IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank) Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. **1:23-cv-00764** (ACR)

PROFESSOR YVES NOUVEL
INTERNATIONAL LAW EXPERT REPORT
ON SERVICE THROUGH DIPLOMATIC CHANNELS

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INTRODUCTION

I have been asked by Marks & Sokolov, LLC, on behalf of the Russian Federation, to opine as to whether the service of process documents (the "Service Documents") transmitted through diplomatic channels by the U.S. Department of State ("U.S. State Department") to the Washington, D.C. embassy (the "RF Embassy") of the Russian Federation ("RF") constitutes valid service of process under applicable treaties and customary international law. My professional opinion as an expert on international law is this does not constitute valid service.

QUALIFICATIONS

I am a professor of law at Panthéon-Assas University in Paris, where I teach International Economic Law, International Investment Law and International Trade Law. I have been full professor for 25 years and a member of the Paris Bar since 2005. My areas of expertise include International Law and Arbitration Law. My native language is French and I am fluent in English.[1] A copy of my Curriculum Vitae is attached.

I have an "Agrégation" in Public Law (qualification required to be certified to teach in universities), a Diploma for Advanced Studies in Philosophy from Sorbonne University, a Bachelor in International Economic Law and a Ph.D. in International Law from the Sorbonne Law School. I have been counsel in ICSID and UNCITRAL arbitration proceedings and an expert in international proceedings before French, British, Dutch and Swedish courts. I have also been a member of tribunals in international arbitration proceedings, including investment treaty arbitrations. I have written numerous articles on international law. A copy of my Curriculum Vitae is attached.

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[1] I certify that the translations of the excerpts of the authorities attached to the present opinion as Exhibits YN 8-10, 22, 41, 43-44, 49 and 54 described in "Annex 1/List of Exhibits" to the opinion, are true and accurate translations from French into English.

SUMMARY OF OPINION

The Service Documents transmitted through diplomatic channels by the U.S. State Department to the RF Embassy do not constitute valid service of process under applicable treaties and customary international law.

First, the 1961 Vienna Convention on Diplomatic Relations ("VCDR") does not permit service of Service Documents by the U.S. State Department on the RF Embassy.

Second, customary international law does not permit service of Service Documents by the U.S. State Department on the RF Embassy, as evidenced by the 2004 Convention on Jurisdictional Immunities of States and their Property ("UNCSI") and other sources.

Third, the service of Service Documents by the U.S State Department on the RF Embassy violates the VCDR Article 47(1) prohibition against discrimination, given the United States has served other States within their territory, but chose not to serve the RF within its territory.

Fourth, the rejection of Service Documents by the RF Embassy constitutes a valid rejection of service by the RF under customary international law, requiring the U.S. State Department to re-serve the Service Documents on the RF Ministry of Foreign Affairs in Moscow ("RF Ministry").

Fifth, U.S. diplomatic practices and statements support my opinion that service of the Service Documents by the U.S. State Department on the RF Embassy is not permitted by VCDR and customary international law.

DOCUMENTS REVIEWED

In addition to the authorities referenced in this report, I reviewed:

- U.S. State Department Note dated October 4, 2023 transmitting Summons, Petition to Enforce Arbitral Award and Standing Order in the present case (*JSC Oschadbank v. Russian Federation*, Case No. 23-cv-00764) (ECF 13);

- Embassy of the Russian Federation Note #299 rejecting the service on the Embassy and returning the documents to the U.S. Department of State ("Rejection Notice"), (ECF 19); and
- October 6, 2022 Declaration of Andrey Kondakov, filed in *Yukos Capital v. Russian Federation*, D.D.C. Case No. 1:23-cv-00764, ("Kondakov Declaration"), attached as Ex. 36 to Declaration of Thomas C. Sullivan filed contemporaneously with this report.

SOURCES OF CUSTOMARY INTERNATIONAL LAW UNDER U.S. LAW

I have been advised that the below reflects the position of U.S. courts on sources of customary international law. In drafting my opinion, I have taken these sources into account because they are applicable to both international and American legal orders.

In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), the U.S. Supreme Court observed "the law of nations … may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 160-61. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("Trustworthy evidence of what [international] law really is" can be found in "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.") (*quoting The Paquete Habana,* 175 U.S. 677, 700 (1900)).

U.S. courts look to the "current state of international law by consulting sources identified by Article 38 of the Statute of the International Court of Justice ("ICJ Statute"), to which the United States and all members of the United Nations are parties." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 175 (2d Cir. 2009) (*citing Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003) ("Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law."). These sources consist of:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations; and

(d) …. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Abdullahi, 562 F.3d at 175 (*quoting* ICJ Statute, art. 38(1), 59 Stat. 1055, 1060, T.S. No. 993 (1945)).

In preparing my opinion, I have sought sources of this nature in order to provide an answer in international law to the question on which I have been asked to opine.

DISCUSSION[2]

I. THE VCDR PROHIBITS SERVICE ON AN EMBASSY THROUGH DIPLOMATIC CHANNELS

A. The United States Is Bound by the VCDR as a Signatory

The 1961 Vienna Convention on Diplomatic Relations ("VCDR"), which was ratified by the U.S. on November 13, 1972 and by the RF on March 25, 1964, has no fewer than 193 State parties. VCDR, Ex. YN 29. The U.S. State Department has emphasized the binding nature of the VCDR, stating:

> The United States has clear international legal obligations regarding diplomatic and consular property. These obligations are critically important. In order effectively to hold other countries to their obligations under the VCDR, the United States must adhere to its own obligations.

U.S. State Dep't Stmt. of Interest filed in *Flatow v. Repub. of Iran*, No. 97-396 (D.D.C.), ECF 27, Ex. YN 2.[3]

VCDR Article 22, which utilizes the term "mission" to include embassies, provides:

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[2] Unless otherwise stated, all emphases are added, and citations, quotations marks, footnotes, ellipses and brackets are omitted.

[3] The Statement of Interest is reproduced in "Contemporary Practice of the United States Relating to International Law," Am. J. Int'l. L., vol. 93, No 1, p.184 (1999), Ex. YN 2.

> 1. ***The premises of the mission shall be inviolable.*** The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

VCDR, art. 22, Ex. YN 29.

