

LEGAL SAFEGUARDS AGAINST ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

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Abstract

Diplomatic immunity allows for necessary confidentiality and security. This immunity is considered to be among the oldest customary norms of international relations, traceable to ancient Roman and Greek governments, where envoys enjoyed special status as sovereign emissaries even where the sending State and receiving State were at war. However, the operationalization of diplomatic immunities and privileges results in the problem of criminal accountability for crimes committed by persons who enjoy them. The paper adopts a doctrinal research methodology to examine the legal safeguards against abuse of diplomatic immunities and privileges. It was found that in response to the problem of abuse of diplomatic immunities, several legal safeguards have been developed. Among them is the requirement of mutual consent for the establishment of diplomatic relations as well as the appointment of the head of the mission. These complications and contradictions contribute significantly to the problem of diplomatic immunity. The paper recommends that persons with criminal records, questionable character, or negative ideological leanings not be appointed to the diplomatic mission, among others.

Keywords: Diplomatic Immunities, Diplomatic Privileges, Head of the Mission

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1.0 INTRODUCTION

Modern friendly interactions among States fall within the circumference of diplomatic law. This branch of international law provides the framework for diplomatic relations, including the rights and obligations of the parties.¹ Diplomatic relations have several advantages. Of particular importance is the role of diplomatic relations in maintaining international peace and security. The point can be made that international peace and security is fundamental to sustainable development since peace and security are basic conditions without which development cannot take place. Another way to look at the issue is that the scourge of international armed conflict is usually devastating. For instance, the Russia-Ukraine armed conflict has occasioned the killing of thousands of civilians, the destruction of critical infrastructures, and the violation of human rights.²

The framework for diplomatic relations consists of mutually assumed rights and obligations by Parties. Nevertheless, these rights and duties are amenable to abuse. This challenge was admitted by the ICJ in *US Diplomatic and Consular Staff in Tehran case*,³ where the Court observed that:

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.

¹ D J Harris, *Cases and Materials on International Law* (6th edn, Maxwell 2004) 354.

² UN Human Rights Office of the High Commission, *Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation* (UN Human Rights Office of the High Commission 2022) 5.

³ *US v Iran*, ICJ Reports (1980) 3.

The point being made is that the operationalization of diplomatic immunities and privileges results in the problem of criminal accountability for crimes committed by persons who enjoy them. That is, while on one hand, diplomatic relations are strategic to international friendly relations and mutually beneficial socio-economic exchanges, on the other hand, diplomatic immunity which it affords may be easily abused. In which case, criminal accountability becomes difficult.

As expected therefore, the principle of diplomatic immunity has continued to face criticism from different quarters especially as a result of abuse by some diplomats. Nevertheless, it is one of the most mutually protected principles in international law. This is because since all States have diplomat missions overseas, they have equal vested interests in the protection of their diplomatic missions. Moreover, since reciprocity is crucial in the enforcement of the principle, States therefore enforce the principle with a sort of dogmatic commitment.⁴

The Supreme Court of the United States of America (USA) for instance in *Boos v Barry*,⁵ emphasized that ‘the need to protect diplomats is grounded in our Nation's important interest in international relations. Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation.’ Such protection is crucial to ensuring equal protection of American diplomats overseas. However, finding the optimal balance between the necessity of diplomatic immunity and preventing abuse of diplomatic immunity to further criminal enterprises has remained a hurricane legal task.

⁴ P Malanczuk, *Akehurst's Modern Introduction to International Law* (Taylor and Francis 2002) 123.

⁵ 99 L.Ed.2d 333, 345-6 (1988); 121 ILR, p 551.

For instance, in 2013, a USA diplomatic agent in Kenya, Joshua Walde crashed his car into a taxi killing one person and grievously injuring eight others. He could not be held criminally accountable for his crime because of diplomatic immunity.⁶ Criminal abuse of diplomatic immunity has also extended to the family members, staffs and personal servants of diplomats including for shoplifting, assault, driving under the influence of alcohol and drug trafficking.⁷ This paper sets out to critically examine legal safeguards against abuse of diplomatic immunities and privileges.

