

Are Diplomats Above The Law? Lifting The Veil Of Diplomatic and Foreign State Immunity

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INTRODUCTION

Diplomatic and consular immunity originated from ancient Roman and Greek state practice and gained global recognition by developing into a principle of customary international law. There is a popular misconception that diplomatic immunity grants diplomats a *carte blanche* to flout the local laws of foreign States and abuse the privileges bestowed on them due to their diplomatic status. On the contrary, Diplomats and Consuls owe a duty to receiving States to respect their laws and regulations and not to interfere with their internal affairs.¹

The Vienna Convention on Diplomatic Relations 1961 (as relates to Ambassadors) and Vienna Convention on Consular Relations 1963 (Consuls and Consuls-General) were adopted by member States, including Australia, to codify and standardise the application of these customary principles. As their Preambles illustrate, these Conventions aim to contribute to the development of friendly relations in light of the purposes and principles of the Charter of the United Nations pertaining to the sovereign equality of States and the maintenance of international peace and security.

Both Conventions have been given force of law in Australia through the enactment of the *Diplomatic Privileges and Immunities Act 1967* (Cth) and the *Consular Privileges and Immunities Act 1972* (Cth).

Immunity is enjoyed not only by members with diplomatic and consular status, but also by foreign States. The notion that foreign governments and their agencies cannot be subjected to the local jurisdiction of another State's judicial system is well established as a principle of international law. Australia gave this principle the force of law by enacting the *Foreign States Immunities Act 1985* (Cth) (FSIA).

A. DIPLOMATIC IMMUNITY

Definition and Origin:

The Vienna Convention on Diplomatic Relations 1961 provides that Diplomatic immunity exempts diplomatic agents from being subjected to the civil and criminal jurisdiction of another country's legal system when performing official acts in the exercise of diplomatic functions.² These diplomatic functions include:³

- Representing the sending State in the receiving State;
- Protecting in the receiving State the interests of the sending State and of its nationals;
- Negotiating with the Government of the receiving State;

¹ Vienna Convention on Diplomatic Relations 1961, art 41; Vienna Convention on Consular Relations 1963, art 55.

² Vienna Convention on Diplomatic Relations 1961, arts 31, 38.

³ Ibid art 3.

- Ascertaining by all lawful means conditions and developments in the receiving State and reporting on them to the sending State's Government;
- Promoting friendly relations between the sending State and receiving State and developing their economic, cultural and scientific relations.

The fundamental purpose of diplomatic immunity is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.⁴ The most widely accepted theory underpinning this purpose is that of 'functional necessity,' which recognises that diplomatic agents would be hampered in their ability to effectively exercise their diplomatic functions if they could be subjected to the jurisdiction of another's country's domestic courts.

Scope of Diplomatic Immunity and Privileges

The Convention outlines 4 classes of diplomatic officials to whom immunity applies and prescribes a different level of immunity for each class. These include diplomatic agents, administrative and technical personnel, service staff and private servants.

1. Diplomatic Agents

A diplomatic agent is the head of the mission or a member of the diplomatic staff of the mission,⁵ such as an ambassador or other member having diplomatic rank.

Diplomatic agents enjoy absolute personal inviolability and immunity from criminal jurisdiction and civil jurisdiction for acts performed within their official capacity.⁶ They may however be subject to the local jurisdiction for private acts performed outside of their official capacity, such as a real action relating to private immovable property located in the territory of the receiving State; an action relating to succession in which the diplomatic agent is an executor, administrator, heir or legatee; or an action relating to any professional or commercial activity exercised by the diplomatic agent beyond their official functions.⁷

Diplomatic agents are not liable to arrest or detention,⁸ they cannot be compelled to give evidence as a witness and their property and premises cannot be entered or searched.⁹ The receiving State has a responsibility to ensure it takes all appropriate steps to prevent any attack on the diplomatic agent's person, freedom or dignity.¹⁰ A diplomatic agent's family enjoys the same immunities and privileges as afforded to the diplomatic agent.¹¹

2. Administrative and Technical Staff

Administrative and Technical staff refers to members of the staff of the mission employed in the administrative and technical service of the mission.¹² Examples include secretaries, office managers and clerical staff. These members and their families enjoy the same level of immunity as diplomatic agents with regards to criminal jurisdiction, however their immunity from civil jurisdiction is limited to the acts performed within the course of their duties.¹³

⁴ Ibid Preamble.

⁵ Ibid art 1.

⁶ Ibid art 31.

⁷ Ibid art 31.

⁸ Ibid art 29.

⁹ Ibid art 30-31.

¹⁰ Ibid art 29.

¹¹ Ibid art 37.

¹² Ibid art 1.

¹³ Ibid art 37.

3. *Service Staff*

Service Staff refers to members of the staff of the mission in the domestic service of the mission.¹⁴ These members enjoy immunity in respect of acts performed within the course of their duties.¹⁵

4. *Private Servant*

A Private Servant is a person who is in the domestic service of a member of the staff of the mission and who is not an employee of the sending State.¹⁶ Private servants enjoy the immunities and privileges only to the extent admitted by the receiving State.¹⁷ The receiving State is not to exercise its jurisdiction over a private servant in such a way that interferes with the performance of the mission's functions.¹⁸

B. CONSULAR IMMUNITY

Definition and Origin

Consular immunity, as consolidated in the Vienna Convention on Consular Relations 1963, is a similar principle to diplomatic immunity, however, it is narrower in scope. Consular officers are only exempt from being subjected to the jurisdiction of the receiving State's judicial or administrative authorities for acts performed in the exercise of consular functions.¹⁹

These consular functions include:²⁰

- Protecting in the receiving State the interests of the sending State and of its nationals;
- Furthering the development of commercial, economic, cultural and scientific relations between the sending State and receiving State and otherwise promoting friendly relations between them;
- Ascertaining by all lawful means conditions and developments in the receiving State and reporting on them to the sending State's Government;
- Issuing passports and travel documents to nationals of the sending State and visas or appropriate documents to persons wishing to travel to the sending State.

Similar to diplomatic immunity, the fundamental purpose of consular immunity is based on 'functional necessity' in that it exists, not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective States.²¹ Regardless of their restricted immunity, Consuls and Consuls-General have a duty to respect the laws and regulations of the receiving State and not to interfere with its internal affairs.²² According to the Preparatory Work of the Vienna Convention, the

¹⁴ Ibid art 1.

¹⁵ Ibid art 37.

¹⁶ Ibid art 1.

¹⁷ Ibid art 37.

¹⁸ Ibid.

¹⁹ Vienna Convention on Consular Relations 1963, art 43.

²⁰ Ibid art 5.

²¹ Curtis J. Milhaupt, 'The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation' (1988) 88 *Columbia Law Review* 841, 848.

²² Vienna Convention on Consular Relations 1963, art 55.

drafters intended the immunity to protect the consular process from unwarranted interference.²³ The issue of whether consular immunity applies in a given case can be resolved by reference to whether the consular process would be hindered if consular officers were subjected to the jurisdiction of the receiving State for its acts.²⁴ This determination is not based on whether the consular officer deserves immunity merely because they would have been prevented from performing their consular function without the act.²⁵

Scope of Consular Immunity and Privileges

The Convention outlines and defines 4 classes of consular personnel to whom immunity applies and prescribes a more limited level of immunity for them as compared with diplomatic agents. While diplomatic agents operate in embassies in capital cities, consular personnel operate in consulates outside of capital cities. These consular personnel include consular officers, honorary consuls, consular employees and consular service staff.

Consular Officers

A consular officer is any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.²⁶ Career consular officers are those who work full time in the execution of consular functions and are not permitted to conduct commercial activities beyond the scope of their consular duties. By contrast, honorary consular officers work part-time and are thus permitted to conduct other business.

Consular officers are exempt from the jurisdiction of judicial or administrative authorities of the receiving State in respect of official acts performed in the exercise of consular functions.²⁷ This immunity from jurisdiction however does not apply in civil actions arising out of a contract that was not entered into by a consular officer in their capacity as an agent of the sending State.²⁸ The immunity also does not apply in respect of a civil action by a third party for damage caused in the receiving State as a result of a vehicle, vessel or aircraft.²⁹

Unlike diplomatic agents, a consular officer's personal inviolability is limited. A consular officer shall not be liable to arrest or detention pending trial unless it involves a grave crime and is pursuant to a decision of a judicial authority.³⁰ Consular officers must appear before the authorities if criminal proceedings are commenced against them. The receiving State has a responsibility to ensure consular officers are treated with due respect and take all appropriate steps to prevent any attack on their person, freedom or dignity.³¹ Consular officers cannot be compelled to give evidence as a witness regarding their official duties.³² The families of consular officers do not receive the same immunity from jurisdiction, nor the personal inviolability as consular officers.

Consular Employees

²³ Curtis J. Milhaupt, 'The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation' (1988) 88 *Columbia Law Review* 841, 848.

²⁴ *Ibid* 857-858.

²⁵ *Ibid*.

²⁶ Vienna Convention on Consular Relations 1963, art 1.

