

The impact of judicial immunity for diplomatic envoy

By

Russell Basim Karim

Department Of Law, Al-Kut University College, Al-Kut, Wasit, Iraq, 52001

Email: russell.basim@alkutcollege.edu.iq

Huda Malik Sabir

Department Of Law, Al-Kut University College, Al-Kut, Wasit, Iraq, 52001

Email: huda.m.sabeer@alkutcollege.edu.iq

Hamood Dheyaa Ati

Department Of Law, Al-Kut University College, Al-Kut, Wasit, Iraq, 52001

Email: Dheyaa.Ati@alkutcollege.edu.iq

Hussein Ali Hameed

Department Of Law, Al-Kut University College, Al-Kut, Wasit, Iraq, 52001

Email: hussein.a.hameed@alkutcollege.edu.iq

Abstract

Since ancient times, human groups have been familiar with, international and diplomatic relations and the methods of practicing them in some forms. International relations are as old as man and passed through different eras and roles in terms of its methods, nature and methods of implementation and developed over time. They are practiced by primitive peoples in communications and negotiations between the various conflicting teams in order to reach agreement and resolve disputes with different motives. This situation that mankind lived was reflected in seeking peace and stability and trying to be guided by sound solutions. They were also obtained to prevent international disputes on the other hand, until the Vienna Conference of 1961 came to devote these concepts in an international agreement known as the Vienna Convention on Diplomatic Relations (VCDR). It guaranteed the judicial immunity of the diplomatic envoy for the protection enjoyed by the diplomatic envoy. It is recommended to narrow down the criminal judicial immunity by imposing special penalties for felonies. It is also suggested to adding a new articles to the VCDR that includes the commitment of the envoy when his mission is terminated to submit a written document to the receiving State authorities.

Conceptual framework

The occupation of a diplomatic envoy is one of the jobs that are subjected to the internal law of each country which determines the conditions for their selection, the procedures of appointment and promotion, and the amount of their salaries (Al-Shami, 2009). In this study, the researchers will discuss the definition of the diplomatic envoy and the categories that have enjoyed this occupation, and the concept of judicial immunity.

Diplomatic envoy and the categories enjoying this capacity

The occupation of a diplomatic envoy is one of the important jobs in the state apparatus which is assigned by the status of a diplomat. Yet, they enjoy the regulations, instructions, and laws pertaining to diplomatic envoys. The VCDR of 1961 defined in Article.1/e a diplomatic envoy as the head of a envoy or one of its diplomatic personnel (Saleh, 2018).

The diplomatic envoy is also defined as the person who represents his/her country abroad on a permanent basis, in everything that relates to its foreign relations with the receiving country (Ratib, 1963). Therefore, the term diplomatic envoy refers to all persons who represent their countries abroad, or in other words, they are the individuals whose names are usually included in the list of diplomatic envoys in the Ministry of Foreign Affairs (MFA) of the their countries (VCDR, 1961, Article 1).

The envoy is subjected to the internal law of the diplomatic corps, which is of a special nature. The state, in its situation, takes into account the international agreements it has signed in which it is restricted when working with it. It is also a two-faced law, the first is an internal law that applies to diplomats working in the General Court of the MFA, and the other is an external law that applies to diplomats who work in missions abroad (Salama, 1997), (Radhi, 2021a).

Accordingly, we can define the diplomatic envoy as a person whose mission is to represent his/her country abroad and who is in conformity with the conditions determined by domestic ruling and the provisions of international law. These rules authorize them to be a representative of their country abroad, and in return they have some powers and defines the framework of their mission that they must abide by. Thus, the representative is subject to the system of his country's ruling, the internal law and the international law system that determines their rights and duties.

Judicial immunity

The VCDR of 1961's Article 31, Paragraph 4 states: "A diplomatic agent's immunity from the jurisdiction of the host country does not relieve him from the jurisdiction of the sending State." (VCDR, 1961). Judicial immunity does not mean escaping responsibility, the responsibility remains against him. The consequences of the defense of immunity are the different courts that resolve the case, as the jurisdiction passes to the judiciary of the envoy's country. Furthermore, these immunities may extend to include the actions carried out by the diplomat (Al-Jundi, 1998), (Radhi, 2021b).

