

ESCAPING DIPLOMATIC IMPUNITY

THE CASE FOR DIPLOMATIC LAW REFORM

INTRODUCTION

Simply because something has always been done a certain way does not mean that there is no possibility of change. As Professor Geoffrey Sawer has observed, 'the *whole* body of the law stands potentially in need of reform'.¹ Indeed, there are many laws which, when passed, challenged timeless traditions and radically changed the way things were done, yet over time have become widely regarded as part of the fabric of democratic society. Governments should therefore be ambitious in their considerations for improving the law, both domestic and international, especially where fundamental rights and freedoms come into question.

The concept of diplomatic immunity from civil and criminal proceedings has established itself as a fundamental of customary diplomatic law. It is one of international law's most successful and enduring rules, with 185 states currently recognising the rules of diplomacy as stated in the Vienna Convention of 1961. Under the Convention, diplomats are not subject to arrest or detention (Article 29); they are immune from the criminal jurisdiction of the receiving state (Article 31); and immune from civil jurisdiction for acts committed within their official capacity (Article 31). The family of the diplomatic agent enjoys the same immunity status (Article 37). Mission-staff also enjoy variable levels of immunity (Article 37).

In recent decades evidence has mounted of abuse by diplomats of their immunities. For the most part abuse is minor, such as diplomats notoriously failing to pay motoring fines and

¹ Geoffrey Sawer, 'The Legal Theory of Law Reform', *University of Toronto Law Review*, 20 (1970), p. 183.

parking tickets.² Nonetheless, from time to time diplomats, their families and their staff, are implicated in extremely serious offences, including murder, rape, child abuse, and imposing slavery. All of these offences can be said to violate international human rights laws and conventions, the recognition of which transcends national boundaries. This essay argues that complete immunity from legal proceedings for diplomats is incompatible with international human rights law and stands in the way of justice for victims. In instances where a conflict arises, human rights must take supremacy over diplomatic immunity. The Vienna Convention and the Rome Statute should therefore be amended to allow for legal proceedings to be taken against diplomats at the International Criminal Court (ICC) in order to ensure that diplomatic immunity does not amount to diplomatic impunity.

DIPLOMATIC IMMUNITY: HISTORICAL DEVELOPMENTS AND CURRENT LAW

The rules of diplomatic law enshrined in the Vienna Convention have been described as ‘the cornerstone of the modern international legal order.’³ But the principle of diplomatic immunity dates back far further than 1961. It is one of the oldest rules of international law. Diplomatic immunity was well-established by the end of the seventeenth century, evolving out of the principles of equality of states and immunity of the sovereign, who was said to embody the

² See Foreign Affairs Committee, ‘The Abuse of Diplomatic Immunities and Privileges’ (London: House of Commons, 1984), 1984/85 HC 127, p. vi.

³ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford, 2008), p. 1.

state.⁴ As Satow put it, 'immunity ... is not a personal immunity but in reality the immunity of the sending state'.⁵

By the twentieth century the rationale behind diplomatic immunity had significantly altered. The notion of the monarch as the personification of the state by divine order had waned with the increasing secularization of society. Nevertheless, the principle of immunity for diplomats remained intact. Now, the prevalent principle justifying diplomatic immunity is that of functional doctrine. As Hazel Fox describes in her authoritative text on state immunity, diplomatic immunity is given

- i) as recognition of the sovereign independent status of the sending State and of the public nature of the acts which render them not subject to the jurisdiction of the receiving State; and
- ii) as protection to the diplomatic mission and staff to ensure their efficient performance of functions free from interference from the receiving state.⁶

The law of diplomatic immunity is not therefore some sort of 'divine law' but a necessity to protect and promote civilized international relations.⁷ This logic was expressed by the Polish Supreme Court which held that 'the immunity of State has a different juridical basis from that of diplomatic agents. The immunity of representatives of a foreign State has the objective of safeguarding their liberty in the exercise of their functions, whilst the immunity of the State is juridically based on the democratic principles of their equality.'⁸

⁴ By 1758 the rules of diplomacy were put in writing by Vattel in his *Le Droit Des Gens*. See Denza, p.2.

⁵ Ernest Satow, *Satow's Guide to Diplomatic Practice 5th Edition* (London, 1979), p. 131.

⁶ Hazel Fox, *The Law of State Immunity 2nd Edition* (Oxford, 2008), p. 701.

⁷ An excellent analysis of the theoretical bases of diplomatic immunity can be found in Mitchell S. Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities', Thesis (J.D.), Washington College of Law (1989), pp. 176-182.

⁸ Cited in Fox, p. 711.

The functional necessity approach explains why diplomatic laws have been so successful: their reliance on reciprocity. The agreements are mutually beneficial for all states involved. As Denza describes, "The negotiators of the Vienna Convention did not forget that the international legislative process cannot be controlled by majority vote but depends ultimately on ratification by national Parliaments looking to national self-interest."⁹

However, although diplomats are granted immunity from jurisdiction of the receiving state, Article 41 of the Convention makes it clear that they are obliged to respect its laws and regulations. Should the receiving state wish to subject the diplomat to criminal or civil action, the receiving state may request that the sending state waive the diplomat's right to jurisdictional immunity. Alternatively the receiving state could make representations to the sending state to initiate proceedings; or in extreme circumstances they may declare the individual involved *persona non grata*. In reality such measures are rarely taken.

