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The Privileges and Immunities of Diplomatic Envoys Under International Law

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Abstract

The concept of diplomatic immunity is an ancient idea based on a mutual understanding between different societies. The idea that a society could send a person on their behalf to negotiate and argue for their cause has been a vital tool in the history of international relations. Since the beginning of civilization, states have recognized and upheld the sanctity of ambassadors, especially as regards the personal freedom and safety of envoys. Although there have been tremendous changes in the way nations interact with each other, the basic functions of diplomacy and their machinery have not changed. Indeed, the central features of diplomatic institutions have survived the fundamental shifts in the order and structure of international politics such as the surge of nationalism and democracy and the incorporation of non-European countries in the international system. Although the notion of diplomatic immunity has been continually adhered to by nations predating the codification of diplomatic law, increased globalization and inter-dependency between states has led to the development of customary International Law which has subsequently been codified to ensure that diplomatic immunity is held sacred till the end of times. In an attempt to properly understand and appreciate the broader concept of International Law, some of the most important privileges and immunities being enjoyed by diplomatic envoys are highlighted and discussed in this work.

Keywords: Immunity, International Law, The Vienna Convention, Inviolability.

Introduction

The Preamble of the Vienna Convention on Diplomatic Relations (1961) [hereinafter The Vienna Convention] states, “*Recalling that people of all nations from ancient times have recognized the*

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status of diplomatic agents...” Building on this statement diplomatic immunity has been a facet of diplomatic relations for countless years and is regarded as one of the oldest branches of International Law. With the concentration of States in a geographical area interaction between States was inevitable, especially with the existence of a common language, culture or religion (Parkhill, 1998). Envoys have since time immemorial been specifically chosen and sent in order to deliver messages, receive replies and report on any news from foreign States. These functions ensured the development of special customs on the treatment of ambassadors and other special representatives of other States (Shaw, 2003) Necessity forced most States to provide envoys with basic protection, both within the State of final destination and in States of transit (Maginnis, 2003). The special immunities and privileges related to diplomatic personnel developed in part, as a consequence of sovereign immunity and the independence and equality of States (Shaw, 2003). With the establishment of permanent missions, sovereigns acknowledged the importance of ambassadors stationed in foreign States in order to negotiate and gather information (Parkhill, 1998).

While customary International Law continues to define the concepts of diplomatic immunity, Today, The Vienna Convention codifies the customary practice of diplomatic immunity and is accepted world-wide as concrete International Law.

Meaning and Nature

The practice of granting diplomatic immunity is thousands of years old (Morris, 2007). Historians recognize that the practice of immunity was common to a wide range of states in ancient times, from classical Greece and Rome to both the near and far east, including the ancient Babylonians, Egyptians, Israelites, Indians and Chinese (David 2001). Kurizaki (2011) traces the development of diplomacy through history, from the Amarna diplomacy in the ancient Near East, to Greek, Roman, Byzantine and French diplomacy in the 17th and 18th centuries.

Ross (1989) defines diplomatic immunity as a situation where members of diplomatic missions are shielded from legal processes. According to Wilson (1984), this "shield"- diplomatic immunity - is broadly defined as the freedom from local jurisdiction accorded under International Law by the receiving state to foreign diplomats and to the families and servants of such officers.

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Various theories have been advanced to explain the concept of diplomatic immunity. Most prominent among these theories are the theories of personal representation, extraterritoriality and functional necessity.

The theory of personal representation is premised on the idea that the diplomat is a representative of the sovereign of a state, and that as the representative he is entitled to the same privileges as the sovereign (Groff, 2000). Under this theory the diplomat is viewed as the personification of the head of the sending state.

The theory of extraterritoriality suggests that the property and person of the diplomat are to be treated as if they exist on the territory of the sending state (McClanahan 1989). This implies that since the diplomat is considered to be living in the sending state, he remains immune from the criminal and civil jurisdiction of the receiving state (Wright 1897).

