THE ABUSE OF DIPLOMATIC IMMUNITIES AMONG STATES: ISSUES AND CHALLENGES

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UDEOJI EBELE ANGELA,PhD
Department of Political Science,
National Open University of Nigeria, Jabi Abuja-Nigeria
uebele@noun.edu.ng

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OCHOGA EDWIN OCHOGA, PhD
Department of Political Science,
Federal University Lokoja
ochoga.ochoga@fulokoja.edu.ng

ABSTRACT

The paper examined the abuse of diplomatic immunities and privileges among nations. It specifically set out to ascertain the cases of abuse of diplomatic immunity and the implications on the Vienna Convention on Diplomatic Immunity Relations, 1961. The paper adopted the theory of Diplomatic Immunity and argued that immunities and privileges accorded diplomats in the receiving state is for the purpose of effective representation. Thus, the paper revealed that many states have had cases of abuse of diplomatic immunity in the area of criminal and civil crimes. Some of such cases include the killing of an American police, Yvonne Fletcher, Kidnapping of Umaru Dikko and other criminal and civil offenses. Even though the Vienna Convention provided remedies against abuse of diplomatic immunity, cases of abuse are at alarming rate and its poses threat to diplomatic relations among states. The paper concluded that, some diplomats have taken advantage of their immunity to commit crimes and the development is a threat to the sanctity of international law particularly the Vienna Convention on Diplomatic Immunity Relations, 1961 regime. It recommends that every diplomat who commits offense should be met to face the wrath of the law after their sojourn in foreign land.

Key Words: Diplomat, Immunity, Convention, Law and Abuse

Introduction

The concept of diplomatic immunity is by no means a new phenomenon. It is pertinent to state that diplomatic immunity is a principle of public international law by which a category of foreign government and international organization officials are not subject to the jurisdiction of the municipal laws of the receiving State. The doctrine of diplomatic immunity is one of the oldest components of foreign relations. This practice could be traced to the ancient Greek and Roman Governments where foreign envoys were accorded with certain immunities and privileges to enhance their effective representation in the foreign land.

Earlier, diplomatic immunity as an integral part of international law was basically based on customs accepted among nations until the emergent of the Vienna Convention on Diplomatic Relations, 1961 (VCDR,1961). The emergent of this Vienna Convention principally redefined the nature and character of diplomatic relations among nations and international organizations. The Convention clearly provided the scope of the immunities and privileges accorded to diplomats according to their status and as well as the procedures involved to prosecute diplomats who abuse the privileges (Kaul,1989). In other words, the rules governing diplomatic relations in contemporary time is more defined and explicit in nature than the pre- Vienna Convention era.

Despite of the explicit provisions of the Convention, it is be observed that some diplomats are taking advantage of the 'diplomatic attire' on their body to violate the law of their host State for personal benefit, while innocent citizens suffer the consequences of the violation. Even though the preamble to the VCDR, 1961 state that 'the basis of the diplomatic immunities and privileges is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as presenting States' (Oke,2000). This implies that the advent of the VCDR, 1961 has not completely put an end to the scourge of the abuse of diplomatic immunities. It is within this premise that this paper will interrogate the extent of the abuse of diplomatic immunities and privileges among nations and also proffer solution so as to reduce the habit of violating people's right in the name of diplomatic immunities.

Conceptual and Theoretical Underpinnings

To start with, the word immunity is generally regarded as a cover that provides protection to certain category of persons against injurious action by the law of the land. While Satow (1957,p.765) posits that immunity is any exception from a duty, liability, or service of process, especially accorded to a public official. In this context therefore, the action and inaction of the immune person is considered as no go area (unenforceable) for the State law enforcement agents. This could why the Green Encyclopedia (2001,p.811) simply sees immunity as a legal condition of aloofness from enforcement of the municipal laws of other States. If the word 'diplomat' connotes a man who represents his State in a foreign State, then the concept of diplomatic immunity is the scope of protection accorded to diplomats by the VCDR, 1961 which exempted they from the jurisdiction of municipal law of the receiving State.