ABUSES OF DIPLOMATIC PRIVILEGES AND IMMUNITIES

Despite the duty stated under Article 41, the Convention contains no enforcement provisions to compel diplomats to comply. But law without any means of compulsion is meaningless.¹⁰ This is apparent from the evidence of diplomats breaking local law, and an issue of extreme concern when it a diplomat, or his/her staff or family, is alleged to have committed a grave offence, such as murder, inflicting inhumane treatment, violence against women, or imposing slavery. Such examples include the case of Floyd Karamba, a representative at the Zimbabwean mission to the United Nations who was deported on charges that he severely abused his children, yet could not

⁹ Cited in Denza,, p.3.

¹⁰ See Ross, p. 182.

be charged with any crime.¹¹ In 1988 Manuel Ayree, the son of a Ghanaian diplomat to the United Nations, was identified as a serial rapist but never faced any charges.¹² Possibly the most widely publicized incident of diplomatic complicity in serious crime was the murder of a London policewoman, killed from a shot fired from the Libyan People's Bureau.¹³

Of particular concern, both for its seriousness and its prevalence, is the appearance of 'a new form of enslavement' which has sadly implicated a number of diplomatic agents. Thousands of people have found themselves victims of domestic slavery, forced to work without financial reward in violation of their human rights and dignity. The problem was discussed in a report by the Parliamentary Assembly of the Council of Europe which 'deplored the fact that a considerable number of victims work for diplomats or international civil servants who, under the Vienna Convention of 1961, enjoy immunity.'¹⁴ Kalayaan, a British charity championing the rights of domestic workers, has produced research which indicates that 6.9% of domestic workers in diplomatic households in the UK are victims of trafficking for domestic servitude.¹⁵

Such crimes are in violation of European and international law. Article 4 of the European Convention on Human Rights provides that no one shall be held in slavery or servitude or be required to perform forced or compulsory labour. Article 3 provides that no one shall suffer torture, inhumane or degrading treatment. The international community is bound by

¹¹ Mark A. Uhlig, 'Court Won't Bar Return of Boy in Abuse Case to Zimbabwe', *New York Times* [online], 1 January 1988. Available from <http://www.nytimes.com/1988/01/01/nyregion/court-won-t-bar-return-of-boy-in-abuse-case-to-zimbabwe.html>.

¹² McFadden, 'Repatriation asked for Diplomat's Son, New York Times', *New York Times* [online], 8 February 1981. Available from http://spiderbites.nytimes.com/pay_1981/articles_1981_02_00000.html.

¹³ See Ian Black, 'Search for PC Yvonne Fletcher's Killer Casts Old Shadow Over Libya's New Era', *The Guardian* [online], 3 September 2010. Available from <http://www.guardian.co.uk/world/2010/sep/03/yvonne-fletcher-killer-search>.

¹⁴ Council of Europe, 'Domestic Slavery' (Strasbourg, 2001), Doc. 9102, p. 149.

¹⁵ Kalayaan, 'Submission to the Special Rapporteur on Contemporary Forms of Slavery' (4 June 2010). Available from http://www.kalayaan.org.uk/documents/SR%20contemporary%20forms%20of%20slavery%20-%20Kalayaan%20submission%20final%20_names%20now%20deleted%20for%20publication_.pdf.

International Labour Organisation Convention Number 29, which states that 'the illegal exaction of forced or compulsory labour shall be punishable as a penal offence'. The International Criminal Code also makes it an offence to reduce a person to slavery or a situation similar to slavery, to traffic or trade in human beings and to sell or buy slaves. Furthermore, none of the victims were able to exercise their right to a remedy, despite the provisions providing this right as articulated in Article 2 of the International Covenant on Civil and Political Rights, and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

HUMAN RIGHTS, DIPLOMATIC LAW AND *JUS COGENS*

In recent decades international recognition of the importance of human rights has grown and with it persuasive arguments have emerged suggesting that human rights should prevail over diplomatic immunity should a conflict arise.

In 1998 the House of Lords famously refused to grant General Pinochet head of state immunity from adjudication in the context of gross violations of human rights. It was held that such abuses could not be held a public function of a Head of State and therefore could not be subject to immunity. Lord Steyn's opinion illustrated the point well:

If a Head of State kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of his functions as Head of State. If a Head of State orders victims to be tortured in his presence for the sole purpose of enjoying the spectacle of the pitiful twitching of victims dying in agony ... that could not be described as [an act] undertaken by him in the exercise of his functions as a Head of State.¹⁶

¹⁶ Opinion of Lord Steyn in U.K. House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (Mar. 24, 1999).

