

DIPLOMATIC PRIVILEGES AND IMMUNITIES (1)

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I. The Concept of Immunity and Privilege

Abstention from exercising jurisdiction by the receiving State institutions with regard to the diplomatic missions and their staff = *diplomatic immunity*;

Some advantages for foreign diplomatic missions and their members = *diplomatic privilege*.



I. Theories for the justification of diplomatic immunities

I. Personal representation (from the ancient times till the Late Middle Ages)

- 1.1. based on the private nature of int'l relations in the ancient times;
- 1.2. the emissary is a personal representative of sovereign and thus one sovereign does not exercise jurisdiction with regard to the acts of the representative of the other sovereign.
- 1.3. later when the diplomatic agent was held as representative of the State, not the sovereign.

this theory was not applicable

II. Extraterritoriality (17th-middle of 20th c.):

- 2.1. embassies are small portions of foreign territory in the other state and people in it are deemed to be out of the receiving state's territory;
- 2.2. changing position of the domestic courts (e.g. the decision of the court of Belgium of 1929: the citizens of China having attacked the diplomatic staff in the embassy of China, violated the laws of Belgium) see also *M. v. Denmark*, No. 17392/90, the decision of the European Commission of Human Rights, 14 October 1992, "Embassy premises are not part of the territory of the sending state".

III. Functional need (from 20th c.)

- 3.1. see *Preamble of the VCDR*: the purpose of diplomatic P&I is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States;
- 3.2. premises are exempted from the jurisdiction of the receiving state;

I. Why diplomatic P&I are necessary?

P&I –justified in the purpose and the functions of the DM:

- To **represent** a sovereign;
- To enable the DM to act **independently** from local jurisdiction (see DM functions: negotiate., etc...)

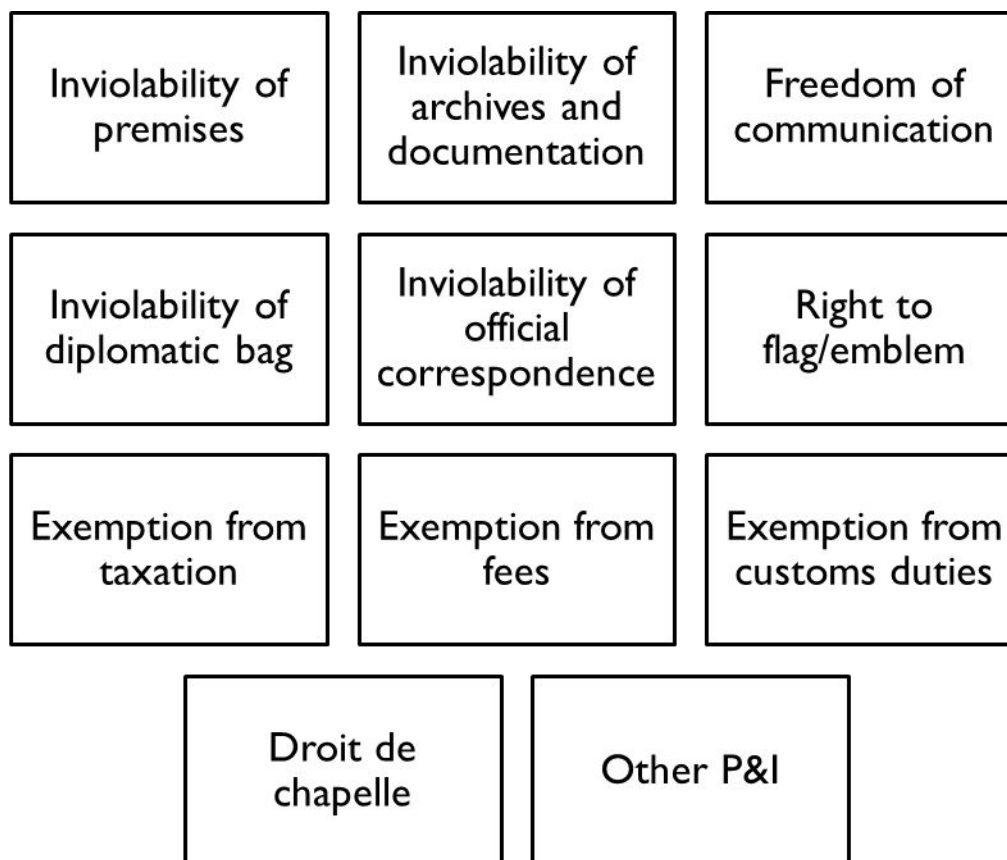
Diplomatic P&I are given on the basis of reciprocity so the states are interested to observe the rules.

