



Consideration of diplomatic immunity

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Introduction

Diplomacy is the bread and butter of international relations. Given the tendency of international politics to become contentious, it is vital for diplomats severing in foreign states to be protected in some way from repercussions in order to maintain open lines of communication between states, even in times of tension or conflict. If diplomats can be arbitrarily harassed, arrested, or imprisoned, diplomacy would disintegrate.

In response to this need, four hundred years ago the international community began to institute processes to ensure diplomats were immune from arbitrary arrest, harassment or interference in the performance of their work. This meant an exception from the laws of the states in which they worked while on diplomatic assignment as a representative of their home government.

Today diplomacy is guarded by the protections in the *Vienna Convention on Diplomatic Relations* of 1961.¹ The treaty remains the bulwark of diplomacy, insulating diplomatic missions from local laws which might inhibit the ability of foreign states to maintain calm relationships. But diplomatic immunity also has mired consulates and embassies in controversy.

Diplomatic immunity from legal detention, prosecution, persecution and interference is based on the principle of *extraterritoriality*, the doctrine that the legal representatives of sovereign states are not subject to the laws of the host country, the country where they work. This ensures they can go about their work without pressure or interference. Based on the principle

of legal *reciprocity*, states agree to respect the rights of diplomats from other countries, on the assumption that their own diplomats will be treated equally well. Diplomats need not fear arbitrary arrest or interference in their work. This principle is the foundation of modern diplomatic relations.

Sometimes it is not enough. In an extreme case, on 4 November 1979, protestors attacked the U.S. embassy to Iran in Tehran, seized its records and equipment, and took the 52 American staff it found captive. They were imprisoned and tortured for 444 days before being released. The embassy seizure remains a source of official and nationalist pride in Iran. The two countries have been without diplomatic relations to this day.



A bad day for diplomacy. Iranian revolutionary protestors enter the U.S. Embassy in Tehran on 4 November 1979. How to be sure that never will happen again?

But diplomatic immunity requires limits. Does it apply to traffic tickets if a diplomat is a chronic bad driver? What if a host government shows its

¹ United Nations. (n.d.). *Privileges and Immunities, Diplomatic and Consular Relations, Etc: Vienna Convention on Diplomatic Relations*. Retrieved from

United Nations Treaty Collection:
https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en

anger with a foreign country by showering its diplomats with traffic tickets, forcing them to attend traffic court all the time, making it impossible for them to work? When are diplomats immune to the law, and when are they subject to the same rules as everyone else?

A recent example came on 27 August 2019, when the wife of an American working in the United Kingdom with diplomatic immunity, while driving on the wrong side of the road, struck and killed an English teenager, Harry Dunn.² She immediately fled the country to return to the United States, where President Donald Trump refused to return her for prosecution, saying ‘These things happen.’ This was widely seen as in the United Kingdom as an abuse of diplomatic immunity, leading to demands to reconsider the breadth and power of diplomatic immunity.³



How to be sure it never happens again? Harry Dunn was killed on 27 August 2019 when his motorbike was hit by a car being driven on the wrong side of the road by Anne Sacoolas, wife of an American with diplomatic immunity. She fled to the United States to avoid prosecution.

Criticism of excesses of diplomatic immunity are common, especially for matters like failure to pay landlords owed rent, to more serious

² Wintour, P. ‘Harry Dunn's parents lose high court immunity case’, *Guardian*, 24 November 2020, <https://www.theguardian.com/uk-news/2020/nov/24/harry-dunn-parents-lose-high-court-immunity-case>

³ Neuman, S. ‘U.S. Won't Hand Over American Diplomat's Wife Wanted in Fatal U.K. Car Crash.’ *National Public Radio*, 24 January 2020,

matters like arms trafficking and child exploitation.⁴ As the body responsible for facilitating and managing the Vienna Convention on Diplomatic Relations, the United Nations serves as a unique arbiter for consideration of the regulations and international laws that make up diplomatic immunity.

History

The system of *diplomatic immunity* dates to the late Renaissance, when sovereign states were emerging as the dominant elements of international politics. With hundreds of sovereign states responsible to only to themselves, the risk of conflict and war was overwhelming, as was the need for diplomacy. States required permanent diplomatic representation, *embassies*, to maintain communication and stay informed, and make sure other countries understood what they wanted. as a concept stretches back to antiquity, though it later would suffer a complex series of setbacks and recognition over time. The modern concept of diplomatic immunity was established in the 19th Century from the Concert of Vienna in 1815, before being solidified by the League of Nations and later the United Nations in the 1961 *Vienna Convention on Diplomatic Relations*.

