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Possible remedies to prevent the misuse of diplomatic immunity

Summary

Since 1945, diplomatic immunity has altered. There are many factors which inhibit immunity. Firstly, consistent Cold War retaliation existed. Second, national security in the nuclear age was prioritized. The intricacy of international politics and mission expansion influenced a change. Also, the abuse of diplomatic and non-diplomatic immunity necessitated modification. In the 1960s, when hundreds of diplomats were sued, diplomatic immunity was called into doubt. Diplomatic abuses should force a reform of the Vienna Convention. Functional needs explained immunity modifications in the 1960s. Increasing and expanding immunity categories contributed to the improvement of the theory. However, there is no abuse remedy that is universally acceptable and enforceable. Should functional necessity theory replace immunity's cloak? The *pacta sunt serva* concept of the noncontroversial law of treaties could be utilized to obtain multilateral agreement on the nature, cause, and effect of the functional necessity theory. A Permanent International Diplomatic Criminal Court with mandatory jurisdiction over accused diplomats and its own punishment system has been under discussion since the late 1980s. It never occurred, yet it may have resolved the diplomat disagreement between the victim and the accused.

Keywords: diplomacy, international relations, diplomatic immunity, Vienna Convention on Diplomatic Relations

1. Introduction

Nowadays it is essential that diplomatic immunity be changed to properly integrate the Functional Necessity Theory and to give potential plaintiffs under this theory Additional Submission assurances. The creation of a new protocol to the Vienna Convention that would provide governments' permission to operate in this way would help to achieve this goal, putting into effect bilateral agreements to lower their immunity to a usable level. At some point in the future, it might

become a benchmark in international law. Also, this approach is respected. States have the authority to determine how their diplomatic staff will be handled in other states thanks to the exercise of state sovereignty. Additionally, it resolves the reciprocity issue that develops in countries that put such accords into effect, obtaining the same standard of treatment for their diplomats while they are abroad. Such an arrangement would not be deemed to be in contravention of the other protections and concepts of the Vienna Convention¹.

A permanent international diplomatic criminal court with mandatory jurisdiction over ambassadors suspected of committing crimes has been proposed by one commentator. The court would become an inquisitorial body under this idea, serving as both the prosecution and the defense. This court would have the authority to levy fines and, in dire circumstances, place ambassadors in its own prisons. This idea has two useful advantages. First, local procedures would not have the potential to unfairly disadvantage the court's operations. Second, using a court outside of the framework of bilateral relations prevents the breaking of diplomatic ties under dire circumstances. Many advantages of this approach call for further study².

2. Introducing new provisions into the Vienna Convention on Diplomatic Relations

The aim of possibly amending the Vienna Convention was to reduce the scope of diplomatic immunity for criminal conduct, which poses a problem in receiving States. The areas of amendment can be divided into three categories, namely the criminal acts of diplomats, the abuse of the diplomatic bag, and the use of the mission³.

The following suggestions focus on restricting the extent of diplomatic immunity⁴. There must be a universal agreement on a list of

¹ V.L. Maginnis: *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*. "J. Int'l L" 2003, Vol. 28, <https://brooklynworks.brooklaw.edu/bjil/vol28/iss3/6> (visited Apr. 3, 2022).

² M.S. Ross: *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*. 2011, p. 4.

³ A.M. Farahmand: *Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses*. "Journal of Legislation" 1989, Vol. 16, p. 102.

⁴ *Ibid.*, p. 102.

crimes for which diplomatic immunity is waived for all governments. The list might be titled “universal crimes list”. The prohibited activity should encompass any acts of violence against others, such as murder, assault, battery, and driving under the influence. Self-defense acts would be excluded from this list. In addition, property crimes would be added to the list of global crimes. Diplomats should preserve immunity from parking and traffic offenses, as the receiving state may easily harass ambassadors by enforcing motor vehicle restrictions unduly strictly. The subsequent step would include the adjudication of diplomats’ misconduct. Signatory states must make it clear that if a diplomat commits a crime on the universal crime list, it is the receiving state’s responsibility to judge the case according to local law. Once ambassadors are aware that the receiving state has the ability to pursue them criminally for their illegal conduct, it is extremely likely that criminal activity will decrease⁵.