²⁷ *Ibid*, art 43.

²⁸ *Ibid* art 43(2).

²⁹ *Ibid*.

³⁰ *Ibid* art 41.

³¹ *Ibid* art 40.

³² *Ibid* art 44.

Consular employees are employed in the administrative and technical service of a consular post.³³ They enjoy immunity from jurisdiction only in relation to their official acts and cannot be compelled to give evidence in respect of those acts, however, they have no personal inviolability.

Consular Service Staff

Members of the service staff refers to people employed in the domestic service of a consular post. They do not have immunity from jurisdiction at all and they do not have personal inviolability.

***Naoum (Consul General of Lebanon in Sydney) v Dannawi* [2011] NSWSC 23**

This case concerned the Consul General of Lebanon, Mr Naoum, refusing to pay his legal costs after instituting proceedings against Mr Dannawi for defamation. Mr Naoum claimed he was exempt from paying costs on the grounds of consular immunity from the civil jurisdiction of the Court. The Supreme Court of New South Wales recognised that while he would be immune for acts performed within his official consular capacity, his institution of defamation proceedings, however, was a personal cause of action directed at protecting his personal reputation.³⁴ Consequently, these proceedings were brought in his personal capacity as opposed to his official capacity.³⁵ The Supreme Court therefore held that Mr Naoum did not have immunity from paying costs.

C. FOREIGN STATES IMMUNITY

Definition and Justification

Foreign States immunity exempts foreign governments and their agencies from being subjected to the local jurisdiction of another State's judicial system. Such immunity is well established as a principle of international law. Australia gave this principle the force of law by enacting the *Foreign States Immunities Act 1985* (Cth) (FSIA) to clarify and codify the common law's recognition of foreign states immunity.

Historically, foreign states immunity was premised on the principle of sovereign equality of States, which recognised that jurisdiction cannot be exercised over equals where no special factors exist – *par in parem non habet jurisdictionem*.³⁶ Another important consideration underlying state immunity is that of reciprocity, whereby it is reasonable for States respecting the authority of foreign States over their own matters to expect equivalent respect for their authority.³⁷ This respect for territorial integrity as a basis for foreign state immunity also serves to avoid conflict in international relations caused by the exercise of jurisdiction over a foreign State.³⁸

Scope

The scope of foreign states immunity has gradually narrowed over time from States being granted absolute immunity, to being granted restrictive immunity. The 'restrictive theory' in public international

³³ Ibid art 1.

³⁴ *Naoum (Consul General of Lebanon in Sydney) v Dannawi* [2011] NSWSC 23 [6]-[8].

³⁵ Ibid.

³⁶ New South Wales Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) 23.

³⁷ Ibid.

³⁸ Ibid 24.

law extends immunity to States in respect of sovereign acts but not private acts.³⁹ The exceptions encompassed by the 'restrictive theory' are outlined in the FSIA and include commercial transactions, employment contracts, personal injury or property damage and intellectual property. Some of these exceptions to immunity, however, are themselves subject to exceptions which operate to restore the immunity. One such example is in relation to the 'commercial transactions' exception in section 11.

Although few cases involving the application of the FSIA have been litigated before Australian courts, a recent case that was heard before the Supreme Court of Queensland and Court of Appeal not only reaffirmed the restrictive theory, but also established a new precedent in respect of the application of foreign states immunity to scholarship payments under section 11(2) of FSIA.

Australian International Islamic College Board Inc v Kingdom of Saudi Arabia [2013] QCA 129

This landmark case involved a dispute between the Australian International Islamic College Board Inc (the plaintiff) and the kingdom of Saudi Arabia (The defendant) concerning the application of foreign states immunity in a claim for breach of contract arising from the defendant's unpaid school fees. The plaintiff administers a Muslim primary school that accepts Saudi children as students. The Saudi parents are themselves enrolled as students in Queensland universities and they receive scholarships from the defendant. The primary school admits Saudi children as students provided the defendant pays for their school fees. After it was discovered, however, that the Australian government's misallocated funding to the primary school in effect paid for the Saudi students' school fees, the school repaid the Australian government and sought to recover the payments from the defendant. With payment still outstanding, the plaintiff commenced proceedings against the defendant for breach of contract in the Supreme Court of Queensland.

At first instance, the proceeding was dismissed for want of jurisdiction after the Kingdom of Saudi Arabia successfully invoked foreign states immunity. On appeal, however, the College challenged the immunity by invoking the exception under section 11 of the FSIA, claiming the dispute involved a commercial transaction. The commercial transaction exception reflects the doctrine of restrictive immunity and stipulates that a foreign state is not immune in a proceeding in so far as it concerns a commercial transaction. Commercial transaction is defined as 'a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes a contract for the supply of goods or services, a loan or other transaction in relation to the provision of finance.'⁴⁰ The Court accepted the defendant's claim that even if their promises of payment constituted a commercial transaction, their immunity was restored because the unpaid fees concern a 'payment in respect of a scholarship.'

On appeal, however, the Court narrowed the interpretation of 'scholarship' and held the immunity on this ground can only be invoked by foreign nationals suing their own government in an Australian court. As the school fees were owed by a foreign State to an Australian entity, the 'scholarship' exception that restores immunity did not apply.

Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC (2011) 14 HKCFAR 395

Restrictive or Absolute Immunity?

³⁹ J.R Crawford, 'A Foreign State Immunities Act for Australia?' (1978-1980) 8 *Australian Year Book of International Law* 71, 73.

⁴⁰ *Foreign States Immunities Act 1985* (Cth) s 11(3).

While Australia's approach to foreign states immunity reflects the doctrine of restrictive immunity, it is clear that this approach has not been universally adopted, as evident in the case of *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* (2011). This case concerned proceedings for the enforcement of two arbitral awards obtained against the Democratic Republic of the Congo in the courts of Hong Kong. The Court of Final Appeal addressed the scope and nature of Hong Kong's principle of foreign state immunity.

In a departure from the widely adopted approach of restrictive immunity, the Court held that the immunity to be granted and recognised by the courts of Hong Kong to foreign states is that of absolute immunity. This means that foreign states and, the Democratic Republic of the Congo in this case, enjoy absolute immunity from local jurisdiction, even in cases involving commercial transactions, unless they waive their immunity. Prior to 1997, Hong Kong was still subject to British sovereignty and so the United Kingdom's State Immunity Act 1978, which reflected restrictive immunity by incorporating a commercial transactions exception, applied to Hong Kong.

The Court held that in light of Hong Kong's independence and current status as a Special Administrative Region of the People's Republic of China (PRC), the scope of state immunity in Hong Kong must be the same as it is across the PRC. Uniformity is required as both a matter of law and constitutionality,⁴¹ as the Central People's Government's determination of state immunity relates to their dealings with foreign States and therefore constitutes an 'act of state such as foreign affairs.'⁴² As the PRC has never recognised the commercial transactions exception to immunity but has always favoured a principle of absolute immunity, the same principle of absolute immunity is to be applied in Hong Kong.⁴³

When Will An Entity Be Considered Part Of The State in Hong Kong?

The Hong Kong courts have sought to determine when an entity is considered to be part of the State and therefore immune from suit. While a specific test has not been conclusively established by the courts in respect of foreign state immunity, a test that has been formulated in respect of Crown immunity is likely to be persuasive, leading to a similar approach.⁴⁴ While foreign state immunity exempts a foreign State from the jurisdiction of another State's courts, Crown immunity exempts a State from being used by its own nationals. The Court in *TNB Fuel v China National Coal* [2017] HKCFI 1016 applied the common law 'Control Test' which recognised the following considerations that a court may take into account when determining the degree of control a State exercises over an entity:⁴⁵

- The degree of autonomy and independence of the entity
- The degree of control exercised by the State
- Whether the entity has separate legal personality
- The financial autonomy of the entity
- Authority of the State to appoint or remove officers of the entity

It is also conceivable that an entity exercising governmental or public functions is more likely to be seen as a part of the State and entitled to Crown immunity.

⁴¹ The Government of the Hong Kong Special Administrative Region Department of Justice, *Judgment Update: Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC*, Basic Law Bulletin Issue 14 (2012) 14.

⁴² *Ibid* 15.

⁴³ *Ibid* 13.

⁴⁴ Duncan Watson and Nathaniel Lai, *Sovereign Immunity - Hong Kong* (September 2018) Getting the Deal Through < <https://gettingthedealthrough.com/area/113/jurisdiction/40/sovereign-immunity-2018-hong-kong/>>.

⁴⁵ *Ibid*.

When Will An Entity Be Considered Part Of The State in Australia?

While Hong Kong still demonstrates a reliance on common law for determining when foreign states immunity applies to entities of the State, Australia has codified this in the *Foreign States Immunities Act 1985* (Cth). While foreign States are generally immune from jurisdiction under section 9 of the Act, section 22 provides that immunity will also apply to separate entities of the foreign State. ‘Separate Entity’ is defined in section 3 as ‘a natural person or body corporate or corporation sole who or that was not established under Australian law and is an agency instrumentality of the foreign State and is not a department or organ of the executive government of the foreign State.’