DIPLOMATIC PRACTICE AND ITS INFLUENCE ON REGULATION OF DIPLOMACY BY DIPLOMATIC LAW AND NON-LEGAL RULES

Peter Rosputinský*

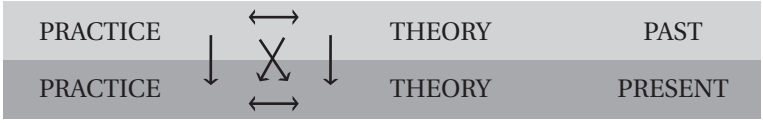
Abstract: *The notion of diplomatic practice is very often used in many works, but typically without a definition. Firstly, this article brings considerations leading both to the definition of diplomatic practice as well as to its comparison with the notion of practice of diplomacy. The second part of the present article deals with application of diplomatic practice with respect to the prospective creation of legal and non-legal norms governing diplomatic relations, and explains how established patterns of behaviour can evolve into rules of conduct. The article classifies four fields of diplomatic practice with different legal effects: (i) one-time practices and repeated practices of one or more States; (ii) general practice; (iii) international courtesy; (iv) international custom; and identifies examples in each normative level of diplomatic practice in order to demonstrate its scope and content, which goes far beyond the regulation of the Vienna Convention on Diplomatic Relations as a written law. Finally, in conclusion and as practical implication, it provides an analysis of the normative potential of new diplomatic practice emerging during COVID-19 restrictions in many States, which rests in lockdown and curfew restricting the freedom of movement of diplomatic missions' members.*

Keywords: *Diplomatic practice, practice of diplomacy, individual practice, general practice, international usage, international courtesy, international custom, diplomatic law, lockdown*

INTRODUCTION

Practice is an important companion to theory. The reverse is also true – except perhaps in philosophy, which is probably the only discipline with no practice[1]. However, unlike philosophy, law and diplomacy encompass both theory and practice. Both of these components are important and influence each other in a number of ways. Their interactions with each other could be illustrated as follows:

Interactions between practice and theory



Examination of practice from the position of theory is undoubtedly significant for the theory itself or general knowledge as such. Nonetheless, of equal importance is to link the theory with practice, to search for practical applications of theoretical concepts as well as to reflect theoretically the practice that is being carried out. One can only concur with the view that *"while theory without practice would be merely an empty scheme, examination*

* Associate Professor, PhDr. Mgr. Peter Rosputinský, Ph.D., Matej Bel University in Banská Bystrica, Banská Bystrica, Slovakia. ORCID: 0000-0002-7354-2519.

[1] SUVÁK, V. Metafyzika diferencie teoretického a praktického: k zodpovednosti nášho myslenia za vlastné konanie. [Metaphysics of the difference between the theoretical and the practical: to the responsibility of our thinking for our own actions]. *Filozofia*. 2003, Vol. 58, No. 3, p. 208.

of practice without the knowledge of theory would produce only incoherent and haphazard descriptions of events".[2]

This article is devoted to studying the interplay between practice and theory in the context of the relation between diplomacy and international diplomatic law. The practice is the common denominator of diplomacy and diplomatic law. It is in or through practice that diplomacy is conducted and, on the other hand, practice is the cornerstone of customary international law, and thus of diplomatic law. The main objective of this article is to provide the definition of the term diplomatic practice and then to identify the normative systems in which the current diplomatic practice is relevant from the perspective of general or particular regulation of diplomacy by legal norms and non-legal rules. The secondary objective is to give examples of non-written rules of diplomatic practice for all identified normative areas of diplomatic practice.

I. DEFINITION OF DIPLOMATIC PRACTICE

Answering the question of what exactly the diplomatic practice means is not quite easy, even though it is a common term in scholarly literature. Nor it is easy to find its explicit definition - I have not been successful in finding one, at least.

The meaning of this term can be inferred from the content of publications which contain this term in their titles. Strictly speaking, this approach does not delineate the term diplomatic practice but rather specifies the fields of diplomatic practice as maintained by publicists, e.g., diplomatic relations, diplomatic communication, diplomatic correspondence, diplomatic protocol, diplomatic negotiations, activities of special missions and permanent missions, publication of official information etc.

As importantly, it is to be noted that some authors do use the term practice of diplomacy[3] apart from the term diplomatic practice.[4] In scholarly literature, the common usage is that these two terms are synonymous. In principle, this can be agreed with even if it is not exactly the case. The term practice of diplomacy evokes implementation aspects of diplomacy (in the sense of conducting diplomacy) – so, it has an executive dimension, and it represents a counterpart to the theory of diplomacy. The term diplomatic practice rather specifies a domain in which a certain type of behaviour takes place, i. e. this term sets this behaviour apart from behaviours in different domains, hence distinguishing diplomatic practice from other practices, such as the consular practice or the practices in treaty law, space law or the law of the sea. And this brings us to the question: what defines an area of behaviour that falls within the scope of diplomatic practice? Is it solely diplomacy and nothing else?

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[2] NOVOTNÝ, A. *Teorie a praxe mezinárodních vztahů.* [Theory and Practice of International Relations]. Žilina: Poradca podnikateľa v spolupráci s Bratislavskou vysokou školou práva, 2006, p. 8.

[3] HAMILTON, K., LANGHORNE, R. *The Practice of Diplomacy. Its evolution, theory and administration. 2nd*. Abingdon, New York: Routledge, 2011 or SPENCE, J., YORKE, C., MASSER, A. (eds.). *New Perspectives on Diplomacy. A New Theory and Practice of Diplomacy.* London: I. B. TAURIS, 2021.

[4] KLEINER, J. *Diplomatic Practice. Between Tradition and Innovation.* Singapore: World Science Publishing, 2010 or ROBERTS, I. (ed). *Satow s Diplomatic Practice. 7th edition. (e-book).* Oxford: Oxford University Press, 2017.

I.1 The notion of practice

It is possible to start the search for answers to these questions either from the term diplomacy or from the term practice. Let us start from the term practice – both because it is the more significant part of the term *diplomatic practice* and because it is more logical. Three complementary paths can be identified for understanding the term practice in the context we are following. These are:

(i) the common meaning of the word practice, i. e. as it is used in the common language,
(ii) the term practice in *practice theory of international relations*, that is in praxeology of international relations,
(iii) the term State practice in the science of public international law.

