invisibility due to sovereignty

Sovereign equality requires trust, respect and cooperation between states in international relations. Courts and public authorities emphasise that the protection of the diplomat child against harm and violence must be ensured by respectful cooperation between the receiving and sending state.

In *Terrence K* the Appellate Division points to the diplomatic efforts that are initiated to ensure the child's protection by the Zimbabwean authorities. The court describes in detail the measures taken by the US Department of State to ensure the protection of the child upon its arrival in Zimbabwe, highlighting the information it had received from a legal adviser from the Department of State who stated that 'there is a well-developed and active administrative and legal infrastructure in Zimbabwe to deal with instances of child abuse that is similar to the system in place in New York State'.[72]

The cooperation between the USA and the Republic of Zimbabwe implies that the two states agreed that the situation was primarily a question of the child's need for protection. The strong evidence of physical and psychological abuse seemed to assist the agreement to define the situation as a child abuse case, not a 'false pretext'. No political mistrust between the states did occur due to the facts of the case being clear and obvious. Thus, trust, respect and cooperation were in place to ensure the protection of Terrence.

In *Barnet v AG* the court does not accept the argument that the children of diplomats were without protection since they would receive the protection of the sending state, following either recall or a declaration of *persona non grata*, if the case is regarded as sufficiently severe.[73] Sir Duncan Ouseley supposes that the sending state's authorities will fulfil its duty to protect the diplomat child's right to protection against violence. The judge relies on the premise of respect for state sovereignty which requires trust in the other state's authorities' ability and willingness to provide protection for the child against all forms of violence.

Due to the fundamental principle of equal state sovereignty, a diplomat child's potentially harmful situation is *redefined*, from a child protection concern to questions about the nature

[68] *Barnet v AG*, above n 60, 141.

[69] E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press, 4th edn, 2016), 235.

[70] Barker, above n 6, 213–214; *Re P (Children's Act: Diplomatic Immunity)*, above n 56, 628.

[71] Barker, above n 6, 217.

[72] *Matter of Terrence K*, above n 55, 859, Appellate Division.

[73] *Barnet v AG*, above n 6059, 113.

of the relationship between the receiving and the sending state. This is especially clear when comparing the case of *Dimitry Borodin* with the cases handled in courts. In a climate of pre-existing diplomatic tension between two countries, an act of not respecting the 'inviolability principle' of Article 22 VCDR will be interpreted as a breach of international law. The *Dimitry Borodin* situation never reached court and we therefore cannot expect to find any details about the children's factual and legal situation. Nevertheless, the 'invisibility' of the children's situation and the lack of consideration of the children's right to protection can be associated with the nature of the relationship between the receiving state and sending state.

Well-functioning, smooth international relations depend on contact, acknowledgment of the other state's equal status, sovereignty, and certainly trust. The courts' reassurance that such a well-functioning relationship is in place, and thus, the children's right to adequate protection is ensured, is surely positive. Yet, as Barker also emphasises, the decision that diplomatic immunity takes precedence over children's rights 'may prove more problematic' in relation to jurisdictions other than those with which the receiving state has well-functioning diplomatic relations.[74] The 'visibility' of the diplomat children's situation and the efforts to ensure diplomat children's rights by the sending state through diplomatic interaction is dependent on policy, political and geo-political relations between states, rather than on a purely legal approach in the state where the diplomat child happens to be resident.

Untouchability due to risk of reciprocal retaliation

The presented cases highlight the impact of the principle of *reciprocal retaliation*, primarily motivated by the need to protect a sending state's own diplomats and their families. If the reciprocal nature of diplomatic immunity were not to be upheld, diplomatic and consular personnel serving abroad would be unnecessarily exposed to the reciprocal risk of retaliatory measures being taken by foreign states.[75]

In *A Local Authority v AG* the court concluded that it was unable to accede to the proposed revision of Article 31(1)(c) VCDR allowing for exceptions from diplomatic immunity in child protection cases. The court does not find that relevant rules of the UNCRC and ECHR could alter the interpretation of Article 31(1) VCDR. Mostyn J bases this decision on the foundation of the VCDR, namely the idea of reciprocity, meaning that a significant reason for conferring diplomatic immunity on foreign nationals is to ensure corresponding immunities. Furthermore, Mostyn J emphasises that the principle of immunity for serving diplomats and their families is one of the most important tenets of civilised and peaceable relations between nation states.[76]

