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A BRIEF EXAMINATION OF THE TREATMENT OF SOVEREIGN STATES AND DIPLOMATS IN THE EXERCISE OF JURISDICTION UNDER INTERNATIONAL LAW

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Abstract

Sovereign states and diplomats are entitled to some protections in the exercise of jurisdiction of a host and receiving state. These protections relate to the immunities and privileges of foreign sovereign and diplomats. In the comity of sovereign states, individual sovereign state and its diplomats enjoy some privileges and immunities. These immunities and privileges are predicated upon the principle of equality of sovereignty of states as well as the preservation of dignity of states. Adopting the doctrinal method of research, this paper examines the treatment of sovereign states and diplomats in the exercise of jurisdiction under international law. It was found out that the extension of waiver of immunity to counterclaims is founded on an erroneous idea. The paper recommends that it is more in the interest of foreign sovereign to submit himself to the rule of law than to claim to be above it. It concludes that the immunities and privileges granted to sovereign states and diplomats are considered imperative but should be reasonable.

Key Words: Sovereign, Diplomats, jurisdiction, International Law.

1. Introduction

The treatment of sovereign states and diplomats in the exercise of jurisdiction under private international law relates to the question of immunity of a sovereign state or a diplomat from a foreign

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jurisdiction. What then is immunity? Immunity simply means exemption from penalty, burden or duty which the law generally requires other citizens to perform. Immunity is based on the preservation of sovereignty and dignity of states and its diplomats. The concept of immunity is tied to two basic questions, first, immunity from what? Secondly, why conferring immunity? As to the first question, the answer lies in the fact that immunity is conferred against legal processes such as search, arrest, seizure of property, prosecution, trial, etc. and for the second question, it is imperative that all those in positions of authority and power, carefully chosen by a national Constitution should enjoy such immunity on the basis that they should not be disturbed or distracted from performing state and constitutional obligations or functions of their offices.

The principle of immunity be it absolute or restrictive is a principle of international law.[4] The state or its agents may enter the territory of another state and act in their official capacity.[5] The privileges of the entrant in such cases stand against the exclusive power of the territorial sovereign to regulate, and to enforce decisions of its organs respecting the territory and its population. The actual circumstances in which immunity is granted are usually settled by the national law of each state.[6] Generally, immunity is delimited by a right on the part of the receiving state to use reasonable force to prevent or terminate activities which are in excess of the license conferred or are otherwise in breach of international law.

2. Conceptual Clarification

This discussion continues with a brief conceptual clarification of the key terms in this paper. Such key terms include: sovereign state, diplomat and jurisdiction.

2. 1 Sovereign State

A state is a group of people occupying a defined territory, exercising the power of governance and free from external control. A sovereign is he who has supreme power over a territory and its inhabitants, unrestrained by any law or rule made by any other power. A sovereign state therefore, simply means a state which has absolute control of its internal affairs, free from external control and has the ability to demonstrate international life. From the nature of

[4] MT Ladan, Materials and Cases on Public International Law (Ahmadu Bello University Press Ltd. 2007) 38

[5] VCDR 1961, article 2

[6] MT Ladan, Materials and Cases on Public International Law, op cit.

sovereignty of states, while a state is supreme internally, it must not interfere in the domestic affairs of another state. The government of a state conducts international activities on behalf of the state such that the non-recognition of the government of a state could amount to denying recognition of the state.