I.1.1 Common meaning of practice

From the perspective of linguistics and semantics, in the meaning relevant to us, the word practice means either (i) *"conduct, behaviour or an action of a person or social groups which results in some changes in the world concerned"*, or (ii) *"a common, established way of conduct, a method"*.[5] In the first quoted meaning, practice generally designates any conduct or behaviour of anyone in any situation. The second meaning denotes customary, repeated, habitual, typical or commonly used behaviour which is expected of someone by other persons in a particular situation.

In other words, the first meaning expresses practice in the wider sense, and the second meaning expresses practice in its narrow sense – one might say qualified practice.

I.1.2 Meaning of practice in praxeology of international relations

The second way how to define diplomatic practice is through practice theory of international relations, the central concept of which is the term *practice*. Books of many authors which started to emerge mainly after the year 2010 are paying a great deal of attention to this term and are based on one of the two perspectives.

The first one distinguishes between the terms *praxis* and *practice* and is completely consistent with the two dictionary definitions explained above. *Praxis* refers to an action of someone here and now, to an action of an actor at a particular time and place, as opposed to the term of *practice*, which refers to typical ways of conduct of the same actor or different actors in comparable situations. *Praxis* is done on a one-time basis. It is a sporadic action. On the contrary, *practice* is a repeated action, a model or a pattern of proceeding in the same or similar circumstances or under similar conditions. Many consistent and uniform cases of *praxis* can evolve into *practice*, both with respect to one and the same acting subject and with respect to different subjects in the same or similar situation. Significance of a particular *practice* increases with the number of subjects behaving in the same way. However, the more dissimilar two *praxes* are, the less likely they are to evolve into *practice*. This situation means that *praxes* of individual subjects are inconsistent. An illustrative example of transformation of *praxis* into *practice* is a gen-

[5] PETRÁČKOVÁ, V., KRAUS, J. (eds.). *Slovník cudzích slov (akademický). [Dictionary of Foreign Words (Academic)]*. Bratislava: SPN – Mladé letá, 2005, p. 613.

erally known process of gradual replacement of French as a diplomatic language with English.

The second perspective inspired by *the practice theory of international relations* is based on notions of behaviour, action and practice which are often used as synonyms, even thought that is not correct. These notions are graded and convey a different quality of doing. Behaviour is an action performed by an actor, usually for the sake of the action itself. Conduct is an action realised with a specific idea for a precise purpose. Finally, practice means specific patterns of action set in socially organised contexts which are developed through learning and training.[6] Routine patrolling of a military ship of the State X in the coastal waters of the State Y represents 'a behaviour'. Should the ship start to chase a vessel fleeing from the port after a person on its board perpetrated a crime in the State X, it would be 'an action'. And if the State X were to dispatch aircraft carriers to a certain sea area on a regular basis, it would be 'a practice' of coercive diplomacy (for example, the practice of dispatching aircraft carriers is labelled aircraft carrier diplomacy,[7] analogous to the gunboat diplomacy). Practice defined in this manner is consistent with the term *practice* according to the first perspective stated above and according to the narrow dictionary definition of diplomatic practice.

I.1.3 Meaning of practice in public international law

The third way how to define diplomatic practice is represented by the science of international law. It deals, *inter alia*, with the concept of State practice which constitutes the material element of international custom (*usus* or *diuturnitas*)[8] as the historically oldest source of international law. In international law, State practice is understood to mean any conduct done by any State organ with reference to any interstate matter and thus legally relevant under international law.[9] At this point, it is necessary to highlight the three significant aspects of the given definition of State practice:

(i) it is any behaviour pertaining to interstate relations, i. e. it is a summary of every behaviour in the field of interstate intercourse – referring to diplomatic practice as one of many types of practice in international community,
(ii) it entails not only well-established patterns of behaviours but also one-off behaviours – addressing practice in a broader sense,
(iii) it is a behaviour of any State organ, provided that it pertains to interstate (international) relations – indicating that this is not only the behaviour of the central organs of a State like the government or the head of State but also of other State organs.

Moreover, in international law, according to its science, practice means not only active conduct and physical acts, but also inactivity in the form of omission of or abstention from an action, and also verbal acts, i.e. expressions of opinion in the form of, for example, diplomatic notes or protests, ministerial and other official statements, gov-

[6] ADLER, E., POULIOT, V. *International Practices*. Cambridge: Cambridge University Press, 2011, pp. 3–29.
[7] LAVOIE, F. *No end in sight for aircraft carrier diplomacy*. pp. 1–11. In: *JCSP 47 Canadian Forces College* [online]. 2021 [2023-06-10]. Available at: <https://www.cfc.forces.gc.ca/259/290/23/192/Lavoie.pdf>.
[8] CASSESE, A. *International Law*. Oxford: Oxford University Press, 2005, p. 157.
[9] FISCHER, P., KÖCK, H. F. *Völkerrecht. Das Recht der universellen Staatengemeinschaft*. Wien: Linde Verlag, 2004, p. 74.

ernmental manuals or diplomatic handbooks for foreign diplomats, or a condemnation or an approval of a particular behaviour of another State.[10] Inactivity represents a particularly significant dimension of practice. Frequently, literature highlights *doing and saying* as components of practice[11] but silence, or so-called negative practice – which are different terms for inactivity – is often forgotten. It can be explained with an example: perhaps the best result of a strongly motivated inactivity is the generally recognised prohibition of national appropriation of the high seas. In the sphere of diplomacy, inactivity as a type of conduct is seen in matters such as now-standard non-sending of heads of mission of the second class (*envoys*) or disappearance of wearing a diplomatic uniform. Other examples are not appointing honorary consular officers by some sending States, not hoisting the rainbow flag by embassies of many sending States or not replying to a request for granting *agrément* for a certain person as a polite form of their rejection. However, what is difficult when assessing inactivity, is finding out whether the inactive State behaves in such a way intentionally or if it simply lacks interest. In State's practice, it is understood that in some situations, inactivity that is not accompanied by a protest or other explicit form of dissention might mean acquiescence of said State.[12] Therefore, e.g., some receiving States, in whose territory some embassies have raised rainbow flags, protested such conduct to prevent the repetition of such a practice, with which they do not agree.

As pointed out above, the practice perceived in this third way does not distinguish between the wider and the narrow meaning of the term practice, as implied by two previous perspectives. However, international law theory and judicial decisions are aware of those meanings, even though they only employ the word practice. When wishing to use the term practice in the narrow sense, they link it with various adjectives implying that these behaviours are established ways of conduct. Typical terms to express these higher qualitative levels of practice are general, consistent, uniform, customary, widespread and representative practice. Without these adjectives, it is impossible to say with certainty whether practice is to mean *praxis* or *practice*.