In *Barnet v AG* Sir Duncan Ouseley quotes extensively from the judgment of Lord Sumption in *Al-Malki v Reyes (Secretary of State for Foreign and Commonwealth Affairs intervening).*[77] Among several reasons for the strict interpretation of the VCDR, Lord Sumption points out that the VCDR depends, even more than most treaties do, on its reciprocal operation. A failure to accord privileges or immunities to diplomatic missions or their members is immediately apparent and is likely to be met by appropriate counter-

[74] Barker, above n 6, 212.

[75] J Jr Hickey and A Fisch, 'The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States' (1990) 41 *Hastings Law Journal* 351.

[76] *A Local Authority v AG*, above n 59, 38.

[77] [2017] UKSC 61, [2019] AC 735.

measures.[78] Reciprocal retaliation leads Sir Duncan Ouseley to argue that the court could not interpret the VCDR under section 3 of the Human Rights Act 1998 so as to put the UK in breach of the VCDR.[79] Sir Duncan Ouseley concludes that: '[T]here is no scope for interpretation of the VCDR in a way which gives children the protection which is at the heart of this case on its wording'.[80]

The interpretation and application of diplomatic immunity by the courts in both the UK and the USA give great weight to the reciprocal nature of diplomatic immunity. The decision by Dutch police authorities in the case of *Dimitry Borodin* to release the family was likely influenced by the problems of reciprocity and risks of reprisal.

Risk of reciprocal retaliation results in child protection cases in diplomat families becoming 'untouchable' for the local authorities and family courts. As pointed out, immunity can certainly act in a child's interest in the context of an external threat. However, the very same legal immunity implies that the children do not have the same access to child protection services as other children when residing abroad. Through an analysis of previous cases, as well as our own empirical research on former Norwegian Foreign Service children, it is apparent that this aspect of immunity presents a real vulnerability. The few cases known to the public illustrate how such a legal construct fails to protect children from their own family members; there is an actual threat that they are not granted legal agency on their own terms; and their voices remain undocumented.

As globalisation gives rise to new lifestyles across national borders, the channels through which children are supposed to realise their rights become less clear. In practice, local authorities do not know whether or not a child has diplomatic immunity until an intervention has taken place. Local authorities may stay away from the expatriate community, as they do not know whether a TCK is a diplomat child. In many situations, expatriates still live among themselves, engaging in the 'continuous drawing, maintaining and negotiating of boundaries. Hence, the metaphors they use to describe their social spheres as a 'bubble', 'bunker', 'ghetto', 'hothouse' and 'Disneyland'.[81] In countries that have particularly significant class differences, expatriates live in 'gated communities', in which housing, workplace, clubs and schools are characterised by heavy security.[82] Together with economic status, Anglo-linguistic and cultural capital, and, in some contexts, ethnicity and 'race', these communal boundaries all play a part in conveying messages to local authorities that these children are 'off-limits' and 'untouchable'.[83] Diplomat children and families' socio-economic status is added to the risk of reciprocal retaliation. Thus, diplomat children's welfare is more likely to be seen as 'untouchable' for local authorities.

Possible proceedings

[78] *Barnet v AG*, above n 6059, 47 (4); see also Vienna Convention on the United Nations law website: https://legal.un.org/avl/ha/vcdr/vcdr.html, last accessed 6 September 2022.

[79] *Barnet v AG*, above n 60, 123.

[80] Ibid, 124.

[81] M Fechter, 'Living in a Bubble: Expatriates' Transnational Spaces' in V Amit (ed), *Going first class? New approaches to privileged travel and movement* (Berghahn Books, 2007).

[82] O Picton and S Urquhart, 'Third Culture Kids and Experiences of Places' in A Cutter Mackenzie-Knowles, K Malone and E Barratt Hacking (eds), *Research Handbook on Childhood Nature* (Springer International Publishing AG, 2020).

[83] D Tanu, *Growing up in Transit: The Politics of Belonging at an International School* (Berghahn Books, 2018).

