

IMMUNITIES AND PRIVILEGES OF DIPLOMATIC AGENTS

Part 1

17 October 2018

1. Concepts

► Privilege and immunity

Privilege - a substantive exemption from laws and regulations,

Immunity - a procedural protection from the enforcement in the receiving state:

List of immunities:

1. personal inviolability;
2. inviolability of residence and property;
3. immunity from criminal jurisdiction and, with some exceptions, from civil and administrative jurisdiction;
4. Exemption from giving evidence.

1.1. Personal inviolability

- ▶ VCDR Art. 29:

*“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall **treat him with due respect** and shall **take all appropriate steps to prevent any attack on his person, freedom or dignity.**”*

- ▶ 2 aspects of personal inviolability:
 - **due respect** > the duty of the receiving State to abstain from exercising sovereign rights and in particular law enforcement rights
 - **duty of special protection** > proportionate to the threat

1.1. Personal inviolability (cont'd): due respect

1. Diplomatic agent is immune from any action by law enforcement of the receiving State

1.1. Personal inviolability (cont'd): duty of special protection

2. The receiving state has the special duty of protection:

all appropriate steps - usually realised by penalizing offences against diplomats (not compulsory under VCDR)

BUT: a balance shall be maintained by the receiving State between its duty and the free speech.

“**Appropriate**” = limited, not all possible and convenient for both sides (if there is a clear need of special police protection, the receiving state should provide such guard);

1975 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents obliges to make these crimes (e.g. murder, kidnapping, other violent attacks, threats and attempts to commit such attacks) punishable by appropriate penalties which take into account their grave nature.

1.2. The inviolability of diplomatic residences and property

- ▶ Art. 30: inviolability and protection of private residence, papers, correspondence and *property* (*the latter is subject to exceptions*)

VCDR Article 30

- 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.*
- 2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.*
 - ▶ the inviolability of the papers, correspondence - absolute, cannot be searched or screened;
 - ▶ the inviolability of the property of a diplomatic agent - with the exception for civil /adm. jurisdiction + duty to respect local laws).

1.3. Immunity from criminal jurisdiction

VCDR Art. 31:

1. A diplomatic agent shall enjoy immunity from the **criminal jurisdiction** of the receiving State.

1.3. Immunity from civil and administrative jurisdiction

Art. 31 of the VCDR a diplomatic agent shall also enjoy immunity from civil and administrative jurisdiction of the receiving State, except in the case of:

- a) **A real action** relating to private immovable property situated in the territory of the receiving State, unless he holds it 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 his official functions.

1.3. Immunity from jurisdiction

2. A diplomatic agent is not obliged to give **evidence as a witness.**
3. No **measures of execution** may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the **jurisdiction of the sending State.**

1.3.Criminal jurisdiction of the receiving state (VCDR Art.31)

- ▶ VCDR Art. 31: absolute immunity from criminal jurisdiction (cannot be tried or punished by the local courts).

In case of criminal offence the receiving state can:

1. notify the head of mission if the **offence is minor**;
 2. declare *persona non grata* if the **offence is recurring**;
 3. ask for the immunity to be waived or declare *persona non grata* if the **offence is grave** (drug trafficking, murder etc.)
- ▶ *1980 ICJ judgment, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*

1.3.Civil and administrative jurisdiction (VCDR Art.31)

The immunity of a diplomatic agent from civil and administrative jurisdiction covers family proceedings, bankruptcy proceedings, matters related to company law, administration of estates. Also, no inquiry into the death of the diplomatic agent (unless the mission consents), no claims for damages arising from motor traffic offences.

► **Immunity from civil and administrative jurisdiction not absolute** - exceptions:

1. **real action** relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.

“**real action**” - the concept to be determined under national law, but it is an action where ownership or possession of immovable property is claimed.

1.3.Civil and administrative jurisdiction (cont'd)

2. Succession matters (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)

1.3.Civil and administrative jurisdiction (cont'd)

3. VCDR Art. 31.1(c) exception to immunity: an action relating to any **professional or commercial activity** exercised by the diplomatic agent in the receiving State outside his official functions.

- ▶ **VCDR Art. 42** prohibits a diplomat from exercising in the receiving State for personal profit any professional or commercial activity.
- ▶ **What is the relation between Art. 42 of the VCDR** which forbids a diplomatic agent to practise any professional or commercial activity for personal profit in the receiving State **and Art. 31.1(c)?**
- ▶ **Meaning of professional and commercial activity:** it covers rather **continuous** activity.
- ▶ „outside his official functions“ - broad interpretation to diplomatic functions in States (e.g. carrying out police liaison activities, translation)
- ▶ „in the receiving State“ - no jurisdiction of the court of the receiving State if the activity was in the other State

2.1. Procedure on establishing immunity and its legal consequences

- ▶ Procedure on establishing immunity: Art 31 VCDR lays down no procedural provisions as to when and how diplomatic immunity should be established in the domestic courts (such issues are decided under the national law)
- ▶ Legal effect of establishment or lifting immunity: procedural in character, substantive liability not affected (on distinction between immunity and impunity, see 2002, ICJ, *Arrest Warrant* case)
- ▶ **The Court must determine the issue of immunity on the facts at the date when this issue comes before the Court (not at the time when the conduct or events giving rise to a claim or charge took place or at the time when the proceedings were begun).**
- ▶ If the domestic court, not being aware of the status of the defendant, delivers a verdict, judgment in the civil, criminal case, it could be legal under the national law, the diplomatic agent, if still entitled to diplomatic immunity, could raise it as a bar to enforcement of a conviction or judgment against him.