2.0 CONCEPT OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

Immunity and privileges in diplomatic relations mean the same thing. It refers to a legal exemption from a duty, liability or process.⁸ In the context of international diplomatic law, diplomatic immunity refers to a legal insulation of defined categories of persons or properties from the legislative, executive and judicial jurisdiction of the receiving State. This immunity derives from the sovereign status of States in international law which excludes a State from being subject to the jurisdiction of another State. Therefore, since diplomats and diplomatic properties are representatives of their respective sending States, they must necessarily enjoy the immunity which statehood confers.⁹ By extension therefore, the diplomatic officers of a State become exempted from the jurisdiction of the host State. This is

⁶ Ibid.

⁷ M S Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' [1989] (4)(1) *American University International Law Review* 173, 174-175.

⁸ B A Garner (ed), *Black's Law Dictionary* (9th edn, Thompson Reuters 2009) 817.

⁹ Malanczuk (n 4).

argued to be necessary for the effective discharge of their duties and particularly to guarantee their safety in the receiving State.¹⁰

Diplomatic immunity allows for necessary confidentiality and security. This immunity is considered to be among the oldest customary norms of international relations traceable to ancient Roman and Greek governments where envoys enjoyed special status as sovereign emissaries even where the sending State and receiving State were at war.¹¹ According to Cessese,¹² diplomatic immunity may be functional or personal. Functional immunity rests on the notion of non-interference in matters that are the exclusive preserve of another State. This implied that agents of a State are not accountable to another State at least in the performance of their official duties which are attributed to acts of the sending State. It also protects the premises and correspondence of a State. This is complemented by personal diplomatic immunity which is to protect against infringing on the capacity of State agents in the receiving State to perform their duties. This immunity is important for assurance of the representatives of the sending State of their safety particularly against prejudicial legislative, executive or judicial acts of the receiving State.

The principle of diplomatic immunity is one of the most mutually protected principles in international law. This is because since all States have diplomat missions overseas, they have equal vested interests in the protection of their diplomatic missions. Moreover, since reciprocity is crucial in the enforcement of the principle, States

¹⁰ M Minch, 'Importance of Diplomacy in the International Relations' [2014] (3)(4) *Paripex Indian Journal of Research* 223, 224.

¹¹ A Abass, *Complete International Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2014) 407.

¹² A Cassese, *International Criminal Law* (2nd edn, Oxford University Press Oxford 2008) 302-303.

therefore enforce the principle with a sort of dogmatic commitment.¹³ The Supreme Court of the United States of America (USA) for instance in *Boos v Barry*,¹⁴ emphasised that ‘the need to protect diplomats is grounded in our Nation's important interest in international relations. Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation.’ Such protection is crucial to ensuring equal protection of American diplomats overseas.

3.0 LEGAL EXTENT OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

The international customary law rules and principles of diplomatic relations are now codified in the Vienna Convention on Diplomatic Relations (VCDR) 1961. The legal extent of immunities and privileges are provided in the Convention.

a. Tax Immunities

The VCDR exempts from taxation the fees and charges levied by the mission in the course of its official duties.¹⁵ The obvious reasons are twofold; the operations of a mission are not considered business ventures. Article 3 of the VCDR is clear on the functions of the diplomatic missions and they do not include profit making. Second, the receiving State has no jurisdiction to impose taxes on another State in the sense that the mission is a representation of the sending State. Yet, while the mission is not a business venture, it can nonetheless charge fees for the services that it provides for third parties. For instance, where the mission is performing consular functions as permitted by article 3(2) of the VCDR, it may charge fees.

¹³ Malanczuk (n. 4), 123.

¹⁴ 99 L.Ed.2d 333, 345-6 (1988); 121 ILR, 551.

¹⁵ Vienna Convention on Diplomatic Relations 1961 art 28.

b. Immunity of Archives and Documents

Historically, secrecy and confidentiality have been an integral part of diplomatic relations. This was a result of the prevailing distrust and tension that persisted at the time. Moreover, States are cautious to protect their military, economic, political and other information.¹⁶ It is within the context of secrecy that the VCDR states that the archives and documents of the mission shall be inviolable at any time and wherever they may be.¹⁷ It should be emphasised that the inviolability of the archives and documents of the diplomatic transcends time and location. That is at times and all places, they remain inviolable. The documents need not be within the diplomatic premises. Even if they are transit or located in any other place, the rule applies. This exemplifies the extent of secrecy that the VCDR attaches to diplomatic documents and archives.

c. Immunity of the Person of Diplomatic Agents

The diplomatic agent is the person in actual agency status of the sending State and therefore capable of binding the sending State.¹⁸ The role of the diplomatic agent is very crucial in diplomatic relations as head of the mission. This role is best appreciated from the perspective of the importance of diplomatic functions which the mission performs. The role of the diplomatic agent has therefore become increasingly

¹⁶ G R Berridge, *Diplomacy: Theory and Practice* (4th edn, Palgrave Macmillan 2010) 118.

