Theoretical Basis for Diplomatic Privileges and Immunities: The Need for States to Exercise their Power of Waiver

Wogu, Bokwujiri Cynthia Owunwene

ABSTRACT
The practice of diplomacy amongst states dates as far back as human existence, wherein envoys are sent to foreign lands to promote the interest of their home states. By way of custom and common practice, privileges and immunities are granted to these envoys in the foreign land, and are today referred to as Diplomatic privileges and immunities. These privileges and immunities have been codified under the Vienna Convention on Diplomatic Relations 1961 – an international treaty that defines the framework for diplomatic relations between sovereign states. This article examined the theoretical basis for the grant of diplomatic privileges and immunities. It discussed some incidences of abuse of the privileges and immunities with the aim of emphasizing the need for states to exercise their power to waive immunity where the need arises.

Keywords: Diplomacy, Immunity, extra-territoriality, criminal jurisdiction

INTRODUCTION
Diplomatic privileges and immunities is the freedom from a country’s jurisdiction or power granted to diplomatic agents while in service in line with customary international law and treaties. This means that the receiving states cannot arrest detain or prosecute diplomatic agents for their actions. These privileges and immunities are provided for in the Vienna Convention on Diplomatic Relations. These privileges and immunities have continued to be abused by diplomatic agents. Although the receiving states have no jurisdiction to try erring diplomats, Convention grants the sending states the power to waive the immunity of an erring diplomat to give the receiving state jurisdiction over such diplomat, this power have often not been exercised by the sending state, leaving one to wonder the basis for the grant of these privileges.

Several theories have been put forward to explain the basis for the grant of privileges and immunities to diplomatic agents. These theories have been formulated to give a legal backing and support for its existence. The commonly accepted theories for the basis of diplomatic privileges and immunities are: the extra-territoriality theory, the representative character theory and the functional necessity theory. An examination of these theories will be carried out in this article.

Diplomatic privileges and Immunities
The Vienna Convention on Diplomatic Relations laid down certain privileges and immunities granted to diplomatic agents. These privileges and immunities include:

a. Inviolability of the Person of a Diplomatic Agent
The Convention provides that the person of a diplomatic agent shall be inviolable. This means that a diplomatic agent shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom or dignity. This provision implies that, diplomatic agents are not just free from any sort of arrest or detention by the authorities of the receiving state, but that the receiving state has a duty to protect...
diplomatic agents. This immunity protects the diplomatic agents from molestation, attacks, as well as arrest or detention by the local authorities of the receiving state.

b. **Immunity from Local Jurisdiction**

The Convention provides that diplomatic agents are immune from both criminal and civil jurisdiction of the receiving state. This means that they cannot be tried for any crime committed in the receiving state; neither can they be sued for any civil action in the courts of the receiving state. As far as criminal jurisdiction is concerned, diplomatic agents enjoy complete immunity from the legal system of the receiving state. Diplomatic immunity from criminal jurisdiction of the receiving state is unqualified and absolute. The immunity covers all possible minor offences as well as grave crimes, ranging from breach of traffic regulations to conspiracy against the national security of the receiving state or crimes against humanity by a diplomatic agent. This immunity is so unqualified that its enjoyment by a diplomatic agent need not be connected with his expressed function. He is also immune from any measure of execution and can raise same as a bar from any form of enforcement of conviction or judgment against him.

With respect to civil jurisdiction, the Convention provides that diplomatic agents are immune from civil and administrative jurisdiction of the receiving state. However, unlike the immunity from criminal jurisdiction, this immunity is not absolute as the Convention provides some exceptions to which the immunity will not avail diplomatic agents. These exceptions are:

i. Real actions (action in rem) relating to a diplomat's private immovable property situated in the territory of the receiving state;

ii. Actions relating to succession in which the diplomatic agent is involved as an executor, administrator, heir or legatee; and

iii. Suits or other actions relating to any professional or commercial activities exercised by the diplomatic agent in the receiving state which are outside his official functions.

From these exceptions, it is evident that the civil and administrative immunity granted to the diplomatic agents is only for the acts performed by them during the course of their assignment. The immunity does not extend to their personal or private functions which are in no way connected with their official duties of the mission. If a diplomatic agent undertakes to real property other than his official residence, a civil suit can be brought in rem against the property. However, the measures taken to enforce the cases relating to the exceptions provided by the Convention must not impinge upon the inviolability of his person or his residence.

In line with the immunity from local jurisdiction of the receiving state, diplomatic agents are not obliged to give evidence as a witness in court; they are exempted from service of subpoena as a witness in a court of law.

c. **Inviolability of Premises**

Inviolability of premises implies that the receiving state or its authority cannot enter the diplomatic premises without the consent of the Head of the mission. It is the duty of the receiving state to ensure that the premises of the mission are protected against any form of

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4 Ibid Art 31 (1)
5 VCDR 1961 Art 31 (1)
6 Rene Vark, ‘Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes’ (2003) (8) Juridica International 113
7 Vark, (n 6)
8 VCDR 1961 Art 31 (1)
9 Ibid Art. 31 (1) (a-c)
11 VCDR 1961 Art 31 (3)
12 Ibid Art 31 (2)
13 VCDR 1961 Art 22 (1)
The receiving state is responsible for taking all necessary measures to protect the mission’s premises and to prevent any form of disturbance of the mission or impairment of its dignity.\textsuperscript{14}

The premises of the mission refers to building or parts of the building that are used by the mission for its purposes including the residence of the head of the mission, including the land on which the given building or parts of the building are located.\textsuperscript{15}

The inviolability of the mission premises also implies that the mission’s premises, its furnishing and other properties that they contain, including their means of transport or vehicles employed by the mission are immune from search, requisition, attachment or execution. The mission’s premises whether owned or rented are free from all state, district and municipal taxes, duties and levies, except for the payment of specific type of services rendered.\textsuperscript{16}

d. Inviolability of Archives

The mission’s archives and documents are also inviolable wherever they may be. They are immune from seizure, whether it is at the instance of the executive authorities or in pursuance of a judicial order of the receiving state. They cannot be seized or be required to be produced before any court of law or executive authority. The receiving state is obliged to respect the inviolability of the archives and to prevent its infringement by private persons.\textsuperscript{17} It is imperative that the archives and documents of the mission is protected as the mission’s secrets would be divulged if the archives were liable to be searched, seized or required to be produced in court.\textsuperscript{18}

With respect to their means of communication, the Convention provides that the receiving state shall permit free communication for all official purposes. That in communicating with its own government and other missions and consulates of the sending state, wherever they may be, the mission may use all appropriate means of communication, including diplomatic couriers and coded telegrams. The entire mission’s official correspondences are inviolable. The receiving state must not tamper with the mission’s communication in any manner whatsoever.\textsuperscript{19}

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\begin{itemize}
\item \textsuperscript{14} Ibid
\item \textsuperscript{15} M O U Gasiokwu and Dakas C J Dakas, \textit{Diplomatic and Consular Law--Selected Essay and Basic Documents} (2nd Ed Chenglo Publishers 2006) 62
\item \textsuperscript{16} VCDR 1961 Art 22 (3) & 23
\item \textsuperscript{17} Gasiokwu and Dakas, (n 15) 62; VCDR 1961 Art 24
\item \textsuperscript{18} Gasiokwu and Dakas, (n15) 63
\item \textsuperscript{19} VCDR 1961 Art 27
\item \textsuperscript{20}Gasiokwu and Dakas, (n 15) 62; VCDR 1961 Art 24
\item \textsuperscript{21}Gasiokwu and Dakas, (n15) 63
\item \textsuperscript{22} VCDR 1961 Art 27
\end{itemize}
Theoretical Basis for Diplomatic Immunity

In an attempt to justify the basis for granting privileges and immunities to diplomatic agents, some theories have been advanced by some international law scholars. Three of these theories have been commonly accepted by most scholars and are discussed herein.

i. The extra-territoriality theory

The theory of extra-territoriality (also called ex-territoriality) is based on the ideology that the premises of diplomatic mission are not the territory of the receiving but part of the sending state. That means, the diplomatic offices and residential premises are treated as though they are within the territory of the sending state and are considered as a sort of extension of the sending state.\(^{23}\)

The reasoning behind this theory is that, since the premises and offices of the diplomatic envoy is considered to be the premises of the sending state, it follows therefore that the diplomatic envoy are subjects of the sending state and within its jurisdiction and not of the receiving state.

Although this theory received widespread support from both international legal scholars and in judicial opinions, authorities have recently questioned and subsequently rejected the theory as a basis for a broad construction of diplomatic immunity.\(^{24}\) It has been criticized by both writers of diplomatic law and in judicial decisions. Oppenheim was one of the scholars that criticised this theory. He argued that the theory of extra-territoriality should not be the basis for granting privileges and immunities to diplomatic agents. He stated that ‘it is wrong to contend that they enjoy these privileges and immunities because they are deemed to be outside the territorial jurisdiction of the receiving state.\(^{25}\)

One of the cases where this theory was rejected is the Australian case of \(R v\) Turnbull and ors.\(^{26}\) In this case, two persons were charged for throwing explosive substances at the Chancery of the Soviet Union’s Embassy in Canberra, in the Australian Capital Territory. It was sought to argue in a prerogative writ proceeding that the magistrate had no jurisdiction to deal with the alleged offences, as they were committed on foreign territory. The court however rejected this contention and expressly held that an embassy was not part of the territory of the sending state, and the accused could be prosecuted for such offences against the local law.

This theory neither provides a scope for balancing the claim of immunities and privileges nor does it provide a means through which the non-official actions of a diplomat can be assessed and controlled. In particular, the invocation of this theory by the violators of law who take refuge in the premises of the mission makes this theory a most controversial juridical basis for the granting of diplomatic immunities.\(^{27}\)

ii. Representative Character Theory

This theory is based on the independence and sovereign equality of states.\(^{28}\) It based the granting of diplomatic privileges and immunities on the representative character of diplomatic agents. It argues that since diplomatic agents are representatives of a sovereign, they should be granted the same privileges and immunities which ordinarily would be granted to the sovereign had the sovereign been physical present himself. It equates the immunities and privileges of the diplomatic agents with those of the sending state itself. The diplomatic agents are given the same degree of privileges and immunities which are provided to the sovereigns. This means that the diplomatic agent representing a sovereign state owes no allegiance to the state which he is accredited to; hence he cannot be subjected to the laws and jurisdiction of the receiving state. This in effect implies that the ambassador is the personification of the sovereign whom he represents.\(^{29}\)

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\(^{24}\)Vark, (n 6) 112


\(^{26}\)\(R v\) Turnbull & ors(1971) 17 FLR 438

\(^{27}\)Eileen Young, ‘The Development of the Law of Diplomatic Relations’ [1964] (40) British Yearbook of International Law 141

\(^{28}\)Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1st edn, J. Byrne & Co 1936) 144

Like the extra-territoriality theory, the representative character theory has also been criticized by many scholars and discarded in several judicial decisions. One of the criticisms is that, even though it may seem reasonable and understandable that diplomats be cloaked with privileges and immunities as representatives of their sovereign and needs to be protected, it is however unreasonable to grant privileges and immunities to the diplomat’s family members, the administrative staff technicians and domestic servants. The representative character does not also explain why diplomatic agents should be immune from acts done outside his official capacity.

It has also been argued that placing a diplomat entirely beyond the law of a host state merely because he personifies his sovereign defines the scope of the diplomats’ right too broadly. And that the concept of personal representation is difficult to apply to modern systems of government. For example, in a monarchy, a diplomat would assume the role of his king, however, in a democratic form of government, where the sovereign power is divided among the executive, the legislative and the judicial branches, it is difficult to ascertain exactly whose authority the diplomat represents.

### iii. The Functional Necessity Theory

This theory bases the grant of diplomatic privileges and immunities on the interest of functions performed by the diplomatic envoy with a view to ensuring free communication between states. Functional necessity theory in essence assumes that the absence of diplomatic immunity would lead to a breakdown in the conduct of foreign relations.

The functional necessity theory hinges on diplomatic function. It aims at removing every hurdle, interference and influence which is likely to impede the discharge of the functions of a diplomat. Based on this theory, privileges and immunities are granted to the diplomats because they could not perform their functions perfectly unless they enjoy such privileges. If diplomats are liable to ordinary legal and political interference from the state or other individuals, they might be influenced by considerations of safety and comfort in a degree which would materially hamper them in the exercise of their functions.

Unlike the other two theories, under the functional necessity theory, diplomatic privileges and immunities are not unlimited and extend only to official functions of diplomats and diplomatic assets. This theory is based on the belief that the grant of immunities is essential for the normal functioning of international affairs.

Although the theory of functional necessity is now the recognized basis for granting privileges and immunities to diplomatic envoys, the theory has however also been criticized by several scholars on different grounds. Ross argued that it is illogical to say that each diplomat should be granted immunity in order to perform his functions to the best of his ability and to ensure the sending State’s objective is adhered to, as this concludes that the diplomat is required to violate the receiving State’s law in order to perform his official duties. It should rather be said that the immunity is necessary to ensure that the diplomat does not get hindered or distracted from the receiving State’s laws. It has also been argued that to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal.

Despite its shortcomings and criticisms by scholars, the functional necessity theory is far more practical and more applied in diplomatic law compared to the theories of representative character and extraterritoriality. The functional necessity theory seems less vague and also more soundly based on reality. For example,

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31 Clifton E Wilson, Diplomatic Privileges and Immunities, (The University of Arizona press 1967) 1-5
32 Ling, (n30)
33 Gasiokwu and Dakas (n 15) 61
the representative character and the extraterritoriality theories extend blanket immunity to the individual diplomat without any regard to the activities he is to perform within the diplomatic mission. The functional necessity theory on the other hand, moves the emphasis from the individual and focuses on the functions of diplomats. This is a more realistic effort extend only the immunity necessary to perform the diplomatic mission.37

Abuse of Diplomatic Privileges and Immunities

Despite the intent behind diplomatic immunity38, many diplomats have grossly abused the privileges afforded to them by disregarding the laws of the receiving state. The abuse of their privileges is seen not just in criminal form, but also in administrative and domestic forms. The abuse of diplomatic immunities and privileges comes in the form of escaping parking violations and various criminal offenses, such as drunk driving, assault, child abuse, possession of deadly weapons, bribery, slavery, money laundering, rape and even murder.39

One of the most infamous incidents of abuse of diplomatic privileges and immunities occurred in 1984 at the Libyan Embassy in London. During a public rally against the Libyan government, someone from within the embassy fired on the crowd with a machine gun. London Police Officer Yvonne Fletcher was tragically struck and killed and eleven others were injured. This resulted in a tense political and diplomatic standoff between the British and Libyan governments. However, pursuant to the Vienna Convention and aware of the possible harm that could come to their diplomats and nationals in Libya, the British government did not arrest any suspects and eventually allowed the perpetrators to go free and return to Libya. The only remedy available to the British government under the Vienna Convention was to break off diplomatic relations with Libya, which it did.40 These events caused great damage to British Libyan relations.

There is also an incident of diplomatic abuse which occurred in 1995, when a Nigerian diplomat’s wife, after learning of her daughter’s pregnancy, slashed the girl’s wrist, and stabbed another daughter of hers as she tried to intervene.41 In all of these cases no charges were brought against the offenders due to diplomatic immunity.

There are also cases in which family members of diplomatic agents have had to assert immunity after commission of a crime in the receiving state. In Skeen v. Federative Republic of Brazil42, the plaintiff had been shot by the grandson of the ambassador of Brazil to the United States. The grandson asserted diplomatic immunity under the Vienna Convention, and the court dismissed the complaint. This situation underscores one of the more serious flaws of the Vienna Convention on Diplomatic Relations. Pursuant to Article 37 of the Convention43, the extended family of the diplomat is protected from legal process, and thus is able to escape prosecution by virtue of his or her relationship to the diplomat.

A more recent case is that involving the wife of a US government employee of the US embassy in Britain and a 19 –year-old Briton. The facts, as reported by the United Kingdom (UK) media are that on 27 August 2019, a car which was being driven on the wrong side of the road collided with a motorcycle ridden by Harry Dunn, a 19-year-old Briton. The driver was Anne Sacoolas, the wife of a US government employee at the base. She was questioned by police, but she returned to the US shortly afterwards. Compounding the grief and dismay of Dunn’s family was the claim, asserted by the UK Foreign Office,

37 Robert A. Wilson, Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations, [1984] (7) Loy. L.A. Int'l& Comp. L. Rev. 113 available online at <http://digitalcommons.lmu.edu/ilr/vol7/iss1/5> accessed 15th September 2021
38 Preamble of the VCDR 1961
41 Ibid
42 Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1416 (D.C. 1983)
43 VCDR 1961, Art 37
that Ms Sacoolas had diplomatic immunity and could not be prosecuted over the collision anyway.\textsuperscript{44} It is obvious from this incident and many others that family members of diplomatic agents are also contributing to the issues of abuse of diplomatic privileges and Immunities.

In responding or reacting to the abuse of diplomatic privileges and immunities by diplomatic agents, the receiving state may take a few possible actions against a diplomat who has committed a crime or has abused his diplomatic privileges. In the most serious situations, the receiving state can limit the size of the mission or terminate relations with the sending state altogether. The receiving state may also expel the diplomat from the state by declaring him a \textit{persona non grata} (which means that the diplomat is no longer welcome in the receiving state). Although, most states will not resort to such drastic measures, unless they feel obligated by extreme circumstances.\textsuperscript{45} The receiving state can also negotiate with the sending state to waive immunity, in order to subject a diplomat to the receiving state’s law, and where such waiver is given, the receiving state will have the jurisdiction to try the diplomat.\textsuperscript{46}

\textbf{Waiver of Immunity}

The Vienna Convention on Diplomatic Relations which bestows diplomatic agents with the privileges and immunities which they enjoy also provides that the immunity from jurisdiction of diplomatic agents from the receiving state can be waived by the sending state.\textsuperscript{47} This means that with the consent of the sending state, the receiving state can properly initiate a suit or a legal process against an offending diplomatic agent. The Convention however, provides that the waiver must be express.\textsuperscript{48}

The reaction of the receiving state to criminal offences committed by diplomatic agents largely depends on the gravity of the alleged offence. But where it concerns more serious crimes and admonition is considered not satisfactory punishment, the receiving state will more likely request that the sending state waive the immunity of the offending diplomatic agent so that the later can be tried in court.\textsuperscript{49} Once the waiver is given, the waiver becomes irrevocable. And the waiver must be express, so as to reduce the possibility of the receiving state mistakenly considering, for example, a statement by the sending state condemning the act of the diplomatic agent as a waiver. It is important to state that proceedings in the same case, but in different states, are regarded as a whole, so one waiver is enough. It also follows that immunity cannot be invoked on appeal if an express waiver was given in the trial court.\textsuperscript{50}

Despite the provision on waiver, history knows of only very few cases where request for waiver have actually been granted by sending states, as most sending states usually prefer to recall or dismiss the offending diplomatic agent from service. The request for a waiver of immunity usually means that the alleged offence is so grave that if the sending state does not waive the immunity, the receiving state is no longer prepared to accept the diplomatic agent.\textsuperscript{51}

Where the sending state fails to grant the request for waiver, the receiving state will usually declare the offending diplomat a \textit{persona non grata}. Although it is the right of the receiving state to declare a diplomatic agent a \textit{persona non grata} without any reason, however, in most occasions, such declaration has been on the basis of gross misconduct on the part of diplomatic agents. It is necessary that the receiving state make notification to the sending state before the mission comes to an end on this ground. In such cases, the sending state shall either recall the person concerned or terminate his functions with the mission.\textsuperscript{52}

\textsuperscript{44}Alison Pert, Diplomatic Immunity: Time to Change the Rules (the Lowy Institute 2019) Available online at <https://www.lowyinstitute.org/the-interpreter/diplomatic-immunity-time-change-rules> Accessed 2\textdegree{} May 2021


\textsuperscript{46} VCDR 1961 Art 32 (1)

\textsuperscript{47} VCDR 1961 Art 32 (1)

\textsuperscript{48}Ibid Art 32 (2)

\textsuperscript{49}Vark, (n 6) 117

\textsuperscript{50} Vark, (n 6) 118

\textsuperscript{51} Ibid 118

\textsuperscript{52} VCDR Art 9; Gupta, (n 21) 309
One of the few incidences where states granted waiver of immunity was the case of a Georgian diplomat, Gueorgui Makharadze, the second-highest ranking Georgian diplomat in the United States. Gueorgui was involved in a tragic automobile accident which resulted in the death of a sixteen-year-old girl, a Brazilian national, on 3 January 1997 in Washington D.C. He was not given a Breathalyzer or blood due to his diplomatic status. This resulted in a public uproar, especially when the Georgian government wanted to recall the diplomat. However, due to intense public pressure, the Georgian president agreed, as a moral gesture to voluntarily waive Gueorgui’s immunity. Gueorgui consequently pled guilty and is currently serving his sentence in the United States.

CONCLUSION
Diplomatic privileges and immunities are granted on the basis of the representative character of diplomatic agents, the extra-territoriality theory and the functional necessity of diplomatic agents. Based on the ideology behind these theories, a diplomatic agent is nothing without his home state. As representative of his state, a diplomatic agent is expected to represent the sending state in good light at every point in time. Just as a diplomatic agent is expected to respect the law of his home state if he to be physically present in there, he is also expected to obey the laws of the receiving state since based on the extra-territoriality theory, he is regarded as being within the territory of his home state. With respect to his functions, it is expected that they must be carried out within the ambits of the law. However, a lot of diplomatic agents have continued to use their privileges and immunities for their selfish interest, violating the laws of the sending states and leaving their victims without a remedy.

RECOMMENDATIONS
1. Since the Vienna Convention placed diplomatic agents only within the jurisdiction of the sending state, in other to curb their excesses, it suggested that sending states should adequately exercise this jurisdiction by prosecuting erring diplomats either upon their recall or at the end of their diplomatic service.
2. It is also suggested that, where a diplomatic agent commits a heinous crime, the sending state, should waive his immunity to grant the receiving state jurisdiction to try him. When diplomatic agents realise that they will always face the consequences of their actions, they will definitely be mindful of their actions.