The practice of diplomatic immunity among nations is built within the theory of diplomatic immunity which has three components namely, extraterritoriality, representative character and functional necessity. In the aspect of the extraterritoriality, the theory believes that diplomatic premises in the receiving State is a territorial extension of the sending State in receiving State and as such entry the diplomatic premises without the approval of the chief diplomat is tantamount to violating the territorial integrity of the sending State. Secondly, for the representative character, the theory holds that a

diplomat is a personification of the send State in the receiving State. That is, diplomats' posse the full attributes of state, which implies that attacking a diplomat is tantamount to attacking a sovereign state. The functional necessity component of the theory argues that representatives of state can only carry out their functions effectively in the receiving state if they are completely free from legal and political pressure that receiving state may impose on them. The essence of diplomatic immunity as advocated by the VCDR, 1961 revolves around this theory.

A Glance at Some of the Diplomatic Immunities in the Vienna Convention on Diplomatic Relations Of 1961

VCDR, 1961 was formally came into force in 1964 as members of United Nations unanimously agreed codification and ratified it to become part of international law to regulate diplomatic practice. The Convention vividly made provisions that cover all categories of diplomatic staff, diplomatic premises, diplomatic properties, diplomatic functions and family members of diplomatic staff. To start with, Article 3(1) of the VCDR of 1961, specifies the functions of a diplomatic as contain inter alia in the Convention; promoting the sending state's interest and its nationals in the receiving state within the ambit of international law, negotiating with the government of the receiving state on issues of mutual interest, and promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations (VCDR, 1961). For diplomats to effectively perform these functions, the Convention accorded them with the following immunities and privileges.

(i) Inviolability of the premises and properties used by diplomatic mission: Article 22 of the Convention states that diplomatic mission shall be inviolable. While Article 1 of the Convention defines diplomatic premises as the building or parts of the building and the other land ancillary thereto, irrespective of ownership used for the purpose of the mission (VCD, 1961). This provision implies that diplomatic premises are outside the legal and administrative jurisdiction of the receiving state. In other words, by international law the municipal police or law enforcement agents does not have the authority to enter the mission premises or diplomatic residence without official permission issues by the chief diplomat.

Entry the premises by any person or group of person acting on authority without the consent of the Head of the mission contravene international law and such act is tantamount to invasion of a sovereign territory. A case of violation of this provision was seen when the Pakistani government told the ambassador of Iraq serving in Pakistan that they had empirical evidence that some sophisticated weapons were surreptitiously brought into the country with the aid of diplomatic cover and store in the embassy of which the Pakistani government demanded for search of the premises. The Head of the mission did not grant the request, consequently the Pakistani police searched the premises in the Ambassador's presence and large quantities of arms were actually found. The receiving state protested to the Iraqi government where the state declared the Ambassador 'persona non grata' and Iraq recalled the Ambassador. This situation led to diplomatic fracas between the two countries (Oke,2000).

(ii) Inviolability of diplomatic agents: Article 29 of the Convention provides that the person of 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(VCDR, 1961).

(iii) Article 31 of the Convention provides that diplomatic agents cannot be trialed or punished by the municipal courts if he commits a crime in the receiving state. The Article 31 also provided that diplomatic agents are immune from civil and administrative jurisdiction of the receiving state with exception to: (1) any action relating to private immovable property situated in the territory of the receiving state, unless the diplomat holds it on behalf of the sending state for the purpose of the mission, (2) action relating to succession in which a diplomat is involved as initiator, executor, heir or legatee as a private person and not on behalf of the sending state; and (3) an action relating to any to professional or commercial activity exercised by diplomats in the receiving state outside their official functions(VCDR, 1961).

(iv) Article 34 of the Convention exempted diplomats from taxation. This entail that diplomatic agents are exonerated from paying all manners of tax, fee or levies that ought to be paid in performing their duties in the receiving state.

(v) Article 36 of the Convention exempted diplomatic bags from the jurisdiction of custom authority of the receiving state. In other words, diplomatic bags are inviolable.

(vi) Going by the provision of Article 37 of the Convention, family members of diplomatic agents who form part of their household in the receiving state enjoy the entire range of diplomatic immunities and privileges. But the privileges and immunities are only applicable to those who live with the diplomatic agent and are directly under his responsibility. For instance, if a child of a diplomat decides to live apart from his father, he will not enjoy privileges and immunities. It is worth of note that the Vienna Convention did not clearly define the word "family members" as regards to persons entitled to diplomatic immunities and privileges under the diplomatic agent's household. But by the evolution of practice of international law, certain degree of immunities and privileges have be granted to non-official staff (private secretaries or servants) hence they remain within the premises of the diplomatic mission and the official residence of the diplomat.

