

## **Immunity and Privileges of Diplomats and Their Family and Staff**

### **Introduction**

Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Whenever in history there has been a group of independent states co-existing, special customs have developed on how the ambassadors and other special representatives of other states were to be treated.

Diplomats, who are sent and received in other countries, represent the state from which they come. Each state can have its own ideas, policies and programmes in the international field which may not suit the convenience of the receiving state, but she will have to listen to the view point of the sending state. It is because each state believes in the philosophy of sovereign equality. It is believed that no state can force the other state to follow particular ideology or adopt a particular course of action at an international level. Any such attempt is considered as interference in the internal affairs of a state and is opposed to the very principle of sovereign equality. This can only be possible when diplomatic agents enjoy certain immunity and privileges.

Granting privileges and immunities to diplomatic envoys is a long-standing norm of international law. The formal sending of envoys as representatives of States may be traced back to the practice of ancient Greece. The ambassadors exchanged between the members of the Amphictyonic League were regarded as inviolable. Similar practices can also be found in the States of ancient India or in the Roman Empire. These practices, established on a customary basis, were codified in the 1961 Vienna Convention on Diplomatic Relations. Countries which have recognized the Convention believe that such practices contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. The purpose of diplomatic privileges, immunities and exemptions, as described in the Convention is not to benefit individuals themselves but to ensure the efficient performance of the functions of diplomatic missions that represent States.

The justification for treating diplomats in this special way is that such measures are necessary for diplomatic functions to be executed effectively. This is not always understood by a state's public opinion, which can lead to adverse comment on the matter.

### **Meaning**

Immunity is the unique asset of diplomatic immunity, can be employed and virtually shared in ways which benefit individuals and groups pursuing democratic development goals and reform.

Host countries can't withdraw immunity, but several have expelled diplomats for alleged interference in internal affairs. The excuse is often that they had supported specific political or partisan outcomes rather than democracy development in general. Intimidation is a frequent recourse of authoritarian regimes, including against the families of diplomats. The doctrine of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions. It is considered to be the exception to the general rule of territorial jurisdiction. There is little distinction between immunity and a privilege and in many cases these have been used interchangeably. Various authors like Verdross, Morton, Stefko and Makowski have tried to distinguish between the meanings.

Although each writer defined the concepts in his own words, they essentially have a common thread. "Privileges" can be defined as a benefit or right to do something that others have no right to do, while "immunities" can be defined as the exemption from local jurisdiction. Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a legal basis, while only some privileges are based on law and others are a matter of courtesy. The field of diplomatic immunities is one of the most accepted and uncontroversial of international law topics, as it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this.

As the International Court of Justice noted in the *US Diplomatic and Consular Staff in Tehran* case:

the rules of diplomatic law, in short, constitute a self-contained regime, which on the one hand, lays down the receiving state's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse.

Immunity means an exemption. And diplomatic immunities means the exemption of normally granted to the diplomats, a privilege is a right or an advantage or favour belonging to a person or a class. As such diplomatic privileges mean the special favours or advantages conferred on diplomats by a treaty, convention or a courtesy. The immunity and privileges jointly confer status on diplomats. Diplomatic immunity is a form of legal immunity and a policy held between governments, which ensures that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws. It was agreed as international law in the Vienna Convention on Diplomatic Relations 1961 (for short Convention 1961), though the concept and custom have a much longer history. Many

principles of diplomatic immunity are now considered to be customary law. Diplomatic immunity as an institution developed to allow for the maintenance of government relations, including during periods of difficulties and even armed conflict. Originally, these privileges and immunities were granted on a bilateral, ad hoc basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault.

Over time, a body of customary international law developed to provide a broad range of privileges and immunities for diplomats, eventually including some degree of similar protection for members of their staffs and families. The Convention 1961 reflects the customary international law with respect to diplomats and is now adhered to almost universally by the nations of the world.

The Supreme Court of United States in *U.S v Coplion and Gubithchev*, has observed that “mere possession of a diplomatic passport or visa, without actual membership of a diplomatic mission accredited to the territorial or any other state, is insufficient to confer immunity”. The House of Lords in *Engelke v Musmann* was of the view that “the statements of the Foreign Office as to the diplomatic status of a particular person are accepted as conclusive by in the same way as with foreign states and foreign sovereign. The immunity of diplomatic envoy extends not merely to their own persons, but to their suits, and members of their family forming part of their household, provided that they are not nationals of the receiving state. Usually the practice in most of the countries is to deposit periodically with the Foreign Office or similar government department a list of personnel for whom exemption from territorial jurisdiction is claimed.