Embassies gained the legal doctrine of *extraterritoriality*. Although located in a host country, they enforce only the laws of their home country. The embassy of Freedonia might be physically in the sovereign state of Tyrannia, but the embassy itself is a legal island. It is immune to the Tyrianian police. Both countries accept this, not because they have to, but

<https://www.npr.org/2020/01/24/799143167/u-s-wont-hand-over-wife-of-american-diplomat-wanted-in-fatal-u-k-car-crash>

⁴ Reed, N. A Call for the Reform of Diplomatic Immunity. *The Prindle Post*. 5 March 2018, <https://www.prindlepost.org/2018/03/call-reform-diplomatic-immunity/>

because it serves both their needs, as part of *diplomatic reciprocity*. But how far does diplomatic immunity extend? Obviously diplomatic need to be able to come and go, to live their lives without fear or intimidation. How far does diplomatic immunity go?

Prior to the establishment of the League, diplomatic protections were considered to be a norm with exact regulations varied across the globe. However, with the establishment of the League of Nations came with specific provisions for immunities to be granted to diplomats for representatives of League members and those carrying out the will of the League itself.⁵ These two provisions diplomatic protections and universalized them to states with membership within the League itself, shielding diplomats from prosecution under law despite having a two tiered system for League officials acting in official League capacity and the diplomats from states themselves.

This system would eventually evolve into the concept of diplomatic immunity acknowledged within the Vienna Convention on Diplomatic Relations. While differing in establishment from the League of Nations' diplomatic protections, the UN protections for diplomats as outlined in the Vienna Convention goes further in describing the protections of diplomats, stating succulently that they are excluded from the jurisdiction of the state in which their work is located.⁶ From this perspective then, the UN provisions of diplomatic immunity are clear and robust regarding where the jurisdiction for the enforcement of law lies for diplomats and thus necessitating a need for the sending state to strip the diplomat of such protections for other states to prosecute.⁷ Thus, the UN is able to balance state power while creating a universal

framework for immunity to foster stable diplomatic relations.



It only looks like it is in Australia. Embassy of Brazil to Australia in Canberra. Physically in Australia, legally in Brazil. That's the legal doctrine of extraterritoriality.

Current Problem

The Vienna Convention on Diplomatic Relations has been a stable part of the international diplomatic network since 1961; however, it is not without significant flaws capable of negatively impacting diplomatic relations. Providing *carte blanche* for diplomats to behave in any manner they see fit can negatively impact relationships between states when bad behavior is able to go unpunished by the state where the diplomat is working. Prominent and public criminal activities from high ranking foreign officials have long been subject to criticism and occur all over the world, with those officials often being protected under clauses of diplomatic immunity. Thus, current problems with diplomatic immunity are twofold for the international community, from the perspective

⁵ Pajuste, T. *The Evolution of the Concept of Immunity of International Organizations*. *East-West Studies*, 2018
<https://core.ac.uk/download/pdf/230910659.pdf> 10-11

⁶ United Nations. (n.d.). *Privileges and Immunities, Diplomatic and Consular Relations, Etc: Vienna*

Convention on Diplomatic Relations. Retrieved from United Nations Treaty Collection:
https://treaties.un.org/pages/viewdetails.aspx?src=traty&mtdsg_no=iii-3&chapter=3&lang=en , 9

⁷ *Ibid.*, 10

the receiving state hosting the protected diplomat and for the sending state providing diplomatic protections.

Initially, the receiving state is dealt a blow by having to manage the potential abuses of diplomats on their citizens and the breaking of domestic laws. High profile diplomats have seen fit to engage in behavior which has ranged from mild crimes like traffic violations to more intense crimes like assault or manslaughter.⁸ While in normal circumstances a state would be able to seek justice for victims and hold perpetrators accountable, in the case of diplomatic immunity the only recourse is to petition to the state the diplomat represents to revoke diplomatic protections or attempt to argue in court diplomatic immunity does not protect against the specific crime in question.⁹

Most of those efforts fail to hold up in court and lead to the perpetrators of crimes to travel freely back to their home countries or continue to carry out their diplomatic duties, leaving the only recourse to be media coverage of the event and public protest which has little value in actually achieving anything meaningful. These abuses occur all over the world from varieties of diplomatic representatives stationed in foreign countries, ranging from ambassadors and the spouses of state leadership to lower level diplomatic appointees.¹⁰ Given the variety of perpetrators of crimes, holding them accountable is often a losing battle for states.