2. 2 Diplomat

A diplomat is a person authorised to relate on behalf of a state with another state or other states for the purposes of establishment of peaceful coexistence between or among them. Diplomat is derived from the word, diplomacy. Diplomacy comprises any means by which states establish and maintain mutual relations, communicate with each other or carry out any transaction which may be cultural, social, religious, political, military, scientific, technological or any other legitimate transaction, in each case by themselves or through their authorised or accredited agents. These accredited agents are called diplomats. According to Mignel Angel Moratinos: 'the core duty of diplomats is for dialogue to prevent crisis and avoid uncertainty. Talking to those who are troublesome, and with whom you may not even share key values; those are the hallmarks of diplomacy, regardless of the state of the world we inhabit.'[7]

2. 3 Jurisdiction

The term, jurisdiction is commonly used to describe the authority to affect legal interest. Jurisdiction concerns the power of the state to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states, neutrality of states and non-interference in domestic affairs. This means that jurisdiction is a vital and indeed the central attribute of state sovereignty since it is the exercise of authority that may create, modify or terminate legal relationships or obligations. The concept of jurisdiction under international law simply means the authority of a state to use its resources to subject persons and things under the powers of its government based on the rules of international law. This definition presupposes the existence of three basic requirements, namely: the entity exercising jurisdiction must be a recognised state; the person or thing must not necessarily possess the state's nationality; and the exercise of jurisdiction must be in accordance with the established rules of international law.

3. The Treatment of Sovereign State in the Exercise of Jurisdiction under International law

A sovereign or sovereign state is immune from the exercise of jurisdiction of a foreign state where he is present. He enjoys both in international and national laws immunity from legal process. The courts are fully committed to the view that they will not exercise jurisdiction over the person or the property of a foreign sovereign state unless it is willing to submit to their process.[8] The law has been reduced to two propositions by Lord ATKIN as follows:

> The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceeding involves process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control ....[9]

There is no limit to the immunity in case of the sovereign personally.[10] However, as regards jurisdiction *in rem* certain factors must exist to authenticate a sovereign's enjoyment of immunity. Such factors include:

a. Where the sovereign state has an immediate right of possession;[11]
b. Where the sovereign state is in *defacto* possession of the subject matter through its own servants;[12]
c. Where the sovereign, though neither owner nor in *defacto* possession, is in control of the subject matter;
d. Where the sovereign state is the admitted owner of the subject matter of the suit.

Immunity may equally well be invoked where the subject matter of the suit is a chose in action.[13] What raises a far more complex problem, however, is an attempt by a sovereign to intervene in an action between two third-parties and to obtain a stay of proceedings on the ground that it possesses, for example, a contractual interest in the

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[7] Miguel Angel Moratinos is an Associate Fellow of Geneva Centre for Security Policy and former Spanish Minister of Foreign Affairs and Cooperation. A comment he made during an Executive Conversation on, 'The Role of Global Transformation.'
[8] The Cristina (1938) AC 485, (1938) 1 ALL ER 719.
[9] Ibid.
[10] Mighell v Sultan of Johore (1894) QB 149.
[11] USA v Dollfus Mieg et cie S. A. and Bank of England (1952) AC 582; (1952) 1 ALL ER 572.
[12] The Cristina (supra).
[13] Rahimtoola v Nizam of Hyderabad (1958) AC 379.

property to which the action relates. Well, this problem seems to have been resolved by the court against such a state. In *Haile Selassie v Cable and Wireless, Ltd,*[14] the court of first instance, BENNETE J. ordered that all further proceedings should be stayed. The Court of Appeal, however, discharged this order, holding that a sovereign cannot enforce the stay of an action to which it is not a party merely by putting forward a claim to an interest in the *res litigiosa*[15].

There is also the question of whether immunity extended in action relating to land. PHILLIMORE said obiter in the case of the *Charkieh*[16] that, 'the exemption from suit is deemed not to apply to immovable property.' Also, Westlake after remarking that 'no court can be expected to renounce the determination of the property in its soil', described as unimaginable the suggestion that a mortgage of English land could not have its usual remedies in England merely because the mortgagor was a foreign sovereign. It is submitted that under private international law, the doctrine of *lex situs* may equally come to play here to hold a foreign sovereign subject to laws of the place where the immovable is situated.