¹⁷ VCDR (n 15), art 24.

¹⁸ E L Evriviades, 'The Demands of Diplomacy: The Role of Career and Honorary Consuls' [2005] *The Whitehead Journal of Diplomacy and International Relations* 21, 22.

important in the globalized world, and may emerge as one of the most significant components of diplomatic power.¹⁹

The diplomatic agent is responsible for the performance of the functions of the diplomatic mission. The diplomatic agent also plays important role of protecting the interests of the sending State and compatriots in the host country.²⁰ Relatedly, the role of the diplomatic agent includes the furtherance of healthy friendly inter-relationship between the sending State and receiving State in the fields of commerce, culture and science.²¹

The VCDR provides extensive immunity and privileges for the diplomatic agent. By the provisions of article 29 of the VCDR, the immunities and privileges include the following:

- a. The person of a diplomatic agent shall be inviolable.
- b. He shall not be liable to any form of arrest or detention.
- c. 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.

Article 31 totally excuses a diplomatic agent from civil and criminal proceedings in the receiving State. He cannot be summoned or compelled to give evidence. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. His papers, correspondence and his property shall

¹⁹ K D Stringer, *Think Global, Act Local: Honorary Consuls in a Transforming Diplomatic World* (Netherlands Institute of International Relations 2007) 1.

²⁰ Z Gruda, *Manual Diplomatiek / Diplomatic Handbook* (Prishtina 2009) 262.

²¹ M Kostecki and O Naray. *Commercial Diplomacy and International Business* (Netherlands Institute of International Relations 2007) 7.

likewise enjoy inviolability.²² The legal implication is that the diplomatic agent is exempted from the jurisdiction of the receiving State. This is argued to be necessary for the effective discharge of his duties and particularly to guarantee his safety and the security of diplomatic documents and achieves in the receiving State.²³

In *Peba v The State*,²⁴ it was held that Courts have no jurisdiction to try and diplomat for crime committed in Nigeria. Similarly, in *Noah v British High Commissioner*,²⁵ it was held that the Court has no jurisdiction to hear and determine a suit brought against the British High Commissioner. In *Trendex Trading Corp v Central Bank*,²⁶ the Court that funds belonging to the Central Bank of Nigeria are not covered by sovereign immunity since the Central Bank does not enjoy immunity.

4.0 ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

Abuse of diplomatic immunities and privileges is one of the major criticisms of diplomatic law. Several high-profile cases of abuse have been reported. In the case of *Abdulaziz v Metropolitan Dade County*,²⁷ a Saudi Arabian Prince who was resident in Florida, USA was alleged to have enslaved his domestic workers. This included forced 20 hours of labour a day, a slave wage system and deprivation of access to the outside world. Upon receipt of the complaints, police officers with a valid search warrant went to search the premises. However, they were assaulted by the prince and his bodyguards. At the time, the prince was

²² VCDR (n 15), art 30.

²³ M Minch, 'Importance of Diplomacy in the International Relations' [2014] (3)(4) *Paripex Indian Journal of Research* 223, 224.

²⁴ (1980) NSCC 266

²⁵ (1980) (12) NSCC 264

²⁶ (1977) 1 All ER 881.

²⁷ 741 F.2d 1328 (11th Cir. 1984).

not a diplomatic agent and therefore had no diplomatic immunity. He filed a civil suit claiming damages for the alleged wrongful search of his house.²⁸

The police counterclaimed for the assault on police officers on duty. However, to frustrate the counterclaim, the Saudi government granted diplomatic status to the prince retrospectively. The Court thereupon dismissed the counterclaim on the grounds of diplomatic immunity. This case illustrates the ease with which diplomatic immunity can be easily manipulated to provide cover against both criminal and civil accountability.²⁹ The approach of the Court in this case is a potentially dangerous precedent. At the material time of the incidence, the Prince did not have diplomatic status. Allowing a retrospective grant of diplomatic status further opens windows to criminal exploitation of diplomatic immunity.

Higgins,³⁰ notes that between 1974 and 1984 alone, the cases of avoiding criminal accountability as result of diplomatic immunity were 546 and these involved serious offences that would have ordinarily attracted prison term of not less than 6 months. Higgins observes also the problem of illegal possession of firearms by some diplomats and that the arms were mostly smuggled into the receiving country with diplomatic bags. There are links of some diplomats to terrorism financing, aiding and abetting using diplomatic channels which allowed for confidential smuggling of arms and transmission of communications.³¹

²⁸ *Abdulaziz v Metropolitan Dade County* (n 27).

²⁹ *Ibid.*

³⁰ R Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' [1975] (79)(1) *American Journal of International Law* 1, 1-2.

³¹ *Ibid.*, 2-3.

5.0 LEGAL SAFEGUARDS AGAINST CRIMINAL ABUSE OF DIPLOMATIC IMMUNITIES

The effectiveness of the legal safeguards against abuse of diplomatic immunities and privileges in international law has remained a controversial issue. While it is a consensus that the law governing diplomatic relations is not devoid of antidotes for immunity abuse, the argument lies in the view that the law on diplomatic relations does not provide a satisfactory solution to curb problems related to the abuse of diplomatic immunities and privileges by diplomats. Some critics insist that the law fails to provide a balance between the interests of the sending and the receiving states.³² Another view is that the VCDR deviates from functional necessity theory by insisting more on individual necessity rather than focusing on the functionality of the immunities and privileges. It can therefore be noted that the immunity under the Convention, immunity is too broad and should be narrowed down according to the type of mission and function of a diplomat.³³

Dreier,³⁴ submits that it can be argued that by addressing the abuse of diplomatic immunity by creating a new and more restrictive interpretation of the Vienna Convention has the advantage of working within the existing framework of international law. He states that “while the concept of diplomatic immunity remains an important underpinning of peaceful diplomacy, it is time with exponential growth of the diplomatic corps, that we re-examine the procedures and policies implicit in the doctrine of diplomatic immunity.”³⁵ In joining

³² E Adjin-Tettey, *Abuse of Diplomatic Privileges and Immunities* (York University Press 1991) 32.

³³ Ibid, 33-36.

³⁴ D Dreier, ‘Diplomatic Immunities and Privileges in International Law’ [1997] (4) *ILSA Journal of International and Comparative Law* 627.

³⁵ Ibid.

the argument, this thesis identifies specific legal safeguards against abuse and proceeds to examine their effectiveness.

a. Consent of the Receiving State for Establishment of Mission and Appointment of Head of Mission

At the core of international diplomatic relations is one of the most fundamental requirements which is consent. Generally, the point remains that diplomatic relations cannot be legislated or imposed. This is explainable in a simple analogy that “two cannot walk together except they agreed”.³⁶ This is simply because friendship at whatever level cannot be imposed or enforced. That is, States vested with the status of sovereignty cannot be forced into bilateral or multi-lateral relationships. Consent therefore lies at the centre of diplomatic relationships.³⁷

For the above reason, the VDCR states that “the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.”³⁸ The consent required here is one that is mutual. The requirement of consent has several legal implications. The first is that it is one of the most basic safeguards against abuse of diplomatic immunity. This is because, since a State must first consent, it is afforded the opportunity to evaluate and to profile the other State before consenting to any diplomatic arrangements. In this way, the antecedents of the other State and her diplomats in third party States become a relevant consideration. Here, a State may refuse to enter into diplomatic relations if it has reason to believe, suspect or fear that the associated immunities of the relationship may be abused, the State may decline consent. Therefore,

³⁶ Holy Bible, Amos 3:10.

³⁷ Malanczuk (n 4).

³⁸ VCDR (n 15), art 2.

consent is first a legal mechanism that a State uses to protect itself against abuse of diplomatic immunity.

The second legal implication of consent is that it activates the legal obligations of the receiving to accord the diplomats of the sending all immunities, privileges and protection under the VCDR. It is the mutual consent that creates binding and reciprocal legal obligations under the VCDR. A receiving State is not bound to accord any diplomatic immunity to a mission it did not consent to. Consent creates *estoppel* against denying immunities, privileges and protection to the diplomats. Considering the sovereign status of States, it is only consent that creates a legal obligation on a State. The question of consent is therefore very important.

In consideration of the importance and legal implications of consent, the VCDR provides for different subject areas that States must mutually consent. For instance, the sending State must make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.³⁹ The head of the mission is the single most powerful and influential person in the mission. The “head of the mission” is the person charged by the sending State with the duty of acting in that capacity as head of the mission.⁴⁰ By this, he is in charge of ensuring that the mission acts within the confines of the law and observes all legal duties including respecting the laws of the receiving State.

All the other members of the mission are under or answerable to the head of the mission. His office and duties are therefore central to ensuring that members of the mission do not abuse their diplomatic immunities and privileges. Based on this, the sending State must make

³⁹ VDCR (n 15), art 4(1).

⁴⁰ Ibid, art 1(a).

certain that the receiving State has consented to the person proposed as head of the mission. The language of the VCDR suggests that the sending State can only “propose” a person as head of the mission. It is only on the certain agreement of the receiving State that the proposal can take effect. This provision allows the receiving State to fully profile the head of the mission before consent.

Moreover, the receiving State is not obliged to give reasons to the sending State for a refusal of agreement.⁴¹ This means that the receiving State can simply refuse to consent to the proposal of the head of the mission without giving a reason. It seems that this provision is intended to protect information upon which the receiving State based its refusal. That is, the receiving State upon profiling of the proposed head of mission may gather intelligence and other security reports about the candidate. The receiving State may consider it best to keep the intelligence private particularly so as not to jeopardise the source. Hence, it is not required to give any reason for the refusal.

Again, it seems that the VCDR focuses on mutual consent rather than the reasonable basis of the consent or refusal of consent. The view of this thesis is that States have different reasons for diplomatic relations and these reasons are usually beyond what is declared publicly. State interests in relating with another State are not always obvious but classified. This justifies the efforts of the VCDR to guarantee the immunity of diplomatic premises, archives and documents. These reasons are taken into consideration in accepting or rejecting a proposed head of a mission. Hence, a State is not required to give any reason either for consenting or rejecting the proposed head of a mission. This totally avoids the issue of whether the rejection is justified. Consent is therefore the fundamental basis of legal

⁴¹ VCDR (n 15), art 4(2).

obligations in international law. Hence, consent is absolutely discretionary, requiring no justification.⁴²

Article 11 of the VCDR is clear that consent is required for the size of the mission. This includes the size of staffs and infrastructure. The article provides that in the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category. These are important legal safeguards which the receiving State may use strategically to address potential abuse of diplomatic immunity.

b. Declaration of a Diplomatic Agent as *Persona non Grata* and Recall

While consent is a very important legal mechanism against abuse of diplomatic immunity, the right or power of the receiving State to declare a diplomat as a *persona non grata* and the obligation of recall, are the most direct control mechanisms under the VCDR. The term *persona non grata* indicates that a diplomatic agent of a State is unacceptable to the receiving State. This can take place either before the individual is accredited, indicating that the proposed appointee is unacceptable to the host State and will not be received, or after the accreditation process in response to some real or alleged impropriety by the diplomatic agent. This is used to checkmate the persons sent as

⁴² R Zedalis, 'Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation' [1990] (25) *Texas Law Journal* 209.

diplomats and therefore to reduce the risks of abuse of diplomatic immunity.⁴³

In Latin, the term means “an unwelcome person”- a diplomat who is no longer welcomed by the government to which they had been accredited. In diplomacy, a *persona non grata* is a person not appreciated or no longer welcomed.⁴⁴ This is an extension of the requirement of consent. This means that consent can be given and withdrawn at any time. The declaration signals the withdrawal of the consent. Diplomats have been declared *persona non grata* for making disparaging remarks against the host government, violating its laws, interfering with its politics, meddling with its domestic affairs, using offensive language against it, criticizing its head of state, and similar grounds. “Usually, the appended host government requests for sending diplomats to recall the offending diplomat. This request is normally complied with.”⁴⁵

Existence of the *persona non grata* principle developed through international customary law and was codified in article 9 of the VCDR. It is intended to construct and create balance, worthiness, and justice between the principle of sovereignty and territorial jurisdiction on one hand, and the principle of inviolability and immunity on the other hand. In Article 9(1) of the Convention, it is asserted that ‘*persona non grata*’ shall be addressed to the head of a mission. If the receiving State finds the ambassador (or any other diplomatic agent)

⁴³ A Fakhoury, ‘*Persona Non Grata: The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State*’ [2017] (57) *Journal of Law, Policy and Globalization* 110, 112-113.

⁴⁴ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press 2012) 67.

⁴⁵ M Gamboa, *A Dictionary of International Law and Diplomacy* (Phoenix Press 2003) 210-11.

unacceptable, after this person personally offends the receiving State, the receiving State can formally request that the diplomat be recalled.⁴⁶

Although the sending State must then comply, if it delays or declines, the receiving State can proceed to a notice of *persona non grata*, in accordance with Article 9 of the VCDR. In the more serious event of disagreements over policies or actions, States may sever diplomatic relations. In less important instances of displeasure, the ambassador may be recalled for consultation. A notice of *persona non grata* may not be used solely for lowering the mission's staff count which is a separate process dealt with in article 11 of the VCDR.⁴⁷

It is an established fundamental principle is that the receiving State does not have to tolerate the continued presence of a diplomat who has become unacceptable. This unacceptability usually derives from a norm proscribing political intrigue against the sending State, in which case the receiving State may expel the diplomat with minimum notice.⁴⁸

Given that the reasons need not to be given by the receiving state when declaring a diplomatic or consular agent of the sending State *persona non grata*, the declaration of a diplomatic agent as *persona non grata* is, in consequence, utterly discretionary. The receiving State may, thus, make use of it for various reasons, whether due to the behaviour of the agent themselves or due to the actions of the sending State.

⁴⁶ E Denza. 'Vienna Convention on Diplomatic Relations' [2009] <http://www.thehindu.com/thehindu/2003/06/10/stories/2003061000701000.htm> Accessed 12 August 2025.

⁴⁷ R Ivor, *Satow's Diplomatic Practice* (6th edn, Oxford University Press 2009) 162.

⁴⁸ H Grotius, *The Rights of War and Peace* (Liberty Fund Press 2005) 5–7.

In practice, a formal declaration *persona non grata* by the receiving state is rarely issued; it is normally sufficient to request the removal of a diplomat or consular. Very often, the diplomatic or consular agent leaves or is withdrawn before any formal notification. The sending State is not entitled to expel the agent following a *persona non grata* declaration. The declaration only obliges the sending state to recall the agent concerned. Only if the sending State does not recall its agent, the receiving State is allowed to consider the agent an ordinary foreign person without any immunity or privilege.⁴⁹

According to the International Court of Justice (ICJ), if the sending State does not recall the agent concerned, the loss of diplomatic and consular privileges is “almost immediate.”⁵⁰ This means that this person can be expelled if not recalled by the receiving State or if they fail to voluntarily leave the country, provided that the conventional and customary rules related to the treatment of foreigners are respected. Expulsion is, thus, not the automatic consequence of the declaration *persona non grata*. In any case, the agent concerned must be offered a reasonable time to leave the country, while they remain entitled to the privileges and immunities attached to their function.⁵¹

If a sending State refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as a member of a mission to have been terminated. In fact, the receiving State may refuse to accept or receive a foreign diplomat. The widespread practice is of the receiving State’s desire for recall

⁴⁹ VCDR (n 15), art 9.

⁵⁰ Case Concerning United States Diplomatic and Consular Sta in Tehran (United States of America v Iran) Judgement of 24 May 1980 p. 86.

⁵¹ Eritrea-Ethiopia Claims Commission, Partial Award, Diplomatic Claim, Eritrea’s Claim No 20, 19 December 2005, 9.

prevailing over the sending State's resistance suggesting it reflected customary international law.⁵²

Proclaiming a diplomat *persona non grata* usually results from an unfriendly attitude toward the (prospective) receiving State. It could be the violation of rules of host State or violation of international law, or improper diplomatic behaviour or indiscretions, in such situation the host State may proclaim a diplomat *persona non grata* for any or no reason. The sending State must then recall its agent, or the host State may ignore the presence of the diplomatic agent or expel the diplomat from its territory. The process of dealing with diplomats who are no longer welcome has now been fully recognized in article 9 of the Vienna Convention on Diplomatic Relations.⁵³

The most common response when foreign diplomatic and consular officials act inappropriately is to declare those officials' *persona non grata* and expel them from the country. While this is traditionally a remedy for offenses committed by the actual personnel being expelled, it is entirely at the host country's discretion and several nations have used it to respond to objectionable activities on the part of a foreign government as a whole been used on some occasion as a symbolic gesture and a way for a country to show displeasure with the actions of another country or entity.⁵⁴

In 2009, Venezuela and Israel expelled each other's diplomats after an Israeli attack on the Gaza Strip. The United States and Ecuador had a

⁵² C E Wilson, 'Diplomatic Privileges and Immunities: The Retinue and Families of the Diplomatic Staff' [2005] (14)(4) *The International and Comparative Law Quarterly* 1265–95

⁵³ T J Lynch, 'Theories of Diplomacy' in T J Lynch (ed), *The Oxford Encyclopedia of American Military and Diplomatic History* (Oxford University Press 2013) 330.

⁵⁴ Lynch (n 33), 335-341.

similar exchange of expulsions after diplomatic cables were linked to secret-sharing with WikiLeaks.⁵⁵ The declaration is therefore one of the most important legal safeguards against abuse of diplomatic immunities and privileges.

c. Waiver of Immunity

The scope of diplomatic immunity has been examined in previous sections. This part of the thesis examines waiver of immunity as one of the legal safeguards against abuse. It should be recalled that by reason of immunity, a diplomatic agent cannot be subject to civil or criminal jurisdiction of the receiving State. International law therefore attempts the balance abuse with counteracting legal measures one of which is waiver of immunity.⁵⁶

Article 32 of the VCDR provides that the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity may be waived by the sending State. Waiver must always be express. Furthermore, the initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. 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.⁵⁷

⁵⁵ N Mapstone, 'Ecuador Expels US Ambassador Over Cable' [2011] <<https://www.ft.com/content/d78c9d8e-5fc9-11e0-a718-00144feab49a>> Accessed 26 October 2024.

⁵⁶ R Garnett, 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?' [2015] (64)(4) *The International and Comparative Law Quarterly* 783-827.

⁵⁷ VCDR (n 15), art 32.

A convenient point to begin is that only the sending State can exercise the right to waive immunity. This is because the immunity itself belongs to the sending State and a diplomatic agent cannot abrogate or waive his immunity without the approval of the sending State. It is a prerogative right owned by the government of his State of origin and it (immunity) is not a prerogative right of the diplomatic agent concerned.⁵⁸ As the Court noted in *Fayed v Al-Tajir*,⁵⁹ the right to waive immunity is exercisable only by the sending State, not the diplomat. It must also be express and unequivocal. In the final analysis, the mechanisms leave the receiving State at the whims and caprices of the sending State regarding accountability for crimes committed by its diplomatic agents.

In *Basfar v Wong*,⁶⁰ the decision was that where the sending State refuses to waive the immunity, the receiving State cannot assume jurisdiction over the diplomat. It was a case trafficking for domestic labour. The Court could only sympathize with the victim. At page 48, “reciprocity forms the constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State.” The receiving State can only declare the diplomat a *persona non grata* and request that he leaves the receiving State.

The discourse has always centred around the question of the effectiveness of this waiver particularly whether a sending State has any incentive to ever waive immunity. It has been observed that the sending State may waive immunities if it deems that the diplomatic

⁵⁸ M Hardy, *Modern Diplomatic Law* (3rd edn, Manchester University Press 2019) 73.

⁵⁹ *Fayed v Al-Tajir* [1987] 2 All ER 396, at 411.

⁶⁰ (2022) 4 All ER

confidentiality is not at risk.⁶¹ This view of this thesis is that this is rather risky approach that a sending State may always be reluctant to take. Consequently, although article 32 of the VCDR allows the sending State to waive the immunity of any of its diplomats, in practice, this is hardly done as sending States are committed to protecting their diplomats.⁶²

Again, the waiver is not absolute. Diplomats who testify as a witness after their sending State has waived its right to object the testimony of its diplomatic agent, still have tools at hand to protect secrecy if needed. Due to his or her immunity from criminal jurisdiction, a diplomat cannot be prosecuted for perjury without a new and specific waiver by the sending State. That is, waiver of immunity is not generic but specific. For instance, a State may waive immunity and allow its diplomat to be sued but may not waive immunity for the execution of the judgment. Similarly, immunity may be waived for a diplomat to be summoned as a witness but he may not be charged for perjury.⁶³

The Marxist theorisation of diplomatic relations is based on the vested interests of States for socio-economic and political survival.⁶⁴ Wizimirska,⁶⁵ observes that in the sphere of international

⁶¹ H G Schermers and N M Blocker, *International Institutional Law: Unity Within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 329.