This sort of change might result in the receiving state harassing diplomatic visitors within its boundaries. To acquire influence over the sending State, fabricated allegations against diplomats might be used to arrest and prosecute diplomats or remove unwelcome representatives entering the receiving State’s borders⁶.

This idea would, of course, be hampered by the fact that the “scope of obligations” might sometimes be interpreted in an overly wide manner; therefore, strict adherence to the rules may require unanimous agreement for the concept to be entirely successful. Yet, even if it were not properly implemented, the modification would go a long way toward reducing outrageous abuses of immunity, such as Manuel Ayree’s. On the other hand, one may argue that restricting diplomatic immunity would allow governments to harass diplomats within their boundaries. Unhappy with the sending nation, the host government may create charges in order to arrest and prosecute diplomats for the sake of gaining leverage in negotiations with the sending state⁷.

Even the most radical regimes view the maintenance of embassies as a crucial indicator of sovereignty, therefore it appears doubtful that

⁵ Ibid., p. 103.

⁶ J.S. Parkhill: *Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications*. 1998, p. 21.

⁷ Ibid.

reciprocity would lead to an increase in arrests, prosecutions, or expulsions that would render the upkeep of embassies untenable. All governments have an interest in interactions that prevent the escalation of retaliation for the retaliation.

As a deterrent against government maltreatment of diplomats and a replacement for immunity, reciprocity appears to offer great potential. It has the benefit of being self-enforcing: nations are hesitant to act against foreign ambassadors since their own nationals are equally vulnerable abroad. It is not an ideal solution, however, because not all governments possess the same countermeasure capabilities⁸.

Article 27 of the Vienna Convention must also be revised to minimize diplomatic bag misuse. The diplomatic bag now allows diplomats to carry narcotics, firearms, and even persons. Secondly, the Agreement should be revised to standardize the size of diplomatic bags. This standard size should let ambassadors transport secret, official papers without intervention from the host country. In addition, particular care should be allocated to embassy equipment and other goods that fall within this category⁹, and special arrangements should be implemented for product inspection. The host nation must also be authorized to use electronic scanning, remote equipment inspection, and dogs. Third, if the receiving state has strong suspicions about the contents of the bag, it should be permitted to request a search of the bag in the presence of an official representative of the sending state; if the diplomat refuses to allow the search, the receiving state should be permitted to demand the return of the diplomatic bag to the sending state. If a diplomat is apprehended for abusing the diplomatic bag, the receiving state should be able to punish him or her to the full extent of the law. These proposed amendments to Article 27 of the Vienna Convention should provide the necessary enforcement mechanism to prohibit the abuse of diplomatic bags¹⁰.

Article 22 of the Vienna Convention stipulates that “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”. Moreover, the mission’s premises are exempt from requisition, attachment, and execution. Although the original drafters of the Vienna

⁸ Ibid.

⁹ A.M. Farahmand: *Diplomatic Immunity and Diplomatic Crime*, supra note 3, p. 103.

¹⁰ Ibid., p. 104.

Convention believed that inviolability must be total to prevent abuses by the receiving state, it appears that the growing use of diplomatic premises for terrorism necessitates amending this article¹¹.

Exemption from prosecution for espionage is an example of the futility of domestic punishments since any sentence is rendered ineffective by privileges and immunities. There has been a major breach of domestic law, but the only recourse is the one of the protocols. Such deterrence is unsuccessful, because it temporarily neutralizes the espionage operation, but does little to remove the problem's root cause, thus allowing espionage to persist. Thus, if feasible, any reevaluation of the receiving state's domestic system must restrict the diplomat's authority to commit espionage. Such an approach would need a modification in current legislation to restrict protection to diplomatic and consular community members who had committed espionage while abusing their privileges and immunities. The amendment should state unequivocally that spying is not a legitimate diplomatic activity¹².

Alistair Brett has suggested amending Articles 22 and 27 to give the International Court of Justice (ICJ) the authority to suspend a non-complying country from the United Nations and to force governments to post monetary bonds as security for good diplomatic behavior¹³. The difficulty emerges during implementation. Although the Vienna Convention does not provide a mechanism for amendment, there is no official, unified method for requesting change. Yet, the U.N. General Assembly might perhaps contemplate changing the treaty, but the logistics required in renegotiating or amending the Vienna Convention would very certainly be insurmountable¹⁴.