Even though peaceful international relations between equal sovereign states require diplomatic immunity, members of diplomatic missions can still be held legally liable for their conduct. There is a difference between *liability* and procedural immunity. Lord Sumption explains that the legal liability's '… practical effect is to require the diplomatic agent to be sued in his own country … There is therefore no conflict between a rule categorising specified conduct as wrongful, and a rule controlling the jurisdictions in which or the time at which it may properly be enforced'.[84] The consequence of liability is that the sending state is responsible for following up the diplomat and their family upon their return. In *Terrence K* the assurance by the Zimbabwean government that the father would face child protection proceedings is an example of diplomatic immunity not being an immunity from liability but a procedural immunity from the jurisdiction of the receiving state. The cases of *Terrence K* and *Dimitry Borodin* illustrate how the standard execution of authority and legal proceedings concerning children in a receiving state are replaced by a different set of state proceedings within hours of an arrest or petition. A parent's immunity is communicated to the receiving state's Ministry of Foreign Affairs, which notifies the executive government. This is followed by negotiations between the receiving and the sending state.

Broadly speaking, the receiving state has two options. Firstly, it can ask the sending state to waive the immunity of the diplomat. If granted, the receiving state has jurisdiction to commence family court proceedings. Secondly, it can ask the sending state to summon its diplomat, and in severe cases, declare the diplomat *persona non grata*. In the case of both *Terrence K* and *Dimitry Borodin*, the parent was called home by his respective state at the first opportunity. This approach was also applied to the case *A Local Authority v AG* and appears to be a standard response.[85]

As the American child protection services physically removed Terrence from his parents, and the Dutch police entered the residence of a diplomat and made an arrest, both cases are examples of local authorities breaching the 'inviolability principle' of diplomatic relations under Article 22 VCDR. Such a breach of the inviolability principle can in fact be institutionalised. In the guidelines 'London Safeguarding Children Procedures', for example, the London Child Protection Services are advised to consider removing a diplomat child from school, rather than from the diplomat's residence.[86] Thus, in child protection cases involving diplomat families, particular institutional procedures can evolve.

The fact that certain procedures exist, both in the receiving state and the sending state, might have influenced the balancing test between the ECHR and VCDR of Sir Duncan Ouseley in *Barnet v AG*. He argues that the ECHR's requirement for a legal system to be in place to protect children cannot be interpreted as meaning that states would have to adopt a system that would require them to be in breach of the VCDR towards other states.[87] The President points out the relativity of human rights obligations in general, stating that state obligations to

[84] *Al Malki*, above n 77, 40.

[85] There is one known example in which the French mission to India decided to suspend their functioning diplomat from his duties, effectively waiving his diplomatic privileges and immunities: https://www.thenewsminute.com/article/bengaluru-court-acquits-ex-french-diplomat-pascal-mazurier-charges-raping-minor-daughter, last accessed 21 June 2022. https://www.huffingtonpost.in/2017/05/02/the-misogyny-in-the-pascal-mazurier-judgment-is-whats-wrong-wit_a_22064579/, last accessed 21 June 2022.

[86] 'London Safeguarding Children Procedures', 1.2, see: https://www.londoncp.co.uk/chapters/diplomats_fam.html, last accessed 26 May 2022.

[87] *Barnet v AG*, above n 60, 98.

protect rights are not absolute.[88] The duty to protect and investigate is ~~furthermore~~ restrained by legitimate reasons due to ~~by~~ the VCDR~~, that can be reasonably expected~~. It is therefore not reasonable, possible, or proportionate to require the state to act in breach of the VCDR.[89] Keeping in mind that there are possible procedures, although different from those formal procedures usually in place for national child protection services, Sir Duncan Ouseley found the scope and type of state obligation following from the VCDR reasonable. After all, some procedures are in place, either between the receiving state and sending state or even within the receiving state itself, such as the 'London Safeguarding Children Procedures' which specifically include the safeguarding of diplomat children.

There are visible developments regarding the attention and weight given to children's rights in the court cases presented above. In all three cases tried before the courts, the court has emphasised a child's right to protection. Evidently, the space and effort to balance children's right to protection with the requirements of diplomatic immunity according to the VCDR reached another level of detail in the legal analysis in *A Local Authority v AG* and *Barnet v AG*. In a period of over 30 years between the case of *Terrence K* and *A Local Authority v AG*, much has happened regarding the recognition of children's legal status as rights holders. Nearly all Member States of the United Nations have ratified the UNCRC, and transnational child protection has been strengthened by the adoption of the Hague Convention of 1996 on the International Protection of Children, increasing the legal protection of children living in transnational family settings.

Concluding observations

The fundamental principle of international law and relations, the sovereign equality of states, and the associated diplomatic immunity norm create a challenge for states in child protection cases involving diplomatic families. There is uncertainty if the diplomat child's right to protection against all forms of violence according to Article 19 of the UNCRC will be realised. The diplomat child's right to protection is to be realised first and foremost by the sending state. This leads to leaving the diplomat child in a particularly vulnerable position because the realisation of his/her rights depends heavily on the bilateral political relations between the receiving and the sending state. The realisation of the diplomat child's rights can be jeopardised by political tensions and mistrust between states.

When nation states cooperate, the child's best interest can be assured within the conditions of the VCDR. Yet, a risk exists that valuable information, documentation, evidence, and the views of the diplomat child may be lost. For instance, child protection services do not have access to the home at the point when a harmful incident is reported. This can impact a case, as the child remains 'invisible' and 'unheld' by caseworkers.[90] What is more, in some of the above cases, the diplomat children lacked legal agency.

Thus, the 'best case scenario', where the rights of the diplomat child are in the forefront, is still at the mercy of political relationships between states~~,~~ and is therefore too arbitrary. Hence, it is necessary to stress the sending and receiving state's legal obligation according to the UNCRC. The legal obligation to the UNCRC calls for legally binding bilateral or multilateral agreements that formalise the steps to be taken by the receiving and sending state in case of concerns of the safety and protection of a diplomat child's upbringing. The

[88] Ibid, 99–100.

[89] Ibid, 104.

[90] Ferguson, above n 24.

following section presents legal and practical suggestions on how to support the implementation of the human right of the child to protection from all forms of violence, giving due attention to the families' right to diplomatic immunity.

The realisation of children's rights regarding diplomatic immunity – a way forward

Obligation to implement measures

Article 19(2) of the UNCRC underlines a state's obligation to implement measures to ensure a child's protection from all forms of violence, including emotional and psychological neglect. Such protective measures include effective procedures for the establishment of social programmes to provide necessary support for a child and for those responsible for caring for the child. Measures for identifying, reporting, referring, investigating, treatment and follow-up of instances of child maltreatment or neglect should also be established by all Member States. The Committee emphasises 'in the strongest terms' that child protection must begin with the proactive prevention of all forms of violence.[91] What types of preventive and protective measures is it possible to establish, or are even already available to sending and receiving states?

Legal measures

Measures that aim to fulfil a diplomat child's right to protection must take into consideration and not infringe upon that child's diplomatic immunity and simultaneously fulfil the child's right to legal protection against all forms of violence. The receiving state's criminal, civil and administrative jurisdiction does not apply to diplomat families. However, measures other than legal intervention can support the prevention of, and when necessary, protection from a child's violent upbringing. As the Committee underlines, measures can be of an administrative, social, and educational nature.[92]

We maintain that some legal measures have already been established and can be applied, regardless of diplomatic immunity, provided the receiving and sending states are member states to these multilateral agreements. Chapter V of the Hague Convention of 1996 on the International Protection of Children has outlined forms of cooperation which are to be implemented between two contracting states to the Convention in child protection cases across borders. This can also be found in Chapter II of the 1980 Hague Convention on the Civil Aspects of Child Abduction. One key feature in both conventions is the establishment of a central authority, which, for example, is tasked with communicating with the other Member State's central authority and to notify about a certain family's situation and concerns raised by a public authority about a child or children's safety. We maintain that such contact and exchange of information in line with the two Hague Conventions does not breach the diplomatic immunity of a family.

Overall, bilateral or multilateral agreements on which measures can be taken by a receiving state towards a sending state, and vice-versa, when concerned about the safety of diplomat children, represent an effective international legal way of fulfilling a state's obligation to implement Article 19 of the UNCRC. Such international legal agreements partially liberate a child's right to protection from policy, geo-politics, and the premise of trust between states.

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[91] UN Committee on the Rights of the Child, General comment no 13 (2011), 46.

[92] Ibid, 42–43.

International legal agreements on procedural measures counteract the notion that such cases are 'untouchable'. It can also be hoped they enhance the 'visibility' of the particular circumstances of diplomat children.

Take the example of *Terrence K*. If Zimbabwe and the US had bilateral agreements in place to ensure a transparent judicial investigation of an alleged crime by a diplomat, the following could be a realistic scenario: immediately upon the US Commissioner filing a petition, the relevant counterparts in Zimbabwe would receive the same petition with an invitation to partake as observers on US soil. The relevant counterparts should have access to all evidence to ensure transparency. The children would be placed in foster care and, again, the relevant counterparts in Zimbabwe would be invited to observe. Zimbabwe's representatives would also be empowered to care for the children or place them with the child protection services or any other suitable party in Zimbabwe. If Zimbabwe did not waive the diplomat's immunity, the diplomat would be sent home and the Zimbabwean authorities would be required to investigate the claim and invite the relevant US counterparts to observe the investigation and adjudication of the claim.

This is one of many potential scenarios and would protect both diplomatic missions and their children while upholding the diplomatic status of the respective states' representatives. Diplomatic relations are meant to be both rigid and flexible enough to accommodate crisis situations. It is not hard to see the potential benefits of countries planning for such eventualities while establishing or ratifying an already existing diplomatic mission. We suspect that both the *Dimitry Borodin* and *Terrence K* cases would have benefited from predetermined procedures to protect both the inviolability principle and the rights of the child. In the case of *Dimitry Borodin* in particular, all communication regarding the children's well-being was denied. There was no opportunity to follow up the children's situation once they had returned to the sending state. As stated above, the children's situation in their family became a serious conflict in international relations when the Russian president Putin made a statement on the violation of the 'inviolability principle'. We maintain that for a state's obligation to realise a child's right to protection from all forms of violence to be fulfilled, the international legal community ought to formulate a draft of a standard agreement that signatory countries of the VCDR could enter bilaterally or even multilaterally.

Social and educational measures

The opportunity for children to easily communicate with the authorities and child protection services in both the receiving and sending state can provide a preventive and protective measure for children living in family environments characterised by physical, psychological, or emotional violence. We suggest that websites and online fora are likely to be effective measures to increase the 'visibility' of the living conditions of children living abroad or children only living temporarily in a state. State-subsidised websites aimed at children and young persons – such as 'ung.no' and 'barneombudet.no' in Norway – should then include information and facilitate interactive discussions for children and youth living abroad or children staying temporarily in Norway, such as diplomat children. Studies of online helplines have found that children and youth talk about emotional issues such as mental health and close relationships in online conversations rather than in telephone conversations or in person. When they are online children feel a higher degree of anonymity and the power imbalance between adults and children is reduced.[93] Online platforms should offer children

[93] A Callahan and K Inckle, 'Cybertherapy or Psychobabble? A mixed-methods study of online emotional support' (2011) 40 *British Journal of Guidance and Counselling* 261.

and youth the opportunity to ask questions directly to an online counsellor, who should be under an obligation to contact the relevant authorities in potential emergency situations.

Ministries of Foreign Affairs should be made aware of the potentially serious implications for a child when posting an employee with diplomatic immunity abroad. There is a need to invest in counsellors who are particularly familiar with the circumstances of diplomat children and TCKs, who follow the families regularly, and create websites and networking possibilities for children and youth. Sponsor organisations, such as Ministries of Foreign Affairs and international organisations, play a significant role in shaping a mobile child's life, as the obligation to move is constant and omnipresent in 'the contract'.[94] Many TCKs form part of their developing identity around their parent's long-term employer, and assume the role of 'little heroes/soldiers' of the armed forces, 'little missionaries' of God's calling, or 'little country representatives' of the diplomatic services.[95] It is therefore of key importance that the support measures and interactive websites of such sponsor organisations do not become closed-off 'interpretive communities' that worship a certain employer profile and emphasise the 'uniqueness' of the children, but rather emphasise that they are normal children, with the same needs as all children, although they live in unusual circumstances.[96]

For over two decades, the Norwegian Foreign Service has had a presentation about the 'Psychological challenges of abroad postings', including the TCK experience. In doing so, the organisation is nuancing a cultural narrative that might otherwise present an understanding of this type of childhood as being exclusively 'privileged', from the perspective of material affluence and special opportunities.[97] Moreover, in 2017, the Norwegian Foreign Service introduced a seminar on the risks associated with alcohol and substance abuse as part of pre-posting briefings, as well as couples counselling workshops. These are issues that directly affect the children's well-being and sense of living in a stable and secure home environment.

It is not acceptable for any organisation or business that sends their employees abroad to argue that it is solely up to the parents to guarantee their children's well-being. As several informants in the Norwegian Foreign Service study highlighted, a good diplomat is not necessarily a good parent, and relocations and repatriations place an added burden on families.[98] Where employees are granted diplomatic immunity, an organisation's responsibility exceeds that of other employers due to the 'untouchable' legal status in which the child is placed. Embassies abroad ought to increase the awareness and skills of 'integration consultants' and 'family liaison officers' about the specific risks involved in being the child of an affluent high-mobility family abroad, as well as the particular legal vulnerability of diplomat children.[99]

Finally, a child who is capable of forming their own views has the right to express those views freely in all matters affecting them, as laid down in Article 12(1) of the UNCRC. States must guarantee this right to a child. The living conditions of a diplomat child definitely

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[94] Several informants in the study on former Norwegian Foreign Service children referred to 'the contract' and how it was something abstract that came and took them away from the world they knew.

[95] M Ender, *Military Brats and other Global Nomads: Growing Up in Organisation Families* (Praeger, 2002).

[96] S Fish, 'Interpreting the variorum' in D Lodge and N Wood (eds), *Modern Criticism and Theory* (Pearson Education, 2008).

[97] Bjørnsen, above n 5.

[98] Wilkinson and Singh, above n 22.

[99] Lidén, Bredal and Reisel, above n 32.

affects the child. Online interaction and follow-up with TCK counsellors provide an opportunity for children's voices to be heard and documented, which is a barrier when they are living abroad. This is of particular concern for diplomat children. As governments are highly motivated to keep any potentially dramatic situations concerning diplomats away from the public eye, the legal agency of diplomat children can be compromised, and their voices go unheard. If the children's voices and circumstances were to be documented, this could help sending and receiving states to cooperate in defining a situation as one that concerns a child's right to care and protection, rather than becoming part of the retaliation game of international relations. In conjunction with a preventive bilateral or multilateral agreement being in place, the situation witnessed in the Netherlands should be possible to avoid in the future.

Conclusion

This article has aimed for a holistic and interdisciplinary understanding of the challenges diplomat children can face in the context of child protection, and what measures can be taken to address these challenges. Drawing on concepts of children's 'invisibility' as children who are 'unthought of' by systems, we have illustrated through a qualitative study how diplomat children, in line with other middle- and upper-class families, generally face 'invisible problems' at home. These are typically physical or emotional absence from parents; psychological and emotional abuse or neglect; and parents with mental illness or substance disorders. Moreover, a serving diplomat's 'duty to move' puts diplomat children in global serial migration, a situation of being 'out of sight, out of mind'. Child protection services are dependent on time, proximity, and accessibility to children in order to assess their well-being, yet diplomatic immunity denies them jurisdiction, making diplomat children 'untouchable cases'.

Our analysis of the legal cases involving a diplomat child and child protection showed the risk of invisibility of diplomat children's welfare to public authorities due to the sovereignty principle and diplomatic immunity. In the rare event that a case becomes visible, the realisation of diplomat children's rights effectively depends on the political climate of international relations. Where there is no trust between sending and receiving states, a child protection case can become a piece in a geo-political game of reciprocal retaliation and thus 'untouchable'. Where there is trust and cooperation between states, the child's right to protection can be assured, yet due to lack of jurisdiction, evidence of a diplomat child's situational circumstance may be limited, and the child's legal agency and voice remain compromised.

Whether children are subjected to physical violence or other forms of violence such as emotional neglect, nation states are under the obligation to protect them. With this in mind, we suggest legal, social, and educational measures to enhance visibility and transparency across borders. If sending and receiving states agree on international legal instruments that enhance visibility and transparency, hopefully this will effectively shrink the legal space in which the diplomat child is perceived as an 'untouchable case'. Employers who place children in this specific vulnerable situation, such as diplomatic services and international organisations, have added responsibilities to make sure these children are visible, approachable, and held in mind.