

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is overlaid on the hourglass.

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February 2, 2009

Congressional Research Service

Report RS21672

Diplomatic Immunity: History and Overview

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Updated November 19, 2003

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CRS Report for Congress

Received through the CRS Web

Diplomatic Immunity: History and Overview

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Summary

Since ancient times, the concept of diplomatic immunity has been recognized in relationships between sovereign entities. More recently, the Vienna Convention on Consular Relations served to codify customary practice concerning the recognition and scope of diplomatic immunity. This report describes the history behind the principle of diplomatic immunity, as well as international and domestic law concerning the scope of this immunity.

Historical Background of Diplomatic Immunity

From the earliest of times, interaction between sovereign entities has required secure means of communication between a government and its envoys in order to facilitate relations between governments. Sovereign entities have long recognized the concept of diplomatic immunity from the jurisdiction of the receiving sovereign as being necessary to ensure that these channels of communication are preserved. The concept of diplomatic immunity has long-standing roots in international practice, and can be traced as far back as the ancient civilizations of China, India, and Egypt.¹ The Greek historian Thucydides records that the ancient Greek City-States regularly exchanged special missions, and ambassadors were ceremoniously received and courteously treated by the receiving City-State.² The early Romans, too, maintained treaty relations with neighboring nations that included active diplomatic exchange.³

¹ United States v. Enger, 472 F. Supp. 490, 504 (D. N.J. 1978) (*citing* PLISCHKE, CONDUCT OF AMERICAN DIPLOMACY 3 (3rd ed. 1959). For example, Ramses II of Egypt and the Hittites negotiated a treaty including provisions for the immunity of each nation's diplomats within the receiving nation. *Id.* at 504n9.

² BISWANATH SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 3(3rd ed. 1988).

³ *Id.* at 3-4.

In both ancient Greece and Rome, diplomats enjoyed personal inviolability that included immunity from the receiving nation's civil and criminal jurisdiction, and the receiving sovereign owed a special duty to protect the diplomat's person.⁴ Even a crime as severe as plotting to overthrow the receiving sovereign could not be punished; the only permissible response was to declare the diplomat *persona non grata* and oust him from the territory.⁵ A violation of a diplomat's inviolability required immediate reparation by the offending sovereign, and "[m]ore than one war began because an envoy was detained or punished by the receiving sovereign without reparation."⁶

As political and economic contact between nations grew, so too did the need for regular diplomatic contact between nations. By the end of the Middle Ages, diplomacy was being practiced in a manner closely resembling modern practice, and the recognition of diplomatic immunity by receiving States had become a customary norm.⁷ Indeed, the noted international legal commentator Grotius asserted that "[t]here are two maxims in the law of nations relating to ambassadors which are generally accepted as established rules: The first is that ambassadors must be received and the second that they must suffer no harm."⁸

The Vienna Convention on Diplomatic Relations,⁹ ratified by the U.S. in 1972, codified the customary law of diplomatic relations that had developed in the previous millennia, including the scope of diplomatic immunity. Historically, a number of theoretical justifications had been presented in support of the doctrine of diplomatic immunity.¹⁰ The privileges and immunities granted to diplomats pursuant to the Vienna Convention are based upon the theory of functional necessity—that is, those privileges and immunities that are required to enable the diplomat to effectively perform his prescribed duties.¹¹

⁴ BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 654 (3rd ed. 1999) (hereinafter "CARTER & TRIMBLE").

⁵ *Id.*

⁶ *Id.*

⁷ *Enger*, 472 F. Supp. at 505.

⁸ GROTIUS, DE JURE BELLI AC PACIS, BOOK II, CHAPTER XVIII.

⁹ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502 (hereinafter "Vienna Convention").

¹⁰ Two notable, historical justifications for diplomatic immunity that are not reflected by the Vienna Convention are the extraterritoriality and representative character theories. The extraterritoriality theory posited the legal fiction that the diplomat legally remained in the sending State even when he was temporally in the receiving State. CARTER & TRIMBLE, *supra* note 4. According to the representative character theory, the diplomat is the personification of the sending State, and should therefore receive the same privileges as the sovereign. See Michael B. McDonough, Note, *Privileged Outlaws: Diplomats, Crime, and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 485-86 (1987).

¹¹ See Vienna Convention at Preamble (declaring that "the purpose of...[diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions....").

International Law Concerning the Scope of Diplomatic Immunity

The Vienna Convention is the controlling international legal authority concerning the scope of diplomatic immunity.¹² It provides that diplomats, diplomatic mission staff members, the families of diplomatic agents, and personal servants of mission members shall receive varying degrees of immunity from the jurisdiction of the receiving State.¹³ The diplomatic agent, defined as the “the head of the mission or a member of the diplomatic staff of the mission,”¹⁴ receives the highest degree of immunity. Article 29 of the Vienna Convention provides: “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.”¹⁵ Diplomats enjoy absolute immunity from criminal jurisdiction of the receiving State.¹⁶ They also are immune from civil and administrative jurisdiction, 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; [or] (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving

¹² It should be noted that diplomatic missions and agents are distinct from consulates and international organizations under international law. The privileges and immunities afforded to consular officers and missions are mainly provided for by the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. The privileges and immunities afforded to individual international organizations and their members are determined by treaty or the domestic law of the receiving State. For example, the privileges and immunities granted to international organizations by the United States are governed by the International Organization Immunities Act, 22 U.S.C. § 288 (2003).