There is no mechanism for amending the Vienna Convention. However, Article 39 of Vienna Convention on the Law of Treaties (general rule regarding the amendment of treaties) states that "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide"¹⁵.

¹¹ Ibid., p. 104.

¹² N.P. Ward: *Espionage and the Forfeiture of Diplomatic Immunity*. "Int'l L" 1977, Vol. 11.

¹³ L.S. Farhangi: *Insuring Against Abuse of Diplomatic Immunity*. "Stanford Law Review" 1986, Vol. 38, pp. 1517-1548.

¹⁴ Ibid.

¹⁵ *Vienna Convention on the Law of Treaties*, p. 14.

In relation to the embassy, Article 22 needs to be changed to read as follows: For the receiving state to have the right to demand a search of the diplomatic grounds, the suspected offense involving embassy workers must first be included on the “universal offences list”. Second, the receiving state is required to provide “probable cause” to support the shady behavior at the embassy. If these conditions are satisfied, authorities from the receiving state, along with chosen representatives from other signatory countries, must be permitted to search the embassy¹⁶. The Vienna Convention may be exceedingly difficult to alter logistically, but if the interests of the various States are aligned, it should not be impossible, especially given the superpowers’ usual unwillingness to agree on any Vienna Convention amendments¹⁷.

3. Implementation of the theory of functional necessity

Diplomatic immunity is not based exclusively on the requirement of a function. Rather, it depends on a number of supplementary theoretical premises, including the representation of states, the sovereign equality of states, and the key connected idea of reciprocity, in addition to functional needs¹⁸.

In its preamble, the Vienna Convention expresses a desire to organize diplomatic immunity using the functional necessity principle. The Vienna Convention demonstrates this objective by giving varying degrees of immunity to four categories of embassy personnel. However, the Vienna Convention departs dramatically from functional necessity by defining diplomatic immunity in terms of individuals rather than conduct, as functional necessity mandates. Consequently, many actions, both violent and nonviolent, that are incidental to the diplomatic process are insulated from jurisdiction¹⁹.

The Vienna Convention exempts diplomatic personnel and their families from civil liability for torts occurring in the “course of their

¹⁶ A.M. Farahmand: *Diplomatic Immunity and Diplomatic Crime*, supra note 3, p. 104.

¹⁷ M. Moutzouris: *Sending and Receiving: Immunity Sought by Diplomats Committing Criminal Offences*. Rhodes University 2008, p. 165.

¹⁸ J.E. Hickey Jr. and A. Fisch: *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*. “Hastings Law Journal” 1990, Vol. 41.

¹⁹ S.L Wright: *Diplomatic Immunity: Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*. “Boston University International Law” 1987, Vol. 5.

official duties”, with the exception of “private servants”. Furthermore, suits based on contract cannot be brought against those in the top three classifications if the contractual relationship arose in the course of official duties. Immunity from criminal prosecution is allocated equally based on a person’s classification. However, this immunity is over-broad, because it is exceedingly improbable that all torts, contracts, and criminal activities for which judicial process may arise are non-collateral to the diplomatic process, particularly in the case of families of diplomatic workers²⁰.

The preamble to the Vienna Convention declares that diplomatic privileges and immunities are not intended to benefit individuals, but rather to facilitate the efficient execution of diplomatic missions as state representatives. Adopting functional requirement as the guiding concept for extending immunity yields a number of noteworthy outcomes. First, it enables the mission’s premises, property, and communications to be better protected. Second, a functional approach may decrease the frequency with which immunity can be invoked. Particularly for junior members of the mission’s personnel, immunity is only attainable for conduct related to official duties and not for actions that are purely private or personal. The concept of diplomatic immunity becomes more attractive to the general public if immunity is limited to those situations when it is required to perform official obligations²¹.

4. Bilateral treaties

The United States and Canada agreed in 1993 to extend complete immunity to each other’s administrative and technical embassy Diplomacy in the Modern World staffs, individuals who had immunity under the Diplomatic Convention solely for official activities. Even within the framework established by the Vienna Conventions, there is considerable room for governments to vary the scope of protection provided²².

²⁰ Ibid.

²¹ J.T. Southwick: *Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms* 1. “Syracuse Journal of International Law and Commerce” 1988, Vol. 15, pp. 83–102.

²² J.S. Parkhill: *Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications*, *supra* note 6.

Reforming diplomatic immunity to fully embrace the principle of functional need and to give further protections to future claimants under this approach is necessary. These protections include the methods of settlement and waiver outlined in Part III.B of the UN Convention. This aim might be attained by creating an extra protocol to the Vienna Convention that authorizes governments to enter into bilateral accords limiting diplomats' immunity to functional immunity. By allowing nations to opt into such an arrangement, those who legitimately fear diplomatic persecution can continue to use the Vienna Convention's framework. However, this protocol presents an option for nations willing to limit total immunity. Eventually, if sufficient nations execute such accords, the functional approach may mature into a norm of customary international law requiring all governments to accept functional immunity. In addition, this approach respects state sovereignty and permits governments to determine the treatment of their diplomatic employees. It also tackles the problem of reciprocity by assuring nations who negotiate such agreements that their ambassadors would get the same treatment in the receiving state. This agreement would not contradict the Vienna Convention's other safeguards and concepts. The agreement would supersede the provisions of the Convention pertaining to absolute immunity, while preserving the sections that provide additional rights²³.

5. Suggestion for an International Permanent Diplomatic Criminal Court

International dispute resolution has gained an extraordinary role in international politics in recent years²⁴, adopting a treaty to establish a permanent international criminal court in order to address one of the long-standing deficiencies in the international humanitarian law implementation system²⁵. A "Permanent International Diplomatic

²³ V.L. Maginnis: *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations.* "J. Int'l L" 2003, Vol. 28, at <https://brooklynworks.brooklaw.edu/bjil/vol28/iss3/6> (visited Apr. 3, 2022).

²⁴ E.A. Posner and J.C. Yoo: *Judicial Independence in International Tribunals.* "California Law Review" 2005, Vol. 93, pp. 1-74, 4.

²⁵ C.K. Hall: *The First Proposal for a Permanent International Criminal Court.* "International Review of the Red Cross" 1998, Vol. 38, pp. 57-74, 57.

Criminal Court” would have been beneficial for adjudicating allegations brought about by the partial abolition of diplomatic immunity. The International Court of Justice (ICJ) was formed to settle disputes between nations, not criminal proceedings; hence, it is superfluous for the ICJ to accept the jurisdiction that this proposal offers. The following paragraph details the planned court²⁶.

ICJ decisions are more likely to be followed if there are effective ways to enforce them. On the other hand, international law in general and international adjudication in particular are often called weak because there are not many ways to enforce them²⁷. The establishment of a Permanent International Diplomatic Criminal Court (Court) with mandatory jurisdiction over suspected criminal actions committed by individual ambassadors offers a potential solution to this deadlock. The organic legislation of the Court would be an amendment to the Vienna Convention. The specifics of the modification should be the topic of an international convention convened under the supervision of the United Nations General Assembly, which also oversaw the meeting that produced the Vienna Convention. Principal benefit of the Court is its ability to treat persons and states neutrally. Members of the Court would consist of legal professionals from states that have ratified the amendment, chosen so as to prevent geographical or cultural prejudice. Although the employment of jurors may look impractical, many judges hearing a single case and the weight of evidence will help to the fair adjudication of disputes. In addition to mitigating any conflicts of interest, the plethora of members hearing any one case helps to prevent them. Members would recuse themselves from cases involving suspects of the same nationality. Before the start of Court operations, rules of discovery, procedure, and evidence would be formulated utilizing commonalities across party states. The Court would employ an inquisitorial form of operation. An adversarial approach that sets the burden of defense on the transmitting state appears unworkable in light of the potential problems associated with the sending state discovering evidence.

Due to the high political stakes associated with charges of state-sponsored violent criminal behaviour, which would undoubtedly arise

²⁶ S.L. Wright: *Diplomatic Immunity: Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, *supra* note 19.

