

DIPLOMATIC IMMUNITY: A FUNCTIONING CONCEPT IN SOCIETY OF TODAY

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INTRODUCTION

"The idea of diplomatic immunity is an ancient thought in view of a shared comprehension among various nations of the world. Diplomatic relations between nations is presently a focal component in universal relations and diplomatic operators acting for their States' advantages are an essential block in building a serene internationalized world."

Diplomatic immunity in international law is the opportunity from a nation's locale or coercive power allowed to specific people by a method for bargains or standard international law. Diplomatic personnel have immunity for moves made before both all through administration. Preventive measures ought to on a basic level be taken. The advantaged are by and by obliged to watch and follow the living arrangement nation's laws.¹

The significance of diplomatic agents has been perceived and might be acknowledged to a specific level however the idea of diplomatic immunity in regards to individual immunity is much more faulty then it at first sight may show up. In this theory the idea of diplomatic immunity will be fundamentally examined from different viewpoints with a specific end goal to check whether the idea is suitable in the general public of today.²

The purpose for this article is to basically analyze the idea of diplomatic immunity from alternate points of view. The idea will be examined from four ranges: [1] Structure: what does the idea individual immunity involve? To answer this, an examination of the Vienna Convention is made

¹ immunitet. <http://www.ne.se/lang/immunitet/210620>, National encyclopedic, 2013-01-09

² Article 53 VCLT, 1969.

with the reason to give a photo of the juridical structure of the idea of diplomatic immunity in regards to individual immunity and concentrating on the way of the specialists getting a charge out of diplomatic immunity. [2] Implementation: what issues exist with the idea in real life? To highlight the issue with the usage of the Vienna Convention an examination of the ICJ case "The arrest warrant case (The Democratic Republic of the Congo versus Belgium)" is led to exhibit the challenges of the usage of diplomatic immunity in regards to individual immunity and the trouble with the meanings of authority versus individual acts. [3] Conceptual correlation: Equality under the watchful eye of the law: What issues with diplomatic immunity can be found when investigations from an 'equality under the watchful eye of the law' point of view? [4] Conceptual correlation: Duty of State: What issues can be found while examining the idea of diplomatic immunity from the hypothesis, exhibited by Thomas Pogge, that human rights cases ought to be comprehended as attesting that every general public should be sorted out so that all individuals appreciate full access to those rights the hypothesis that the State has an obligation to regard, ensure and satisfy every single human right?

CLASSES OF IMMUNITY AND INTERNATIONAL VS NATIONAL LEGISLATION

There exist two categories of immunities that may, in principle, come into play and be relied upon. There are those immunities accruing under international law. These may relate to the conduct of a state agent acting in their official duty and are entitled functional immunities (*ratione materiae*) or they may be constructed to protect the private life of the state official, so-called personal immunities (*ratione personae*).

The functional immunities, on the strength of the so-called "Act of State Doctrine", to all states discharging their official duties and only the state may be held responsible at the international level and, in principle, individual performing acts on behalf of a sovereign state may not be called to account for any violations of international law he or she may have committed while acting in an official function. Personal immunities are instead granted by international customary or treaty rules to some categories of individuals on account on their functions and are intended to protect both their private and their public life. The individuals of whom these privileges comprise are Head of

State, prime ministers or foreign ministers, diplomatic agents and other high-ranking agents of various international organizations. The reason they enjoy these privileges is to be able to conduct their official mission free from any impairment or interference. There are immunities provided for in national legislation and are normally granted to the Head of State, the members of the cabinet and members of Parliament. These generally cover the acts of the individuals concerned and involve exemption from national jurisdiction. In addition, they also often include immunity from national prosecution for ordinary crimes having no link with the function and committed either before or during the exercise of the functions. Such immunities, however, terminates as soon as the functions come to an end, although normally the individual remains immune from jurisdiction for any official act performed during the discharge of his or hers function. The basis behind these national immunities is grounded in the principle of separation of powers in particular the need to protect state officials from interference from other state organs that could jeopardize their independence, mission or political action.³ In this thesis the immunities provided in international law will be analyzed.

➤ **TWO CLASSES OF IMMUNITY IN INTERNATIONAL LAW**

Interesting to analyze is the distinction between the two categories of immunities presented in international law, functional immunities and personal immunities. Functional immunities is based on the notion that states must respect other states' internal organization and may not therefore interfere with the structure of foreign states or the allegiance a state official may owe to his own state. Hence, no state agents are accountable to other states for acts conducted in an official capacity and which therefore must be attributed to the state. Personal immunities is predicted to need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of state agents under the pretext of dealing with an exclusively private act.⁴

“This distinction, based on state practice, is very important. Functional immunities: [1] Relate to substantive law, that is, amount to a substantive defense; [2] Cover official acts of any de jure or

³Cassese, Antonio. *International Criminal Law Second Edition.*, Oxford University Press, Oxford, 2008, p. 302

⁴Cassese, Antonio. *International Criminal Law Second Edition.*, Oxford University Press, Oxford, 2008, p. 303

de facto state agent; [3] Do not cease at the end of the discharge of official functions by the state agent [4] are erga omnes that is, may be invoked towards any other state.⁵

In contrast, personal immunities: [1] relate to procedural law, they render the state official immune from civil or criminal jurisdiction; [2] private acts carried out by the state agent while in office, as well as private or official acts carried out before taking office; [3] are intended to protect only some categories of state officials, namely diplomatic agents, Head of Government, heads of States, foreign ministers; [4] come to an end after cessation of the official functions of the state agent; [5] may not be erga omnes. The distinctions presented above permits us to realize that the two classes of immunity coexist and somewhat overlap as long as a state official who may also invoke personal or diplomatic immunities is in office. While he is conducting his official functions he always enjoys personal immunity. Nonetheless, the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the state official may be prosecuted for such crimes after leaving office⁶.

THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961

Article 1 is the interpretation paragraph where the aim is to define the different concepts of agents in possession of different levels of diplomatic immunity; “head of the mission”, “members of the mission”, “members of the diplomatic staff”, “members of the staff of the mission”, “members of the service staff”, “diplomatic agents”, “members of the administrative and technical staff”, “private servant” and lastly “premises of the mission”.⁷The general rule is that diplomatic agents are those persons so designated by the sending State and the receiving State simply receives.⁸ Diplomatic agents should, according to Article 8 be of the nationality of the sending State while the receiving State may declare a member of the diplomatic staff unacceptable (Article 9). The receiving State has often a particular interest in ensuring that diplomatic agents are what they

⁵ Ibid p. 304

⁶ Ibid p. 304

⁷The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Apr. 18, 1961, 500 U.N.T.S. 95. Art. 1

⁸Jonathan Brown “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relations” *The International and Comparative Law Quarterly*, Vol. 37, No. 1. Jan., 1988, p. 55

purport to be⁹. That is that they should be representatives of the sending State performing diplomatic functions, as stated in Article 3, and not be practicing for personal profit or commercial activity, prohibited by Article 42.¹⁰ The freedom of appointment and classification has become somewhat eroded in today's practice of the Vienna Convention, by means of an increasingly elaborate form of notification required by the receiving State.¹¹ Article 10 requires that the ministry for foreign affairs of receiving State shall be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission. Similar notifications are required in respect of other persons enjoying privileges or immunities. In practice though, some States have required a great number of details to be submitted as part of the notification process. Based on these details, the foreign ministry can determine whether or not the person notified properly falls into the classification given.¹² In practical terms, the value of ensuring proper classification of staff is prevent, for example, a driver being notified as a member of the administrative and technical staff, who enjoys full immunity from criminal jurisdiction, when he/she may more appropriately be considered a member of the service staff, who enjoys immunity only in respect of acts performed in the course of his or her duties¹³. The same considerations apply to members of the administrative and technical staff, who enjoy the privilege of duty-free imports only "in respect of articles imported at the time of first installation, whose governments seek to notify them as members of the diplomatic staff, who enjoys the privilege of duty-free imports throughout their posting.¹⁴ Why is it then so important with the notification system? The importance of the notification system is that it enables the foreign ministry of the receiving State to say who is a diplomatic agent: the sending State appoints, but the receiving State in effect determines status. There is nothing in the Vienna Convention on the recognition, as such, of diplomatic agents. The juridical practice of many countries consist of courts which determine immunity that state that recognition is a matter for the executive government, or for the foreign