- The abuse of diplomatic P&I does not justify the reprisals; the limitations of diplomatic P&I shall be based exclusively on the diplomatic law (e.g. Case concerning United States diplomatic and consular staff in Tehran, 1980
<<http://www.icj-cij.org/docket/files/64/6291.pdf>>)



II. P&I of diplomatic missions

- Granted from the moment of the establishment of the DM (notification/disposal/final stage of installation);



2.1. Inviolability of the premises of diplomatic mission

VCDR, Art. I (i):

*The “premises of the mission” are **the buildings or parts of buildings and the land ancillary** thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission”.*

- The **content** of “premises” is specified under the basis of the bilateral agreement (but never used for commercial purposes): the sending State cannot build houses without the permission of the receiving state;
- the receiving state must ensure the *suitability of surroundings* and cannot build e.g. underground railway without the consent of the sending state;



2.1. Relevant articles - VCDR 22 & 41.3

VCDR 22:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

VCDR 41.3

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State



2.1. Emergency on the Premises of the Mission (implied consent under VCDR 22.1)

Commentary of Harvard Draft Convention: “*it would be absurd to wait for the expressed consent in case of fire or crime*”;

But it would be dangerous to let the receiving state to determine the existence of “*exceptional circumstances*” so the proposal was deleted;

In practice: firemen during the fire in the US embassy in Moscow were secret agents seeking for the documentation..



Embassy bank accounts



- Embassy bank accounts are not subject to attachment or execution (in some States attachment or execution is possible in the exceptional cases of private nature, linked with specific property)



Means of Transport of mission

- *More limited* version of inviolability than in the case of premises:
- Police **enforcement** and strict measures, as well as the clamping of wheels are not allowed because of their penal/enforcement nature;
- But **towing** away is allowed if the car causes serious road obstruction or public hazard (without penalties/sometimes with compensation for towaway) – e.g. parked in a handicapped zone, loading zone, blocking a crosswalk etc.



Duty to protect and prevent

VCDR 22.2:

*The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any **intrusion** or **damage** and to prevent any disturbance of the **peace** of the mission or impairment of its **dignity**.*

- On duty to protect see ICJ case *concerning United States diplomatic and consular staff in Tehran*, 24/05/1980 (<http://www.icj-cij.org/docket/files/64/6293.pdf>)
- Also see ICJ case concerning *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*



2.1. Diplomatic asylum (DA) (1)

- Notion of diplomatic asylum (DA)
 - Related to the inviolability of diplomatic mission
 - Provision of DA to fugitives persecuted on political grounds
 - Discretion of the Head of Mission
 - Conflicting interests: humanitarian act *versus* state sovereignty
 - Distinguishing DA from political/ territorial asylum and collective shelter



2.1. Diplomatic asylum (DA) (2)

Status of DA under international law

- Inviolability of diplomatic mission does not encompass DA
- See e.g. Art. 41 para. 3 of the VCDR
- Principle of non-interference in internal affairs
- However, DA possible on treaty basis



2.1. Diplomatic asylum (DA) (3)

- Most states do not recognize DA
- Exceptions, especially in Latin America: 1928 Havana Convention, 1933 and 1939 Montevideo Conventions, 1954 Caracas Convention
- E.g., 1928 Havana Convention:

*“Asylum granted to political offenders in legations, warships, military camps or military aircraft, **shall be respected** to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted...”*



2.1. Diplomatic asylum (4)

- In *Asylum* case (1950) the ICJ held:

*“In the case of diplomatic asylum, the refugee is **within the territory of the State where the offence was committed**. A decision to grant diplomatic asylum involves a **derogation from the sovereignty of the State**. It withdraws the offender from the jurisdiction of the territorial State and constitutes an **intervention** in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty **cannot be recognised unless its legal basis is established** in each particular case.”*



2.1. Diplomatic asylum (5)

- No right of the Receiving State to breach the inviolability of the diplomatic premises (ICJ case *Haya de la Torre*, 1951)
- Possible exceptions – humanitarian reasons
 - Resolution of the Institute of International Law (1950):
"*... asylum may be granted to every individual whose life, person or liberty are threatened by violence emanating from local authorities or against which local authorities are manifestly not in the position to offer protection, which they tolerate or to which they incite. „*
 - US practice: does not recognize the right to DA, but granted DA for the humanitarian reasons, there is a threat to the person



2.2. Inviolability of the archives and documentation

- Follows from the general inviolability of the premises (diplomatic bag and inviolability of the communication have more limited inviolability)

VCDR Art. 24:

“The *archives and documents* of the mission shall be *inviolable at any time* and *wherever* they may be.”