2.2. Jurisdiction of the sending State

- ▶ Art. 31.4 of the VCDR: The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

2.2. Jurisdiction of the sending State

- ▶ Civil proceedings against a diplomatic agent in the sending State are rather problematic
- ▶ Criminal proceedings in the sending State can be problematic as well

2.3. Execution of judgment in the case

- ▶ Art. 31.3 of the VCDR: „No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence“.
- In general: a separate waiver is necessary for the execution of judgment.
- In case of the exceptions from the jurisdiction immunity, there is also the exception to immunity from execution.
- Impossible to enter the diplomatic residence.
- If the diplomatic agent does not comply with the final judgment of a national court of the receiving State, the matter would be drawn to the Gov't of the sending State, the withdrawal of the diplomat may be requested.

2.4. Exemption from giving evidence

- ▶ A diplomatic agent is not **obliged** to give evidence as a witness in any legal proceedings in the receiving State (Art. 31.2 of the VCDR).
- ▶ The receiving state cannot declare the diplomatic agent *persona non grata* if the diplomatic agent refuses to give evidence on request.
- ▶ The diplomatic agent may give evidence if permitted by his sending State.
- ▶ The receiving state may refuse to admit evidence if it is offered on condition that it may not be subject to cross-examination or not given in open court.

2.5. Waiver of immunity

- **VCDR Art. 32:**

1. The immunity from jurisdiction <...> may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

2.5. Waiver of immunity

Immunity in substance belongs to the sending State and must be waived by that State (not individual).

There can be no implied waiver of immunity (e.g. when the diplomatic agent appears as defendant without claiming any immunity). The waiver should be express in regard to all (e.g. criminal, civil) proceedings.

Waiver is irrevocable

The evidence which a court may require to establish that a valid waiver has been made by the sending State (determined under the national law of the receiving State, but usual practice: a waiver by the Head of the mission is deemed to be a waiver by that State)

2.5. Waiver of immunity

If the diplomatic agent chooses to bring legal proceedings before the local courts:

- ▶ no authority of the sending State is required under the VCDR
- ▶ obligation to comply with the rules of the court of the receiving State;
- ▶ the diplomatic agent cannot plead immunity in regard to any counterclaim which may be pleaded by the defendant to his action;
- ▶ the diplomatic agent cannot plead immunity in regard to the appeal.

2.5. Waiver of immunity

- ▶ the execution of a judgment requires a separate waiver by the sending State (Art 32.4 of the VCDR). The implication of the text is that in respect of criminal proceedings no separate waiver in respect of execution of any penalty is necessary, thus waiver of immunity in a criminal case cannot be confined to the proceedings to determine guilt

2.6. If a person wants to sue a diplomat...

3 options:

1. try to institute proceedings before the **courts of the diplomat's home State**;
2. lay the matter before the **ambassador** of the sending State hoping to have his assistance in obtaining a settlement;
3. lay the matter before his **own government**, usually before the ministry of foreign affairs, and ask them to intervene.

4. Commencement and termination of immunities

VCDR Article 39

1. Every person entitled to **privileges and immunities** shall enjoy them **from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.**

2. When the functions of a person enjoying privileges and immunities have come to an end, such **privileges and immunities shall normally cease** at the moment when he **leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist** until that time, even in case of armed conflict. However, **with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.**

3. In case of the **death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.** In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission which to leave the country.

4. Commencement and termination of immunities (cont'd)

VCDR 39.1: personal privileges and immunities begin:

- 1) when the person entitled **enters** the receiving State on his way to take up his post.
- 2) If he is in the territory of the receiving State when he is appointed, his privileges and immunities begin when his appointment is **notified** to the ministry of foreign affairs.

4. Commencement and termination of immunities (cont'd)

Termination: immunities subsist until:

1. the diplomatic agent **leaves** the country on termination of his mission, or for a reasonable period to enable him to do so.

What constitutes a “*reasonable period*”? Some states define under domestic law, some prefer a flexible approach; usually 1-30 days for the *persona non grata* or 1-6 months to normal cases

2. the receiving State may **extend** a longer 'reasonable period' to **members** of the family of the diplomat expelled on short notice or in the **case of death** of the diplomat.
3. No termination of immunity for official acts.

Reading materials

- ▶ DENZA, E. *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford: Oxford University Press, 4th edition, 2016, p. 213-364; p. 386-388;
- ▶ *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>
- ▶ *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>
- ▶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ, judgment of 4 June 2008 (judgment full text: <http://www.icj-cij.org/docket/files/136/14550.pdf>; summary of the judgment: <http://www.icj-cij.org/docket/files/136/14572.pdf>

Reading materials

- ▶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Judgment of 14 February 2002: (judgment full text: <http://www.icj-cij.org/docket/files/121/8126.pdf>; summary of the judgment: <http://www.icj-cij.org/docket/files/121/13743.pdf>)