The significance of this Convention to international relations cannot be emphasized, to start with VCDR of 1961 has over the years become a legal mechanism to checkmate diplomatic behaviour in international relations. In other words, the provisions of the Convention have immensely shaped diplomatic relations among sovereign nations. Also, the experience of VCDR of 1961 served as the basis for the conceptualization of the 1963 Vienna Convention on Consular Relations and diplomatic law of most receiving states. The accepted of the rules in the VCDR of 1961 by the international community has invariably made it to become a guild and a minimum standard.

Abuses of Diplomatic Immunities and the Challenges of VCDR, 1961

The essence of diplomatic immunities and privileges are not to serve as protective cover for illegal acts among diplomats and diplomatic agents. Originally, the spirit of the VCDR of 1961 was for the purpose of security of diplomats while performing their duties in foreign land. Over the years, cases of abuse of diplomatic immunities and privileges by those accorded with rights have

become a source of challenge to rules of the VCDR of 1961 and diplomatic practices at large. To start with, In April 1984, there was a case of shooting a British police woman in St. James square by an unidentified person within the Libyan Embassy in London. Protesters were peacefully demonstrating when submachine gun sporadically fire from the Embassy killing the British police constable, Yvonne Fletcher and wounded many others. In swift reaction, the British government declared the diplomats persona non grata and this incident led to broke of diplomatic ties of between the countries. Despite that British diplomat was declared persona non grata and recalled home, the unflinching truth is that, the illegal act of the diplomatic agent violated the fundamental right of the police woman (Eze,2012). Thus no amount of break of diplomatic relations can bring back the deceased to life.

Another abuse is the case of a former member of Nigerian government, Alhaji Umaru Dikko in Britain. 1984 Alhaji Dikko was kidnapped from his London home and kept in a diplomatic bound for Nigeria. The crate also contained Israelis who aided in the kidnapping. The Nigerian government refused to cooperate and all the British government could do was to declare the diplomat persona non grata and recalled the diplomats involved in the kidnapping. Also, The United States of America had a similar case in 1983 when Guatemalan diplomats helped to kidnap the wife of El Salvador's former Ambassador to United States. She was taken from her Florida home and held for a 1.5 million dollars war tax. The two diplomats involved in the kidnapping were taken into custody after the State Department swiftly waded into the matter(Eze,2012).

Moreso, in 1987 O Nam chol, a North Korean diplomat, America authorities and he found sanctuary in the North Korean Embassy for ten months after allegedly sexually assaulting a woman in a park in New York. In the same year, Shah Mohammed Dost, a former Afghanistan's diplomatic envoy to the United Nations recklessly killed a woman with his car due to dispute over parking space in New York. But he could not be arrested and prosecuted because of the immunities and privileges that he enjoyed. There was another case in 2004 when American Embassy in Bucharest, Romania allegedly drunk and collided with a taxi which led to the death of the popular Romania musician, Teo Peter. Nothing happed to the diplomat as he was protected by the rules of the VCDR of 1961 (Vark, 2012).

Equally in 1981, a New York police were in search of a black young man had allegedly raped young ladies. In the course of investigation, the young man was identified as Mannel Aryee, a son of a Ghanaian diplomat. Aryee could not be arrested for interrogation and prosecution due to the inviolability legal status of diplomatic missions and residence (Vark, 2012). In all these criminal situations giving the provisions of the VCDR of 1961, the receiving governments had narrow range of options, i.e declaring of persona non grata and a break in diplomatic relations.

Civil laws are not exonerated from the abuse of diplomatic immunities and privileges. In civil cases, diplomatic immunities permit diplomats to escape liability for their actions. Immunity also allows diplomats to avoid service of process and appearance in court of competent jurisdiction. For instance, see the case between Skeen V. Federative Republic of Brazil. The plaintiff, an Ambassador's grandson was alleged of assault and shooting. A legal action was instituted against the defendant at the United States District Court for Columbia. Upon showing that the Ambassador and his family were satisfied diplomat by United States Department of States the court dismissed the suit accordingly(Vark, 2012). The foregoing implies that service of summons by courts will amount to violation of diplomatic immunity.