Under the so-called "long diplomatic channel," service documents are delivered to the respondent State's Ministry of Foreign Affairs via the embassy of the forum state abroad. In U.S. practice:

> Transmittal by 'diplomatic channels' means that the [U.S. State Department] pouches a copy to the U.S. embassy in the foreign state, which then prepares a diplomatic note of transmittal to deliver with the other papers to the appropriate official at the foreign state's ministry of foreign affairs. The [U.S. State] Department then returns to the court the diplomatic note used in transmitting the papers.

A. L. George, "A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act," 19 Int'l L. 49, p.54 f.n.35 (1985), Ex. YN 34. As explained below, the VCDR does not permit the U.S. State Department to transmit Service Documents to the RF through the RF Embassy.

B. VCDR Article 22(1) Prohibits Service on Embassies Because "Premises of the Mission Are Inviolable"

1. Inviolability of Embassy Premises Is a Fundamental VCDR Principle

The sanctity of the principle of inviolability has been emphasized by the International Court of Justice ("ICJ"), which has stated "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies[.]" December 15, 1979 Order in *U.S. Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), 1979 I.C.J. 19,

¶38, Ex. YN 25. The ICJ has held the VCDR "not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others … from doing so…." December 19, 2005 Judgment in *Armed Activities on the Territory of the Congo* (*Congo v. Uganda*), 2005 I.C.J. 278-279, ¶342, Ex. YN 26. Numerous decisions apply this principle of inviolability, establishing it as fundamental customary international law.

The "universal definition of 'inviolability' is freedom from any act of interference on the part of the receiving state." Judgment in *R. (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs (No 3)*, Court of Appeal, May 23, 2014, ¶61 [2014] EWCA Civ 708 (2014), Ex. YN 4. Or to express it another way: "'Inviolability' … means freedom from official interference." F.A. Mann, "Inviolability and Other Problems of the Vienna Convention on Diplomatic Relations," *Further Studies in International Law*, Clarendon Press, Oxford, 1990, p.337, Ex. YN 50.

Service of process on an embassy interferes in the activities of the diplomatic mission. The United States, as the receiving State, has no authority over matters relating to the organization of a sending State's embassy. The receiving State cannot assign tasks to an embassy that it is not authorized by the sending State to carry out – *i.e.*, to be the recipient of judicial acts directed against the sending State – unless expressly authorized to do so by the sending State. It is for this reason that courts expressly insist that the receiving State give its consent to this method of service. In this way, the Paris Court of Appeal, summarizing the position of the Court of Cassation 2019 (see below Ex. YN 8), stated: "[N]otification of a document to a State by the 'short' consular or diplomatic channel [to a foreign mission] is only possible if the recipient State does not object." Paris Court of Appeal, Pôle 6, Ch. 9, September 21, 2022, no. 18/03984, *Ms. [W][S][K] v.*

Republic of South Africa (Department of International Relations and Cooperation of the Republic of South Africa), Ex. YN 43.

The U.S. State Department recognizes the intrusion created by this type of service, pointing out:

> The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process. The Department of State, as in the case of any other foreign office, may not impute such authority to the diplomatic mission of the sending state.

August 10, 1964 Ltr. from the Acting Legal Adviser Meeker to Asst. Atty. Gen. Douglas ("Meeker Ltr."), Am. J. Int'l L, at p.111 (1965), Ex. YN 53.

2. An Embassy Is Not the Same as the Ministry of Foreign Affairs of the Sending State for Judicial Acts Against the Sending State

While VCDR Article 3(a) states that one of the functions of a diplomatic mission is "[r]epresenting the sending State in the receiving State," this function does not mean the sending State is to be considered the same as the mission representing it, in particular with regard to capacity to receive a judicial act against it. This is evidenced by the VCDR itself which establishes customary international law on this point. An embassy only represents the State in the functions assigned to it, and cannot be held responsible for the sending State in this activity. Numerous courts have sustained this interpretation evidencing its acceptance as customary international law.

United Kingdom: In *Kuwait Airways Corp. v Iraqi Airways Co.*, House of Lords, 24 July 1995, [1995] 3 All ER 694, Lord Goff of Chieveley confirmed this point in vivid terms, citing with approval Evans J.: "Service is effected by transmission *to* the Ministry and takes effect when the document is received *at* the Ministry. In no sense is a diplomatic mission in a foreign state the same as the Ministry of Foreign Affairs of the sending state." *Id.* at 702 (emphasis in original), Ex. YN 6. Lord Goff added: "The delivery of the writ by the Foreign and Commonwealth Office to

the Iraqi embassy was at best a request to the Iraqi embassy to forward the writ on behalf of the Foreign and Commonwealth Office to the Iraqi Ministry of Foreign Affairs" and "[o]n the evidence, that was not done. It follows that the service of the writ on Iraq was never effected…." *Id*. at 703.

Austria: The Austrian Supreme Court concluded service had failed because the Embassy had indicated that it was not empowered to represent its sending State with regard to the reception of judicial acts:

> The attempt made by the Federal Chancery (Foreign Affairs) to effect personal service of the complaint together with the application for an interim injunction on the Legation of the Republic of Indonesia in Vienna failed because the Legation made it known that it was not empowered to represent … Indonesia in a civil suit before an Austrian court, or to accept judicial documents in connection with private litigation.

Neustein v. Republic of Indonesia, 65 I.L.R. 3, p.8 (Austria Supreme Court 1958), Ex. YN 35.

Switzerland: The Geneva Court of Justice found the same, holding "the Rental Housing Tribunal (*Tribunal des baux à loyers*) violated Articles 22(1) and 30 of the Vienna Convention by having procedural documents notified directly to the inviolable seat of the mission instead of proceeding against the State through diplomatic channels." December 7, 1984 Judgment, *S.I. Champel Bellevue A.S.A. v. Etat de Genève*, A.S.D.I. 1986, p.98, Ex. YN 54.

These, and many other decisions, show the VCDR, as customary international law, does not permit service on embassies, absent consent of the receiving State.

