

Rethinking Diplomatic Immunity under the International Law

Dr. Salim Javed

Department of Law, Patna University, Bihar

Abstract

World during these days are more connected and dependent on each other than any other time of known history. This connection and interdependencies leads the sovereign countries to maintain the relationships for which diplomats are usually sent to all the countries of significance for the specific nation. But the question arises that when a diplomat of one nation is residing in other nation which law will be applied on the diplomat. Vienna Convention on Diplomatic Relations (1961) is an answer to this question. The present paper is an attempt to analyses the question and to find whether the provisions made under the convention is sufficient.

Keywords: Vienna Convention, Diplomatic Relations, Immunity, International Law.

Introduction

Generally, immunity refers to a waiver. But instead diplomatic immunity implies the immunity of ambassadors usually given. As such, official rights imply the unique benefits or benefits given by a contract, protocol or privilege to ambassadors. Thus, ambassadors have a common stance with immunities and rights. Diplomatic immunity is a type of legal protection that guarantees that foreign officers are provided secure access and deemed not to be prosecutable in

accordance with the legislation of the Guest Nation. The "Vienna Convention on Diplomatic Relations", 1961¹ (or "Vienna Convention", 1961) was accepted as an International Diplomatic Law, although the notions and consensus are much more historic.

Diplomatic immunity can be defined as the immunity granted to diplomats in the course of their duty in a receiving state for the

necessity of performing their official function². It should be noted that the definition of diplomatic immunity is however different from that of diplomatic protection. Diplomatic protection may be outlined as a mechanism of international law that is used by states to secure simply treatments of their nationals abroad.³

"Recalling that people all over the world have acknowledged the position of diplomatic officials from a long time ago," says the Preamble of the "Vienna Convention" Constructing on this declaration, diplomatic immunity has over the countless years been an element of diplomatic ties and has been regarded one of international law's earliest sections. Communication between States was essential, especially with those of the presence of a normal language, belief or culture in a geographical territory concentration. Sending and delivering emails, receiving answers and reporting on all media information from overseas States has since ancient times been specially selected.

Specific customs in treating diplomats as well as other unique officials of various states were developed in accordance according to these responsibilities. Compulsion compelled most States,

amongst each of the State of intended destination and also in transit territories, to create emissaries with fundamental security. Partly as a result of the provision of privileges and immunity as well as providing freedom and equality to states, the unique constitutional protections and benefits connected with diplomatic officers were evolved.

The sovereign states have recognized the significance of representatives serving in overseas countries to communicate and collect information by establishing continuous operations, As the scope and tasks of ambassadors have changed from representative to mediator and leading few as spies, the legal foundation for attempting to justify the diplomatic privileges has therefore, been amended.

The Indian Perspective

The Diplomatic Agents laws began to develop after 1815; and a Convention was eventually passed in 1961. The "Vienna Convention Preamble" makes it apparent, though, that such issues whereby the "Vienna Convention" does not specifically provide are still covered by international standard regulations. In this regard, the Parliament of India has adopted the Diplomatic Relations Act of 1972⁴ to lend

support to, and to provide for "Vienna Convention on Diplomatic Relations" of 1961. Similar acts were also adopted by several other Nations.

The Act of 1972, which mainly addresses the diplomatic rights and privileges as laid down in the "Vienna Convention", has also been adopted by India in order to give influence to this Convention. Thus, diplomatic officials have immunity from prosecution and immunity from their personal and bureaucratic competence from the felonious competence of either the recipient Nation. This protection does not stretch towards their own individuals but to their cabinet as well as their families that are component of their team, provided that they cannot be citizens of host nation. The concept of exemption is whether the envoy should be free, without disruption, intervention or disruption, to carry out formal transactions on account of his nation.

Deterrent Measures Provided by the Vienna Convention

International law doesn't provide unrestrained license to people with immunity. The component of immunity is that the obligation to conform native laws. Hill takes into consideration and describes the process to be pursued in diplomatic

means as defined by Sir Cecil Hurst. The very 1st phase is to tackle an accused individual by emphasizing that perhaps the conduct of the representative would have a negative impact on his foreign life as well as the public perception of recipient and host countries. If this strategy is futile, must the issue be transferred to the operation leader? The recipient Nation's Foreign Affairs Minister shall contact the chief of embassy if this might be unsuccessful as well. The required payment arrangements or waiver were often arranged whether the director of the team decides to charge. The recipient Nation may apply to the guest Nation wherein the Head of Project would not initiate effective actions.

How to monitor violations of rights and special privileges are: "persona non grata" statement, privilege relinquishment, punishment of the offenders in the competence of the requesting state, reciprocation, breach of bilateral relations and resolution of claims.