⁹Brown, Jonathan, "Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation" 1988, p. 55

¹⁰ The Vienna Convention on Diplomatic Relations, 1961. Art. 3, Art. 42

¹¹ Brown, Jonathan, "Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation" 1988, p. 55

¹² Ibid p. 56

¹³ The Vienna Convention on Diplomatic Relations, 1961, Art. 37(3)

¹⁴ Ibid 36(1)

ministry in particular¹⁵. The advantages to the receiving State of the formal notification and certification process is that it can limit privileges and immunities to those properly entitled to them. In some cases the persons have been appointed as representatives by the sending State in all good faith, yet the freedom of appointment is ineffective without acceptance: the receiving State must “accord” diplomatic status to representatives of the sending State if it is to be operative.¹⁶

NATURE OF THE DIPLOMATIC IMMUNITY

The diplomats are not liable to be sued, unless the particular action falls into one of the three exceptions listed in article 31(1) where it is stated that a diplomatic agent enjoys immunity from criminal jurisdiction except in the case of: ¹⁷

- (a) relating to private immovable property situated in the territory of the receiving State, unless he/she 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 its official functions.

Of course diplomatic agents may be sued in respect of a matter claimed to fall within one of the three exceptions. If the diplomatic agents are sued, they do not have to claim immunity because they have already it. If the agents are held immune from the jurisdiction, the proceedings are stayed and may be reactivated if the person loses his or her immunity, for example by the termination of duties.¹⁸. Thereby it is of great importance for both the receiving State and diplomatic agents to know the proper limits within which the authorities of the receiving State, the law enforcement authorities as well as the courts, must act if this duty is to be observed. Immunity and inviolability do not simply mean diplomatic agents cannot be convicted by a court for offences they allegedly commit. The immunity also covers “the law enforcement activities of the agents of the State itself”.

¹⁵ Brown, Jonathan, “Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 55-56

¹⁶ Ibid

¹⁷ The Vienna Convention on Diplomatic relations, 1961, Art. 31(1)

¹⁸ Ibid p. 2

The receiving State's duty to treat diplomatic agents with due respect is broad, and must preclude the whole range of law enforcement and related measures. It is clear that an ordinary criminal investigation, in which no alleged offender possessing diplomatic immunity is approached or interviewed by police, is clearly permissible, as would be the issue of a minor charge such as a parking ticket or traffic infringement notice issued by an official who is confronted with prima facie evidence of an offence. Any attempt at execution would of course be in contravention of Article 29. Remedies are available to the receiving State and its residents, but it is suggested they do not lie down this road¹⁹.

CASE LAWS

Implementation: ICJ “arrest warrant case (Congo vs. Belgium)”

This case is of relevance because of its remarkable judgment. The case concerns the Minister of foreign affairs in DRC, Mr. Adbulaye Yerodia Ndombase (Yerodia). In this case, Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for the grave breaches of the Geneva Conventions of 1949 and for the crimes against humanity allegedly perpetrated before he undertook the office, breached international law²⁰. In particular, according to the Congo, Belgium violated the ‘principle that a state may not exercise its authority on the territory of another state’, the principle of sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state.²¹” According to the Court, taking reference of the Vienna Convention on diplomatic immunity, a foreign minister enjoys immunities from foreign criminal jurisdiction and sacredness, whether the minister is on foreign territory on an official mission or in a private capacity; whether the acts are performed prior to assuming office or while in office; and whether the acts performed are in an official or private capacity”.²²

¹⁹ Brown, Jonathan, ”Diplomatic immunity: State Practice under the Vienna Convention on Diplomatic Relation” 1988, p. 75

²⁰ <http://docplayer.net/390695-When-may-senior-state-officials-be-tried-for-international-crimes-some-comments-on-the-congo-v-belgium-case.html>

²¹ Ibid. p.4

²² Ibid. p.5

Ratione materiae vs. Ratione personae

This part of the analysis will focus on the problematic of the distinction between *ratione materiae* and *ratione personae* and the Court's conflation of the two. The ICJ's confusion resulted in a category of immunity for former state officials, in this case a foreign minister, who contradicts the rationale of sovereign immunity established under customary international law, by all but granting former for foreign ministers absolute impunity.²³ The Court held that "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability". There is though a crucial aspect of personal immunity which is that it does not render the official permanently immune from criminal proceedings; rather, it guarantees immunity only as long as the official retains his or her position in government.

Personal immunity therefore, is procedural law that [1]protects any act carried out by a state agent while in office or before taking office; [2]is afforded only those high officials who represent the state in international relation; [3]comes to an end at the termination of the official position.²⁴ In contrast to personal immunity, as describes in the "conceptual description", *ratione materiae* is a matter of substantive law rendering state officials permanently unaccountable to other states for acts that fall within his or her official capacity. Instead, under *ratione materiae*, official acts are directly attributable to the state itself and thus give rise to individual criminal responsibility. The substantive nature of *ratione materiae* means that a state official's violation of national or international law does not negate the violation. It only means that individual liability does not attach. As an agent's private actions are not attributed to the state, personal immunity attaches to the official position itself, not the individual.

CONCLUSION

"The purpose was to scrutinize the concept of diplomatic immunity from four areas: *structure, implementation, conceptual comparison: Equality before the law, conceptual comparison: Duty of State.*

²³ Day, Adam "Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong" Berkeley Journal of International Law Vol. 22, No. 489, 2004 p. 492

²⁴ Day, Adam "Crimes Against Humanity as a Nexus of individual and State Responsibility: Why the ICJ got Belgium v. Congo wrong", 2004 p. 493

What does the concept of personal immunity entail?

When analyzing the structure of the concept of diplomatic immunity regarding personal immunity the definitions of different actors enjoying personal diplomatic immunity was presented. The most questionable agent possessing the privilege of diplomatic immunity is the members of the families of diplomatic agents. There is no existing definition of family in the Vienna Convention other than “members of the family [...] forming that part of his household”¹²³. Since the concept of family differs among different societies it may be difficult to determine a distinct definition, with that stated though, one must recognize the structural weakness of the concept by its non-existing precise definition of family. This non-existing definition creates a window of possibilities for exploitation of diplomatic immunity. For example, a diplomatic agent may, even though it is not ethical, include several distant family members in his or hers definition of family and thereby granting them, somewhat undeserving, diplomatic immunity. These family members may then commit crimes without having to face any prosecution. “

“What problems exist with the concept in action?”

In the analysis of the implementation of the concept of diplomatic immunity i.e. the implementation of the Vienna Convention on Diplomatic immunity, the ICJ case the “arrest warrant case (Congo vs. Belgium)” was interpreted to provide a picture of how the concept is used in action. The case illustrated a clear problem with the distinction between *ratione materiae* and *ratione personae*. The personal immunity protects the agent for all acts, private or official, and functional immunity is limited to those acts carried out on behalf of the state.¹²⁴ The Court fails to distinguish between private and official acts and thereby reinforced that its plication of immunity was personal rather than functional. This statement also declares that Yeodia enjoyed immunity even for all acts committed before entering office. The Court thus compound the two distinct categories of immunity and the Court merged personal immunity, which covers all acts (official and private) while the minister is in office, with functional immunity, which negated individual liability and instead attributes all official acts to the state itself. The result is that Yeodia hold no liability for international core crimes. Since international core crimes are almost never committed as private acts but rather the nature of these crimes is that there are committed by

governments, militaries or other institutional organizations this non-existing distinction between acts committed in a private or official capacity. As stated in the analysis, the ICJ ruling offers a non-sufficient response to the problem of attribution; either a former foreign minister's acts are considered official acts and are attributed directly to the state or they are considered private acts and the state is not accountable for the ministers' crimes. Whatever the answer may be the fact that the question ever had to be made gives a hint to the flaws with the implementation and interpretation of the concept. “

“What problems with diplomatic immunity can be found when viewed upon from an ‘equality before the law’ perspective?”

The comparative analysis demonstrated that since the legal system created as a consequence of diplomatic immunity is unjust. The system is unjust in the sense that the concept of diplomatic immunity does not comply with the first component of ‘equality before the law’, presumptive-identity component. Since the concept of diplomatic immunity makes a distinction between persons of the society the recipients of the law cannot be described as being identical in the two respects that they are regarded as if they are the same in terms of capacities. The application of the comparative method enabled the conclusion that a legal system using the concept of diplomatic immunity can be described as unjust. “