A state has the final say in determining the recognition of a foreign entity as a co-sovereign state *(dejure*[17] or *defacto*[18]). In a situation where it is doubtful[19] whether a person enjoys sufficient independence to entitle him to immunity, the court is enjoined to apply to the Secretary of State for Foreign Affairs or the Minister for Foreign Affairs, as the case may be of the forum state,[20] whose answer is final and conclusive and cannot be queried either by the court or the parties. An interesting problem of proof of sovereignty arose in *Carl Zeiss Stiftung v Rayner and Keeler Ltd. (No.2)*[21] where the House of Lords had to consider the issue whether recognition should be given to the German Democratic Republic as an independent sovereign state. The court accepted as conclusive the information from the Foreign Secretary that no recognition, either *dejure* or *defacto* had been granted to East Germany. However, the Foreign Secretary also certified that her Majesty's

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[14] (1948) ch 844; (1938) 3 ALL ER 386.

[15] This means subject matter of a suit or litigation.

[16] (1873) LR 4 A&E 59 @ 97.

[17] This means rightful, legitimate, just or constitutional. It is descriptive of a condition in which there has been total compliance with all requirements of law. It is the contrary of *de facto*.

[18] This simply means in fact, indeed, actually. It is a phrase used to characterize an officer, a government, a past action, or a state of affairs, which must be accepted for all practical purposes, but is illegal or illegitimate. It is the contrary of *de jure*.

[19] Otherwise the court is supposed to take judicial notice of a sovereign state.

[20] Forum state means the state where the proceeding is going on.

[21] (1967) AC 853; (1966) 2 ALL ER 536.

government has recognized the state and government of USSR as *dejure* entitled to the exercise of governing authority in respect of that zone.

4. The Treatment of Diplomats in the Exercise of Jurisdiction under International Law

In its simplest sense diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions in each case through their authorized agents.[22] These authorized agents are called diplomats. The rules of international law governing diplomatic relations which were the product of long-established state practice reflected in legislative provision and judicial decision of national laws have accorded certain privileges or immunity to diplomats from the exercise of jurisdiction of the receiving state. The laws in this respect have now been codified to a considerable extent in the Vienna Convention on Diplomatic Relations which came into force on 24th April, 1964.

The Vienna Convention in Article I made provision for the categories of persons protected as diplomats to include:

1. The diplomatic staff, namely members of the mission having diplomatic rank as counselors, secretaries, or attaches:
2. The administrative and technical staff such as clerical assistants and archivist;
3. The service staff who are the other employees of the mission itself, such as drivers and kitchen staff referred to in the Convention as being 'in the domestic services of the mission.'

A diplomatic agent is the head of the mission or a member of the diplomatic staff of the mission and the head of the mission is the person charged by the sending state with the duty of acting in that capacity. A sending state certifies the head of the mission by accreditation and agreement.[23] The Vienna Convention makes provision for, *inter alia*, the following privileges and immunities to diplomatic mission to ensure the efficient performance of their functions as representing states:[24]

1. The premises of the mission shall be inviolable. Here the premises of the mission are to be understood as the buildings or parts of buildings and the land ancillary thereto irrespective

[22] Ian Brownie, Principles of Public International Law (4th ed).
[23] VCDR 1961, article 4.
[24] Ibid, articles 22 – 31.

of ownerships, used for the purposes of the mission including the residence of head of mission.

2. The premises of the mission, their furnishing and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.
3. The official correspondence of the mission, that is, all correspondence relating to the mission and its functions is inviolable
4. The diplomatic bag shall not be opened or detained, but may only contain diplomatic documents or articles intended for official use.
5. The person of a diplomatic agent i.e. the head of mission or a member of the diplomatic staff shall be inviolable. Such person cannot be liable to any form of arrest or detention.
6. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.
7. By virtue of article 41 of the Convention which makes reference to 'special agreement', there may be room for bilateral recognition of the right to give asylum to political refugees within the mission.
8. The diplomatic agent shall also enjoy immunity from local civil and administrative jurisdiction.

The importance of the principles of law embodied in the Vienna Convention was stressed by the International Court in the case of *USA v Tehran*.[25] In its judgement on the merits, the court observed that 'the obligations of the Iranian government here in question are not merely contractual ... but also obligations under general international law.' In that case, the government of Iran was held responsible for failing to prevent and for subsequently approving the actions of militants in invading the United States mission in Tehran and holding the diplomatic and consular personnel as hostages.

5. The Current Legal Position on the Controversy over the Scope of Diplomatic and State Immunity.

In the course of the nineteenth century, states appeared as commercial entrepreneurs on a considerable scale creating monopolies in particular trades, and operating railway, shipping and

[25] (1980) ICJ Rep. 3, 30 – 43

postal services. The first world war increased such activities, and the appearance of socialist and communist states gave greater prominence to the public sector in national economies. The implication of this was that states and their agents then began to get involved in most commercial, industrial and other private dealings to the extent that occasions arose where the courts found themselves in the dilemma of whether or not a state or its diplomatic agent still enjoys immunity in a particular dealing. Meanwhile, it is believed that immunity should be absolute.

However, the courts responded to the extension of state activity by developing a distinction between acts of governments, *jure imperii*, and acts of a commercial nature, *jure gestionis*, denying immunity from jurisdiction in the latter case, that is acts of a commercial nature. This introduced the doctrine of restrictive or relative immunity. In the case of *Alfred Dunhill of London, Inc. v Republic of Cuba*[26], four of the Justices of the Supreme Court expressed support for the restrictive approach. The current position then is that courts try to distinguish between acts which are private acts of the state, *jure gestionis*, and acts which are public or official acts of the state, *jure imperii*. which could not equally be performed by private persons, examples of such public acts include:

a. Internal administrative acts, such as expulsion of aliens;
b. Legislative act such as nationalization;
c. Acts concerning diplomatic activity;
d. Public loans.

Characteristics of such public acts, *jure imperii* is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is, by its own nature, a governmental act, as opposed to an act which any private citizen can perform. In their current practice today, most states follow the doctrine of restrictive immunity, whereby a foreign state is allowed immunity for acts *jure imperii* only. See the case of *Victory Transport v Comisaria*.[27] However, the combined effect of the European Convention on State Immunity adopted in 1972[28] and the United Kingdom State Immunity Act which came into force on November 22, 1978[29] is to the effect that restrictive immunity shall not apply if all the parties to the dispute are states, or if the parties have otherwise agreed in writing. It is

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[26] (1946) 425 US 682
[27] 35 ILR 110 (US Cir App)
[28] ECSI, articles 6 & 7.
[29] UKSIA, article 3.

submitted that the doctrine of restrictive immunity should not be a blessing in disguise introduced to prejudice the fundamental essence of immunity and it is advisable that our laws and practices should be made to fight against such background.

6. Exceptions to, and Waiver of Immunity

By way of exception to the exemption from civil jurisdiction there are three types of action that lie against a diplomatic agent namely:[30]

a. Real action relating to private immovable property in England, unless it is held on behalf of the sending state for the purpose of the mission;
b. Action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee in his capacity as a private person;
c. An action relating to any professional or commercial activity pursued by him, in the United Kingdom outside his official functions. See also, Article 32(1) of the Vienna Convention on Diplomatic Relations, 1961.

Article 32(2) of the Vienna Convention on Diplomatic Relation, 1961 provides that no measure of execution may be taken in respect of a diplomatic agent as regards the foregoing exceptions unless the measure concerned can be taken without infringing the inviolability of his person or residence. Apart from the foregoing exceptions, it is recognized that a diplomatic agent or other members of the diplomatic staff might waive his immunity from the civil and criminal jurisdiction of the local courts, either by expressly consenting through his solicitor to the proceedings or by entering an appearance to the writ or by commencing proceedings as plaintiff or by even, implication by conduct. Since, however, the privilege is the privilege of the sending state in the case of proceedings against the head of the mission, and by the head the mission where the proceedings were against a subordinate member of the staff, it follows that even if a subordinate member had waived the privilege, he might later obtain a stay of proceedings by showing that he had not acted with the consent of his superior.[31] Nevertheless, a waiver by the head of the mission shall be deemed to be a waiver by that state.[32] This is wide enough to accommodate the case where the head of the mission waives his own privilege, not merely that of a subordinate member of the staff.