Remedial Actions in the Vienna Convention on Diplomatic Relations Waiver Immunity

A waiver of immunity, authorized by Article 32, is "the act under which the sending State waives immunity in relation to

the person concerned."⁵ After waiver, the local court in the receiving country will have the power to prosecute and punish the offender. The "Vienna Convention" Preamble stipulates that it's not the long-term interest of the ordinary person to aim for the special protection of a diplomatic envoy, and instead to assure that his presence as a representative of his own nation is continued.⁶ In the meeting and thus, in the Knesset discussed if there would be a difference among legal and criminal justice and if there is a right to waiver of immunity. A further element of the matter was if the leader of the group had a right to waive for every representative of its entire group's protection or if he quite often needed an officer issuing state judgment. Almost all of the ILC dismissed the opinion that a post sending can waive immunity. Furthermore, waiver by the supplying nation can be a severe push for the official representative in any big situation equivalent to the individual of the recipient nation, like some kind of turbulent legal accountability.

Persona non grata

In some of these situations the sending Nation is authorized to recollect the diplomatically-associated agents or abort its

roles with the project. The recipient Nation may inform the sending Representative that perhaps the deployment operation leader or any other team member of the embassy staff is "persona non grata". It must be pointed out that every reason should be provided for the intervention by the recipient Nation making the envoy agent "persona non grata". The concept of "persona non grata" is the most effective method of curbing the exploitation of executive privilege provided for by the "Vienna Convention", and this is not appropriate to the recipient Nation's governing authorities.

Background of the reviewing paper

Diplomatic relations have been regulated by international laws as a result of long-standing Federal exercise, as expressed in domestic parliamentary regulations and judgements. But perhaps the next parts provide us with the finest proof of usually suitable laws when proposed amendments are produced. There are at least 192 participants to the "Vienna Convention" today⁷.

The "Vienna Convention" doesn't influence the laws regulating usual ground matters not specifically governed by its regulations and Countries are permitted, to change their stance by contracts and implicit treaties

depending on the successive conducts. Diplomacy includes any mechanism whereby Countries, for each situation through their approved officials, create or retain shared contacts or interact or conduct legal or political transactions.

There may in this context be diplomacy among war-like or combat nations, however, it doesn't correspond to tangible types of financial and army conflicts, but to interactions either for sympathetic, violent, or otherwise. Diplomacy usually requires the swap of perpetual and comparable temporary diplomatic tasks. For countries to bring significance to their UN membership and significant inter governmental organisations, at least a regular presence is required. International treaties may not be imposed on Government nor diplomatic immunity however, usually approved by agreement and reciprocate on account of the foundations of the need to overcome brutal conflict by voluntary agreements.⁸

Statement of the Problem

However, some states have brought diplomats who were guilty of abusing the immunity to justice by stating that their actions which has led to the abuse thereof was not necessary for their function, and have occasionally suggested that diplomatic

agents should enjoy immunity only in exercising their diplomatic function. There has been several controversies on this notion as the Vienna Convention stipulates that diplomats are meant to respect the laws of the receiving state and on the other hand , states that the diplomats should not be subject to the civil or the criminal jurisdiction in order to allow them perform their duty without interference from the receiving state.

The Vienna Convention also provides that the diplomats can waive his right in order to face trial and also gives an option for diplomats to be recalled by the sending state. In most cases when diplomats are recalled by the sending state there are no actions which have been taken against them.

Findings

In the light of the above, the following findings were made in this research: 1. the deterrent measures provided by the Vienna convention were inadequate, outdated and therefore ineffective. As a result, diplomats continue to abuse their immunity and occasioned grave injustice to the victims. 2. The convention did not provide means of settlement of individuals who were injured as a result of diplomatic misconduct. 3.

Commissions of civil wrong by diplomats were not serious as criminal offences.

Abuse of diplomatic immunity occurs in circumstances where diplomatic agents have taken actions which do not fall within their official mandate. The abuse of diplomatic immunity has grown due to the lack of clarity provided in the Vienna Convention on Diplomatic Relations. Due to this lack of clarity as to when abuse arises and stringent provisions in the VCDR to curb abuse, the VCDR has been used as a form of defense by diplomatic agent based on the inviolability principle. The provisions in the VCDR need to be reviewed to stipulate clearly when an abuse has occurred as well as stipulate punitive provisions in the Convention in order to curb diplomatic abuse as well as to deter other diplomats from carry actions which do not fall within the realm of their functions which will make other diplomatic agents aware of their actions and further make them aware of the fact that they are not above the law, hence, upholding the notion of rule of law.

Recommendations while rethinking diplomatic immunity under international law

From the foregoing statements and discussions, the following recommendations were made:

1. Immunity from civil wrong is accorded to diplomats. Although, this should be accompanied with stringent measures before entering into any transactions, for example, contracts, torts, commercial transactions, services, etc.

In addition to that possible future solutions can also be stated as: A potential reform considered to be worth examining is setting up an international criminal court for diplomats, which would operate in a non-adversarial/inquisitorial manner. This means the court is involved in investigating the facts of a case, as opposed to the adversarial justice system many people will be familiar with that pits two opposing parties against each other. It can impose monetary fines on diplomats or imprison them in its own penal facilities.

The court could operate free from the potential unfair bias of local proceedings, and the use of a court outside a bilateral relations structure can prevent the termination of diplomatic relations in extreme cases. However, issues with this include a lack of funding and resources that plagues many international courts, such as

the International Criminal Court, as non-adversarial court systems typically require more resources to operate. Furthermore, a system such as this infringes significantly on the operation and purpose of diplomatic immunity. For something that will require extremely high levels of support among member states, this may be a significant disincentive for states to support it.

Diplomatic police should be given more powers to instigate proceedings against diplomatic agent who are guilty of carrying out criminal activities as well as deliberately carrying out functions which do not fall within their official functions which disrespects the laws of the receiving state which have no effect on the official function of the diplomatic agent. The diplomatic police should also be given the mandate to carry out investigation in cases of abuse of diplomatic immunity. These roles should be provided for in the VCDR. The diplomatic agent should be treated with respect and dignity during the process of instigation and investigation.

The fact that diplomacy is a branch of international law and one of the purpose of diplomacy is to represent states, in some instances the receiving state may want to instigate proceedings against a diplomatic agent maliciously which may affect the

relationship between states. An ad hoc tribunal should be set up to decide independently on cases of abuse of immunity which are criminal in nature.

The ad hoc tribunal should be established for the purpose of determining criminal actions which are grave in nature as what may be considered as grave in the receiving state may be considered minor in which case the diplomat should be recalled back, this is to prevent malicious prosecution. The tribunal should also be able to review the functions of diplomat; those which are criminal in nature should be penalized as well as those which infringe on the rights of the citizens of the receiving state.

Very importantly, reduce the number of Immune personalities to least possible and to the most required. Several solutions have been proposed to the problems encountered with current law. Great Britain has discussed isolating nations which abuse Vienna Convention provisions. The US has thought of creating a common fund to help those harassed by foreign mandarins. A third option requires prosecution of the diplomat in her sending state and a fourth would interpret some of the Vienna Convention's provisions more restrictively.

Last, the Vienna Convention could itself be amended. But, none of these solutions are away from drawbacks. On similar grounds, there have been many suggestions coming like, A Claim fund by state departments to the victims later reimbursed by the Mission, a mandatory insurance scheme, a permanent international Diplomatic Criminal Court, Diplomatic Crime Legislations in UN etc.

Current solution suggested: Currently, the main form for holding diplomats accountable for criminal actions committed in the course of their foreign service is through expulsion from the host country, through the “persona non grata” (PNG) procedure set up in the Vienna Convention. However, this method is infrequently used by countries such as the US as it has the potential to create tension between the countries involved. Further, it provides no compensation for the victim; they would have to pursue it in the diplomat’s home country and a number of financial, cultural, logistical and political barriers limit chances of success.

Another issue with this procedure is that it is very hard to know whether or not the home country will actually prosecute the diplomat for the crimes committed in the host country. For United Nations staff specifically, the Convention on the

Privileges and Immunities of the United Nations 1946 applies. This Convention provides immunity for any acts undertaken in an official capacity and includes all the same immunity rights as diplomats enjoy under the VCDR.

Similar to diplomatic immunity, this has been taken advantage of by a number of UN staff and adequately addressing this issue has been difficult. The Secretary-General has a duty to waive immunity in certain cases but despite this, some UN employees have been able to get away with several offences. For example, a few years ago the High Commissioner for Refugees sexually harassed a fellow employee and then-Secretary General Kofi Annan was recommended to take disciplinary action against him, but never did.

Conclusion

First, the clauses of Art 41 should be reinterpreted and be made harsher if required, where respecting the law and regulation of host state is made legally compulsory, otherwise in heinous crime the trial could happen with joint jury at the place where alleged crime occurred. Second, there should be a provision of binding international acceptance of mistake, not installing the same diplomat to work

anywhere till the trial gets verdict. There could be a strong group of those 'internationally weak' nations whose large expatriates often work in other parts of world and it must not be a deterrence in lodging a strong protest against any such 'dominant' nation. Thirdly, the International Court of Justice should gear up; with UNGA legislation to give binding judgments before such shaking incidents take place.

References

1. http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.
2. NATHANIEL P. WARD, Espionage and the Forfeiture of Diplomatic Immunity, *The International Lawyer* Vol. 11, No. 4 (Fall 1977), pp. 657-671.
3. Annemarieke Vermeer-Künzli, A Matter of Interest: Diplomatic Protection and State Responsibility *Erga omnes*, *The International and Comparative Law Quarterly*, Vol. 56, No. 3 (Jul., 2007), pp. 553-581.
4. http://www.mea.gov.in/Uploads/PublicationDocs/150_The-Diplomatic-Relations-Vienna-Convention-Act-1972.pdf.
5. http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.
6. DROR BEN-ASHE, Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions *Harvard Law School*, November 2000.
7. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&=_en.
8. Subramanian, S. R. (2017). Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience. *The Chinese Journal of Global Governance*, 3(2), 182-233.