

STOP PRESS - INCIDENT AT THE LIBYAN EMBASSY, LONDON
INVIOABILITY OF DIPLOMATIC PREMISES

The reports that an automatic weapon was fired from the Libyan Embassy, or Peoples Bureau, upon peaceful demonstrators in London on 17 April 1984, and the subsequent death of a policewoman and injury to others, raises serious questions as to the inviolability of diplomatic premises. Article 22 (1) of the Vienna Convention on Diplomatic Relations which has the force of law in the UK: Diplomatic Privileges Act, 1964, ss2(1) provides:

"The premises of the mission shall be inviolable.
 The agents of the receiving state may not enter them except with the consent of the head of mission"

There is no provision for entry, even in an emergency. It was proposed in the TRAVAUX PREPARATOIRES at Vienna that the head of a diplomatic mission should "...co-operate with the local authorities in the case of fire, epidemic or other extreme emergency..." The rejection of this has been interpreted by Professor Rosalyn Higgins of The London School of Economics as a clear indication that entry without consent was not envisaged in the Convention: BBC World Service 17 April 1984. As to whether the Vienna Convention on this point is declaratory of international law, see Lord McNair, Volume I, International Law Opinions, at 85 where he notes the Sun Yat Sen Incident of 1896.

The inviolability of diplomatic premises does however carry corresponding obligations. Article 4(3) of the Vienna Convention provides:

The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving states.

In Australia, only Articles 1,22 to 24 and 27-40 have the force of law: Diplomatic Privileges and Immunities Act, 1967. This approach was probably adopted because some of the articles are effected by substantive provisions in the Act itself or other legislation, e.g. those on taxation, or because the relevant articles are thought to only create obligations in public international law. The UK Act gives internal effect to all of the Articles.

The quandary which arises when local authorities wish to enter diplomatic premises and are met by the rule that such premises are inviolable has led to a number of breaches of international law where entry without consent is made. Some examples are:-

31 January 1963	Embassy of the Federal Republic of Germany, Moscow.
12 November 1963	British Embassy, Moscow
4 April 1964	Hungarian Embassy, Rio de Janiero
10 May 1965	French Embassy, Rio de Janiero
3 February 1967	Chinese Embassy, Moscow
26 August 1968	US Embassy, Prague (by USSR Soldiers)
26 September 1968	US Embassy, Athens
24 January 1969	British Embassy, Moscow
16 March 1971	US Embassy, Moscow

The following incidents led to the breaking of diplomatic relations:-

6 April 1927	USSR Embassy, China
27 April 1963	Dominican Embassy, Haiti
28 June 1973	Venezuelan Embassy, Montevideo

(See C. Rousseau, Droit International Public, Volume IV, pp. 180-181, where detailed references to Revue Generale de Droit International Public may be found)

What solution is then available to a receiving state which wishes to stop use of diplomatic premises incompatible with the functions of those premises? Clearly, a diplomatic agent who commits a criminal act is immune from the jurisdiction of the receiving State: Vienna Convention Article 31(1). This may be waived by the sending state: Article 32(1). Such waiver must always be express: Article 32(2). The receiving state could declare the diplomatic agent persona non grata (Article 43(a)) and argue that the sending state was responsible under international law. This could be pursued through diplomatic channels, and other methods for the settlement of international disputes.

In the event of the receiving country breaking off diplomatic relations Article 45 of the Vienna Convention applies. This provides:

"If diplomatic relations are broken off between two States or if a mission is permanently or temporarily recalled:

- (a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives.
- (b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State."

Hence in the event of the breaking of diplomatic relations, the receiving State is still under an obligation to "... respect and protect..." the premises. Perhaps its strongest role is that the custodian state must be one "... acceptable to the receiving state." This is not an insignificant power. While the function of a diplomatic agent comes to an end upon the agent being declared persona non grata by the receiving state (Article 43(a)), the person of that diplomatic agent would seem to remain inviolable until at least the agent leaves the receiving country: Article 39(2). The agent is not "...liable to any form of arrest or detention." (Article 29) Does this mean the agent should not be searched against his or her will? Article 29 goes on to state that: "The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his persons, freedom or dignity". It would seem that a forcible search would be in breach of the Article. While the diplomatic pouch must contain only diplomatic documents or articles intended for official use, it too is protected. It must not be opened or detained: Article 27(2). However, there have been instances where the diplomatic pouch has been opened because of a suspicion of, for example, its use in the drug trade.

The victims of a criminal act committed by a diplomatic agent on the

territory of the receiving state may have an action in tort against the state itself (but not the diplomatic agent) where the receiving state has adopted the restrictive doctrine of sovereign immunity. This is the case in the UK both at common law and under statute: I Congresso del Partido [1983]AC 244; State Immunity Act, 1978 (UK). The UK legislation denies sovereign immunity for an action in certain torts where the act or omission occurs within the UK: State Immunity Act, 1978 s.5. The US legislation denies immunity in regard to torts where the damage occurs within the territory of the US; Foreign Sovereign Immunities Act, 1976 (U.S.) s.1605 (a) (5); Persinger v Islamic Republic of Iran 690 F. 2d 1010 (1982), casenote [1984] Australian I.L. News 78. