JUDICIAL IMMUNITY OF DIPLOMATIC MISSIONS AS PART OF THE SCOPE OF THE DIPLOMATIC PROTOCOL

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ABSTRACT

Immunity, in the broadest sense of the word, in the international law is excluding the jurisdiction of the state authorities in admissions regarding a diplomatic representative. The legal basis of this institute is in the common law, as a concept of inviolability of the diplomatic representative. In this context, the irrepressible assumption, over which the concept of immunity is built, is the rule that the diplomats are sacred figures (sancti habeantur legati). Today, the immunity of the diplomatic representative is determined according to the international law and international custom, unlike the privileges of the diplomatic representative which are largely dependent on the internal law of the state of admission.

This paper will be focused on the judicial immunity of the diplomatic missions in the criminal, civil, administrative, and misdemeanor procedure. The paper consists of introduction, two main parts, and conclusion. In the introduction, a general overview of the emergence and the development of the conception of the immunity will be reviewed. In the second part the timeframe in which the judicial immunity is applied is reviewed. And, in the conclusion section, we will try to provide answer to the question what are the

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future tendencies in the international law and international case law regarding the judicial immunity in diplomatic missions.

KEY WORDS: judicial immunity, diplomatic mission, Vienna convention.

INTRODUCTION

The essence of the immunity that diplomats have is to provide realization of the important responsibilities without any constraints from the local government. The chief of mission needs to be allowed to do free acts in interest of the country he/she represents. Considering the fact that they don’t have the right to use force, even since past times they enjoy privileges and immunity which guarantees the independence of their personality, property, and dignity as well for themselves and the country represented by them. Technically, there are three theories for diplomatic privileges and immunities: theory of extraterritoriality, theory of presentment, and functional theory. In articles from 29 to 39 from Vienna Convention from 1961, the privileges and the immunity that the members of the diplomatic missions have are stated. With these articles, they are allowed to perform their duty without being obstructed from the local government. All duties are stated in Article 41 from the Convention. The expanded immunity is mainly given to the members of the diplomatic staff, as well as the members of their families. Most of them have diplomatic passport. It is worth mentioning that the British diplomats don’t have diplomatic passports because the United Kingdom is not issuing any. According to the Vienna Convention, immunity is predicted also for the administration and the technical part of the mission’s staff, which is given according to the official regulations and does not refer to the members of their families. The staff of international organizations also enjoys certain segments of the immunity, per example the staff of UN, NATO, Council of Europe, EU, USAID etc. The law of immunity is given according to the international contracts, and laws in the recipient country.
DETERMINATION OF JUDICIAL IMMUNITY AND TYPES OF JUDICIAL IMMUNITY OF DIPLOMATIC MISSIONS

The basic distinction that needs to be done from the very beginning is the fact that the diplomatic mission does not represent a legal entity by itself, i.e. diplomatic mission is determined in administrative-organizational manner, as organ of the named state. That means that the diplomatic mission, from normative aspect, does not perform the activities in its own name, but in the name of the state, and in eventual dispute the state is the one that will take charge on the actions, not the diplomatic mission. According to that, the state has active and passive legitimation in the acts in front of the competent authorities, not the mission. In this context, the dispute is conducted by the state attorney, as lawyer and representative of the state’s interests.

In judicial practice, there are two distinct types of acts which the diplomatic mission takes: acts which have official character (acts de iure imperii), and acts that have private, commercial character (acti de iure gestionis). This division has its roots far back in the Roman law, in contexts of determination of immunity of the Roman State as a legal entity. In principal, the judicial immunity of diplomatic missions is acknowledged only while performing the first type of acts.

The international practices and law allow the chiefs of diplomatic missions immunity of civil and crime jurisdiction in the host country regardless of their rank. That is a necessary bound that allows complete and free performing of the activities for the sender country. Their duty is to respect the laws of the host country, but they are under authority of the government and judiciary of their own country.

The aim of judicial immunity is to allow diplomats transfer of power of the local courts to the courts of the state whose representative is the diplomat. This type of immunity does not belong to the representatives of the states which are de facto acknowledged. In Act 38 from the Vienna Convention, the immunity of jurisdiction is limited for the members of the staff of the diplomatic missions of the sender country only for official acts which are performed during their diplomatic laws.

Under judicial immunity are also:

- Exemption from criminal liability
- Car accidents
Civic immunity
Exceptional cases

We will shortly distinguish the privileges of immunity of diplomats for the abovementioned judicial immunity.

Immunity for legal and criminal defense

Immunity for crime responsibility, in most of the countries, means that the diplomatic agent alone has no right to renounce immunity because he has no right to question the independence of the country. Immunity has validity in the period while the diplomatic agent is in residence on the territory of the host country. The immunity of the jurisdiction of the host country courts doesn’t mean that the foreign diplomat is not responsible for the criminal proceedings, and for the offences he has committed. He must respect the laws of the host country. But if he violates any of the laws, he can be called in court only in his native country.

The judicial immunity in force may exist even if the diplomatic representative acts against the country that sent him. By rejecting the request the host country becomes an accomplice to its representative. The diplomatic representative does not need to appear as a witness in court, but can send a written statement, but he can’t be forced to do so. The judicial immunity enjoyed by the heads of diplomatic missions applies to entire diplomatic staff on the mission, and the members of their families. Judicial immunity of lower-ranked employees and local recruited staff is controversial.

Usually, the inviolability of the head of mission includes them too, especially when they are not nationals of the host country. It should use its jurisdiction on those persons so that it will obstruct them on larger scale in performing their functions in the mission.

Immunity for civil and administrative law

Diplomatic officials, as we have already mentioned, enjoy immunity from civil and administrative jurisdiction. That is, in most countries the diplomat has the right to waive that right only if he has authority from his government.
When the government receives a lawsuit against a foreign diplomat, it informs the ministry for foreign affairs or the sender country’s court. Civil and administrative immunity enjoy all those that enjoy criminal immunity.

Immunity in exceptional cases

According to Article 31 from the Vienna convention, the diplomatic agent enjoys immunity from civil and administrative courts, except in cases where:

a) actual lawsuit for owning private property on the territory of the host country; b) lawsuit related to an inheritance in which the diplomatic agent appears as a private person, not as someone in the name of the sender country; c) Lawsuit related to free professions or economic activities performed by the diplomatic agent in the host country outside the borders of his professional function.

When a diplomatic agent appears in court as a plaintiff, it is assumed that he has given up his immunity.

Immunity in case of a car accidents

As it turns to the car accidents, the privileges and the immunity enjoyed by the diplomatic representatives in the host country strongly oblige the ambassador and the consulate to respect the traffic regulations where they are guests. But if a diplomatic representative happens to be involved in a car accident, regardless if he is the driver or the owner of the car, the following rules apply:

- Diplomatic representative must call on his diplomatic immunity as soon as possible, especially when he can’t give up on it individually. But, if the car was controlled by his driver, he must never allow his arrest nor detention in custody.
- In no case he should allow his position to avoid liability. In that way he would question the reputation of his country as well as the reputation of the diplomatic corps of which he is member.
- He has no right to hinder the investigation by denying information about the circumstances that led to the accident.
Diplomatic representative must not invoke judicial immunity in order to avoid paying damages to the victims of the accident.

If there is no insurance, the judicial immunity does not exempt obligations for friendly agreement, and paying the damages.

If the diplomatic representative is not insured, or if his insurance policy is made so that the insurance company can be discharged from liability, it is his duty to contact his country’s ministry for foreign affairs, and request revocation of immunity.

Immunity for duty to testimony

A diplomatic agent is not obliged to testify in any trials in the host country, nor is it his duty to appear as a witness. Many countries, due to good cooperation with their authorized representative, provided that there is no tendency to testify, the representative may, in writing or orally, make a statement in the mission’s premises.

The mentioned immunity in certain cases resumes moral questions again. Is it correct that the diplomatic agent, who was witness of crime refuses to testify, relying on his immunity? Shouldn’t that be, in certain cases prescribed and considered a mandatory for him? This question should be asked from the side of Commission for international law. As Murty says, the Marine Corps that there are certain cases in which the representative who witnesses a particular act should have a mandatory obligation to testify and help in the disclosure of the event.

TIME FRAME OF THE DIPLOMATIC PRIVILEGES AND IMMUNITIES

All abovementioned privileges and immunities are usually available for the time frame of staying in the host country where the diplomatic representative is in official visit. However, viewing the real performances of the functions needed for a certain period of time (usually in order to pass credentials), in Article 39 of Vienna convention it is stated that:

Everyone enjoys privileges and immunity he’s entitled to, from the time he enters the host country, during the performance of his official mission. Those privileges and immunity are enjoyed since the moment of departure of the home country until the leaving of the host country, or in the reasonable time
after the end of the mission, even in case of military conflict (2 paragraph 39 precisely what is the reason why some countries restrict their home right).
For immunity, for acts committed by a diplomatic agent in the execution of his mission, he functions as a member of the mission - the form of immunity is as a remnant. This does not apply to catering staff whose members are citizens of the host country and live there.
Their immunity has been terminated with the termination of employment, and since then it has been subject to the jurisdiction of the country of admission for acts committed within their functions. Family members who thus cease to be either due to divorce or due to economic independence, and private servants are defined as derivative beneficiaries of privileged status, as persons who are privileged and will enjoy the protection of others.
On the basis of this, provided that they do not have the right to a trial within a reasonable time and that their privileges and immunities cease at the moment when they lose a family member.
The inviolability of consular premises is governed by the similar rights of inviolability of the diplomatic representatives of the mission, with the difference that the consular integrity concerns only the premises used exclusively for the needs of the diplomatic mission. The next significant difference will be the assumption of consent from the head of the consulate for entry of the authorities of the host country in the consular premises in the event of an accident requiring prompt safeguards.
Another difference is the authorization to expropriate the consular premises, the furniture in them, and the property of the consulate from its assets in meeting certain conditions.
For consular couriers, additional requirements are placed with which it is ensured that they should not be a national of the host country (except with its consent) nor should they have a permanent home (if not a national of the sending country). It also allows consular senders who are entrusted with the task of carrying out the mission. Bohte and Sancin as a significant difference point out the immunity of the career of consular officers which are much more limited, because their personal inviolability is not explicitly mentioned.
Probably in most countries today, and on the diplomatic mission in cooperation with the host country authorities, it is well established that additional immunity and privileges are not needed.
Under normal circumstances, the diplomatic agent and members of his family rarely but are going to come in a situation where they will violate a provision.
CONCLUSION

Privileges and immunity of the diplomatic missions are derogation of the appliance of laws and orders of the reception country, under which the diplomatic members do not belong. Of course, that doesn’t mean that the abuse of privileges and immunity of diplomatic missions is allowed, i.e. they are obliged to respect the laws of the reception country and to refrain from interfering in its internal affairs. The purpose of diplomatic privileges and immunities is to ensure the efficient operation of the diplomatic mission. Judicial immunity is not, in principle, a personal right, but it is the right of a country to require certain behavior of the other country in relation to its diplomatic representatives. In this context, only the consent of the state is a constitutive element for the waiver of privileges and immunities by a member of the diplomatic mission.

In theory, there are different views regarding the dilemma whether the diplomatic mission represents the legal entity or not. We consider that it is impossible to consider it a legal entity per se, i.e. it is not legal entity. The diplomatic mission is practically an extension of the country it represents. The diplomatic mission undertakes various types of actions and legal acts within its competencies. In principle, judicial immunity encompasses only the acts undertaken by the mission in the capacity of sovereign, that is de iure imperii acts.

Accordingly, the contemporary tendencies of international judicial practice are aimed at narrowing, i.e. limiting the judicial immunity of diplomatic missions. This means that the principle of absolute immunity, according to the Roman principle par in parem non habet iurisdictionem (equal to the equal can not be judged) gets relative dimensions.

REFERENCES