3. Service of Process Documents on an Embassy Would Be a Sovereign Act Infringing Upon Inviolability of Embassy Premises

The most widely respected experts in the field of diplomatic and immunity law agree that service of a judicial document on an embassy infringes its inviolability. The author of a landmark diplomatic law textbook explains:

> International law prohibits the serving of writs, summonses, orders or processes within the premises of a diplomatic mission. This rule derives from the principle of inviolability and from the rule we find in [VCDR] Article 22 [¶]1 which forbids the agents of the receiving State or any of its political subdivisions from entering the mission.

G.E. Do Nascimento e Silva, *Diplomacy in International Law*, Sijthoff, Leiden 1972, p.97, Ex. YN 56.

As noted by a leading scholar in the realm of international immunity law:

> The presence of the foreign States' diplomatic mission within the forum territory cannot qualify as legal presence within the jurisdiction for purposes of service of process or submission to proceedings. Service of process is an exercise of sovereignty and to perform such an act in relation to diplomatic premises is an infringement of the inviolability of the premises of the diplomatic mission contrary to Article 22 of the Vienna Convention on Diplomatic Relations.

H. Fox, *The Law of State Immunity*, Oxford University Press, pp.179-180 (2002), Ex. YN 48.

The *Note Verbale* at issue states it "constitutes transmittal of these documents to the Russian Federation as contemplated in Title 28, [U.S.] Code, Sections 1608(a)(4) and (e)." ECF 58-1, p.4. In so saying, the *Note Verbale* presumes that the RF Embassy has been authorized to receive the documents attached to it, even though the Embassy can only act in this matter in the name and on behalf of the RF if it has been invested with this power by the RF. The U.S. State Department's action thus undermines the RF Embassy's freedom to act in accordance with the instructions of the sending State. It is not for the home State to dictate the functions of the embassy, which performs essential sovereign functions, but for the sending State (RF) to do so. As a Dutch Court has stated, "[e]stablishing, maintaining and running embassies is an essential part of the function of government[.]" *State of the Netherlands v. Azeta BV*, District Court of Rotterdam, 14 May 1998, Neth. Yb. Int'l L., vol XXXI, 2000, p.266, 3.2 Ex. YN 24.

C. The VCDR Is Based Upon the Principle of *Ne Impediatur Legatio*, Preventing Hindrance to Performance of Functions by an Embassy

The VCDR's underlying principle to protect the functioning of state missions is expressed in the maxim *ne impediatur legatio*, which has been recognized as customary international law by many national courts. "The international legal standard *ne impediatur legatio* excludes such [enforcement and constraining] measures to the extent that through them the fulfillment of diplomatic functions could be adversely affected…." *Anonymous Landlord v. the Republic of the Philippines*, December 13, 1977, 38 Federal Constitutional Court Z.a.ö.R.V. 1978, 278, Ex. YN 5. The Belgian Court of Cassation held that "[according to] the customary international rule *ne impediatur legatio* … the functioning of a diplomatic mission may not be impeded." *Argentine Republic v. NML Capital Ltd.*, November 22, 2012, n° C.11.0688.F, p.17 (Court of Cassation of Belgium), Ex. YN 22.

This principle is enshrined in the VCDR's fourth recital of the Preamble, which provides that the purpose of diplomatic privileges and immunities "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions." VCDR, Preamble, Ex. YN 29. VCDR Article 25 stipulates that "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." VCDR, art. 25, Ex. YN 29. The last recital of the Preamble stresses that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention." VCDR, Preamble, Ex. YN 29.

Far from granting "full facilities for the performance of the functions of the mission" as required by VCDR Article 25, the U.S. State Department is undermining the RF Embassy's mission to represent the RF if the Embassy is deemed authorized to accept service. The duty of the receiving State is to ensure that foreign embassies can freely exercise their functions. By

ascribing to the RF Embassy a role – acceptance of service of process – which does not fall within the Embassy's domain, the United States infringes upon the Embassy's free exercise of its functions.

In conclusion, service on the RF Embassy without its consent violates the inviolability of the mission under the VCDR and customary international law emanating from it.

II. SERVICE ON AN EMBASSY THROUGH DIPLOMATIC CHANNELS VIOLATES CUSTOMARY INTERNATIONAL LAW

A. International Conventions and the Laws of Many of Their State Members Require Service on Their Ministry of Foreign Affairs

1. The 2004 UNCSI and the European Court of Human Rights

In 2004, the UN General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property ("UNCSI"), Ex. YN 30. UNCSI Article 22 "Service of Process" provides:

> 1. Service of process by writ or other document instituting a proceeding against a State shall be effected:
>
>   (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
>
>   (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of forum; or
>
>   (c) in the absence of such a convention or special arrangement:
>
>   (i) ***by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned***; or
>
>   (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.
>
> 2. Service of process referred to in paragraph 1(c)(i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

UNCSI art. 22., p.10 Ex. YN 30.

The European Court of Human Rights ("ECtHR") recognized: "State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the [UNCSI.]" *Wallishauser v. Austria*, Application No. 156/04 (ECtHR, Nov. 19, 2012), ¶30. Ex. YN 28. In that case, the ECtHR held the rules on service of process through diplomatic channels codified in the UNCSI Articles 22(1)(c)(i) and 22(2) are binding on the United States as customary international law even though the U.S. has not yet ratified the UNCSI. The Court observed:

> During the drafting process the United States commented on … Article 22 [and] did not object to the rules enshrined in Article 22(1)(c)(i) and Article 22(2).… [A]ccording to a well-established principle of international law a rule enshrined in a treaty could be binding on a State as a rule of customary international law even if the State in question had not ratified the treaty, provided that it had not opposed it either…. While [the U.S.] has not signed or ratified the [UNCSI], it did not vote against it.

Id. at ¶¶39, 66, 69, Ex. YN 28.

UNCSI Articles 22(1)(c)(i) and 22(2) represent a very strong convergence of national practices, identified and affirmed by the UN Special Rapporteur as early as 1985:

> By definition, a foreign State is physically outside the territory of the forum State, and extraterritorial service of process is difficult and should be done through proper diplomatic channels. In this connection, there is growing practice – endorsed by recent national legislation – in support of the proposition that service of any writ or other document instituting proceedings against a foreign State should be transmitted through the Ministry of Foreign Affairs of the forum State to the Ministry of Foreign Affairs of the State against which the proceeding is instituted, and that service is deemed to have been effected when the writ or document is received at the Ministry.

Seventh Report on Jurisdictional Immunities of States and Their Property, S. Sucharitkul, Special Rapporteur, ILC Yb. 1985, vol. 2(1), p.45, ¶126. Ex. YN 31. By 2004, when the UNSCI was adopted, this "growing practice" of requiring service on the Ministry of Foreign Affairs, not on an embassy, had become customary international law.

2. Other Conventions and National Laws

As shown below, other international conventions and the laws of many states support the rule of customary international law that service on a foreign state shall be affected on its Ministry of Foreign Affairs rather than on its missions abroad.

a) The 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (658 U.N.T.S. 165)

Articles 8(1) and 9 of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"), which was ratified by the United States on August 24, 1967 and by the Russian Federation on May 1, 2001, while not primarily concerned with service on a foreign state, mention the possibility of communication through diplomatic channels. The application guidelines of the Hague Service Convention are clear:

> Under [diplomatic] channels, the forwarding authority of the State of origin sends the request and document to be served to its Ministry of Foreign Affairs (depending on the State, this may have to be done through the Ministry of Justice); the Ministry of Foreign Affairs then sends the documents to its diplomatic or consular representation in the State of destination, which then sends it to the Ministry of Foreign Affairs of the State of destination…

Practical Handbook on the Operation of the Service Convention, Hague Conference on Private International Law: Permanent Bureau, 2016, ¶239, Ex. YN 42.

Significantly, the RF affirmed international obligations regarding transmission to a foreign state within the meaning of the Hague Service Convention in a declaration which rejected service by mail, diplomatically stating:

> It is highly desirable that documents intended for service upon the Russian Federation, the President of the Russian Federation, the Government of the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation are transmitted through diplomatic channels, i.e. by Notes Verbales of diplomatic missions of foreign States accredited in the Russian Federation.

RF Declaration dated July 19, 2016, Ex. YN 39.

The obvious purpose of its declaration was to confirm service under the Hague Service Convention was to be made on its Ministry of Foreign Affairs.

b) The 1972 European Convention on State Immunity

The agreement of the European States is along the same lines as the UNCSI, evidencing customary international law:

> 1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.
>
> 2. The competent authorities of the State of the forum shall transmit … the original or a copy of the document by which the proceedings are instituted …, through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state….
>
> 3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.

European Convention on State Immunity, art. 16 (May 1972), Ex. YN 33.

While the Explanatory Report to the European Convention does not specify what is meant by "diplomatic channels," the only channel envisaged in the commentary is through the diplomatic mission of the forum State:

> When transmitting a document instituting proceedings to the Foreign Ministry, the diplomatic mission of the State of the forum should ensure that it provides the information necessary to enable the authority which is competent to represent the defendant State to be identified. If necessary, the diplomatic mission may be asked to give additional information.

European Convention on State Immunity, Explan. Rpt., Comments on Article 16, p.14, para. 61 (May 1972). Ex. YN 33.

c) United Kingdom State Immunity Act

The national legislation of many states is modeled on the United Kingdom State Immunity Act of 1978. The UK State Immunity Act and the laws of other States modeled on it are strong evidence of customary international law. Section 12 of the UK Act provides:

> *Service of process and judgments in default of appearance*: (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

UK State Immunity Act 1978, s. 12(1). Ex. YN 7.

d) Other Legislation Modeled on UK State Immunity Act

The terms of the UK legislation are reproduced in their entirety in: Singapore's State Immunity Act, 1979, s. 14(1) Ex. YN 11; Antigua and Barbuda's State Immunity Act, s. 14(1), Ex. YN 12; Pakistan's State Immunity Ordinance, 1981, s. 13(1), Ex. YN 13; South Africa's Foreign State Immunities Act, 1981, s. 13(1) Ex. YN 14; Malawi's Immunities and Privileges Act, s. 14(1), Ex. YN 15; and to a lesser extent in the Canada's State Immunity Act, s. 9(2), Ex. YN 16 ("[A]nyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.")

e) Australia State Immunity Act

Australia's Foreign States Immunities Act, 1985, Section 24, entitled "Service through the diplomatic channel," states: "Initiating process that is to be served on a foreign State may be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department." Ex. YN 21.

f) China State Immunity Act

The People's Republic of China, Foreign State Immunity Law 2023, Article 17, stipulates:

> The courts of the [PRC] shall effect service of writs of summons or such other litigation documents on a on a foreign state in accordance with:
>
> (1) the means specified in international treaties to which the foreign state and the [PRC] are contracting or acceding parties; or

> (2) other means accepted by the foreign State and not precluded by the law of the [PRC].
>
> Where the service cannot be effected by means specified in the previous paragraph, service may be effected by transmitting a diplomatic note to the diplomatic authorities of the foreign State, and the service shall be deemed to have been effected on the date of the issuance of the diplomatic note.

Ex. YN 20.

g) French Code of Civil Procedure

The French Code of Civil Procedure, Article 684(2) provides:

> A paper intended to be served on a foreign State … is delivered to the Public Prosecutor's Office and transmitted through the intermediary of the Minister of Justice for service by diplomatic channel, unless by virtue of a European regulation or an international treaty transmission can be made by another channel.

French Code of Civil Procedure, art. 684(2), Ex. YN 10.

The French Circular on International Service, drawn up by the Ministry of Justice, provides that service of process through diplomatic channels is based on the following transmission circuit: "Bailiff or Registry (in France) → Competent French Public Prosecutor → Chancellery → Ministry of Foreign Affairs in France → French Embassy abroad → Ministry of Foreign Affairs of the country of destination…" Circular CIV no. 2005-20D3 of 1st February 2006. Ex. YN 44.

h) Israel Foreign State Immunity Act

Israel's Foreign States Immunity Law, 2009, Section 13(a) provides: "An action brought against a foreign state with the object of commencing legal proceedings against it or a judgment given against it in default of defence shall be served through the Ministry of Foreign Affairs, on the Foreign Office of the foreign state." Ex. YN 17.

i) Japan State Immunity Act

Japan's Civil Jurisdiction with respect to Foreign States, 2009, Article 20(2) states: "[S]ervice is deemed to have been effected when the body of the foreign state (for those other than a state, the state to which they belong) that corresponds to the Ministry of Foreign Affairs has received the complaint…." Ex. YN 19.

j) Spain State Immunity Act

Spain's Organic Law 16/2015 on the Privileges and Immunities of Foreign States, Article 54(1) provides: "The Ministry of Foreign Affairs and Cooperation shall forward the summons or notification of the court to the corresponding Spanish diplomatic mission or permanent representation, for the purposes of its transfer to the Ministry of Foreign Affairs … of the foreign State…." Ex. YN 18.