What comes to mind here regarding the abuse of diplomatic immunities and privileges is the amendment of the VCDR of 1961 so to reduce the rights and privileges of diplomats. But this agitation has not been giving proper attention considering the catalog of challenges connected to diplomatic immunity. It is believe in some quarters that any reduction in diplomatic immunities and privileges would lead to unfair treatment of diplomats in the receiving state. For instance, if country "A" treats diplomatic agents in its state well; it can equally expect that its own diplomats will be treated likewise. This is when the doctrine of Reciprocity comes in.

Uncooperative nature of some states to waive the immunity of a diplomat even when it is glaring that diplomat or his agent erred and violated the law of the receiving state with impunity. This development is all means encourage recalcitrant diplomatic agent to continuously abuse diplomatic immunity.

Remedies against Abuses of Diplomatic Immunity: A Contradiction

Waiver of immunity ought to be an alternative mechanism to bring erring diplomats to book. For instance, Section 2 of Nigerian Diplomatic Immunity and Privileges Act states that a foreign envoy or foreign consular officer could with the consent of his government, waive any immunity or inviolability conferred in by the Act. Such an envoy or consular officer could *suo moto* waive the immunity or inviolability conferred on his subordinate official or domestic staff. Also, the Act clearly states that a chief representative of a Commonwealth country could waive or inviolability conferred on by the Act with the consent of his government (Cap D9 LFN, 2004). In other words, when there is a waiver of immunity, thus process of legal action ought to commence against the erring diplomat. Seen the case of African Reinsurance Corporation V. Fantaye, where the court held that the person in whose favour, the privileges and immunities is presumed must be shown to have waived it knowing fully what he or she is doing.

Immunity can only be waived by the sending state on the request of the receiving state so that the alleged diplomat can be trialed in court. This implies that it is the sending state that has the prerogative to waive immunity of its representatives. It has be observed that in practice, the waiver of immunity is more political in nature than legal procedure and to some large extent, the refusal of sending states to waive immunity encourages defiant diplomats to feel that the highest action the receiving state can do when they commits crime is to declare they persona non grata and they will be allowed to return untouched to their home state. In other words, the doctrine of waiver of immunity has not in any significant way helped to checkmate the abuse of diplomatic immunities hence states do not easily grant the request for waiver and surrender the alleged diplomat to receiving the state to face legal trial. The exercise of waiver ought to be the basis for post-immunity prosecution to ensure that an alleged erring diplomat is prosecuted after his assignment has been terminated but the refusal to waive the immunity invariably makes their home state a 'safe heaven' for they upon their return.

The doctrine of Self Defense became very popular among scholars around 15th to 17th centuries as an alternative mechanism to reduce the degree of crimes often committed by diplomats. This concept evolved on the ground that diplomatic immunity should not be more fundamental than the security of the receiving state and lives of the innocent citizens, thus the receiving states may, without violating provisions in article 29 of the VCDR of 1961, detain diplomats when they commits crime for their safety and the affected member of the public. This measure sounds laudable as a panacea for the abuse of diplomatic immunity, but the missing link is whether the detention is presumed to guarantee the security of the diplomat and maintain public order, and the contradiction is that; any arrest or

detention against the person of diplomats in an attempt to maintain law and order would amount to violability of the immunities and privileges accorded to they by the VCDR of 1961 which supersede diplomatic laws of states.

The Missing Links

The doctrine of self defense has be criticized on the ground that its practice would contravene the provisions of the VCDR of 1961 and waiver of immunity has not being so realistic in it practices, thus apart from deceleration of persona non grata and recalling which aim to ensure safety returning of the erring diplomat to the sending state, what becomes the best alternative measure from preventing the abuse at the first instance. What would happen for instance, if a diplomat who is under the influence of alcohol threatening to shoot a gun at armless citizen, should security agents disarm and arrest the diplomat? Or should they observe the provisions of the VCDR of 1961 at the detriment of the innocent citizen? Therefore, the doctrine of self defense as suggested in some quarters would have be the solution this situation unfortunately, it is not recognized in international law and as such the failure of the VCDR of 1961 to provide rapid remedy to such emergency situation is however considered as a conundrum that required a second thought.