The same could equally be said of those holding diplomatic immunity. The problem of course lies in that Head of State immunity is given only *ratione materia* whilst diplomatic immunity is given both *ratione materia* and *ratione personae*. That said, in his judgment on the same case, Lord Nicholls stated that '[I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct *on the part of anyone* [emphasis added]. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.'¹⁷

In the case of *USA v. Iran* held before the International Court of Justice in 1980 there was further suggestion that laws relating to serious crimes against individuals must take precedent over other treaty law. The judgment stated that the diplomatic privilege of inviolability of the person, as stated in Article 29 of the Vienna Convention, could not mean 'that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving state in order to prevent the commission of the particular crime.'¹⁸

The key issue being reflected in these judgments is, if we accept that diplomatic immunity stems from functional necessity, that the privileges of immunity and inviolability are granted in order to protect the diplomat's ability to carry out their work effectively and not as a personal benefit. The drafters did not design the Convention with a mind to helping an individual escape prosecution for wrongs committed.

In the case of *Epson v. Smith* the judge said, 'it is elementary law that diplomatic immunity is not immunity from legal liability, but immunity from suit.'¹⁹ Diplomatic immunity is little more than a procedural barrier, a handy tool to enable diplomats to carry out their duties without hindrance. With this in mind, it is very difficult to justify diplomatic immunity taking supremacy

¹⁷ Opinion of Lord Nicholls in U.K. House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (Mar. 24, 1999).

¹⁸ *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1. C. J. Reports 1980.

¹⁹ *Epson v. Smith*, Queen's Bench Division, 1 Q.B. 426 (1996).

in the hierarchy of laws over human rights. Human rights have frequently been written about as *jus cogens* not to be derogated from. They are enshrined in an ever-increasing number of regional and international treaties, covenants and declarations. They cannot take supremacy over what is essentially little more than a very useful compromise.²⁰

PROPOSALS FOR REFORM

The Ndombasi Case concerned the lawfulness of an arrest warrant issued by Belgium against the Congolese Minister for Foreign Affairs, wanted for breaches of the Geneva Conventions 1949. The Court decided by 13 votes to 3 that the disputed arrest warrant failed to respect the immunity from criminal jurisdiction and inviolability which Mr Ndombasi enjoyed under international law. However, in its judgment the court emphasized

that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.²¹

The current arrangement is therefore unsatisfactory. There is a clear argument that without any possibility of enforcement action being taken against diplomats violation of the law will occur, amounting to diplomatic impunity.

²⁰ For an excellent analysis of the hierarchy of diplomatic law and human rights law, with reference to *jus cogens* see Dror Ben-Asher, 'Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions', Thesis (PhD), Harvard Law School (November, 2000), pp. 19-26.

²¹ Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002.

Recognising this problem, the Parliamentary Assembly of the Council of Europe has recommended that the Vienna Convention be amended in order to waive diplomatic immunity for all offences committed in private life.²² Whilst attractive at first glance this issue raises difficult questions about how easily a line can be drawn between public and private functions. Furthermore, this could easily be open to abuse from politically motivated false accusations. Such drastic reform would be both undesirable and difficult to achieve, due to the reciprocal benefit of immunity for all states involved. Immunity exists for good reason: diplomats, as representatives of a foreign state living in a host nation, are vulnerable. The very real risk to diplomats from politically motivated violence, kidnapping and attack make protection necessary. It would therefore not be prudent to dispose of the law of immunity for the sake of being able to prosecute, for example, non-payment of a few parking tickets.

With serious offences, as demonstrated above, immunity is much harder to justify. But the problem between simply drawing a line between 'major' and 'minor' offences is that certain offences may be minor in one state, completely legal in another, and a serious offence elsewhere. It would therefore not be advisable to reform international law to enable diplomats to be punished by local courts for committing any crime whatsoever.

The crux of the problem is not about liability but about jurisdiction: the risk of abuse makes jurisdiction of the receiving state over acts committed by diplomats undesirable, yet there is no guarantee that he or she will be brought to justice in the sending state. However, there is a body that does have jurisdiction across international borders for issues that are held to be of serious international concern: The International Criminal Court.

This essay proposes that the Vienna Convention be amended to make it clear that diplomatic immunity cannot mean immunity from the ICC's jurisdiction, and that Article 5 of the Rome Statue be amended to extend the ICC's jurisdiction to cover crimes committed by diplomatic

²² Council of Europe, p. 149.

agents which breach an individual's human rights. Unlike domestic courts, the ICC would be able to operate freely and fairly. Sitting outside of a bilateral relations structure, it would enable justice to be served without the risk of breakdown of international relations and many safeguards exist in the ICC treaty to prevent frivolous or politically motivated cases.

CONCLUSION

In international law, as in any other legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. If a right is violated, access to justice is of paramount importance for the victim and is an essential component of the rule of law. Governments around the world should be unafraid to protect and enhance human rights through the restatement of existing rules and the formulation of new ones, in order to ensure equal protection under the law and access to justice for all. Where a gap in the availability of judicial remedy is found it should be closed, even if that means rethinking a seemingly timeless legal principle: that of the immunity afforded to diplomats.

[2,985 words, inc, footnotes]

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