In other words diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities. Today, immunity protects the channels of diplomatic communication by exempting diplomats from local jurisdiction so that they can perform their duties with freedom, independence, and security. Diplomatic immunity is not meant to benefit individuals personally; it is meant to ensure that foreign officials can do their jobs. Under the concept of reciprocity, diplomats assigned to any country in the world benefit equally from diplomatic immunity.

Diplomatic immunity and privileges are the rights enjoyed by diplomats to perform their function independently without any intervention by the receiving state, without which they could not discharge their functions, and which exceeds those possessed by the other bodies or individuals. Immunities and privileges are essential incidents to high and multifarious

functions which the diplomats are called to perform representing his state interest in receiving state. The distinctive mark of immunities and privileges is its 'ancillary character' a necessary means to fulfillment of functions. Immunities and privileges are enjoyed by the diplomatic missionary because these missionary cannot perform their functions without unimpeded use of the services of his members; and by each state for the protection of its members and the vindication of its own authority and dignity.

The rules of diplomatic immunity sometimes have raised indignation in ordinary people, but are almost always observed by states, because states have a common interest in preserving the rules. A state may be under pressure from its internal public opinion to limit the immunity of foreign diplomats, but it usually resists the pressure, because otherwise it would create a precedent which would be used against its own diplomats in foreign countries. All states are both 'sending states' and 'receiving states', and consequently the rules on diplomatic immunity work much more smoothly than the rules on expropriation, for instance, which are sometimes regarded as favouring the rich states at the expense of the poor states. The rules of diplomatic immunity are 'essential for the maintenance of relations between states and are accepted throughout the world by nations of all creeds, cultures and political complexions'. Major breaches of these rules, such as Iran's behaviour towards the United States diplomats who were held as hostages in 1979–81, while extremely rare, receive disproportionate publicity because of that rarity.

### **Rationality**

The immunities and privileges which are granted to diplomatic agents are not, as in the case of sovereign Heads of State, based primarily on the principle *par in Parem Non Habet Imperium*, but on such agents need for them for the purpose of fulfilling their duties to be independent of the jurisdiction control and the like, of receiving states. The preamble of Convention 1961 enshrines that privileges and immunities granted to diplomatic agent are primarily based on the need to ensure the efficient performance of the function of diplomatic mission.

Fenwick viewed that "the basis upon which this personal immunity rests was generally found in the principle that ambassador personified the state or sovereign here represented. From this principle follows not only the custom of according special protection to the ambassador but also a comprehensive exemption from the local jurisdiction". The diplomatic agents have been granted certain privileges and immunities from an early date. The ancient Greeks considered an attack upon the person of an ambassador as an offence of 'great nature'. An injury to envoys in ancient Rome was, regarded as a deliberate infraction of the '*jus gentium*'. The

same has been recognised in the great epics like Ramayana and Mahabharata in ancient Indian history.

The principles of sacredness of the body of diplomatic representative it is observed that “the person of public minister is sacred and inviolable. Whoever offers any violence to him not only affronts, the sovereign he represents, but also hurts the common safety and well being of nations, he is guilty of crime against the whole world”. Hugo Grotius, in 1625 has said that diplomats are regarded as “possessing a peculiarly sacred character in consequence of which they have accorded special privileges and immunities”. During the 16<sup>th</sup> and 17<sup>th</sup> centuries, the privileges and immunities were firmly established by numerous precedents. There were, indeed, a few exceptions, and even as late as the early 19<sup>th</sup> century ambassadors in developing countries could be threatened with imprisonment. But the rules were very generally observed in all civilized society. The thinking underlying these proportions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free diplomats from national control to enable them to discharge their responsibilities impartially on behalf of their nation.

### **Philosophy of Immunity and Disability**

Immunity is an exemption from the force of law specifically from the exercise of power. It is a subset of the rights that one has and another person not exercise power to change the existing rights. Its opposite is disability. A diplomat has diplomatic immunity not be charged and tried in the court of a foreign country in which diplomat enjoys diplomatic status. Thus, the ambassador of country C in Australia who causes an accident by reckless driving in Sydney may successfully invoke his diplomatic when charged for the offence in an Australian court. A donor who donates a part of this income to a charity may claim an exemption (immunity) from income tax on that part of the salary. The right to remain silent is an immunity enjoyed by an accused person that prevents the police or the prosecution from forcing the accused to give evidence against him. Hohfeld regarded immunity in a more expansive way. According to him every disability of a person under the law creates immunity. These concepts are duty, claim, liberty, no-claim, power, liability, disability, and immunity. Hohfeld explained how these concepts logically related to one another through what he called “correlation” and “opposition.” These concepts and the analytical framework arising from them are best explained using hypothetical.

**Immunities**←→**Disabilities**: The holder of immunity is not exposed to the exercise of a power within the domain covered by the immunity. In that domain, everyone vis-a-vis whom the immunity obtains is disabled from changing the immunity holder's entitlements.

i. Most of the entitlements conferred by so-called bills of rights are immunities.ii. Immunities must accompany other entitlements to prevent them from being meaninglessly hollow.

iii. The relationship between the power/liability axis and the immunity/disability axis is precisely similar to the relationship between the liberty/no-right axis and the right/duty axis. Just as a liability is the absence of immunity and a disability is the absence of a power, so a no-right is [obviously] the absence of a right, and a duty is the absence of a liberty.

iv. Note that rights are logically parallel to immunities and that liberties are logically parallel to powers, whereas rights are genetically or etiologically parallel to powers, and liberties are genetically or etiologically parallel to immunities.

Hohfeld's system is based on definitions of the fundamental elements which are themselves based on three concepts: claim, control, and freedom. Specifically, a right is one person's affirmative claim against another person to have that other person do something or not do something, and a privilege is one person's freedom from the right of another person. As a result, to the extent that a privilege negates a right, the person that would otherwise have the right has a no-right and the person who has the privilege does not have a duty. However, to the extent that a privilege does not negate a right, the person that has the privilege still has a duty. Likewise, a power is one person's affirmative control over creating or ending or maintaining a legal relation as against another person, and immunity is one person's freedom from the power of another person. As a result, to the extent that immunity negates a power, the person that would otherwise have the power has a disability and the person that has the immunity does not have a liability. However, to the extent that immunity does not negate a power, the person that has the immunity still has a liability.

### **Theoretical Approach**

The providing of immunity and privileges to diplomats is as old as the birth of civilization, there has been a lot of debate over immunity and privileges that are granted to diplomats in this modern era. The present international law on diplomatic relations has been concluded, basing the customary practices of international law on diplomat's relations which existed in the past. The reasons for granting special status to diplomats are:

- It is traditional;
- It helps diplomats to carry out their functions satisfactorily, free from legal, physical or moral pressures. (Functional Theory)

- It is based on the principles that diplomats are personal representatives of their heads of state and also, in effect if not in form, of governments and hence of the people of their own countries. (Representative Theory)

Since the 16th century there have been three major theories of diplomatic immunity. Each theory plays a prominent role during different periods in history. These theories are: (a) extraterritoriality (b) personal representation, (c) functional necessity.

Every State with representatives abroad needs protection for its diplomats, the embassy, documents and bags. Any act committed by a diplomat that is unlawful has no effect on the functioning of the mission and thus the offender should be punished accordingly. Furthermore, police and legal officials are then trapped between the international obligations of their respective countries on not prosecuting protected offenders for their crimes and their oath to their country and citizens to uphold the law. There is no justification for refraining from prosecuting a diplomat who rapes, smuggles, kills or commits any other serious crime. Further, there is an even less convincing rationale for families and staff of diplomats to be treated with the same immunity.

As the breach of trust by diplomats becomes more obvious, the use of diplomatic privileges and immunities, although essential to the efficient operation of relations of States, has increasingly become endangered. The Convention of 1961 simply places the diplomats beyond the laws of the receiving State and in most cases creates an environment of impunity. As a result, some diplomats, their families and staff will continue to use their status to abuse their immunity in order to gain considerable profits or just carry out violent, immoral or illegal behaviour. Berridge states that the inviolability of diplomatic agents is somewhat less sacrosanct than the inviolability of the mission because the constraints on a diplomat endanger the performance less than the constraints of the mission premises. If this is the case, then absolute immunity from prosecution is not necessary.