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DECONSTRUCT

International Law of State and Diplomatic Immunity

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Introduction

States, like their citizens, do not exist in silos. International relations catapulted by globalisation have created an increasingly interconnected global village. Irrespective of the populist backlash on globalisation, the criticality of international relations has not diminished in any manner. Rather, it has become more relevant than before. Diplomatic exchanges and extraterritorial conduct of States are much more frequent and for the smooth functioning of it the international community recognises certain privileges and immunities conferred upon diplomats and other State officials. According to the Vienna Convention on Diplomatic Relations, 1961 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States'.

In this light, this short piece seeks to put up a broad view of the international legal regime vis-à-vis the actors or agents of nations by highlighting aspects of State and diplomatic immunity.

State Immunity

Law on State immunity highlights legal rules and principles determining the conditions under which a foreign State may claim freedom from the jurisdiction of the host State. Domestic legislation on State immunity form customary law and are sometimes incorporated in international treaties like the 1972 European Convention on State Immunity. For State officials, immunity is a layer of privilege, which protects its recipient from the ordinary process of the courts. As an extension of this practice, the centralization of such international law gained traction in 1978. The British Parliament passed the State Immunity Act in 1978, Section 3 of which provides that foreign states

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do not enjoy immunity in respect of their commercial transactions. Other common law countries followed suit.

International instruments, such as the European Convention on State Immunity (which states have been reluctant to ratify) or the Montreal Draft Convention on State Immunity, 1983 endorsed the principle of qualified immunity. The former has been ratified by a small number of European countries. The extent to which a foreign nation (or its government agencies and corporate entities) may rely on sovereignty to claim immunity from the legal process will depend very much on domestic law. By 1992, the consensus in the International Law Commission in its Draft Articles on the Jurisdictional Immunities of States and Their Property, 1991 was also developing in favour of the restrictive idea of immunity.

The current trend or the State practice is to adopt a doctrine of qualified immunity i.e. immunity is granted to foreign States only with respect to their governmental acts (*acta iure imperii*), not for their commercial acts (*acta iure gestionis*). However, the distinction between the two is subjective. This has complicated the law on State immunity. Only when the question concerns the exercise of 'classical' State functions, such as the use of the army in an armed conflict, the matter can be objectively assessed.

Act of State

In Argentine Republic v. Amerada Hess Shipping Corp (1989), the US Supreme Court granted immunity to Argentina against a claim filed by the owner of a tanker that had been attacked and damaged on high seas by the Argentinian air force during the Falklands war. The court also rejected the contention raised by the claimant against sovereign immunity that the Argentinian act had been a violation of international law.

Where no universally accepted classification test to determine the distinction between *acts de jure imperii* and *acta de jure gestionis*, some States make a distinction between them on the basis of 'nature' of the act (objective test) as observed in the case of Trendtex Trading Corporation v. Central Bank of Nigeria (1977). For others, the distinction may be purpose based (subjective test).

Sometimes, the demarcation between the two can become difficult. For instance, the purchase of military equipment for the army would be regarded as a commercial activity under the objective test and as a governmental act under the subjective test. It is submitted though; such borderline cases are exceptional, and they can be resolved by carefully looking at the 'nature' of the activity.

There are various exceptions to the immunity conferred by the Act of State doctrine. It cannot be pleaded as a defence to charges of war crimes, crimes against peace, or crimes against humanity. In the Rainbow Warrior case (1990), for example, there was no commission of crimes of this nature by the two French agents. The incident rather falls within the category of cases in which immunity from local jurisdiction (in this case New Zealand) over State agents entering another State illegally with the purpose of committing unlawful acts cannot be established. Thus, the French government made no formal immunity claim for the two French agents in the New Zealand proceedings, even after French responsibility for the attack was admitted.

Diplomatic Immunity

The United States of America v. Islamic Republic of Iran ([1980] ICJ 1) recognised that rules of diplomatic immunity are 'essential for the maintenance of relations between States and are accepted throughout the world by nations of all creeds, cultures and political complexions'. Major breaches of these rules, such as holding of United States diplomats as hostages by Iranian militant revolutionaries (1979–81), are very rare. But international law does accept the idea of attributing personal responsibility to military and high-ranking officials. This also includes heads of the States accused of international crimes. Trials such as Nuremberg and Tokyo prosecuted high-ranking officials who, otherwise would be immune from persecution. This was originally established through Article 227 of the Treaty of Versailles, which provided the basis of the prosecution of Kaiser Wilhelm II.

Article 29 of the Vienna Convention provides that diplomats shall not be liable to any form of arrest or detention, and that appropriate steps must be taken to protect them from attack. Other immunities under the Vienna Convention include:

i. Inviolability of the mission's premises, archives and documents and exemption from all taxes (Article 22, 23,24, 30 and 34).
ii. Freedom of movement and communication (Article 26 and 27).
iii. Immunity from the civil or criminal jurisdiction of the host State except in cases where the diplomatic agent gets involved in activities falling 'outside his official functions' (Article 31).

In the aforementioned case, the approval given by Iran to the militants seizing United States diplomats in November 1979 was described by the International Court of Justice as 'unique'. Iranians defended these actions claiming that the United States and its diplomats had acted unlawfully towards Iran (for example, by intervening in Iran's internal affairs, starting from the CIA-supported overthrow of the government of Mossadegh in 1951 to protect American and British oil interests). But the Court held that these charges, even if they had been proved, would not have justified Iran's violation of

diplomatic immunity. The obligation to respect the rules of diplomatic immunity is an absolute obligation that must be obeyed in all circumstances.

Conclusion

Sometimes, the question of immunity from jurisdiction allows undesirable circumvention of the system. But courts have tried to evolve robust mechanisms to penalize patently unacceptable breaches. It is submitted; however, the requirement of immunity must not be undermined as it allows diplomats and heads of missions to function autonomously and smoothly. Henceforth, the real issue for the courts will be to do the tight rope walking in order to ensure that the privileges are not open to abuse or manipulation for purely political ends.

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