Judicial immunity is defined as the public prosecution may not be moved to a public case except after obtaining the permission of a special committee that constitutes the judiciary. Yet, the envoy must not exploit the immunity granted to him in a manner that results in negative effects as a result of the abuse of judicial immunity by diplomatic envoys. The reason for the diplomatic envoy to enjoy those privileges established in international law is to perform his duties in the manner required of him. These protections and rights he enjoys in the host country, but he does not benefit from them in his state (Abu Samra, 2021), (Radhi, 2021c). Among these privileges are:

1. The diplomatic envoy's personal inviolability and the mission's premises inviolability.
2. The ability to move and communicate freely.
3. Financial exemptions where the diplomatic envoy is exempted from taxes, customs duties and other facilities (Al-Zaben, 2011).

Vienna Convention established diplomatic immunities in accordance with the international custom that prevails over the representativeness and the interest of the job. The agreement stressed the need for freedom of communication between sovereign states and protection for envoys abroad. Furthermore, the Vienna Convention asserted that diplomatic

immunity is targeted for diplomatic envoys of sovereign states. However, envoys of states that lacked sovereignty do not have these immunities unless it is agreed upon. Besides, the convention affirmed that international organizations are international legal persons who do not have the element of sovereignty, officials at these organizations are just enjoying judicial immunity due to the actions they perform in their official capacity according to the theory of the requirements of the job.

Moreover, the diplomatic envoy who is a citizen of the receiving country or a permanent resident, does not enjoy judicial immunity and personal inviolability except for the official works he performs in the course of exercising his functions, unless the host country grants him extra benefits and immunities in line with Article 38/1 of the Vienna Convention which stipulates that: (A diplomatic agent who is a national of or a permanent resident in the receiving State shall only be immune from jurisdiction and inviolable with regard to official acts performed in the performance of his duties, with the exception of any additional privileges and immunities that may be granted by the receiving State). Accordingly, the diplomatic immunity has been linked to the diplomat envoy who was described as an envoy to the president of sovereign countries, under the system of absolute rule that linked between sovereignty and the person is the president of the state.

As soon as the emergence of the democratic system and the principle of the people sovereignty, immunity was linked to the sovereignty of the state and became an extension of it. Besides, the international custom since the 17th century has established that diplomats are not subjected to the local judiciary of the state in terms of criminal and civil. The jurisprudence recognized that immunity from jurisdiction is one of the criminal issues for diplomats. It is not permissible for the diplomat to be subjected to the judiciary of the accredited state, no matter what violations they committed that require punishment, as stated by the criminal law of the host country (Al-Shami, 2009).

One of the most important results of the immunity from jurisdiction is to submit the diplomatic envoy to the criminal justice system of the host country. Therefore, the legal immunity that diplomatic envoys enjoyed is absolute immunity, and the receiving state cannot punish them under any circumstances, nor they be tried before their criminal courts.

It is one of the most important examples of international agreements and covenants signed between countries in the field of judicial immunity. Furthermore, it is one of the fundamental conventions for diplomatic envoys is one of the most important agreements for diplomatic envoys before the VCDR of 1961 which reflects charters and privileges, and among the most important agreements: Vienna regulations in 1815 (Al-Shami, 2009). Then the "pre - Church" protocol which was held at the recommendation of Metternich, Chancellor of Austria, on November 21, 1818, and "Havana Charter" which was approved a century and a half after the Vienna meeting in 1815. Through this charter, the American state held its sixth conference and concluded the first international agreement on February 20, 1928 in the city of Havana, Cuba.

The legal basis for judicial immunity

The immunity enjoyed by the diplomatic representative towards the judiciary is divided into a personal immunity and immunity for the mission house and its contents. Hussein (2019) identified the legal basis of immunity as:

Personal judicial immunity

Article (31) of the Vienna Agreement to immunity decided that:

1. The diplomatic representative has immunity to the criminal judiciary of the host country, and he also enjoys protection towards the civic and administrative judiciary of the same state, except for the following cases:
 - a) In-kind lawsuit related to a private property located in the host country, unless the diplomatic envoy has the right to ownership of his government for the mission.
 - b) A lawsuit related to a legacy that the diplomatic envoy has appointed an outlet or director for, or to be an heir or recommended to him in his personal capacity and not in the name of the sent state.
 - c) A lawsuit associated to a free profession or a commercial activity of any kind that the diplomatic representative in the host country is practiced outside his formal duties.
2. A diplomatic representative is not deemed to perform witness.
3. No executive action could be adopted regarding the diplomatic representative, except in the cases under the items A, B, C of Paragraph (1) of this article, and on the condition that these procedures do not affect the status of his personality or his residence.
4. The immunity of the diplomatic representative in the judiciary of the host country is not exempted from submitting to the judiciary of the sent country.

We induced from the articles that the diplomatic envoy should not be prosecuted before the receiving courts approved by a debts or being prevented from leaving the country, until he was fulfilled by the debts he owed, because that would prejudice the freedom diplomatic envoy, as well as this constitutes a violation of its sanctity and dignity. According to this privilege, men of the diplomatic corps are not subjected to the mandate of the ruler in the delegated state in relation to the crimes they commit of all kinds, whether they are (felonies, misdemeanors, or violations). Similarly, no judicial action may not be taken against (i.e., arresting, investigating, accusing and trial) one of diplomatic corps.

However, the host country has the right to inform the dispatching state of the wrong diplomatic envoy asking for his withdrawal and trial. Likewise, the victims in the receiving country have the right to submit complaints to the MFA to the host country in order to take the necessary measures against the envoy, and may demand the host country from the burner state to raise the immunity of its envoy, thus, it can achieve justice (Ratib, 1963).

The immunity of the mission and its accommodations

They were mentioned in Arti (22) of the Vienna Agreement as:

- 1- The mission's premises must be kept secure. Agents of the receiving State are not allowed to access them without the mission chief's permission.
- 2- It is the duty of the receiving state must to take all suitable actions to guard the mission buildings from intervention or harm to them, and to thwart any violation of the security of the mission or the undermining of its dignity.
- 3- The mission's facilities, the furniture and other property they contain, as well as its transportation, are exempt from search, requisition, attachment, and execution. The house of the diplomatic mission (the headquarters of the mission, or the house of the agency) refers to the places occupied by the mission and the dwellings allocated by the dispatching State for the use of the mission, and transport owned or rented by the

mission, as well as the garden and the parking of vehicles. All of these properties enjoy immunity alike. Also, what is attached to the mission house: its contents and documents, and all archives and documents of the diplomatic mission also enjoy immunity. It indicates that these archives or documents may not be exposed or their confidentiality revealed (Ratib, 1963). The inviolability of the mission's house is not an ordered result due to the inviolability of the mission head, but rather it is an extension of the sanctity of the dispatching State. Yet, the sanctity of the envoy's private house in which resides is an extension of his personal sanctity.

Types of judicial immunity

In this section, the researchers will discuss the types of judicial immunity which are of three divisions, in which we focus on civil immunity, legal immunity and administrative immunity.

Civil immunity

Civil judicial immunity refers to the exemption of the diplomatic envoy from all civil lawsuits brought against him. The courts of the sent State where he is sent may not try him for his debts or prevent him from traveling if he does not pay his debts or seize his money. Therefore, it is not permissible to force the diplomatic envoy to appear before the local courts of the host country. Civil immunity is given to the diplomatic envoy due to the violations that are issued by him in his private capacity, for example, owning immovable funds from real estate, business and financial borrowing (Al-Sheikh, 1999). It is unlawful of the courts in the host country to try the envoy for a debt or prevent him from leaving its land for non-payment of his debts or confiscation of his property. Thus, the diplomatic envoy may not be compelled to appear before the local courts (Al-Maghareez, 2009). As for the Vienna Convention in Article (41/1), confirms that the diplomatic envoy enjoying immunity before civil and administrative courts, unless it is related to the activity of the special envoy (Shoukry, 2004). Such lawsuits include real estate lawsuits and lawsuits related to inheritance, as well as lawsuits related to practicing of a free business or commercial activity in addition to the envoy's works and actions. The Court of Cassation in Iraq legalized that the diplomatic envoy enjoys civil judicial immunity in the cases related to the rental of specialized properties for the purposes of the mission (Court Decision No. 159). On the contrary, the envoy private actions are restricted under the Vienna Convention in Article (31/1) which points out that a diplomatic agent is granted immunity from the criminal jurisdiction of the host country, with the following exceptions: (a) A real action involving private immovable property located in the host country territory, unless he holds it on behalf of the dispatching State for the purposes of the mission; and (b) A succession action 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. (c) A diplomatic agent's professional or business activity outside of his official duties that takes place in the host country. Article (31/1) set some exceptions related to the ownership of real estate, cases related to inheritance and inheritance, or cases related to practicing a free profession or commercial activity, or when the diplomat resorts of his free will to the civil judiciary of the host country. It is necessity to amend the Vienna Convention to obligate the envoy, upon the end of his job, to submit to the government of the host country, a guarantee that he is cleared of any financial obligations while he is in the receiving state.

Legal immunity

Judicial immunity is one of the most important protections and advantages that a diplomatic envoy enjoyed in the receiving country. It is not limited to litigation procedures, rather it includes the protection and maintenance of his personality in all other procedures.

Therefore, the envoy is not subjected to criminal justice comments that are usually taken when the national or foreign violate of the provisions of internal laws, such as inspection, arrest, reservation, investigation, trial and other procedures. Diplomatic envoy is not subjected to the criminal judiciary in the receiving State. Furthermore, neither he nor his residency is not violated as a guarantee and respect for his State independency. The most important thing resulted from the judicial immunity is that the diplomatic policy is not subjected to the criminal judiciary in the receiving State. This immunity is a manifestation of the opponent of the personal sanctity of the diplomatic envoy (Ghanem, 1967). Article (31/1) of the General Agreement (1961) (See above Article 31, a, b and c paragraphs).

Accordingly, the authority of criminal judiciary of the receiving State cannot be competent to prosecute the diplomatic envoy who committed the crime of any kind. However, this exemption does not mean that the diplomatic envoy is free from commitment to the laws, but rather he must respect the laws of the receiving State. not This immunity should not clash with intertwined means that affect the security of the receiving State. Besides respecting the laws, provisions and customs of the receiving country are at the front position of the envoy's duties enforced upon him. There should work should attempt to narrow the immunity of criminal judiciary in order to protect the State and the envoy alike.

Administrative immunity

Administrative immunity refers to the immunity of the diplomatic envoy from being subjected to the administrative judiciary. Administrative immunity is against all instructions, rules and regulations approved by the local authority in the receiving State which seeks to maintain order, security and public safety on its territory. The diplomatic envoy must not violate local regulations, administrative or security instructions issued by the receiving State.

This is what is stipulated in the VCDR in Article (41/1): "All individuals who benefit from such privileges and immunities have a responsibility to observe the laws and rules of the receiving State, without affecting their rights and privileges. They also have a responsibility to refrain from meddling in that State's internal affairs." A question arises, may the diplomatic envoy violate the laws, regulations or administrative instructions, then does he enjoy immunity? Is it permissible for the receiving State local authorities to prosecute him?

International relations have tended to the fact that the diplomatic envoy enjoys immunity from prosecution. It is not permissible to impose a fine against him, take a violation against him, nor is he requested to appear before the judiciary. But by this does not mean authorities in the receiving country cannot make any effect against the envoy. The international accustomed to informed the diplomatic mission head of the violations committed by members of the mission of traffic laws. In the event of repeated violations of the envoy, the MFA deals with the matter with the relevant embassy, and the mission shall take administrative measures against him. If a diplomatic envoy shows disregard for the internal regulations, the receiving country shall summon him and ask him to leave the country within a specified period (Al-Hadi, 2020).