In sum, this whole *corpus* of conventions (particularly Article 22(1)(c)(i) and 22(2) of the UNCSI, which has a codifying character) and national laws clearly point to a concordant practice: the diplomatic channel is understood in matters of service of judicial documents to mean the channel whose addressee is the Ministry of Foreign Affairs of the State concerned by the document. This strong convergence of practice establishes and reflects customary international law.

B. National Judicial Practices, Including in States Without Special Legislation, Require Service on Ministry of Foreign Affairs

In countries that have not made special provisions in this area (and in those that have), judicial practice has adopted the same solution. For example:

Belgium: Belgian practice has been summarized as follows: "Judicial paper intended for foreign States are sent to the government concerned via the Ministry of Foreign Affairs, which forwards them through the Belgian embassy accredited to the State concerned (with a copy for

information purposes to the diplomatic post of that State in Brussels)." J. Salmon, *Manuel de droit diplomatique*, 1994, Bruylant, n° 302, p.196, Ex. YN 49.

France: Unless expressly agreed otherwise by the foreign State, the "diplomatic channel" to be followed is that corresponding to the "long circuit." Court of Cassation, 2nd civ., no. 16-25.266 (Feb. 21, 2019),[4] Ex. YN 8. This solution was taken up more recently by the Paris Court of Appeal:

> Moreover, as the Republic of South Africa justly observed, notification of a document to a State by the 'short' consular or diplomatic channel is only possible if the recipient State does not object. However, this is not the case with the Republic of South Africa, in that it did not formally acknowledge receipt of the summonses of September 1, 2014 and August 27, 2015, and, moreover, lodged conclusions of nullity for non-compliance with the diplomatic channel as soon as it appeared before the conciliation board.

Ms. [W][S][K] v. Republic of South Africa (Department of International Relations and Cooperation of the Republic of South Africa), Paris Court of Appeal, Pôle 6, Ch. 9, no. 18/03984 (September 21, 2022), Ex. YN 43.

Germany: German courts have repeatedly affirmed the impossibility of service on foreign States through their embassies in Germany: "Transmission of the writ was to be made through the German Embassy in Moscow. Direct transmission to the defendant through its Ambassador in the Federal Republic [Germany] as representative organ was inadmissible." Provincial Court (*Landsgericht*) of Bonn, February 11, 1987, I.L.R. vol. 80 (1989), pp.367, 370, Ex. YN 45.

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[4] The French Court of Cassation has also recognized that the State concerned by the judicial act has a power of waiver with respect to service of process. Court of Cassation, 1st civ., no. 04-13.108 (Feb. 6, 2007). Ex. YN 9. If a foreign state could be seen as the owner of a right, then this is a practice motivated by a sense of legal duty, rather than of diplomatic courtesy, which demonstrates that French legislation was designed to give effect to international rules of law. This is also true of other national laws: "It is clearly the intention of section 12(1) [U.K. State Immunity Act] that the method of service shall be out of the jurisdiction. In doing so it is clearly in line with international law." H. Fox, *The Law of State Immunity*, 2002, Oxford University Press, p.179, Ex. YN 48.

In sum, the rejection (save in exceptional or consensual circumstances) of making the mission of the foreign state the addressee of a judicial act demonstrates that the practice of providing for the long diplomatic channel with the Ministry of Foreign Affairs as the final addressee is mandatory.

C. Customary International Law, as Codified by the 2004 UNCSI Article 22 and Evidenced by Other Sources, Is Consistent With the U.S. Position Adopted In *Republic of Sudan v. Harrison*

In *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019), the U.S. Supreme Court held that service by mail to the embassy of a foreign state is not permitted under the U.S. 1976 Foreign Sovereign Immunities Act ("FSIA"). The United States submitted *amicus curiae* briefs in support of that position to the U.S. Second Circuit Court of Appeals, and later, to the U.S. Supreme Court. In both *amicus* briefs, the U.S. relied on the VCDR, which "codified longstanding principles of customary international law with respect to diplomatic relations." U.S. Amicus Br. in *Harrison*, No. 16-1094, p.11 (U.S. May 22, 2018) (*quoting 767 Third Ave. Assocs. v. Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir. 1993)). Additionally, the U.S. relied on the principles of customary international law pertaining to sovereign immunities, in particular as codified by the 2004 UNCSI Article 22 and evidenced by other sources, as follows:

> That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33 (same).

U.S. Amicus Br. in *Harrison*, Case 14-121, ECF 101 (2d Cir. Nov. 6, 2015).

Accordingly, the principles of international law codified by the 2004 UNCSI Article 22 and other sources cited by the U.S., including requiring service of process through diplomatic channels to the Ministry of Foreign Affairs, are consistent with the U.S. position stated in *Harrison*

that service on an embassy is improper. As the U.S. Supreme Court noted, "the [U.S.] State Department has reiterated this view in *amicus curiae* briefs," and given that the U.S. State Department "helped to draft the FSIA's language, … we therefore pay special attention to the Department's views on sovereign immunity." *Harrison*, 139 S. Ct. at 1060-61.

III. SERVICE ON THE RF EMBASSY VIOLATED VCDR ARTICLE 47(1)'S PROHIBITION AGAINST DISCRIMINATION

VCDR Article 47(1) states: "In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States." VCDR, art. 47(1). In the course of the VCDR codification, the International Law Commission stated that the rule of non-discrimination "is a general rule which follows from the equality of States." Commentary on Article 43, ILC Yearbook 1958, vol. 1, p.251, ¶44, Ex. YN 32. By entering into an undertaking prohibiting discrimination, "Receiving States are therefore under an obligation to provide uniform treatment to all missions they have agreed to receive." M. Hardy, *Modern Diplomatic Law*, Manchester University Press, p.84 (1968), Ex. YN 47. A breach of equality in the treatment of the diplomatic mission is an infringement on both the VCDR and customary principles governing relations between States.