⁶² S R Mitchell, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' [2024] (4)(1) *American University International Law Review* 173, 174-175.

⁶³ 3ECtHR, Decision of 18 June 2013 (Chamber, Second Section), Case no 11590/08, *Meier v Switzerland*.

⁶⁴ D M Shehu and Others, 'The Nature and Scope of Diplomatic History' [2024] (7)(1) *African Journal of Social Sciences and Humanities Research* 152.

⁶⁵ K Wizimirska, 'The Art of Diplomacy in the Context of Contemporary International Relations' [2016] (48)(4) *Journal of Science of the Military Academy of Land Forces* 88.

relations it can be stated that international interests are based on the needs. Interests play an important role in the formulation of objectives and foreign policies of States. These, in turn, serve as a guide in undertaking a specific international activity. When international interests are brought into focus, the relationship among the participants of international relations and their mutual interactions with assets, values and conditions become important. An interest can be understood as a need that induces participants to take action to satisfy it. Interests may therefore provide incentives for waiver of diplomatic immunity by the sending State.

This thesis is not persuaded by the above view. It is maintained that States are likely never going to waive immunity. In fact, sending States are more likely to exploit diplomatic immunity for the protection of their diplomats rather than waive immunity. A case in point is the *Abdulaziz v Metropolitan Dade County*,⁶⁶ where a Saudi prince was granted diplomatic status retrospectively to enable him escape the criminal jurisdiction of Florida, USA where he was alleged to have enslaved his domestic workers.

Another perspective is that a sending State may waive immunity based on reputational risks. According to Egwemi,⁶⁷ the positive perception of any country's image is an important gauge for judging her standing in the international political system. A good image translates to respect, influence and prestige. On the other hand, a bad or negative perception of a country's image indicates that such a country lacks respect influence and prestige in the international system. Hence, a State may be pressured into taking some decisions to preserve its

⁶⁶ *Abdulaziz v Metro. Dade County*, 741 F.2d 1328 (11th Cir. 1984).

⁶⁷ V Egwemi, 'Managing Nigeria's Image Crisis: Akunyili's Rebranding Programme to the Rescue' [2010] (2)(3) *Current Research Journal of Economic Theory* 131.

international reputation and image.⁶⁸ While image crisis may be an incentive, in practice, there is no reported instance of waiver of diplomatic immunity to protect image. The VCDR will have to provide practical incentives for waiver of immunity to be effective.

6.0 CONCLUSION

In response to the problem of abuse of diplomatic immunities, several legal safeguards have been developed. Among them is the requirement of mutual consent for the establishment of diplomatic relations as well as the appointment of the head of the mission. This offers the receiving State a very critical opportunity to influence the person to be appointed head of the mission. This can be used strategically to ensure that persons with criminal records, questionable character or negative ideological leaning are not appointed into the diplomatic mission. Furthermore, the receiving State reserves the right to declare a diplomat a *persona non grata* and activate the obligation of the sending State to recall the diplomat. The sending State may also waive immunity allowing for the diplomat to be subject to the jurisdiction of the receiving State to the extent of the waiver.

While the legal safeguards are very important, they are undermined by inherent complications and contradictions. For instance, the declaration of a diplomat a *persona non grata* is responsive to a case of abuse not preventive of abuse. Even then, the declaration does not divest the diplomat of immunities and privileges but merely obligates the sending State to recall the diplomat. This does not constitute sufficient deterrence against abuse of immunities since in reality, the diplomat is not sanctioned. Again, the waiver of immunity is complicated by the fact that a sending State is not legally obligation or incentive to waive immunity.

⁶⁸ A Ogunsanwo, 'Citizen Diplomacy: Challenges for Nigeria's Foreign Policy' in O Eze (ed), *Citizen Diplomacy* (NIIA 2009) 19-30.

State practices reveal a reluctance to waive immunity and consequently, there is no recorded case of waiver. The implication is that waiver relies on the goodwill of the sending State rather than any system of legal compulsion. Similarly, the duty of the diplomat to respect the laws of the receiving State is contradicted by immunity which implies that he cannot be held accountable for even wilful or malicious refusal to respect the laws of the sending State. These complications and contradictions contribute significantly to the problem of diplomatic immunity.