However, problems also exist regarding diplomatic immunity for the states sending those

protected diplomats abroad. These problems mostly pertain to negative impacts on the relationship between the sending and hosting states, as having a public disagreement regarding high level diplomatic officials can lead to embarrassing disputes. Especially in states with free press, high level disputes regarding potential abuses of diplomatic immunity can lead to straining relationships with allies and lost confidence from those states constituents.¹¹ While it is possible for states to resolve the issue by stripping diplomatic protections for officials accused of heinous crimes, states must balance the need to save face on the internationally, domestically, and with their own diplomatic corps.

Role of the United Nations

While the United Nations inherited much of the initial ideas that went into diplomatic immunity, today the UN is responsible for supporting the Vienna Convention on Diplomatic Relations which makes up the core of the diplomatic immunity framework present within the international system. Specifically, the International Law Commission played a major role in developing the Vienna Convention on Diplomatic Relations and the International Court of Justice serves as a major arbiter concerning cases of diplomatic immunity.

Thus, the UN does have specific areas to engage in concerning diplomatic protections and the potential abuse that can be carried out by

⁸ Kelly, J. 'Should Diplomats still have immunity?' *BBC*. 28 March 2016,

<https://www.bbc.com/news/magazine-35882967>

⁹ Ibid. ; *CBC News*. Diplomatic immunity doesn't cover rent, judge rules. *CBC*, 2 February 2018,

<https://www.cbc.ca/news/canada/ottawa/diplomatic-immunity-rental-case-ottawa-1.4517908>

¹⁰ Reed, N. 'A Call for the Reform of Diplomatic Immunity. *The Prindle Post*, 5 March 2018,

¹¹ 'The U.S. should be wary of using diplomatic immunity in a fatal U.K. car accident. *The Washington Post*. 8 October 2019,

https://www.washingtonpost.com/opinions/the-us-should-be-wary-of-using-diplomatic-immunity-in-a-fatal-uk-car-accident/2019/10/08/1b50ef26-e9e0-11e9-9306-47cb0324fd44_story.html ; Thompson,

T. 'Secret Crimes: How the Dept. of State is Classifying and Covering Up Violent Crimes Committed in the U.S. *NBC Washington*, 16 March 2016,

<https://www.nbcwashington.com/news/local/secret-crimes-how-department-of-state-is-classifying-covering-up-violent-crimes-committed-in-the-us/65720/>

perpetrators who would hide behind such protections. Still, the UN has a horse in the race concerning diplomatic immunity. Abuse is carried out by diplomats assigned to the United Nations in New York City and in Geneva, in addition to UN staff possessing similar protections.¹²

From this perspective then, the UN is in a position to enact, debate, or otherwise reform aspects of diplomatic immunity in order to make it easier to hold abusers of diplomatic immunity accountable. In addition to this, it is possible for the UN to directly mediate cases between states regarding issues pertaining to diplomatic immunity through the International Court of Justice.¹³

Previous UN Action

Given the long history of diplomatic immunity and the United Nations, there exists a plethora of precedent to engage in regarding previous UN action. There are three notable chunks of discussion when it comes to diplomatic immunity and its problems: the Vienna Convention of 1961, UN functional immunity, and International Court of Justice Cases.

The Vienna Convention on Diplomatic Relations of 1961 remains the most important piece for consideration on the abuses and potential reforms of diplomatic immunity. While much of the Convention is important for consideration, critical sections address the ability of states to waive diplomatic immunity, the extent of the protections of that immunity, and the eligibility of diplomatic staff to possess

such protections.¹⁴ These specific areas of consideration outline much of the protections offered by diplomatic immunity, and serve as a foundation capable of abuse.

Next, **the Convention on the Privileges and Immunities of the United Nations** outlines the specific protections of United Nations personnel and the extent of those protections.¹⁵ While this enables the UN to be insulated from the laws of states the UN operates within, there remain significant provisions regarding the settlement of disputes which could arise from UN action which most often takes the form of settlement arbitration. Importantly though, these UN protections can extend to a variety of representatives acting under UN mandates including representatives from the WHO, the IMF, UN Peacekeeping Forces, and other UN organizations. Meaning UN functional immunity can be case in a wide net.

Finally, The Vienna Convention's **Optional Protocol concerning the Compulsory Settlement of Disputes** provides the groundwork for resolving disputes related to diplomatic immunity. The most important facet of this specific document lies in the provision of the International Court of Justice as an arbiter during disputes regarding diplomatic immunity disputes.¹⁶ While the protocol favors bilateral conciliation and negotiation, the option to pursue third party mediation through the International Court of Justice on diplomatic immunity disputes has occurred several times involving a variety of states. Notable cases regarding diplomatic immunity include *United States of America v. Iran*, *Equatorial Guinea v. France*, *Timor-Leste v. Australia*, *Commonwealth of*

¹² United Nations. *Convention on the Privileges and Immunities of the United Nations*, 2021, <https://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html>

¹³ United Nations. *Optional Protocol concerning the Compulsory Settlement of Disputes*. 18 April 1961, United Nations Treaty Series: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961_disputes.pdf

¹⁴ Vienna Convention on Diplomatic Immunity; Articles 31, 32, and 37.

¹⁵ United Nations. (2021). *Convention on the Privileges and Immunities of the United Nations*.

¹⁶ United Nations. (1961, April 18). *Optional Protocol concerning the Compulsory Settlement of Disputes*.

*Dominica v. Switzerland, and Paraguay v. United States of America.*¹⁷

Country and Bloc Positions

Canada has an interesting recent history with the abuse of diplomatic immunity. Recent decisions from the Canadian Supreme Court over the ability of diplomatic immunity to extend to the payments of rent for American diplomats staying in Ottawa has empowered domestic officials in removing diplomatic immunity in cases of rent nonpayment.¹⁸ However, Canada does not shy away from diplomatic immunity on the international stage, as Prime Minister Trudeau argued China violated the diplomatic immunity of Michael Kovrig in 2019.¹⁹ Thus, Canada is a mixed bag on issues pertaining to diplomatic immunity's abuse.

China's inclinations on diplomatic immunity are nuanced, depending on the specific situation. The most recently visible action involving

Chinese actions on the legal protections of diplomats remains the case of Michael Kovrig a Canadian, and the dispute as to if he is still protected by diplomatic immunity.²⁰ China remains adamant such protections to not exist for Mr. Kovrig and thus can be prosecuted under the fullest extent of international law China. Meanwhile, Chinese actions abroad are more contentious regarding their use of diplomatic immunity. Particularly, Chinese actions in Belfast related to the construction of new security measures and a fist fight between Chinese and Taiwanese officials in Fiji.²¹

European Union: The EU emphasizes the rule of law above all, including strengthening existing treaties and international obligations. EU Member States stress the importance of enhancing legal protection for diplomats, their families, as well as vulnerable support staff hired from each host country. EU Member States are not opposed to reforms that would allow prosecution of diplomats from genuine crimes, but expect these to be administered with care and oversight by international institutions.

¹⁷ International Court of Justice. (2021). *Status vis-a-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland)*. Retrieved from International Court of Justice: <https://www.icj-cij.org/en/case/134>; International Court of Justice. (2021). *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*. Retrieved from International Court of Justice: <https://www.icj-cij.org/en/case/64>; International Court of Justice. (2021). *Vienna Convention on Consular Relations (Paraguay v. United States of America)*. Retrieved from International Court of Justice: <https://www.icj-cij.org/en/case/99>; International Court of Justice. (2021). *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. Retrieved from International Court of Justice: <https://www.icj-cij.org/en/case/163>; International Court of Justice. (2021). *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*. Retrieved from International Court of Justice: <https://www.icj-cij.org/en/case/156>

¹⁸ Reed, N. 'A Call for the Reform of Diplomatic Immunity'. *The Prindle Post*, 5 March 2018.

¹⁹ Voice of America News. (2019, January 11). Trudeau to China: Respect Diplomatic Immunity of Detained Canadian. *Voice of America*. Retrieved from <https://www.voanews.com/americas/trudeau-china-respect-diplomatic-immunity-detained-canadian>

²⁰ Vanderklippe, N. 'China denies violating diplomatic immunity of detained Canadian'. *The Globe and Mail*, 17 January 2019, <https://www.theglobeandmail.com/world/article-china-denies-violating-diplomatic-immunity-of-detained-canadian/>

²¹ Ames, J. (2020, August 11). China uses diplomatic immunity to build Great Wall of Belfast. *The Times*. 11 August 2020, <https://www.thetimes.co.uk/article/beijing-uses-immunity-to-build-great-wall-of-belfast-k6hst2tt9>; 'Taiwan says it won't be intimidated by China's 'hooligan' diplomats', *Reuters*, 20 October 2020, <https://www.nbcnews.com/news/world/taiwan-says-it-won-t-be-intimidated-china-s-hooligan-n1243985>

Non-Aligned Movement (NAM), the bloc of 120 Member States mostly from Africa, Latin America, South and Southeast Asia, is highly protective of diplomatic immunity. Although it too would like to see modifications. Particularly, pursuing accountability for criminal acts is important on both the national and international level, to ensure the perpetrators of criminal activity are not able to escape from justice.²² The variety of states within the Non-Aligned Movement implies a variety of perspectives on how to balance the protection of their own diplomats while holding other diplomats accountable.

The United States favors the strongest forms of diplomatic immunity to protect its diplomats, although in practice it expects other countries dispense with extraterritoriality and surrender their diplomatic accused of crimes in the United States. Currently the US maintains a record of involvement over cases heard in the International Court of Justice regarding issues related to diplomatic immunity, and supports it, despite longstanding criticisms of it from domestic sources due to the actions of State Department officials and foreign diplomats.²³ Particularly, reporting indicates much of the problems associated with US embassies around the world and court cases where immunity is used as a defense are related to repeat offenses of specific individuals rather than a broad sweep of US embassy personnel.

Some proposals for action

The controversies of diplomatic immunity have attracted powerful critics and allies since the establishment in the Vienna Convention on

Diplomatic Relations. Reforming diplomatic immunity, whether to strengthen protection for diplomats, or to increase the power of states to address criminal behavior, is possible, but tricky. How to strengthen responsibility without exposing diplomacy to crippling dangers?

The list below is only suggestive. Consider the following as potential reforms for the future of UN relations on diplomatic immunity. All have advantages and disadvantages. They may seem appealing for solving some problems, but open the doors to others:

- **Strengthen guarantees of diplomatic immunity.** The General Assembly could raise the standard of protection to ensure diplomatic rights are observed everywhere, that they are immune to legal attack or harassment, even if this means exempting diplomatic sometimes from legal responsibility for misdemeanors (minor crimes) or establishes very high standards for their prosecution for felonies and other more serious crimes.
- **Abolish diplomatic immunity** in its entirety, making diplomats subject to all the laws and authority of their host countries. Or reduce it, to protect only diplomats, not their families, or remove protection from prosecution for more serious crimes.
- **Divide diplomatic immunity** on the UN model, enabling ambassadors and heads of state to possess traditional diplomatic immunity while other members of diplomatic staff possess functional immunity. Alternatively,

²² United Nations General Assembly. (2019, October 10). *Sixth Committee Speakers Say Member States Must Increase National Extraterritorial Jurisdiction, Hold Officials, Experts on Mission Accountable for Crimes*. Retrieved from United Nations Meetings Coverage and Press Releases: <https://www.un.org/press/en/2019/gal3595.doc.htm>

²³ Thompson, T. (2016, March 16). Secret Crimes: How the Dept. of State is Classifying and Covering Up Violent Crimes Committed in the U.S. *NBC 4 Washington*; Editorial Board. (2019, October 8). The U.S. should be wary of using diplomatic immunity in a fatal U.K. car accident. *The Washington Post*



remove diplomatic immunity for allegations of heinous crimes, as recognized by the international community.

- **Create an independent, diplomatically neutral UN investigative service** to investigate allegations and prosecute crimes committed by diplomats. This could be complimented by establishing **a process for conditional removal** and prosecution in international court rather than through the legal system of the host or home state.
- **Reaffirm the existing system of diplomatic immunity, in essence doing nothing**, showing international agreement that the system of diplomatic

immunity is working well, or is too difficult to improve.

- **Require home governments to investigate and prosecute** crimes committed by their diplomatic personnel in a host state.
- **Give supporting staff diplomatic immunity** given their lack of critical importance to diplomatic missions. Support staff typically are locally hired private citizens from the host country who work at a foreign embassy, with clerical or other responsibilities including drivers, cooks and cleaners. Their immunity helps foreign embassies be sure their staff will not be subject to pressure and forced to spy on them.



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