²⁷ C. Schulte: *Compliance with Decisions of the International Court of Justice*, 2004.

in such criminal episodes, it is possible that the receiving state would seek to obstruct the sending state's discovery activities and destroy or manufacture evidence. The risk of the receiving state blocking discovery is decreased as a result of the Court's adoption of both prosecutor and defense positions. A staff of investigators affiliated to the Court would perform evidence finding, therefore decreasing the probability of further hostility between the sending and receiving states²⁸. There is a famous quote from the first president of the ICTY, Antonio Cassese. It says that: "The ICTY is very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions". It has been quoted so frequently that it risks becoming a cliché. However, it is mentioned so frequently because it applies not just to the ICTY but also to the ICC. The International Criminal Court will be ineffective unless States bypass the absence of a genuine supranational enforcement framework by working with the ICC. In practice, investigations would be exceedingly challenging, and no trial could be held before the ICC if states do not give assistance²⁹. The ICJ Court of Justice has taken attempts to modernize its processes, but the international community has indirectly opposed the Court's strengthening. Thus, the ICJ court taken efforts to improve the efficacy of its internal operations, pushed litigating states to submit better, more concise written pleadings, and made its orders and judgements readily accessible to all via its new website. On the other side, the United Nations has imposed major fiscal restrictions on the Court, hindering its capacity to manage its rising workload³⁰. This is one of the few instances where the ICJ has seen fit to cite a tribunal other than itself. The dialogue has primarily been between the ICJ and *ad hoc* arbitral tribunals, some of which have contained serving or former ICJ judges. The sparse number of hard rules has left much room

²⁸ S.L. Wright: *Diplomatic Immunity: Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, *supra* note 19.

²⁹ O. Bekou and R. Cryer: *The International Criminal Court and Universal Jurisdiction: A Close Encounter?* "International and Comparative Law Quarterly" 2007, Vol. 56, pp. 49–68, 60.

³⁰ J.I. Charney: *The Impact on the International Legal System of the Growth of International Courts and Tribunals*. "New York University Journal of International Law" 1999, Vol. 31, pp. 697–708.

for discretion, minimizing explicit rule conflicts. Greater concerns have started to emerge in other areas, and these could get worse as more tribunals get involved in directly cognate matters and the number of foreign cases increases³¹. The debate arises as to whether the expansion of international courts endangers the international legal system's cohesion. Not only may a cacophony of opinions on international legal standards undermine the appearance that an international legal system exists, but if analogous situations are not addressed similarly, the entire nature of a normative legal system will be lost. If this occurs, the validity of international law as a whole will be compromised³².

Multiple tribunals addressing the same matter without proper procedures for overlapping jurisdiction is an apparent risk³³. The relationship between international courts and tribunals and national law and institutions, particularly national courts, is arguably the biggest challenge posed by the expansion of the authority and activity of international courts and tribunals. This problem has been extensively discussed elsewhere and is not the subject of this study; nevertheless, some of the writers bring attention to international law theories that may be completely applicable to these concerns³⁴. Experimentation and inquiry, which can lead to advancements in international law, are made possible by the plurality of international courts. The absence of a firmly hierarchical framework allows international tribunals to collaboratively propose ideas that might be integrated into general international law. It also makes it easier for the international community to evaluate these concepts. In the end, one would anticipate that the finest ideas will be widely embraced, therefore adding to international law. In certain instances, though, customized solutions for unusual conditions may be preferable³⁵. In the history of the ICJ, there are several examples of such fail. Non-compliance may hurt the Court in two

³¹ B. Kingsbury: *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem*. "New York University Journal of International Law and Politics" 1999, Vol. 31, pp. 679–696, 682.

³² J.I. Charney: *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, *supra* note 30.

³³ B. Kingsbury: *Foreword: Is the Proliferation of International Courts and Tribunals a systemic Problem*, *supra* note 31, p. 683.

³⁴ *Ibid.*, pp. 694–95.

³⁵ J.I. Charney: *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, *supra* note 30.

ways: on the one hand, the decision it has rendered will be ineffective, and, on the other hand, frequent noncompliance may damage the reputation of the Court and thus weaken its institutional position³⁶.