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[30] See generally, the Diplomatic Privileges Act, 1964 of England.
[31] R v Madan (1961) 2 QB; (1961) ALL ER 566.
[32] Diplomatic Privileges Act, 1964 of England, article 2(3).

In addition, a waiver of immunity at the point of initiating a proceeding does not extend to the execution or enforcement of any judgement resulting from that proceeding. Another waiver will still be required at the point of the execution.[33] Failure to obtain a separate waiver, the judgement (*execution forcee*) or pre-judgment attachment (*Saisie Conservatoire*) remains unenforceable, until the defendant has ceased to be a member of the foreign mission.

Article 9 of the Vienna Convention on Diplomatic Relations, 1961 provides that the receiving state may at anytime and without having to explain its decision, notify the sending state, that the head of the mission or any member of the staff of the mission is *persona non grata*[34] or that any other member of the staff of the mission is not acceptable, in any such case the sending state shall as appropriate either recall the person concerned, or terminate his appointment. The immunity of the diplomat of the receiving state shall not exempt him from the jurisdiction of the sending state on the ground that the immunity was granted to him because he is a representative of the sending state. See article 31 (4) Vienna Convention on Diplomatic Relations, 1961.

7. Finding

The provision of the English Diplomatic Privileges Act of 1964[35] and Article 32(3) Vienna Convention on Diplomatic Relations, 1961, which extended a waiver by a person enjoying immunity from jurisdiction to any counterclaims directly connected with the principal claim, seems to be founded on an erroneous idea. This is because a counter-claim is a different action altogether, which stands even upon the failure of the principal claim. So, what happens in a situation where rights and liabilities not envisaged by a state (and which may drag the sovereignty and dignity of that state to the mould) emanated from such a counter-claim? Is it not proper that the state could still at that point exercise its right to either waive or activate its immunity?

8. Recommendation

Based on the above finding and questions raised from the finding, the Researchers hereby recommend that in the interest of the equality of sovereignty and dignity of states (which are the main essence of

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33 Ibid, article 32(4); [illegible] v [illegible] ([illegible]) 1 [illegible]

34 Persona non grata, an unacceptable person.

35 DPA 1964, article 32 (3) schedule 1.

immunity), a state could still be given the privilege of withdrawing its waiver whenever such waiver intermeddles with the purpose of immunity in the first place. However, such a withdrawal should be reasonable. Here, the view of Lord Denning in the case of *Rahintoola v Nizam of Hyderabad*[36] is instructive to the effect that, 'It is more in the interest of foreign sovereign to submit himself to the rule of law than to claim to be above it.'

9. Conclusion

It is now clear that based on the special treatment accorded to sovereign states and diplomats, they enjoy certain immunities and privileges in the exercise of jurisdiction under international law because the issue or idea of immunity operates also at international level and not limited to domestic setting only. It is also, understandable that it is these immunities and privileges which states and diplomats enjoy that actually define and distinguish their position and treatment given to them *vis-a-vis* any other person not entitled to such immunities and privileges. It appears from the nuances of our law and current practices on immunity by states that the doctrine of absolute immunity is prevailing. This is because even in the face of restrictive immunity, the state or its agent may still have a way to wriggle out, as may be derived from the provisions of European Convention on State Immunity[37] and United Kingdom State Immunity Act.[38] Sometimes too, like in the case of United States of America and former USSR, states agree by treaty to waive immunity in respect of some areas e.g. shipping and other commercial activities and it could be said either that such treaties assume a broad doctrine of immunity or that they are part of a contrary trend.

[36] (1958) AC 379.
[37] Diplomatic Privileges Act, 1964 of England.
[38] Ibid.