First, service of documents by the United States on other States shows that certain diplomatic missions established on American territory have been treated more favorably than the RF Embassy. By refraining from serving documents on some embassies, and, instead, serving them via U.S. embassies on the territory of the States involved, the United States caused a breach in equal treatment of the RF. Even a brief review of U.S. State Department practice shows that the inviolability and *ne impediatur legatio* norms have been applied more favorably to other embassies recently and historically.

Germany: In *Rukoro v. Fed. Rep. of Germany*, 1:17-cv-00062 (S.D.N.Y.), the U.S. Embassy in Berlin transmitted service documents to the German Federal Foreign Office under cover of diplomatic note no. 479:

> The Embassy of the United States of America presents its compliments to the Auswärtiges Amt and has the honor to refer to the lawsuit *Rukoro* ..., which is pending in the United States District Court, Southern District of New York. The Federal Republic of Germany is a defendant in this case. The Embassy transmits an amended summons in a civil action, class action complaint, and notice of suit herewith. The U.S. District Court has requested the transmittal of these documents. This note constitutes transmittal of these documents to the Federal Republic of Germany as contemplated in Title 28, United States Code, Section 1608(a)(4).

Rokuro at ECF 27, p.4.[5]

Tajikistan: In *Finamar Invs. Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 116 (S.D.N.Y. 1995), the "petitioner attempted to serve respondent through diplomatic channels, as provided by § 1608(a)(4), by sending the pleadings to the U.S. Secretary of State for transmittal to the U.S. Embassy in Dushanbe, Tajikistan, and ultimately, to Tajikistan's Ministry of Foreign Affairs." *Id.* at 116. Thereafter "the U.S. State Department notified petitioner that the documents, translated into Russian, had been received by the embassy for presentation to the Minister of Foreign Affairs in Tajikistan." *Id.*

Turkey: In *Ghazarian v. Republic of Turkey*, 2021 U.S. Dist. LEXIS 242545 (C.D. Cal. Mar. 16, 2021), "[t]he United States Embassy in Ankara, Turkey transmitted a summons, complaint, notice of suit, and translations to the Ministry of Foreign Affairs of the Republic of Turkey via a diplomatic note." *Id.* at *21.

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[5] *See also* S. Talmon, "Suing Germany Over the Genocide in Namibia in U.S. Courts: the Pitfalls of Serving a Summons on the German Government," *German Practice of International Law*, pp.4-5 (Nov. 23, 2017), Ex. YN 52.

Second, additional evidence of discrimination in this case is that the United States has served the RF in Moscow many times in the past. As set forth in the Kondakov Declaration, the RF was served at its Ministry of Foreign Affairs at least four times between 2004 and 2018. If the United States could serve the RF in Moscow as recently as 2018, it could have served the RF in Moscow in this case.

Third, these breaches of equal treatment are not a mere formality, as the U.S. State Department admits: "[A]s a practical matter, service upon a foreign mission here would disadvantage many foreign states in the litigation of these matters in view of the requirement that a response to the complaint must be made within sixty days to the court." U.S. State Department Memorandum on Judicial Assistance under the Foreign Sovereign Immunities Act and Service of Process upon a Foreign State (October 5, 1979), 18 I.L.M. 1177, 1180 (1979), Ex. YN 1. Considering the obvious and potentially serious consequences of this difference in treatment, there has been a serious breach of the principle of non-discrimination with regard to the RF Embassy. Indeed, the U.S. State Department observed during Senate hearings on the VCDR that Article 47(1) "prescribes a general rule of non-discrimination in applying provisions of the Convention." Hearing on Vienna Convention, S. Hrg. 1st Sess., 89th Cong., 1st Sess. at p.67 (1965), Ex. YN 3.

Thus, service on the RF Embassy violated the principle prohibiting discrimination.

IV. SERVICE ON AN EMBASSY IS INEFFECTIVE UNDER VCDR ARTICLE 22(1) WHEN THE HEAD OF MISSION RETURNS IT

A. VCDR Article 22(1) Requires "Consent of the Head of Mission"

The inviolability of diplomatic missions is a fundamental and longstanding principle of international law which includes a prohibition on serving process on an embassy. This principle has been codified in the VCDR Article 22(1), which provides: "The agents of the receiving State may not enter them, except with the consent of the head of the mission." Ex. YN 29.

The "head of the mission" is a defined term in the VCDR, denoting the foreign sovereign's Ambassador or *chargé d'affaires* (an individual who heads an embassy in the absence of the ambassador). VCDR, art. 14(1)(a), Ex. YN 29. There is no ambiguity that the "consent" must come from the "head of mission" and cannot be substituted by the consent of a mailroom employee to overcome the mission's inviolability under the VCDR. Therefore, under the VCDR, only the head of mission may consent to entry and receipt of documents by the receiving State. The Rejection Notice rebuts any possible interpretations that acceptance of the delivery in the mail room evidenced a "consent of the head of the mission" to enter the embassy, as required by the VCDR.

B. The RF's Rejection of Service Complies With Customary International Law

The Embassy's rejection is an expression of its lack of authority to receive judicial documents concerning the RF. The reply to the notification states: "Nothing in this note may be construed as confirmation of proper service of documents or proper notification of the Russian Federation, the Government of the Russian Federation or the relevant executive authorities of the Russian Federation, its individuals and legal entities." Ex. YN 46. The Embassy has thus confirmed its lack of power to effectuate receipt of judicial documents directed against the RF, and it has made this known to the State Department.

The RF Embassy's rejection is in line with the international law recognized by specialists: "The mission may not receive these documents [pleadings] even if they are sent by a simple registered letter, because the prohibition referred to in article 22 §1 [of the VCDR] is less the presence of an official of the receiving State who could enter a foreign embassy in a perfectly legitimate manner to seek a visa or deposit an official envelope, for example, than the command which the document carries." J. Salmon, *Manuel de droit diplomatique*, 1994, Bruylant, n° 302

p.195, Ex. YN 49. In the present case, the violation of inviolability derives firstly from the U.S. State Department's *Note Verbale* itself, which "requests" a specific performance from the embassy, namely that the enclosed papers "be forwarded to the appropriate authority of the Russian Federation," all this accompanied by a threat that if the defendant RF fails to comply with a pleading deadline, "the defendant risks the possibility of having judgment entered against it without the opportunity to present arguments or evidence on its behalf." ECF 58-1, pp.1-2.