¹³ Family members of a diplomat who are not nationals of the receiving State enjoy the same privileges and immunities afforded to the diplomat pursuant to Articles 29 through 36 of the Vienna Convention. Vienna Convention at art. 37(1). Members of the administrative and technical staff of the diplomatic mission, along with members of their families, shall, if they are not nationals of or permanent residents in the receiving State, enjoy the privileges and immunities afforded to diplomatic agents except 1) their immunity from civil and administrative jurisdiction of the receiving State shall not extend to acts performed outside the course of their duties and 2) exemptions from custom duties for articles imported into the receiving State for official or personal use will apply only at the time of first installation. *Id.* at art. 37(2). Members of the service staff of the mission who are not nationals of or permanent residents in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, as well as exemption from dues and taxes on the emoluments they receive by reason of their employment. *Id.* at art. 37(3). Private servants of members of the mission shall, if they are not nationals of or permanent residents in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. *Id.* at art. 37(4).

¹⁴ *Id.* at art. 1(e).

¹⁵ *Id.* at art. 29.

¹⁶ Vienna Convention at art. 31(1).

State outside his official functions.”¹⁷ In addition, the receiving State may not compel a foreign diplomat to give evidence as a witness.¹⁸

As a result of the broad immunity granted by the Vienna Convention, receiving States have only a limited number of options for dealing with a diplomat’s impropriety. One method for dealing with abuse is by declaring the diplomat *persona non grata*, in which case the sending State shall either recall the diplomat or terminate his functions with the mission and thereby eliminate his prospective diplomatic immunity.¹⁹ If the sending State refuses or fails to respond to the receiving State’s *persona non grata* declaration regarding one of its diplomats, the receiving State may refuse to recognize the person concerned as a member of the mission.²⁰

Another option available to the receiving State is to reach an agreement with the sending State to waive a diplomat’s immunity. Article 32 of the Vienna Convention provides that the sending State can waive the diplomatic immunity of an agent, though this waiver must always be express.²¹ A notable recent example of a sending State waiving diplomatic immunity for a foreign officer occurred in 1997, when a Georgian diplomat, driving drunk, killed an American teenager in a car accident. Although diplomatic immunity would have shielded the diplomat from prosecution in the United States, Georgia waived the diplomat’s immunity and he was subsequently convicted for involuntary manslaughter.²² The diplomat nevertheless remained immune from civil suit, however, because neither the Department of State’s request to Georgia for a waiver of immunity nor the actual waiver expressly mentioned civil litigation.²³

Redress for offenses committed by a diplomat in the receiving State may be sought within the sending State. The immunity of the diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.²⁴ Depending upon the particular civil and criminal laws of the sending State, its diplomats could potentially be held liable for actions they commit in another State.

Further, the privileges and immunities provided by the Vienna Convention remain subject to reciprocal limitations. Article 47 of the Convention provides that if the receiving State infringes upon the legal rights afforded to the sending State, the sending State is permitted to reciprocate this treatment against the receiving State’s diplomats.²⁵

¹⁷ *Id.*

¹⁸ *Id.* at art. 31(2).

¹⁹ *Id.* at art. 9(1).

²⁰ *Id.* at art. 9(2).

²¹ *Id.* at art. 32.

²² CARTER & TRIMBLE, *supra* note 4 at 655-56.

²³ See *Knab v. Republic of Georgia*, Civ. No. 97-3118, 1998 WL 34067108 (D.D.C. May 29, 1998).

²⁴ Vienna Convention at art. 31(4).

²⁵ *Id.* at art. 47.

U.S. Domestic Law Concerning Diplomatic Immunity

Enacted legislation and treaties ratified by the United States operate as the “supreme Law of the Land.”²⁶ Following its ratification of the Vienna Convention, the U.S. enacted the Diplomatic Relations Act (“DRA”),²⁷ which more fully details the scope of immunities provided to foreign diplomats in the United States. The DRA generally provides that diplomats from all States shall enjoy the privileges and immunities specified in the Vienna Convention, regardless of whether or not the States are actually parties to the Convention.²⁸ Any action or proceeding brought in a U.S. court against an individual entitled to immunity with respect to the DRA or Vienna Convention shall be dismissed.²⁹ The DRA also provides that the President may, on the basis of reciprocity, specify privileges and immunities for diplomats which result in more or less favorable treatment than is provided by the Vienna Convention.³⁰

Conclusion

Since ancient times, diplomatic immunity has been a customary practice in international relations. The Vienna Convention on Diplomatic Relations codified this customary practice and provided diplomats with broad immunity from the jurisdiction of receiving States that can only be circumvented in limited circumstances. As a party to the Vienna Convention, the United States has adopted its provisions concerning diplomatic immunity, and in enacting the Diplomatic Relations Act, the United States provided a similar level of immunity to diplomats of States that are not party to the Convention.

²⁶ U.S. CONST. art. VI, cl. 2.

²⁷ 22 U.S.C. §§254-258 (2003).

²⁸ 22 U.S.C. §254(a). The families of diplomatic agents, as well as diplomatic mission members and their families, receive the same privileges and immunities under the DRA as they receive under the Vienna Convention.

²⁹ 22 U.S.C. §254(d).

³⁰ 22 U.S.C. §254(c).