Article 41 of the VCDR of 1961, it vividly stated that the people who have privileges and immunities are to 'respect' the laws and regulations of the receiving state. A critical look at this provision will reveal that the Convention (law) only admonishes diplomats to 'respect' law of their receiving states but it did not say they should 'obey' left alone compliance. Therefore the absolute exoneration of diplomats from the administrative, legal and legislative jurisdiction of the receiving state could be identified as the boaster of the abuse of diplomatic immunities and privileges.

Article 9 of the VCDR of 1961 states that a host country may declare erring diplomats persona non grata at any time, when a crime has clearly been committed by either the diplomat or family member. In an event when the sending state is notified and waiver of immunity is requested and the sending state refuses to waive immunity, the receiving state is empowered by the VCDR of 1961 to declare the diplomat persona non grata. Despite of this provision, the waiver of immunity which is among other measures appears to be a more viable legal procedure to check the excess of diplomats has its own challenges.

Waiver of immunity is by no means a solution rather a means to an end, because it is one thing to waive the immunity and recall the diplomat to his home country to enable the receiving state institute a legal action against the diplomat. Also, it is entirely another process for a sending state to extradite an erring diplomat to be prosecuted in the receiving state. This could what came to his mind when Dakas (2006:131) lamented on the nature of curious provision of double waiver, according to him, why should a waiver from jurisdiction be accorded, while quality time and resources expended in the determination of a matter only for the execution of the judgment to be conditional upon another waiver. It is against this precarious standard that we observed that the waiver of immunity is ambiguous and too loose to rely on it for result driven legal exercise.

Recommendations

Without sentiment, the architects of the VCDR of 1961 have to be strongly commended. While we commend the architects of the VCDR for their thoughtful efforts, there is need to drawn the attention of the international community, particularly the United Nations to review the Convention with the view to reflect realities associated with contemporary diplomatic practices.

One of the issues to be entrenched in the review is 'Self Defence'. In this regard, security agent of receiving states should be empowered to arrest those accorded with diplomatic immunity when they allegedly engage in an act that is capable of threatening lives of innocent citizens. The aim of the arrest is to prevent possible break of law and disorderly situation. The affected diplomats should be released and accompanied by security agents to his mission or residence as soon as the situation is brought under control. The arrest should be done with civility without assault and brutality on the personality of diplomats.

The Convention is clearly state that erring diplomats who have been declared persona non grata by the receiving state should be made to remain in the receiving state to answer legal charges instituted against him. This is imperative because recalled diplomats often enjoy the protective cover of their home country and thereby make litigation for extradition more or less an exercise in futility.

Due to the phenomenon increase of terrorism and nation's divergent interest in internal crisis, therefore there is a compelling need for international law to empower security agents of receiving states to search diplomatic bags at the point of entry receiving states.

The scope of immunities and privileges accorded to family members of diplomats should be down sided. This is necessary to curtain misconduct of dependants of diplomats, hence most cases of abuse of diplomatic rights and privileges are often perpetuated by family members (dependants) of diplomats. If international law empowers receiving states to institute action against family members of diplomats on criminal charges, then the incidents of abuse of diplomatic immunity would be reduced to some extent because of the fear of prosecution.

Conclusion

The chapter has established that the diplomatic immunity law of various nations are in tandem with the international best practices in line with the provisions of the VCDR of 1961; based on the established cases, abuse of diplomatic immunity is mostly perpetrated by the subordinate staff in foreign mission and dependents of the ambassador or head of mission; the high number of abuses of diplomatic immunity anchor on the mammoth size of diplomatic agents all over the world; and states are uncooperative in calling erring diplomats and their agents to face consequences of their misconducts.

It is unflinching fact that diplomatic agents perform crucial functions that required them to be accorded some level of protection in the foreign land. But the cause for our worry is whether the protective cover accorded them by the VCDR of 1961 is a licensed to perpetuate impunity against innocent citizens. The abuses of diplomatic immunity have over the years being a source of diplomatic fracas among nations. This does not mean that international law did not provide possible remedies to that effect; the problem with the remedies is the unwillingness of actors to adhere to the rules of engagement.

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