C. Mere Acceptance by a Clerical Employee Does Not Establish "Consent of Head of Mission"

The VCDR contains guidance regarding the "members of the staff of the mission," which includes the "members of the diplomatic staff, of the administrative and technical staff and of the service staff." VCDR, art. 1(c). Ex. YN 29. The "administrative staff" is employed in the "administrative … service of the mission." *Id.*, art. 1(f). Ex. YN 29. The individual receiving the mail is not the "head of the mission" or even a member of the diplomatic staff, and possibly not a national of the foreign State at all. Such an individual is neither competent nor authorized to make decisions regarding acceptance of legal process on behalf of the foreign State. The clerical personnel signing for confirmation of delivery, without knowing the contents, cannot establish a "consent" of the head of mission, and is obviously at odds with the VCDR.[6]

[6] *See, e.g., Sabbaugh v. United Arab Emirates,* 2002 U.S. Dist. LEXIS 26380, at *6 (D. D.C. 2002) ("The Court is not persuaded that plaintiff can satisfy the strict requirements for service on a foreign sovereign under §1608 merely by having its process server procure the consent of a low-level official at the time of service" and it "therefore finds that the Embassy was not properly served … under §1608 of the FSIA.").

V. U.S. PRACTICE AND STATEMENTS SUPPORT THE CONCLUSION THAT SERVICE ON EMBASSIES IS NOT PERMITTED BY CUSTOMARY INTERNATIONAL LAW

In understanding the meaning of the VCDR and customary international law, it is particularly relevant to consider statements by the U.S. State Department and the position of the United States and its courts, which fully establish that service on an embassy is not permitted under the VCDR or customary international law.

A. The United States' Consistent Position That Service May Not Be Made on Embassies

Long ago, the U.S State Department discussed problems associated with service on embassies, explaining:

> In several such cases the sovereign immunity of the United States has been claimed through diplomatic channels without authorization from the Department and/or the notice of suit has been returned without informing Washington, with the result that default judgments have been entered against the United States Government or its agency concerned.

U.S. State Dep't 6/16/61 Instr. to Am. Diplo. P, Am. J. Int'l L. 56, no. 2, p.532 (April 1962), Ex. YN 55. This mode of service risks serious legal difficulties, of which the U.S. State Department is well aware, having warned against them itself.

1. United States Caselaw

In *Hellenic Lines. Ltd. v. Moore,* 345 F.2d 978 (D.C. Cir. 1965), the U.S. Marshals Service refused to serve a summons addressed to the Ambassador of the Republic of Tunisia because of the risk of violating 22 U.S.C. §§252 and 253, which make it a crime to violate diplomatic immunity. The Court, in ruling such service impermissible, initially observed:

> We have never decided whether [the statute] is violated by service of process on a diplomatic officer in an attempt to join, not him, but his sending state. There is little authority in international law concerning whether service of process on a diplomatic officer as an agent of his sending country is an 'attack on his person, freedom or dignity' prohibited by diplomatic immunity.

Hellenic Lines, Ltd. 345 F.2d at 980.

The Court then carefully recalled the purposes of the VCDR, namely to "contribute to the development of friendly relations among nations" and "to ensure the efficient performance of the functions of diplomatic missions." *Id*. (*quoting* VCDR, preamble). The Court requested the views of the U.S. State Department "concerning the effect of service in this type of case on international relations and on the performance of diplomatic duties," and the answer was clear that such "service would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions." *Hellenic Lines, Ltd.* 345 F.2d at 980. The Court concluded: "[T]he purposes of diplomatic immunity forbid service in this case." *Id.* at 980-81.

Most recently, in the *Harrison* case, described above, the U.S. Supreme Court reviewed statements by the U.S. State Department and concluded that service by mail on embassies may violate the VCHR, and thus held that the FSIA did not permit service on the embassy. The United States' highest court has thus repeatedly recognized that permitting service on foreign embassies would wreak havoc.

2. U.S. State Department Statements

The hindrance to embassy operations is reinforced by the time limits within which transmittal is to produce legal effects. In this respect,

> The United States has consistently maintained that, for service to be considered valid under customary international law, a state must be afforded a period of at least sixty days, from receipt of notice that litigation has been brought against it in foreign court, before an initial response to the court must be made.

D. P. Stewart, "The UN Convention on Jurisdictional Immunities of States and their Properties," 99 Am. J. Int'l L. 194, 209, f.n. 83 (2005), Ex. YN 51.

The U.S. State Department itself recognizes the difficulties imposed on embassies to take all necessary steps to meet this deadline:

> Since it would take days or even weeks before the documents could be sent by the foreign embassy in Washington to the appropriate officials of the foreign government, most likely in the foreign ministry, they would be sorely pressed for time to answer within the period prescribed by statute.

State Dep't 10/5/79 Memo on Judicial Assistance under the FSIA, 18 *I.L.M.* 1177, 1180 (1979), Ex. YN 1.

Even before FSIA, the U.S. State Department made this position publicly known when the question arose in U.S. courts:

> ***The Department would not, in the absence of express statutory or treaty provision, attempt to transmit the summons by an official diplomatic note to the embassy of a sending state, unless the embassy indicated a willingness to accept the summons.***

Meeker Ltr., p.110, Ex. YN 53.

While FSIA §1608(a)(4) makes no mention of service on Foreign Ministries, it immediately follows §1608(a)(3), which does. The U.S. State Department advised:

> [T]he express language of the statute as well as the legislative history makes it clear that ***the statute contemplates service upon the ministry of foreign affairs of the defendant foreign state abroad. Therefore, the Department is extremely reluctant to engage in alternative methods of service deviant from the method specified by the statute.***

State Dep't Memo, 18 I.L.M. 1177, 1180, ¶9 (1979), Ex. YN 1.