Conclusion

While reviewing the literature written in the field concerning the impact of the judicial immunity of the diplomatic envoy, the researchers reached a number of findings and recommendations.

Findings

- 1- Diplomatic envoys abuse of judicial immunity may result in many negative effects, and the procedures stipulated in the VCDR of 1961 do not achieve the desired goal.
- 2- The diplomatic envoy is not subjected to the receiving country law cannot exempt him from being subjected to the jurisdiction of the dispatching country (his country).
- 3- Protection against judicatory has specific and clear personal limits, and there are clear objectives and procedures. Each of them has a spatial and temporal scope in terms of the crimes that it includes and entails.
- 4- Immunity against judicatory includes all crimes of all kinds, whether they are related or not related to the job, and of their different types, whether they are a felony, a misdemeanor or any violation.

Recommendations

It is recommended to:

- 1- Narrow down the criminal judicial immunity due to the seriousness of this type of immunities by imposing special penalties for felonies.
- 2- Activate the principle of reciprocity between countries in applying the judicial immunity of the diplomatic envoy, to implement the law and international agreements.
- 3- Adding a new articles to the VCDR that includes the commitment of the envoy when his mission is terminated to submit a written document to the receiving State authorities via diplomatic means stating which shows his clarity of any debts or financial obligations that arose while he was in the sending State.

References

- Abu Samra, L. (2021). Types of diplomatic judicial immunity. *Journal of Studies in the Public Service*, 4(2),35-53.
- Al-Hadi, A. H. (2020). diplomatic immunity guarantees in islamic jurisprudence and international law: a comparative rooting study. Al-Manhal lil-Nashr al-Ilkītirūnī.
- Al-Jundi, G. (1998). Bilateral diplomacy. Jordan: Wael House for Printing and Publishing.
- Al-Maghareez, A. F. (2009). Diplomatic Immunity, (1st edition). Amman: House of Culture
- Al-Shami, A. H. (2009). Diplomacy: Its origin, development, rules and the system of diplomatic immunities and privileges, (5th Edition). Amman: House of Culture for Publishing and Distribution.
- Al-Sheikh, K. H. (1999). Diplomacy and diplomatic law, (Vol. 1). Adnan Abdel-Jaber Publisher.
- Al-Zaben, H. S. (2011). Legal basis for granting diplomatic immunities and privileges, (Unpublished Master's thesis). Middle East University.
- Court Decision No. 159. Pagan Public Authority, 1974, dated 4/7/1974, Judicial Bulletin No. 4, Year 5, 1987, p. 344.
- Ghanem, M. (1967). Principles of public international law. Cairo: Modern Renaissance Press.

- Hussein, M. A. (2019). The immunity of the diplomatic envoy in “Islamic” public international law, a comparative study with “positive” public international law. *Journal of the College of Law for Legal and Political Sciences*, 21(4),
- Radib, A. (1963). *Diplomatic and consular organization*. Cairo: Arab Renaissance House.
- Radhi, H.D.A. (2021a). The legal Nature of Petroleum Contracts from the National Point of View: *Review of International Geographical Education Online*, 11(5), pp. 4798–4808.
- Radhi, H.D.A. (2021b). The legal capability thought and its application at the Civil law: *Review of International Geographical Education Online*, 11(4), pp. 1254–1269.
- Radhi, H.D.A. (2021c). The legal nature of the COVID-19 pandemic and its impact on contractual obligations applied in human rights: [International Journal of Human Rights in Healthcare](#).
- Salama, A. (1997). *Diplomatic rules, protocol - etiquette - courtesy*, (1st Edition). Cairo: Dar Al-Nahda Al-Arabiya.
- Saleh, L. H. (2018). *Responsibility of members of diplomatic missions for administrative work*, (Unpublished master’s thesis). Middle East University.
- Shoukry, A. Y. (2004). *Diplomacy in a Changing World*, (1st edition). Cairo: ITRAC Publishing and Distribution.
- The Noble Quo'ran
- VCDR. (1961). *United Nations, Treaty Series*, vol. 500, https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf