

The Abuse of Diplomatic Privilege

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Events concerning the Libyan People's Bureau in London (an Embassy by another name) have raised in dramatic form the question of how far a sending State can use one of its diplomatic missions as a base for operations which are inimical to the interests of the receiving State.

The rules, which States have made for themselves, are for the most part contained in the Convention on Diplomatic Relations, the final text of which was settled at an international conference held in Vienna in 1961. Relevant parts of the Convention have been incorporated into the law of most countries (including Australia and Britain) by legislation. The Convention as a whole seeks to establish a balance between the interests of the diplomatic mission and the host government.

One area of tension concerns the diplomat's normal function of "ascertaining by all lawful means conditions and developments in the receiving state", a part of his duties specifically permitted by Article 3.1(d) of the Convention. This can give rise to suspicion, either because the receiving government is unduly sensitive, or because the information obtained is of a type which would be regarded as classified in the freest of societies. A diplomatic agent enjoys complete immunity from the criminal jurisdiction of the receiving State under Article 31.1 of the Convention. Hence, the only course open to the receiving State (unless the sending State were to take the unlikely step of waiving the immunity under Article 32) if he transgresses the law is to declare the offender persona non grata, a step which it may take under Article 9 at any time and without providing any explanation.

The use of the embassy itself as a base for terrorist operations is a comparatively recent phenomenon. It is also

something which is very difficult to prove. The London incident is unusual because there appears to be evidence that the shots were fired from the embassy premises. Why was it not possible to take action against the building and its occupants, particularly as some of them, according to reports, did not have diplomatic status?

It is true that Article 41 of the Convention provides that the premises of the mission are not to be used "in any manner incompatible with the functions of the mission". However in a case of breach of this prescription, the rights of the receiving State are circumscribed. Article 22.1 lays down that the diplomatic mission is "inviolable". That this is the overriding principle is clear. In the earlier drafting stages prior to the 1961 Conference, a qualification of the principle was deleted, and, at the Conference itself, the following limitation introduced by Ireland and Japan was rejected: that the inviolability of the mission "shall not prevent the receiving State from taking such measures as are essential for the protection of life and property in exceptional circumstances of public emergency or danger." Moreover, Article 22.1 itself goes on to reinforce the inviolability principle by stipulating that agents of the receiving State may not enter the embassy "except with the consent of the head of the mission".

Faced with the shooting incident, the British authorities could have waited for the non-diplomatic occupants of the mission to emerge and then detained them for questioning. However there are numerous examples of wanted individuals or groups of people remaining for months or years in an embassy from which they could not be forcibly removed by the host State. Such a situation could easily have developed to the embarrassment of the British government. The only practical alternative was to sever diplomatic relations, thus bringing an end, on reasonable notice, to the diplomatic status of the mission and its staff. However, in the face of threats by the occupants to remain on the premises

to avoid the possibility of further violence in taking possession after such notice expired, it was presumably felt necessary by the British government to reach an agreement with the Libyan authorities whereby the occupants were allowed free passage to leave Britain.

These events have raised the issue of whether the Vienna Convention should not be revised to give the receiving State added protection. It is doubtful whether such a proposal would gain sufficient support from States, not least because the present situation does have its advantages. As long as there is no qualification to the inviolability principle, both parties to a dispute know where they stand. Moreover, the receiving State may itself find it a convenient rule as a means for resisting popular pressure to take steps against a foreign mission. Certainly in the light of the need not to jeopardise British nationals and British interests in Libya, the British government must have been thankful to be able to rely upon the inviolability principle as a ground for not taking action against the occupants of the Bureau.

If a qualification was introduced to the inviolability of the mission, difficult issues would be raised. In what circumstances could a receiving State legitimately intervene? How could it be resolved in a particular case whether the appropriate circumstances existed? In the international sphere, in which there is no system of courts with universal jurisdiction, the vast majority of disputes are resolved by negotiation and some form of compromise between the States concerned. All that a concept of qualified inviolability might create is an additional dimension to an already tense situation with the consequence that it might become even more difficult to resolve.

All this is not to say that a receiving State could not, in the last resort, take steps against a foreign embassy in a situation in which its vital security interests were involved.

The concept of self-defence would be available in an extreme case. The example usually given is of the demand by the Pakistan government in 1973 to search the Iraqi Embassy. Despite the refusal by the ambassador to give permission, a search was conducted which revealed that a large quantity of arms and ammunition was being stored on the premises.

Apart from the difficulty of a host government being sure enough of the situation to be able to act in this way, this right is obviously of an exceptional nature. That such action by a host government may be permissible in the case of an imminent threat to its own security was recognised at the time of drafting the Convention. It was said, however, that such an exceptional power was recognised by general international law and that it was not necessary to make special provision for it in the Convention.

For all normal purposes a diplomatic mission would be inviolable. Indeed, as whatever threats might have been posed by or from the Libyan Bureau were directed principally at disaffected Libyans living in Britain, these activities constituted no direct violation of Britain's national security.

Not that the existence of threats of this nature are an acceptable diplomatic function. However the remedy is not to violate the premises of the mission, but for a receiving State to refuse to accept a diplomatic relationship with a State indulging in these activities. Such a drastic step can have disadvantages from the point of view of the interests of the State which breaks off relations. The withdrawal of its own representatives from the territory of the other State can disadvantage its own nationals and trading interests in that country. This was the dilemma faced by Britain. The alleged shooting upon demonstrators and members of the local police force in a London street gave the British Government no alternative but to close the mission by breaking diplomatic ties. No feasible amendments to the 1961 Convention could have assisted the British Government

in its invidious choice which allowed a suspected murderer to leave the country with impunity.

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EDITOR'S NOTES

1. Newspaper commentaries on the Libyan embassy affair have focussed on British plans to propose amendments to the Vienna Convention on Diplomatic Relations of 1961, and on the problems of detecting or responding to abuses of diplomatic privilege under the present law. See eg The Guardian, 6 May 1984, p5; The Times, 21 June 1984, p1. The British Foreign Office has stated that in the past ten years 546 serious offences (where the maximum penalty would have been 6 months imprisonment or more) were committed under cover of diplomatic immunity in the UK. Apart from shoplifting and drunken driving, these included rape (2), incest (2), gross indecency (12), firearms offences (5), and cases of personal violence (36) as well as 700,000 parking tickets and 2,000 traffic offences in the same period. But offenders do not always escape. In one case in 1980, a Moroccan diplomatic bag, in the form of a large crate, fell off a forklift truck and broke open. It contained over 500,000 pounds worth of cannabis. The culprit was not accredited to the UK and was gaoled (see The Guardian, 6 May 1984, p5).

2. However, it appears that not all measures that could have been taken by the UK to prevent abuse of the diplomatic bag by Libya were taken. When Libya acceded to the Vienna Convention in 1977 it made the following reservation:

(3) In the event that the authorities of the Socialist People's Libyan Arab Jamahiriya entertain strong doubts that the contents of a diplomatic pouch include items which may not be sent by diplomatic pouch in accordance with paragraph 4 of article 27 of said Convention, the Socialist People's Libyan Arab Jamahiriya reserves its right to request the opening of such pouch in the presence of an official representative of the diplomatic mission concerned. If such request is denied by the authorities of the sending state, the diplomatic pouch shall be returned to its place of origin.

Reservations to art 27 along somewhat similar lines have also been made by Bahrain, Kuwait and Saudi Arabia. The Bahrain Government, for example, reserved

its right to open the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law.

Objections to some or all of these reservations were made by a number of Eastern European States, the USSR, the USA and the Federal Republic of Germany. The UK objected to Bahrain's reservation (which it did 'not regard as valid'), but not to that of Libya. The Federal Republic of Germany objected to both (Bahrain's as 'inconsistent with the object and purpose' of the Convention, Libya's as 'not valid'). The Libyan reservation is considerably more limited than Bahrain's: if valid, it would give the UK reciprocal rights to request the diplomatic pouch to be opened or returned (cf Vienna Convention on the Law of Treaties 1967, art 21(1)(b)). This assumes that the presence of weapons in a diplomatic bag could be detected: the UK's view is reportedly that x-ray searches of such bags are prohibited as an aspect of their inviolability. Nonetheless the new Legal Advisor to the Foreign Office, Sir John Freeland, admitted before a House of Commons Select Committee that the effect of the Libyan reservation was to allow searches of Libyan diplomatic bags: the reason why this was not done was 'a political decision rather than a legal one', made in particular to help bring about the withdrawal of the reservation. However he denied that it would have been lawful under international law to enter the embassy after the shooting, in the absence of any indication that further violence was likely. According to the Times report (21 June 1984, p1)

Sir Antony Acland, head of the diplomatic service, told MPs that amendment would be difficult, time-consuming and could result in penalties. "It may well be that we conclude the right way forward is not through amendment of the Vienna Convention. The convention is widely regarded as an essential element in the conduct of foreign relations and it is in Britain's interest that diplomatic immunity provided by the conventions be preserved."

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