6. The UN Convention on State Jurisdictional Immunities and Property

The UN Convention was adopted by the UNGA three years after Fogarty, which was a remarkable achievement. The Convention's Article 5 presumes immunity from foreign courts. Embassy and consular employment contracts are unclear under Article 11. Article 11(1) exempts immunity "in a procedure which relates to a contract of employment" for forum labor, however paragraph sometimes restores State immunity (2). Immunity applies when the employee is a diplomatic agent or consular officer (subparagraphs (2)(b) I and (ii)), 8 when "the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual" (subparagraph (2)(c)), or when the employee is a national of the employer State at the time the proceeding is instituted, unless the person is a permanent resident of the forum State (subparagraph (2)(e)). Undisputed exceptions precede. Subparagraphs (d) (d) "Recruited to perform specific obligations in the exercise of governmental authority" personnel are immune. Article 11(2)(d) grants immunity if "the subject of the proceeding is the dismissal or termination of employment of an individual and as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer state, such a proceeding would interfere with the security interests of that state". Both of these restrictions have the ability to exclude a wide variety of employee claims at first appearance.

Subparagraph (a) was derived from an earlier provision (also Article 11 (2)(a)) in the 1991 International Law Commission Draft Articles on State Immunity (ILC Draft Articles) that imposed immunity where "the employee was hired to perform functions closely related to the exercise of governmental authority". Such a provision was construed

³⁶ N: Petersen: *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*. "European Journal of International Law" 2017, Vol. 28, pp. 357–85, 364.

to preclude legal action by all individuals “entrusted with tasks relating to state security or fundamental interests of the state. Private secretaries, code clerks, interpreters, and translators”³⁷, in addition to top policy-oriented personnel, were excluded from the right to sue. This outcome would be closer to the one applicable in the states. Examples include the United Kingdom, which have placed immunity from prosecution on mission employment issues”.

The ILC’s Special Rapporteur construed subparagraph (2) to “exclude administrative and technical staff of a diplomatic mission from the scope of [the broad exception to immunity in] paragraph 1(a)”. Gerard Hafner’s ILC Working Group suggested a considerable immunity reduction to Article 1 l(2)(a) of the ILC Draft Articles in 1999. Hence, immunity exists only where “the employee has been recruited to undertake defined obligations in the exercise of governmental authority”. Hafner, who chaired the UN Working Group that concluded the Agreement, wanted fewer troops. He refused to change the following: “administrative and technical staff should be expressly referred to in Article 1 l(2)(a) and denied rights to sue” despite ILC members’ demands. Hafner claimed that administrative workers, whose court practice was still unestablished, should not be grouped in one category. So, subparagraph (2)(a) should be used to evaluate if each employee exercised governmental authority and immunity independently. Consider employee tasks. “Some delegations considered the Chairman’s definition of subparagraph (a) was too restrictive and should include administrative and technical staff”, Hafner wrote after the ILC forwarded Draft Articles to the UN General Assembly Sixth Committee Working Group. Hafner later admitted that Article (2)(a) did not apply to all diplomatic and consular staff. In 2010, he noted the ILC’s draft “was potentially substantially bigger” in including mission crew, but it was limited³⁸.

Convention coverage excludes some administrative, technical, and service staff. (2) excludes “ancillary functions” (a). So, workers implementing State foreign and defense policy, handling sensitive govern-

³⁷ R. Garnett: *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?* “The International and Comparative Law Quarterly” October 2015, Vol. 64, No. 4, pp. 783–827, at <https://www.jstor.org/stable/24761320> (visited Jan. 12, 2023).

³⁸ Ibid.

ment papers, or doing activities with no private sector parallel presumably undertake “functions in the exercise of governmental authority”. Passport and visa issuers, government advisors, diplomats, and intelligence agents fall within this category. A chauffeur who drives mission members, an accountant, or a marketing and product promotions agent are too common to include. Cooks, cleaners, butlers, and mission maintenance workers would also be exempt. If correct, this narrows State immunity in mission employment situations. Article 11(2)(d) of the UN Convention allows senior officers of the defendant employer State to classify wrongful dismissal or termination claims as “interfering with (its) security interests” and reinstate immunity. It was not in the ILC Draft Articles. However, because wrongful dismissal is a common complaint, the subparagraph may reestablish State immunity in many cases. National security and diplomatic/consular post-security are security interests. Hafner’s 2010 comments do not help with this rule³⁹. Hafner’s comment, which was made in 2010 suggests that it was intended to be used sparingly with the risk of “misuse”, while being limited by the requirement that “the existence of such security interests ... be determined by a superior state organ”.

It remains to be seen whether Hafner’s confidence in its limited use is justified. States with absolute views of State immunity in employment cases could be tempted to rely on their wide discretion under the provision to obstruct employees’ claims and there would be little, if any, scope for claimants to obtain judicial review of such decisions. Fortunately, in a recent Indian decision, the court was careful not to find immunity under this provision where there had been no determination by the relevant foreign government authority that the proposed action for wrongful dismissal would interfere with the State’s security interests⁴⁰.

7. Conclusion

The many approaches that have been proposed are not foolproof solutions to the problem of abuse, but they might assist in lowering the incidence of abuse. The removal of diplomatic immunity does not

³⁹ Ibid.

⁴⁰ Ibid.

compromise the functioning of the diplomatic process, nor does it change the definition of the idea of functional necessity.

The employment of bilateral treaties is the recommended course of action, and countries ought to pursue this course of action in order to figure out what the right levels of immunity should be between members of diplomatic personnel and the families of such members. In addition, the states would be free to make written agreements that are customized to their specific diplomatic requirements, and they would be expected to adhere to those accords. This would be a condition of the freedom to create written agreements.

The formation of a Permanent International Diplomatic Criminal Court has the potential to be an undertaking that is fruitful in the long run. However, it could have the same effect as the International Criminal Court and the International Court of Justice in the sense that the decisions and judgments of the courts will not be taken seriously, and powerful states may choose to ignore them. This would be the case if it had the same effect as the International Criminal Court and the International Court of Justice. In addition to that, a change needs to be made to the Vienna Convention, which, as was indicated previously, is a difficult task. This is a must.

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Możliwe środki zaradcze zapobiegające nadużyciu immunitetu dyplomatycznego

Streszczenie

Począwszy od 1945 roku, immunitet dyplomatyczny uległ zmianie. Jest wiele czynników, które powodują ograniczenie immunitetu. Po pierwsze, długo obowiązywał trwały środek odwetowy w postaci zimnej wojny. Po drugie, priorytetem było bezpieczeństwo narodowe w erze nuklearnej. Na zmiany w tym obszarze miały wpływ takie czynniki jak zawziętość polityki międzynarodowej i rozszerzenie misji. Nadużywanie immunitetu dyplomatycznego i niedyplomatycznego wymusiło wprowadzenie modyfikacji. W latach 60., kiedy setki dyplomatów zostało pozwanych, immunitet dyplomatyczny został podany w wątpliwość. Nadużycia dyplomatyczne powinny przyczynić się do reformy Konwencji wiedeńskiej. W latach 60. modyfikacje immunitetu wynikały z potrzeb funkcjonalnych. Zwiększanie i rozszerzanie kategorii immunitetu przyczyniło się do udoskonalenia teorii. Nie istnieje żaden środek ochrony przed nadużyciami, który byłby powszechnie akceptowalny i egzekwowalny. Czy teoria konieczności funkcjonalnej powinna zastąpić płaszcz immunitetu? Koncepcja *pacta sunt serva*, czyli niekontrowersyjnego prawa traktatów, mogłaby zostać wykorzystana do uzyskania wielostronnego porozumienia co do natury, przyczyny i skutków teorii konieczności funkcjonalnej. Stały Międzynarodowy Dyplomatyczny Sąd Karny z obowiązkową jurysdykcją nad oskarżonymi dyplomatami oraz z własnym systemem kar jest przedmiotem dyskusji od końca lat 80. Nigdy nie doszło do jego utworzenia, jednak mógł on rozwiązać spór dyplomatów pomiędzy ofiarą a oskarżonym.

Słowa kluczowe: dyplomacja, stosunki międzynarodowe, immunitet dyplomatyczny, Konwencja wiedeńska o stosunkach dyplomatycznych