3. United States' Position in Foreign Courts

The United States has asserted in French courts that it had been improperly served with documents initiating proceedings forwarded to the U.S. Embassy. In a *Note Verbale* concerning a summons to appear before the Paris labor tribunal (Conseil des prud'hommes), the U.S. Embassy stated that "under current international law, service of documents must be effected through

diplomatic channels." June 1, 2006 *Note Verbale* as quoted in *United States v. Ms. Michèle S.-B.*, Paris Court of Appeal, Pôle 6, ch. 4, no. 14/07682, September 20, 2016, Ex. YN 41. The judgment also mentions a note dated February 27, 2015, in which "the United States of America formally took a position in favor of a single transmission through official diplomatic channels, i.e directly by the French Embassy in Washington D.C. to the U.S. State Department." Ex. YN 41.

Based on this statement, the French Court of Cassation held that service on an embassy through diplomatic channels can only be admitted with the express consent of the State concerned. It then ruled:

> [It] did not appear from any of its findings that the United States of America had consented to the notification of acts through diplomatic channels being made to its embassy in France and, secondly, that it noted that by diplomatic note of November 20, 2012, the Embassy of the United States of America in France had refused to accept the document, informing the French Ministry of Foreign Affairs that the official diplomatic channel had not been used to bring the case to the attention of the addressee of the document, with the result that the notification at issue could not be regarded as a regular notification made through diplomatic channels.

Court of Cassation, 2nd civ., February 21, 2019, no. 16-25.266, Ex. YN 8.

4. U.S. Regulation

I am aware that 22 C.F.R. §93.1(c) provides for diplomatic channels of service:

> (1) To the Embassy of the United States in the foreign state concerned, and the Embassy shall promptly deliver them to the foreign ministry or other appropriate authority of the foreign state, or (2) If the foreign state so requests or if otherwise appropriate, to the embassy of the foreign state in the District of Columbia….

22 CFR § 93.1(c).

But the U.S. State Department has strictly defined appropriateness of transmission to embassies:

> Note that regulations promulgated pursuant to 1608(a)(4), which might be utilized in extremely burdensome or compelling circumstances, provide that the Department would in an appropriate case effect service upon the Embassy of the foreign state here by way of diplomatic note. ***The Department wishes to stress,***

> ***however, that this alternative envisions only very exceptional circumstances. Only upon submission of a telegram providing the complete reasons as to why in an individual case reconsideration should be made will the Department review the matter. We will only concur in an Embassy's appraisal if the circumstances are so compelling as to warrant this exceptional alternative.***

State Dep't Memo, 18 I.L.M. 1177, 1179-1180 (1979), Ex. YN 1.

No such justification is given in the United States' *Note Verbale* at issue, and no exceptional reasons required by the U.S. State Department appear.

B. The United States' Position Can Be Considered as a Source of Unilateral Commitments or at Least as a Contribution to Customary International Law

1. The United States' Consistent Position Against Service on Embassies Is a Unilateral Commitment

Other States may legitimately rely on the U.S. State Department's ***repeated*** statements that service on embassies will not be made, or only in exceptional circumstances, which are then binding on the United States.

First, the Permanent Court of International Justice held that statements made by a Minister of Foreign Affairs in response to legal issues can have a binding effect on the State:

> The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

P.C.I.J., *Legal Status of Eastern Greenland (Norway v. Denmark)*, [1933] P.C.I.J. Ser. A/B, No. 53, 71), Ex. YN 27.

Second, in the international legal order, the U.S. State Department's statements may bind the United States. "A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations."

"Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations," Int'l Law Comm'n, 58th Sess., p.372 (2006), Ex. YN 36.

Third, the International Court of Justice recalled various judgments which affirmed a commitment made by a unilateral act:

> [T]he Court observes that … ***it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments.***

Ex. YN 40, I.C.J., *Armed Activities on the Territory of the Congo* (*Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p.27, ¶46 (citing *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp.269-270, ¶49-51), Ex. YN 37.

The *Nuclear Test* case stated:

> ***It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.*** Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

I.C.J., *Nuclear Test Case (Australia & New Zealand v. France)*, Judgment, 1974 I.C.J. Reports 1974, p.267, ¶43, Ex. YN 37.

Fourth, "[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily." *Guiding Principles*, Int'l Law Comm'n, 58th Sess. (2006), Ex. YN 36. This is particularly true in cases where the addressees of the declaration referred to it in good faith and were consequently led to "suffer some prejudice." I.C.J., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,

Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p.415, ¶51, Ex. YN 38.

In sum, U.S. statements on service of judicial documents to foreign states have been provided for the attention of foreign embassies, its own embassies, domestic judges and foreign judges confronted with this issue. The hierarchical order of transmission channels is indisputable, with service on the Ministry of Foreign Affairs in the receiving State as the normal channel of exchange. The short-channel alternative is denounced as likely to give rise to serious legal consequences it inherently carries, and it is thus relegated to special circumstances, which are understood to be those that render the classic route unusable.

2. The United States' Consistent Position Evidences Customary International Law

The repeated U.S. position provides important evidence for the existence of an *opinio juris* of this State. This position is of the binding nature of the hierarchy to be followed in the mode of transmission—indeed, it is in this form that the United States has given directives to its own services.

First, all of these statements show that the United States is well convinced of its international legal obligation to use the "long channel" for the transmission of judicial acts against foreign States. The consistent position taken reveals that this practice was followed because the United States felt legally bound by what it considered to be an obligatory rule of law. From this point of view, the statements must be seen as a relevant element in the identification of a customary rule, the most revealing aspect of which was to be observed in proceedings before foreign courts.

Second, the position taken by the United States in French Courts is the same as that taken by the RF in these proceedings—which is perfectly in line with the way in which *opinio juris* can be identified according to the International Court of Justice:

> *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.

Jurisdictional Immunities of the State (Germany v. Italy), February 3, 2012 Judgment, I.C.J. Reports 2012, p.123, ¶55, Ex. YN 23.

In sum, the United States' consistent position against service on embassies constitutes a unilateral commitment under international law or, at the very least, it is part of the process of consolidating the customary rule which is binding on the United States.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Paris, March 1, 2024

Yves NOUVEL
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