I.2 The notion of diplomacy

Having discussed practice, we can return to the notion of diplomacy and its significance for defining diplomatic practice. Now, the point is not to explain different contents and meanings of diplomacy. It is sufficient to conclude that the common overlap of most definitions of diplomacy is that it is a special activity intrinsic to a sovereign State, which is carried out by its official representatives and institutions for the purpose of promoting its foreign policy interests through non-violent means.[13] Consequently, the conflation of practice and diplomacy within the term diplomatic practice means a summary of all one-

[10] For more details about States practice and evidence on it see for example: AUST, A. *Handbook of International Law.* Cambridge: Camridge University Press, 2010. p. 6. and SHAW, M. *International Law.* Cambridge: Camridge University Press, 2008, pp. 76–84.
[11] MALANCZUK, P. *Akehurst s Modern Introduction to International Law.* London and New York: Routledge, 2002, p. 43.
[12] Ibid., p. 43 or WALLACE, R. M. M. *International Law.* London: Sweet & Maxwell, 2002, pp. 12–13.
[13] PAJTINKA, E. *Slovník diplomacie. [Dictionary of Diplomacy].* Bratislava: Pamiko, 2013, p. 28.

time actions and established ways of conduct carried out in order to promote a State's foreign policy interests through State organs of representational nature, both domestic (head of State, head of government, MFA) and foreign (diplomats).

It is indisputable that all activities of a State directed towards the performance of diplomacy constitute diplomatic practice. However, there are two areas that do not fall within the above definition of diplomacy and yet are directly related to conducting diplomacy. Therefore, they are necessary elements of diplomatic practice.

The first area is represented by activities of State's organs for international relations, which are not aimed at promoting State's foreign policy interests, but rather at regulating issues relating to the status of foreign diplomats on its own territory and to any matters concerning them: e.g. determining the criteria for accreditation of diplomats and members of their families, determining the conditions for the employment of its own citizens by foreign missions, the choice of the method of communication with foreign missions, the reasons for declaring a diplomat *persona non grata*, or exempting diplomatic vehicles from the ban on parking.

The second area beyond the scope of diplomacy and yet within the framework of diplomatic practice is engagement of States' organs, which were not included in the definition of diplomacy, in processes pertaining to conduct of diplomacy. Said definition gives the impression of diplomacy being exclusively the activity of State's highest organs and of diplomats. This is, probably, since it does not mention any other foreign actors. In other words, there is no addressee of diplomacy; i. e. the definition of diplomacy is principially one-directional: from one State to its surroundings. Should we set aside the direct communication and direct cooperation between heads of States, governments and MFAs, then a substantial part of mutual interstate relations is conducted through diplomats, be it on the bilateral or multilateral level. That implies their physical presence abroad, which naturally results in their direct contact with not only the central organs of receiving State, but also with its local authorities. And if these authorities deal with accredited diplomats, are their behaviours relevant from the perspective of diplomatic relations of the given receiving State? For example, there may be different practices of public health authorities in the case of lockdown, COVID-19 testing or quarantine regulations also for persons with privileges and immunities, different proceedings of traffic police departments in different receiving States in case of violation of traffic rules and parking procedures by diplomats. These decisions, proceedings and actions undoubtedly have a real impact on the exercise of the functions of the diplomatic missions of sending States, and thus should or must form part of the diplomatic practice of a particular receiving State, even if they are not actions of its representative organs. The above analysis leads to the conclusion that the term diplomatic practice is a broader term then practice of diplomacy. For the area of overlap of diplomacy and diplomatic law, it is necessary to consider diplomatic practice in the broader sense, since the status of foreign diplomats depends not only on the central organs, but also on the local ones. In the words of the Vienna Convention on Diplomatic Relations ("VCDR"), 'practice of diplomacy of a State' refers only to its position as a sending State, while 'diplomatic practice of a State' refers to both of its positions – as a sending State, and simultaneously, as a receiving State.

I.3 Subjects of diplomatic practice

Ultimately, when defining diplomatic practice, it is necessary to pay attention also to the fact of whose practice is in question. No practice, including diplomatic practice, can exist without its implementer. And at this point, we are hinting at another significant theoretic link of the definition of the term diplomatic practice. This is the question of whether the term diplomacy applies solely to States or to other subjects as well. It ought to be openly stated that both theory and practice transcend the interstate level of diplomacy. Theory does it by introducing new kinds of diplomacy, e.g. sport diplomacy or paradiplomacy. Practice does so by establishing diplomatic relations between independent States on one hand and subjects other than independent States on the other, e.g. national liberation movements, insurgents, the Sovereign Military Order of Malta, and particularly by the external relations of international governmental organisations and the EU. Therefore, the definition of diplomatic practice will depend on the range of diplomatic actors. For the purposes of this article, the diplomatic practice of only those entities that establish and conduct diplomatic relations will be considered. This means that it will be the practice of independent States and other entities with *ius legationis* (right to send and receive diplomatic agents).

I.4 Findings

Through synthesis of the above considerations, it is possible to formulate the conclusion that, in general, diplomatic practice is understood to be the summary of all actions, inactions and verbal acts, in the area of conducting diplomacy, of all organs of all entities that are capable of establishing diplomatic relations. With respect to a particular State or other diplomatic actor, it can be said that its diplomatic practice is the totality of all its actions, inactions and verbal acts in the area of diplomacy and diplomatic relations, e.g. the Slovak diplomatic practice or the diplomatic practice of the Holy See.

As outlined above, the forms of diplomatic practice are very diverse. Their common feature is that they are empirically verifiable facts. Practice is, or should be the result of deliberate action, competent performance. Practice is a socially meaningful pattern of behaviour, a model method incorporated in specific organized contexts and articulated into specific types of actions and responses. In general, and also in the field of diplomacy, the list of forms of practice cannot be made exhaustive. However, the following acts – if done with respect to conduct of diplomacy – definitely belong to diplomatic practice:

(i) diplomatic acts and diplomatic correspondence,
(ii) proceedings and behaviour towards other States and actors of world political system,
(iii) behaviour pertaining to treaties,
(iv) behaviour pertaining to resolutions of international conferences and international organisations,
(v) behaviour of all executive organs including their *in situ* behaviour,
(vi) legislative acts,
(vii) acts of administrative organs,
(viii) official documents of all State organs,

(ix) rulings of arbitration bodies, international and national courts,
(x) official announcements of heads of States, heads of governmnets and ministers (e.g. in parliament, in court, at press conference etc.),
(xi) recordings of negotiations at international level.

II. APPLICATION OF DIPLOMATIC PRACTICE

Having solved the problem of theoretical definition of diplomatic practice, it is necessary to address the problem of its application. The latter is methodological and consists of two phases: determining the content of diplomatic practice and determining whether this content is legally binding or not.

II.1 Identification of diplomatic practice

The issue of determining the content of diplomatic practice can be addressed by identifying the diplomatic practice which is a fairly complicated process. This is caused by the atomisation of diplomatic practice of individual diplomatic actors, its difficult accessibility to other diplomatic actors and virtual inaccessibility to theoreticians. The content of diplomatic practice can be ascertained from two sources:

I. from collections of diplomatic (and other) practices issued by some States and from other official documents of States or other diplomatic actors (diplomatic notes, press releases, joint communiqués etc.) which are the primary source; the problem is that not many States create this kind of diplomatic practices' collections or publish diplomatic documents, even fewer do so online and free of charge; finaly, it has to be said, that it is usual for the given collections not to contain the whole diplomatic practice but only its selected parts;

II. from publications of reputable writers and various scientific institutions, which are the secondary source and therefore only auxiliary, consisting of:
(i) studying and analysing particular behaviours of States, most commonly based on publicised information available from media or on documents published by States themselves or by other diplomatic actors,
(ii) direct contacts with ministers and other representatives of executive power, diplomats, and other persons conducting diplomatic practice,
(iii) studying, verifying and analysing data published by journalists, former diplomats, politicians and other authors (e. g. handbooks, memoirs),
(iv) studying and analysing rulings of courts and arbitration bodies,
(v) studying and analysing decisions of international conferences and organs of international organisations,
(vi) own research in various forms.

Scholarly literature often mentions missing empirical studies of States' practice which, despite offering only partial perspectives on a particular diplomatic practice, maybe even without time and content uniformity, would contribute to completing the mosaic of know-

ing the past and the present diplomatic practice in specific fields of diplomatic relations.[14] Greater presence of such studies in scholarly writings would contribute to the identification of common diplomatic practices by inferring general patterns from the multitude of specific cases of many States examined. The common diplomatic practice can not be claimed to exist without evidence of it. Moreover, if diplomatic practice is to be general or at least widespread, it must include the practice of the States whose interests are particularly affected. For example, in relation to practice regarding the post-mortem diplomatic privileges and immunities, we have to examine the practice of States whose diplomats have died while serving abroad on one hand, and the practice of States in which such deaths of diplomats have occurred on the other.

The above-mentioned process of identification of diplomatic practice is time-consuming as well as difficult due to a limited range of options to obtain relevant input data. No lesser difficulty lies in subsequent assessment of data received. This is on account of (i) diversity of diplomatic practices; (ii) absence of any practice; (iii) absence of information on existing practice(s); (iv) absence of reasoning given for a particular action or inaction.

Suppose a situation where, ten minutes before the end of his shift, a policeman of a receiving State sees a parked vehicle with a diplomatic license plate blocking the emergency entry to hospital and decides not to act: did he do so due to the legal exemption of the person who parked the vehicle from jurisdiction of the receiving State or did he do so because he is too lazy to initiate a lengthy process of resolving the situation before the end of his shift or did he do so because he does not know how to proceed, so he opted for doing nothing? And if diplomats violate parking bans repeatedly with no reaction on the part of the receiving State, would they be correct to assume that it is a special practice in the given receiving State that a diplomatic vehicle can park anywhere at any time?

Finally, we should not overlook the factor of misleading or outright deception on the States' part when it comes to characterisation or justification of their actions. Frankly, this factor can sometimes be virtually impossible to detect.

II.2 Evaluation of diplomatic practice

Determining whether the content of diplomatic practice is legally or otherwise binding is an even more complex process than identification of diplomatic practice itself. A different method than the one mentioned in section 2.1 of this article does not exist. Thus, it needs to be applied in this task as well. It essentially means to look for evidence about States' conviction that their own behaviour/action/practice does not stem only from its appropriateness from the perspective of achieving its own goals but also from the conviction that the given behaviour is legally or at least morally or politically binding. The most convincing evidence – apart from explicit verbal or written confirmation of a specific conduct with the justification that it was done because of the binding nature of the practice in question – can be obtained from observation of the State's conduct with respect to an issue conflicting its interests. If a State follows a rule rooted in practice and not its own interest

[14] STIRLING-ZANDA, E. The Privileges and Immunities of the Family of the Diplomatic Agent: The current scope of Article 37(1). In: Paul Behrens (ed.). *Diplomatic Law in a New Millenium*. Oxford: Oxford University Press, 2017, p. 107 and pp. 111–112.

and the State s conduct is in contradiction to its foreign policy or other goals, it is very likely that the said State is acting under legal obligation. For example, in the time of implementing increasingly extensive sanctions against the Russian Federation after 24th February 2022, there is the question of inviolability of the bank accounts[15] of the Russian embassies used exclusively for official purposes. Should some receiving States not block the bank accounts used to fund the operation of the embassies, including the salaries of their members, even though all other Russian assets in these States are frozen by these States without exception, then this is *prima facie* evidence that the practice is considered legally binding by these States. On the other hand, one can not detect the position of a receiving State towards inviolability of the Russian embassy's bank account, if this State has not frozen any Russian assets on its own territory at all.

II.3 Normative levels of diplomatic practice

Furthermore, it is necessary to add that diplomatic practice is a descriptive term. By its very nature, it does not have normative nor evaluatory meaning in itself. Practice is the behaviour as it is, not as it ought to be. Practice describes behaviour in a way it truly is. It is a real application or usage of the thought, theory or a method in real life. Diplomatic practice, by and of itself, does not determine what behaviour is requested or expected at all. Desired behaviour results from rules regulating the exercise of diplomatic practice. These rules, understandably, like all others, always command, prohibit or allow something. For example, according to the theory of diplomacy or the applicable diplomatic law, we know what diplomacy is and what it is not. However, it not infrequently happens that diplomatic practice of some sending States involves espionage, monitoring of its own citizens on the territory of receiving States, using the diplomatic missions to interfere with the internal affairs of other States or illicit trade with various articles (drugs, arms, gold). Therefore, it is necessary to consider conscious and deliberate act(s) that violate(s) the corresponding rule as *praxis* (or practice). One-time negligent action as a result of a mistake (hoisting the wrong flag, playing another State's anthem or playing the anthem off-key)[16] normally constitutes *praxis* but not practice.

Obviously, the objective of diplomatic practice is not to create legal or other rules for diplomacy, but to ensure political, economical, social and other interests of a subject conducting this practice. An eventual gradual emergence of a rule as a result of broadening of a particular practice is merely a byproduct of States' behaviour in international relations. This feature of diplomatic practice can be called normative potential or the capacity

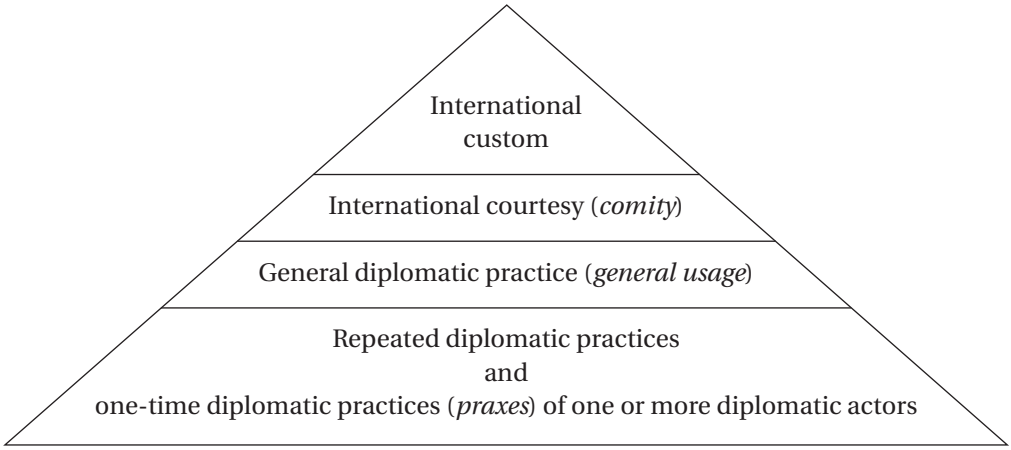
[15] This inviolability is not mentioned in any provision of the VCDR.

[16] In this respect, the reference can be made to failed musical production of national anthems performed by the Egyptian army orchestra. This was not an isolated incident but a repeated issue. To illustrate, false anthems were heard in Egypt by Russian president Vladimir Putin. In: *youtube.com* [online]. 10. 2. 2015 [2023-06-15]. Available at: <https://www.youtube.com/watch?v=P0Vyl-0hNnU>, French president François Hollande. In: *dailymotion.com* [online]. 17. 4. 2016 [2023-06-15]. Available at: <https://www.dailymotion.com/video/x45jr2c>, German chancellor Angela Merkel. In: *unsertirol24.com* [online]. 3. 2. 2017 [2023-06-15]. Available at: <https://www.unsertirol24.com/2017/03/09/hymne-verhunzt-ohrenqual-fuer-merkel-video/> or Chinese president Xi Jinping. In: *youtube.com* [online]. 12. 1. 2021 [2023-06-15]. Available at: <https://www.youtube.com/watch?v=qf1Yuu778Q8>. The reason for recurrence is unknown, but it is probably not reasonable to assume that it was intentional conduct.

of the practice to transform factual reality into legal reality; in other words, to transform generally established patterns of behaviour in certain situations into norms of conduct. One-time practice (*praxis*), certainly, does not have this potential. Repeated practice, however, does. And it will only depend on the attitude of individual actors of diplomatic relations, whether this potential will manifest itself, and if so, in what intensity and how quickly. Should the actors of a given practice uniformly abide by its content because they always consider it polite and respectful, this practice could be constituted into a legally non-binding rule of international courtesy. And if the actors of general international practice uniformly develop a subjective or psychological conviction that its content is legally binding, i.e. it is not merely usage or courtesy, the practice in question can become a rule of international customary law. It should be added that, while theoretically conceivable, it is quite unlikely that the content of any new practice would be directly incorporated into the text of a multilateral international treaty. That would mean a direct transformation of practice into a rule of international treaty law.

The following figure illustrates application levels of diplomatic practices from the perspective of their normative effects:

Normative levels of diplomatic practice



Under examination in this article, it is important to observe that we do not consider diplomatic practice to be the conduct of States pursuant to the VCDR as written law. In such cases, it is a matter of fulfilling treaty obligations, which naturally does not create a new kind of diplomatic practice and thus has no rule-making potential. The conduct of States according to the VCDR and violations of its provisions are well specified in the writings. However, the situation is substantially different from that regarding the diplomatic practice under review. The latter is not summarized in one place, much less divided into normative levels. Certainly, internationalists address it, but usually only to its narrowly defined scope in a particular area of diplomatic relations. This results in a considerable information scattering with commentaries on the VCDR as an exception. However, although these publications contain numerous examples of diplomatic practice, they are mentioned at different places and always with a certain degree of selectivity according

to what the author considered significant to mention about the particular provision of the VCDR. This fact makes it difficult to become familiar with the content of diplomatic practice, and it distorts the reader's idea of its scope going far beyond the diplomatic law defined by the VCDR. In order to alleviate both of the problems above, it is more than helpful to present a summary of the available examples of the most relevant diplomatic practices in each of four normative levels, especially those that are gaining wider acceptance among States, i.e. international custom, international courtesy, and general diplomatic practice.

II.3.1 International custom

The highest level of normativity associated with legally binding effects is represented by practices established in the form of general international custom as unwritten international law. The following diplomatic practices and rules are included here:[17]

(i) law of legation,[18]
(ii) appointment of a permanent representative of a sending State to an international organization with its headquarters in the receiving State after consultations between the sending State and the receiving State,[19]
(iii) nationality questions of diplomatic agents and their families,[20]
(iv) organization and tasks of the diplomatic corps and the role and the function of its doyen,[21]
(v) right of chapel[22] and right to freedom of private worship on diplomatic mission's premises,[23]
(vi) decision of localisation of a diplomatic mission based on an agreement between the sending and the receiving States,[24]
(vii) placing personal residences of members of diplomatic missions and their family members at the location of diplomatic missions or in their vicinity,[25]
(viii) right of the receiving State to summon the head of diplomatic mission of the sending State,[26]

[17] Consular practices are omitted, even though they are very similar to the diplomatic ones. Similarly, activities done pursuant to the rules written in the VCDR are also omitted; the reason is that they represent the conduct pursuant to the VCDR, i. e. treaty implementation.
[18] SUTOR, J. *Prawo dyplomatyczne i konsularne. [Diplomatic and Consular Law]*. Warszawa: LexisNexis, 2010, pp. 95–117.
[19] In: *United Nations Conference on Diplomatic Intercourse and Immunities. Volume I.* p. 11. [online]. 2. 3. – 14. 4. 1961[2023-03-03]. Available at: <https://legal.un.org/diplomaticconferences/1961_dipl_intercourse/docs/english/vol_1.pdf>.
[20] Ibid., pp. 29–31.
[21] WOHLAN, M. Diplomatic Protocol. In: Rüdiger Wolfrum (ed.). *The Max Planck Encyclopedia of Public International Law. Volume III*. New York: Oxford University Press, 2012, p. 136.
[22] Ibid., p. 139.
[23] DENZA, E. *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations. 4th edition*. Oxford: Oxford University Press, 2016, p. 118.
[24] OELFKE, CH. (ed.). *Vienna Convention on Diplomatic Relations of 18 April 1961. Commentaries on Practical Application*. Berlin: Berliner Wissenschaftsverlag, 2018, p. 111.
[25] Ibid., p. 111.
[26] Ibid., p. 93.

(ix) inadmissibility under diplomatic law of granting diplomatic asylum to persons persecuted for political reasons on the premises of the mission of the sending State,[27]
(x) right of the receiving State to temporarily restrict the personal freedom of a member of diplomatic mission or their family member in order to defend itself, to protect the public and to protect the diplomat's own life or health[28] as well as to prevent a member of diplomatic mission or their family member from committing a particular crime,[29]
(xi) treatment of administrative and technical staff at least at the level of service staff treatment under the VCDR,[30]
(xii) granting privileges and immunities to incumbent heads of State and members of their families traveling together with them during their stay on the territory of a third State in a broader extent than to diplomatic agents pursuant to the VCDR,[31]
(xiii) granting of all diplomatic privileges and immunities to an incumbent member of government including the minister of foreign affairs,[32]
(xiv) right of a diplomatic courier to carry a personal weapon,[33]
(xv) inviolability of embassy bank accounts used for official purposes,[34]
(xvi) exemption of members of diplomatic mission from the requirement of a residence permit in the receiving State,[35]
(xvii) exemption of diplomatic mission and its members from the foreign exchange control regulations of the receiving State,[36]
(xviii) exemption of diplomatic mission and its members from the duty to pay a bond for the costs of court proceedings.[37]

II.3.2 International courtesy

The second level of normativity is comprised of diplomatic practices that are entrenched in international courtesy (comity). These practices, although widespread, have not (yet) become a part of international law but they are of great importance to daily life of the international community. Naturally, it may not always be a general practice. International courtesy *"embraces those acts, practices and rules of goodwill, amity and courteous treatment habitually observed by States in their mutual intercourse without the conviction that any legal obligation is involved"*.[38] That is the case of, for example:

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[27] *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 7. p. 274 as cited in OELFKE, CH. (ed.) *Vienna Convention on Diplomatic Relations of 18 April 1961*. p. 44.
[28] BOURNE, C. B. *The Canadian Yearbook of International Law. Volume XXI. 1983*. Vancouver: University of British Columbia Press, 1984, pp. 309–310.
[29] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] ICJ Rep 64. p. 40.
[30] DENZA, E. *Diplomatic Law*. p. 332.
[31] POTOČNÝ, M, ONDŘEJ, J. *Mezinárodní právo veřejné. Zvláštní část. [International Public Law. Special Part]*. Praha: C. H. Beck, 2003, pp. 153–154.
[32] Ibid., pp. 154–155.
[33] MYSLIL, S. *Diplomatické styky a imunity. [Diplomatic Relations and Immunities]*. Praha: Nakladatelství Československé akademie věd, 1964, p. 205.
[34] DENZA, E. *Diplomatic Law. p.* 3 and pp. 128–131.
[35] OELFKE, CH. (ed.) *Vienna Convention on Diplomatic Relations of 18 April 1961*. p. 44.
[36] Ibid., p. 181.
[37] MYSLIL, S. *Diplomatické styky a imunity*. p. 261.
[38] MACALISTER-SMITH, P. Comity. In: Rudolf Bernhardt (ed.). *Encyclopedia of Public International Law. Instalment 7*. Amsterdam, New York, Oxford, Tokyo: North-Holland, 1984, p. 41.

(i) special police or military protection of premises of diplomatic missions by receiving States according to bilateral protection arrangements above and beyond the VCDR,[39]
(ii) special treatment (like identifiable registration numbers for diplomatic vehicles), protection and priority in traffic,[40]
(iii) *ex gratia* compensation for damages to premises of foreign diplomatic mission,[41]
(iv) provision of parking places or other special parking privileges on the public roads[42] or at the airports,
(v) some exemptions from taxation (mostly those which are based upon reciprocity),[43]
(vi) keeping a diplomatic mission's last telephone line for incoming calls, if the mission fails to pay bills for telephone services,[44]
(vii) granting customs privileges and exemption from baggage search in a third State,[45]
(viii) providing curricula vitae when notifying of staff appointments of diplomatic missions,[46]
(ix) granting of privileges and immunities to a person not normally considered in the receiving State as a family member, or in other words, acceptance of the sending States' definition of family by receiving States (i. e. spouse or partner),[47]
(x) granting of privileges and immunities by third States to members of missions other than diplomats and members of their families,[48]
(xi) examptions from radio and TV fees,[49]
(xii) notifying diplomatic missions of public gatherings at places close to their premises,[50]
(xiii) withholding from publication by a sending State of the contents of a diplomatic note until its receipt or acknowledgement by the addressee,[51]
(xiv) granting diplomatic couriers basically the same privileges and immunities as to diplomatic agents (immunity from jurisdiction, exemptions from personal examinations, custom duties and inspections and from dues and taxes),[52]

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[39] OELFKE, CH. (ed.). *Vienna Convention on Diplomatic Relations of 18 April 1961*. p. 138.
[40] DENZA, E. *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*. p. 103.
[41] Ibid., p. 138.
[42] Ibid., pp. 169–170.
[43] Ibid., pp. 149–155 and p. 298.
[44] Ibid., p. 171 and p. 183.
[45] Ibid., p. 369. Some authors are of opinion that exemption from customs inspections of personal baggage of transiting diplomats in third States belongs not to international courtesy, but to general diplomatic practice. For more details, see: RICHTSTEIG, M. *Wiener Übereinkommen über diplomatische und konsularische Beziehungen. Entstehungsgeschichte, Kommentierung, Praxis*. Baden-Baden: Nomos, 2010, p. 100.
[46] Ibid, p. 78.
[47] ROSPUTINSKÝ, P. Current Diplomatic Practice on Partners of Homosexual Members of Diplomatic Missions and Wives of Polygamous Members of Diplomatic Missions. *Politické vedy*. 2019, Vol. XXII. No. 4. pp. 172–220. In: *researchgate.net* [online]. [2023-06-10]. Available at: <https://www.researchgate.net/publication/340666122_POLITICKE_VEDY_POLITICAL_SCIENCES_Current_Diplomatic_Practice_on_Partners_of_Homosexual_Members_of_Diplomatic_Missions_and_Wives_of_Polygamous_Members_of_Diplomatic_Missions_Publisher_Faculty_of_Polit>.
[48] MYSLIL, S. *Diplomatické styky a imunity*. p. 304.
[49] Ibid., p. 260.
[50] Bratislava: Staré Mesto pristupuje k opatreniam voči ruskej ambasáde [Bratislava: Old Town Takes Measures against the Russian Embassy]. In: *TASR* [online]. 28. 2. 2022 [2023-06-11]. Available at: <https://www.tasr.sk/tasr-clanok/TASR:2022022800000192>.
[51] MACALISTER-SMITH, P. Comity. In: Rudolf Bernhardt (ed.). *Encyclopedia of Public International Law. Instalment 7*. p. 43.
[52] KAUL, H.-P. Couriers. In: Rudolf Bernhardt (ed.). *Encyclopedia of Public International Law. Instalment 9*. p. 50.

(xv) replying to the *démarche*,[53]
(xvi) granting diplomatic privileges and immunities to apostolic delegates accredited to the Catholic Church in receiving States,[54]
(xvii) (almost all) the rules of diplomatic protocol and ceremony.[55]

II.3.3 General diplomatic practice

The third normative level is represented by broadly recognised and worldwide uniformly conducted diplomatic practice, also known as general diplomatic practice. It is a part of common (general) international usage which means widespread ways of conduct in the field of international relations. These practices are commonly used as traditional or habitual without being motivated by any legal obligation or courtesy. They contain areas such as:

(i) usage of white paper in diplomatic communication,[56] or – exceptionally – cream paper,[57]
(ii) observance of diplomatic ceremonial of the receiving State,[58]
(iii) sending a note written in the language of the sending State with a translation into the language of the receiving State on plain paper,[59]
(iv) establishment of diplomatic missions at the seat of receiving State's government,[60]
(v) granting State's permission to establish a diplomatic mission of another State with which the former has already established diplomatic relations,[61]
(vi) the commencement of inviolability of diplomatic premises when they reached the installation stage[62] (probably as the evidence to be able to be at the disposal for the mission's purposes),
(vii) notification of the receiving State of the temporary absence of the head of the mission,[63]
(viii) right of a member of diplomatic mission to enter and transit the territory of a third State when necessary to take up or to return to their post in a receiving State (if there is no other way to get there),[64]

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[53] KAUL, H.-P. Démarche. In: Rudolf Bernhardt (ed.). *Encyclopedia of Public International Law. Instalment 9.* p. 70.
[54] ROBERTS, I. (ed). *Satow s Diplomatic Practice. 7th edition. (e-book).* p. 204.
[55] MALANCZUK, P. *Akehurst s Modern Introduction to International Law. p.* 44 and MACALISTER-SMITH, P. Comity. In: Rudolf Bernhardt (ed.). *Encyclopedia of Public International Law. Instalment 7.* p. 43.
[56] FISCHER, P., KÖCK, H. F. *Völkerrecht.* p. 30.
[57] SUTOR, J. *Korespondencja dyplomatyczna. [Diplomatic Correspondence].* Warszawa: Dom Wydawniczy Elipsa, 2008, p. 19.
[58] FISCHER, P., KÖCK, H. F. *Völkerrecht. p.* 30. I allow myself to add that this practice could be regarded as international courtesy.
[59] ROBERTS, I. (ed). *Satow s Diplomatic Practice. 7th edition. (e-book).* p. 185.
[60] In: *United Nations Conference on Diplomatic Intercourse and Immunities. Volume I.* p. 109. [online]. 2. 3. – 14. 4. 1961 [2023-03-03]. Available at: <https://legal.un.org/diplomaticconferences/1961_dipl_intercourse/docs/english/vol_1.pdf>.
[61] JAMES, A. Diplomatic Relations and Contacts. *British Yearbook of International Law.* 1991, Vol. 62, No. 1, p. 360.
[62] BARTOS, M. In: *Yearbook of the International Law Commisiion. 1957. Volume I.* pp. 52–3.
[63] MRÁZ, S. *Diplomatické a konzulárne právo. [Diplomatic and Consular Law].* Bratislava: Vydavateľstvo Ekonóm, 2009, p. 29.
[64] Ibid., p. 86.

(ix) issues relating to internal staffing of a diplomatic mission,[65]
(x) right of a member of a mission to enter and stay on the territory of a receiving State while not declared *persona non grata* or unacceptable before their arrival (exemption from immigration control),[66]
(xi) considering espionage, violent crimes and drug smuggling as a reason to declare a diplomatic agent *persona non grata,*[67]
(xii) towing a vehicle of diplomatic mission or of its member in the event of grossly negligent parking of privileged vehicle in violation of traffic regulations of receiving State (e. g. blocking the entrance to the emergency hospital),[68]
(xiii) tolerance of sending a limited amount of mission's members' private mail in diplomatic bag,[69]
(xiv) finalisation of diplomatic documents without erasures, typing errors and overwriting.[70]

II.3.4 Particular diplomatic practice and diplomatic praxes

At the lowest level, there are particular and individual diplomatic practices, i. e. a practice common to a few diplomatic actors or alternatively, a practice of a single diplomatic actor. From the nature of the matter as well as from the amount of subjects with diplomatic relations, it is obvious that these practices are the most numerous. Their often detailed description is contained in the diplomatic guides of many States. Issues that are managed in contemporary diplomacy at this level are, for example:

(i) the form of ambassador's credentials and the ceremony of their formal presentation to the head of receiving State,
(ii) possibility for members of diplomatic missions to interrogate persons in premises of diplomatic mission,
(iii) relation between sending State's diplomatic missions and consular offices in receiving State,
(iv) criteria of receiving State for accepting a member of diplomatic personnel of diplomatic mission,
(v) employment of members of the administrative and technical staff and service staff from the ranks of the citizens of receiving State,
(vi) frequency of rotation of members of diplomatic mission of sending State,
(vii) exemption of diplomatic vehicles from parking bans on the territory of receiving State,
(viii) using the rank of envoy for a member of diplomatic personnel,
(ix) introduction of upper limit for the number of members of diplomatic mission in receiving State,

[65] DENZA, E. *Diplomatic Law.* p. 55.
[66] Ibid., p. 50.
[67] OELFKE, CH. (ed.). *Vienna Convention on Diplomatic Relations of 18 April 1961.* p. 95.
[68] Ibid., p. 163.
[69] Ibid., p. 187.
[70] *Diplomatická prax. [Diplomatic Practice].* Bratislava: Ministerstvo zahraničných vecí SR, 1996, p. 139.

(x) holding the position of doyen of the diplomatic corps by representative of the Holy See or according to the seniority principle,
(xi) communication between Ministry of Foreign Affairs of receiving State and foreign diplomatic missions through doyen, circular notes, the Internet or internal computer network,
(xii) common or separate diplomatic and consular services of sending State and performance of consular functions by diplomatic missions,
(xiii) delivering diplomatic bags by a ship's captain,
(xiv) using flags other than those of sending State by its diplomatic mission in receiving State,
(xv) presenting credentials of head of mission to head of receiving State via videoconference due to COVID-19 restrictions,
(xvi) extent of application of so-called lockdown rules of receiving States with respect to members of diplomatic missions,
(xvii) extent of application of mandatory quarantine and mandatory testing for COVID-19 with respect to members of diplomatic missions in receiving State.

CONCLUSION

Contemplating the term diplomatic practice is neither mere intellectual exercise nor empty theorising. This contemplation has a practical significance from the perspective of creation of new rules for diplomatic relations including rules of diplomatic law. Even though it is true that the diplomatic law is undoubtedly one of the most rigid branches of the international law, its development is not finished. From attitudes of States towards codification of international law, it might appear that the VCDR represents a full stop to their normative efforts in the field of diplomatic relations. This, indeed, is not the case. Even though new treaties pertaining to diplomatic law are not being proposed, the life of diplomacy has not come to standstill. It continues and it does so in new ways, too.

In general, new practices most often arise when life circumstances are challenged or changed. The situation in international community is not different and it could be best illustrated by new diplomatic practices emerging in the time of COVID-19 pandemic. Various restrictions of receiving States which were implemented completely naturally as a result of measures against spreading of this disease, have inevitably affected diplomatic life. Following the difference between the notions of 'diplomatic practice' and 'practice of diplomacy', it has to be noticed that those measures were not adopted only by the States' organs conducting diplomacy within their powers in foreign policy, but also by other States' authorities, mostly by those with competences in public health protection. Consequently, States and their diplomats were forced to find new solutions for day-to-day course of diplomatic activities in the new circumstances and therefore new practices were emerging all over the world.

It is true that despite the global extent of the pandemic, the nascent diplomatic practices were still rather individual or particular. However, the essence of the matter suggests that the development towards a general diplomatic practice and perhaps even a new international custom is not impossible; on the contrary, it will be likely. This can be demonstrated by diplomatic practice with respect to lockdown or curfew. Although Michaela

Sýkorová briefly claims that this practice *"could also be permissible, insofar as it does not prevent diplomats to make trips essential for their work"*,[71] a detailed analysis of its implications for freedom of movement of diplomatic missions' members in receiving States can be done.

Pursuant to the Article 26 VCDR *"Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory."* However, lockdown or curfew imposed by many States restricted this freedom in such a manner that would be unthinkable in the "pre-covid" era. On the other hand, the extent of acceptance of this restriction raises the question of whether there is, in diplomatic practice, a change in interpretation of Article 26 VCDR – specifically with respect to the term national security, or whether a new ground to limit the freedom of movement of members of missions is being added. Under the current wording of Article 26 VCDR, the given term of national security is the only ground for restriction of diplomatic missions' members' freedom of movement. In the context of the COVID-19 pandemic and in the extent of (principially generally accepted) lockdown restrictions, it currently appears that the term national security either entails the health security or the health security itself gradually becomes generally accepted ground for restriction of freedom of movement of missions' members by other States. In other words, receiving States are entitled to regulate freedom of movement of missions' members on the grounds of serious health reasons.

Nonetheless, it is not to be overlooked that the restriction of freedom of movement under the current wording of Article 26 VCDR does not assume its application concerning the entire territory of receiving State which is, on the contrary, typical for lockdown measures. This different territorial scope of the discussed issue (i. e. VCDR wording *versus* new diplomatic practice) and specificity of the reasons for the restriction of freedom of movement in the form of an easily transmitted contagious disease indicate apparent developments towards changing the rule entrenched in Article 26 VCDR rather than towards its new interpretation. From the perspective of the theory of public international law, this could take the form of interpretation of the text of the international treaty under sub-paragraph (b) of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties, or of adding (amending) the text of the treaty as a result of the new practice of States. And if the new diplomatic practice is addressing a treaty provision, it is obvious that the power of this practice is greater than the normative level of general international practice – not to mention the fact that acceptance of restrictions of diplomats' freedom of movement is not a matter of international courtesy.

Based on the above analysis, it can be concluded that diplomatic practice is still one of basic sources of the normative regulation of diplomatic relations and it does not and can not lose its significance. It is obvious that it will be mostly practice of States, rather than an international codification conference, which will result in a new regulation of States' behaviour in the suddenly changed reality of international community. It is normal that

[71] SÝKOROVÁ, M. Restricting Diplomatic Privileges in the Protection of Public Health? The Application of the Vienna Convention in the Times of Pandemic. In: Pavel Šturma (ed.). *Czech yearbook of public & private law. Vol. 12.* Praha: Česká společnost pro mezinárodní právo, 2021, p. 20.

this regulation, at first, takes a form of self-regulation of a particular State or a group of States. Depending on the context of the developments, the convergence of different States' practices cannot be ruled out. This means that the way for the creation of a new rule, whether legally binding or legally non-binding, is open. And that is, *inter alia*, why it is necessary to monitor the development of diplomatic practices, their content, possible normative effects and ramifications in the real life.