Lastly, the theory of functional necessity postulates that immunities and privileges should be limited to only those necessary for the diplomat to carry out his official functions (McClanahan 1989). The approach is justified by arguing that diplomats could not fulfil their roles without certain privileges and immunities. Proponents of this theory suggest that it is dynamic and contains safeguards preventing the needless expansion of privileges and immunities (Farhangi 1984-84 and Wilson 1984).

According to Fox (2008), diplomatic immunity as applied now is given as recognition of the sovereign independent status of the sending state and that of the status of the public nature of the acts which render them not subject to the jurisdiction of the receiving state and as protection to the diplomatic mission and staff to ensure their efficient performance of functions free from the interference from the receiving state.

Some of the most important rights, privileges and immunities a diplomat enjoys today are highlighted and discussed below.

1. Personal Inviolability

Peoples have recognized the special status of foreign representatives already since ancient times and therefore some of the fundamental principles concerning such representatives, for example,

personal inviolability are as old as the first civilizations. Since then, diplomatic law has continuously developed and changed, but the vital principles have survived that evolution.

Article 29 of The Vienna Convention provides that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity. This simply means that diplomats are accorded the highest degree of privileges and immunities, and from the provisions of the article this generally has two aspects;

Firstly, there is immunity from action by law enforcement of the receiving State. They could not be arrested unless they were actually engaged in plotting against the State they were accredited to, and even in such extreme circumstances, only an application for their recall must be implemented. A clear example happened in 1717, when the Swedish ambassador to England was a prime suspect in a conspiracy to overthrow King George I. The British government obtained evidence by intercepting some letters. The ambassador was expelled from Britain.

Secondly, there is the special duty of protection by the receiving State to take appropriate steps against attack. Where there is a threat to the safety of a diplomat, such as a mob attack or kidnapping, the receiving State must provide special protection, like an armed guard or bodyguards. And where a government is aware of a possible kidnapping, or diplomats situated in countries such as in South America or in the Middle East, where diplomats are vulnerable to terrorist attacks, extra measures must be taken in the tightening of their security and the protection of these diplomats.

Ogdon (1936) adds a third aspect to this, stating that the State has a duty to punish individuals who have committed offences against diplomats, which most foreign States make provision for in domestic laws. Nations ratifying the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1979, make these crimes punishable with appropriate penalties, which take into account the gravity of the offence and either extradite offenders or apply the domestic law.

Personal inviolability is a physical privilege in nature and thus it is distinct from the diplomatic immunity from criminal or civil jurisdiction. This right is absolute. This means that, a diplomatic agent may not be arrested or detained in any circumstances, no matter how grave or heinous his/her

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crime is. The police can, of course, arrest such a person in good faith, but when they learn that the person is entitled to personal inviolability, the police must release him immediately.

Diplomatic history has seen very few situations where states have not respected personal inviolability. Probably the best-known incidence occurred in Tehran, Iran, where on 4th November 1979, the embassy of the United States was invaded by militant students and all 66 diplomats and citizens of the embassy were seized as hostages for 44 days. The purpose of such action was to secure the extraction of the former Shah by the United States into the hands of the new Islamic regime for trial, for crimes committed against the citizens during his reign. The Iranian authorities subsequently approved the actions of the militant students and therefore took responsibility for such actions and grave breaches of The Vienna Convention.

The International Court of Justice (ICJ) stated in the judgment on these events that the Iranian actions were “clear and serious violations” of Article 29 of The Vienna Convention and the decision of the Iranian authorities to continue the occupation of the mission’s premises “gave rise to repeated and multiple breaches of the applicable provisions of The Vienna Convention”. The ICJ clearly condemned the Iranian actions, but the Iranian officials still alleged that these actions were warranted under Islamic Law although they were indeed prohibited by the convention. This action led to the severance of diplomatic relations between the United States and Iran.

2. Immunity from Jurisdiction

Jurisdictional immunity entails that persons with immunity cannot be brought before the courts for any illegal acts or offences committed while in the receiving State during the period of their functions. This extends to all jurisdictions whether civil, administrative or criminal. Thus, a diplomatic agent who commits an illegal act in the receiving State cannot be prosecuted in the local courts as the courts would be incompetent to pass upon the merits of action brought against such a person.

Although immunity from jurisdiction is distinct from Personal Inviolability, the two privileges can be seen to complement each other. Article 31 of The Vienna Convention provides that, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. Complete exemption of a diplomatic agent from local criminal jurisdiction appears to be fully

justified by the requirement of his function. Otherwise the inviolability of his person as enshrined under Article 29 of The Vienna Convention could hardly be guaranteed.

Therefore, it can be said that the most important consequence of the personal inviolability of the envoy is his right to exemption from jurisdiction of the receiving state in respect of criminal proceedings. The immunity of a diplomatic agent in this regard is absolute, and he cannot under any circumstances be tried or punished by local criminal courts of the country to which he is accredited. Article 19 of the Havana Convention on Diplomatic officers 1928 states “Diplomatic officers are exempted from all civil or criminal jurisdiction of the state to which they are accredited”. The same principles have been embodied in Article 31 of The Vienna Convention.

Hickey and Fisch (1990) in summarizing this position, state that as regard the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of International Law agree nowadays that the receiving state has no right in any circumstances whatsoever to prosecute and punish diplomatic envoys. It is settled principle of law that a diplomatic agent can under no circumstance be prosecuted in the receiving state for any criminal offence which may be committed. It is clear that this absolute immunity attaches also to acts committed in his private capacity, because it is difficult to see how a crime can be committed by a diplomatic agent in the exercise of his official functions.

A person entitled to immunity in the receiving state might still be subject to the jurisdiction of his home state upon recall or dismissal from service. The sending State can ask the receiving State to arrest and extradite him so he can stand trial in the sending State.

It is important that Immunity from jurisdiction is not confused with the immunity from liability, for once the exemption from jurisdiction is effectively waived, then liability may arise. The immunity, if any, is from suit, not from liability. Lord Hewart CJ in case of *Dickinson v. Del Solar* (1930) has pointed out that:

Diplomatic agents are not, in virtue of their privileges as such immune from legal liability for any wrongful act. The accurate statement is that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction.

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The second arm of Article 31 of The Vienna Convention extends the immunity of diplomatic agents to cover the civil and administrative jurisdiction of the receiving state. No civil action of any kind as regard debts or their car, furniture etc. can be seized for debts. They cannot be prevented from leaving country for not having paid their debts, nor can their passport be refused to them in this account (Gardiner, 2003). This exemption is confined of his functions as a diplomat and not for property or services outside his official duties.

A diplomatic agent's immunity from civil suits applies to both his private acts and to those performed in the course of his official functions. The International Law Commission (ILC) considered the jurisdictions mentioned to include any special courts in the categories concerned like commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial or quasi-judicial functions.

In Nazre Aga case (1900) the French Court of Cassation has laid down that the diplomatic immunity which is founded by the necessity for mutual independence of States extends to every effective member of the delegations. It can only be set aside by a clear and regular acceptance by these persons of the jurisdiction of the Courts before which they are proceeded against. It is irrelevant whether the defendant contracted his obligations before or after he began his official duties. It is sufficient that he possesses his official character at the time when proceedings against him are initiated.

However, unlike immunity from criminal jurisdiction, immunity from civil jurisdiction is not absolute. Sub-clauses of Article 31 (1) (a), (b) and (c) of The Vienna Convention provides for certain exceptions, namely:

- (a) In a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.
- (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Further, The Vienna Convention under Article 41 requires that a diplomatic agent shall not, in the receiving State, practice for personal profit any such activities.

3. Inviolability of Diplomat's Residence and Property

Previously there was no distinction between the residence of the ambassador and the premises of the mission. However, as a result of the growing numbers of diplomatic and official staff, it is often necessary to separate these premises (Ross, 1989). Many States enacted legislation conferring inviolability on the residence of the diplomat and later express provision was made for inviolability in the Havana Convention. The nature of the property was made clear by The International Law Commission (ILC), which stated that it denotes a residence distinct from the mission, which could include a hotel room, an apartment or house, whether owned or leased. A second residence, such as a holiday home or a hotel room away from the capital would also have inviolability, but if the diplomat began living in it, it might lead to the loss of inviolability of the principal residence (Fox, 2008).

A situation like this arose in *Agbor v Metropolitan Police Commissioner* (1969) where a Nigerian diplomat moved out of his flat for "re-decoration". When the diplomat moved out, a Biafran family moved in. The Nigerian High Commissioner claimed that the residence still maintained its inviolability and requested police assistance to evict the family. However, the court held that the diplomat had moved out permanently and it had thus lost its inviolability.

Article 36 of The Vienna Convention provides that the personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds of suspicion that it contains articles that are not for official use of the mission or for personal use of the diplomat or his family. It is important to note that there is a distinction between personal baggage and diplomatic bags and the two should not be confused.

In the event that there are grounds of suspicion, the personal bags may be inspected in the presence of the diplomatic agent or his or her authorized representative. Some airports routinely allow the luggage to be sniffed by dogs to check for drugs. If the dogs sense drugs, the diplomat is normally requested to open the suspicious bag. If the diplomat does not allow his baggage to be inspected

or tested by agents of the aircraft carrier, the carrier is under no obligation to carry him (Farhangi, 1985-86)

4. Inviolability of Diplomatic Bag and Courier

All official correspondence of mission is inviolable. The concept of inviolability of communication extends to bags of the diplomatic agents. It is certainly an accepted international practice, and probably International Law, that in exceptional cases where the receiving state had grounds for suspecting abuse it had right to challenge in respect of the diplomatic bag. It could, that is, ask for permission to inspect the content. The sending state could either allow the bag to be opened and inspected or have the bag return to its place of origin (Parkhill, 1998).

The ‘diplomatic bag’ is defined as meaning “the package containing official correspondence, and documents or articles intended to exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communication referred to in Article 1 which bears visible external marks of their character as a diplomatic bag” (Berridge and Alan, 2003).

Article 27 (3) requires that the bag be allowed through without inspection. However, reservation to the Convention insists upon inspection to be made. But this has been met with protest by some other parties. United Kingdom Foreign Affairs committee report says that “Article 27 does not prohibit electronic scanning of the diplomatic bag or sniffing by dogs” (Maginnis, 2003). The exemption of the diplomatic bag from examination through electronic or other technical devices, which does not appear in Article 27 (3) of the Convention is controversial and has been objected to by many states.

An incident took place at London’s Stansted Airport in 1984 when customs officers discovered a former Nigerian Minister (Umaru Dikko) in an unconscious state packed in a large crate together with a doctor supposed to take care of him during the undesirable journey. The Nigerian diplomatic service hoped to circumvent British extradition procedures by that means, but it failed to furnish the crate with the visible external marks of its diplomatic character as required by The Vienna Convention (Akinsanya, 1985). After the airport authorities became suspicious about the content

of the crate, they consulted the Foreign Office which gave the advice that in the absence of lead or wax seals the crate could not be considered as a diplomatic bag and, as a consequence, it could be opened and subjected to a more thorough inspection.

5. Exemption from Taxes, Local Charges and Customs

Article 34 The Vienna Convention looks into the basic principle of exemption from domestic taxes in all cases, with some exceptions to taxes on private income and property arising in the receiving State, indirect taxes and charges levied for services rendered.

In general, diplomatic exemption from taxation is a broad immunity. While there are specific exceptions, when faced with conflicting interpretations, courts should favor exemption (Wilson, 1984).

The terms used in the articles are not defined, and because nations raise revenue differently, what one nation defines as a charge for services rendered could be deemed a tax in another nation. The line between what is considered a charge or fee for specific services and what is simply a tax is blurry. Even when labelled a tax under a nation's revenue laws, a charge can still be for specific services rendered for purposes of The Vienna Convention. Charges for specific services rendered include bridge and road tolls and charges imposed by local governments to provide services such as water, road maintenance and improvement, and street lighting. Charges that would not fall within the exception for specific services rendered include contributions for national security efforts, "public education, social security benefits or the general expenses of central government."

Diplomats are generally immune from paying "non-beneficial" local taxes or rates. Non-beneficial rates are those from which the mission does not derive a direct benefit (Southwick, 1989). The distinction between beneficial and non-beneficial rates is an important one that courts across the country and regimes around the world use when analyzing whether charges constitute a fee or a tax. Unfortunately, there is no bright line test for what constitutes a benefit and what does not. Some courts require a benefit to actually be conferred, while others only require the possibility of a benefit. The meaning of benefit also varies among nations and international organizations. The only constant is that the definition of a benefit depends upon the jurisdiction in which the court or governing body resides.

6. Freedom of Communication

It is essential for the proper functioning of a diplomatic mission that it is able to communicate freely for all official purposes, both with its home government and with other missions of its own state in other countries. Furthermore, Article 24 of The Vienna Convention extends the concept of inviolability to all communications and documents of the diplomatic agent wherever they are in the receiving country.

Protection of the freedom and secrecy of official communications of missions with their own government or agent is one of the important privileges and immunities given in International Law (McClanahan, 1989). A mission is entitled to communicate for official purposes and to have access to every facility for this purpose in the receiving State.

Telecommunication is considered as any mode of communication over a long distance and can be in written form and delivered by couriers, telephone services, fax, electronic mail, wireless transmitters and the like. There is no clear, established rule in customary law concerning the inviolability of correspondence to or from a mission sent through the public postal system. Letters to the mission would become archived documents on delivery, but not before then.

The inviolability of official correspondence is twofold: it makes it unlawful for the correspondence to be opened by the receiving State, and it prevents the correspondence from being used as evidence in a court proceeding.

Conclusion

It must be stated that the formulation of Vienna Convention on Diplomatic Relations (1961) was largely a reaction to the unlimited immunity historically granted to diplomats (Ogdon, 1936). The preamble to the Vienna Convention reflected the international concern of giving unlimited immunity to all classes of diplomats. The stated purpose of the Convention is to enable diplomatic missions to represent their sending state. The drafters did not design it for the individual's benefit. In addition to the immunities provided for in the Vienna Convention, Article 41 imposes a duty on the persons who benefit from such privileges and immunities to obey the laws and regulations of the receiving state.

Unfortunately, diplomatic immunity has protected outlaw diplomats for thousands of years. There are several cases of serious crimes that have gone unpunished under the guise of diplomatic immunity. In Ashman and Trescott (1987), concentrating on the U.S. and Britain, journalist Ashman and his lawyer wife compiled an appalling number of case histories in which those with immunity abuse it to perpetrate, without consequence, rape, shoplifting, smuggling and drunken driving. In some particularly shocking instances, diplomatic officials guilty of vehicular homicide have gone unpunished. The documentation of these abuses is thorough and horrifying.

While acknowledging that there are indeed some sad and unfortunate cases, it must be stated that there is simply no factual justification for the removal of diplomatic immunity. The number of crimes committed by immune foreign diplomats around the world is statistically insignificant and these offenses are, for the most part, misdemeanours. In the rare instance that an immune alien commits a serious crime, adequate remedies exist under domestic and International Law. A strict application of the existing remedies should effectively address the problem of "diplomatic crime" and serve as a potent deterrent. (Hickey and Fisch, 1990)

Furthermore, from a foreign policy perspective, removal of such immunity would create a threat of false criminal prosecution, especially in periods of political tension when the need for uninhibited discourse is particularly valuable. The exposure of the diplomatic and consular corps to such unnecessary risks ultimately may result in a personnel shortage of individuals willing to serve at foreign posts. Simply put, the desirability of maintaining diplomatic immunity far outweighs its undesirability.

In conclusion, it is recommended that there should be a regular appraisal/review of The Vienna Convention as a whole, every ten years for obsolete provisions to be discarded and more prudent articles added to it. This regeneration mechanism would ensure that the Convention stays relevant throughout time.

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