- “**Archives and documents**” – Archives by analogy to the VCCR Art. I – correspondence, books, tapes, codes, cards.. and “documents” to include drafting documents and memoranda;
- “**Inviolable**” - absolute inviolability: *prohibition* to seize, detain, inspect or use in legal proceedings and *positive* duty of protection;
- “**At any time**” – even after the closure of the DM and the withdrawal of the diplomatic agents;
- “**Wherever**” – no requirement to mark it officially if outside the DM; if lost or stolen, the receiving state has the obligation to return it and cannot use in the legal proceedings.

Archives and documents belong to the sending state irrespective of the government change



2.3. Exemption of mission from taxation, fees and duties

□ Exemption of mission premises from taxation, VCDR Art. 23:

*“1. The sending State and the head of the mission shall be exempt from all **national, regional or municipal** dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent **payment for specific services rendered**.*

*2. The exemption from taxation referred to in this article **shall not apply** to such dues and taxes*

*payable under the law of the receiving State by persons **contracting** with the sending State or the head of the mission.”*

□ Exemption of official fees of mission from taxation, VCDR Art. 28:

“The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes”.

□ Exemption from customs duties, Art. 36 para. 1 a:

“1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the mission <...>”



2.3. Exemption of mission premises from taxation (cont'd)

VCDR 23.1:

- Exception: -“payment for specific services rendered”- covers the services of actual benefit for the mission
- To be specified under the receiving state’s law;

VCDR 23.2 :


- exemption from rates, taxes and duties does not apply to persons who leased or sold premises to the sending states.



2.4. Freedom of communication

□ **VCDR Art. 27 para. 1:**

*“1. The receiving State shall **permit and protect free communication** on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State <...>”*



2.4. Freedom of communication

- Covers communications from a mission with **the receiving state, sending state, other missions and consulates, int'l organizations and nationals of the sending state**
- **All appropriate means**, incl. diplomatic couriers and messages in code or cipher, fax, e-mail etc.
- Protection is granted for **official communication** (unofficial communication is covered by the national law)
- N.B. Use of the **wireless transmitter** is subject to the consent of the receiving state and cannot disregard local laws and procedures (incl. inspection)
- Telephone services – paid (if DM does not pay, formally has the same status as a private consumer)
- Respect and duty of protection



2.4. Inviolability of official correspondence



□ VCDR Art. 27 para. 2:

*“<...>2. **The official correspondence of the mission shall be inviolable.** Official correspondence means all correspondence relating to the mission and its functions <...>”*

1. Shall not be opened by the authorities of receiving state;
2. Shall not be used as evidence in cases;



2.5. Diplomatic bag

VCDR Art. 27 paras. 3 and 4:

“<...>3. The **diplomatic bag** shall not be opened or detained.

4. The packages constituting the **diplomatic bag** must bear visible external **marks** of their character and may contain only diplomatic **documents or articles intended for official use** <...>”

- No definition of diplomatic bag;
- No limits on size or weight;
- Must conform to the transit requirements under domestic law.



2.5. Diplomatic bag (cont'd)

- Permitted **content** is not specified in the VCDR;
 - Usually it contains the articles for the DM functions: computers, copiers, building materials etc., but may also include currency notes, coins, food and drink, medals, clothing (but shall not violate the domestic law of the receiving state)
- Typical **form** of diplomatic bag - sack, pouch, envelope, etc. – cannot be opened (transport means (lorries, planes, cars) may be opened)
- Visible external **marks** (special label, seal, stamp, certification)
- Materials for the official use only
- *De facto* inviolability (scanning does not open the bag literally, but it should not be used if it could reveal the sensitive contents)



2.6. Right to use flag and emblem

□ VCDR 20:

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

- “New” right (from the 19th c.) – imposes a high duty of protection on the receiving state (symbols are often a target);
- On the transport means - usually if the car is being used for the official purposes;
- “transport means” in this Art. includes cars, planes, boats etc. but does not cover the public transport used by the DM members.



Reading materials

- *DENZA, E. Diplomatic law: Commentary on the Vienna Convention on Diplomatic Relations, Oxford: OUP, 2016, 4th edition, p. 102-105; 110-212; 374-385;*
- *M v. Denmark*, No. [17392/90](#), ECHR, dec.: <http://hudoc.echr.coe.int/eng?i=001-1390>
- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, Judgment of 19 December 2005: (judgment full text: <http://www.icj-cij.org/docket/files/116/10455.pdf>, summary of the judgment: <http://www.icj-cij.org/docket/files/116/10457.pdf>)
- *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, judgment of 24 May 1980: (judgment full text: <http://www.icj-cij.org/docket/files/64/6291.pdf>; summary of the judgment: <http://www.icj-cij.org/docket/files/64/6293.pdf>)

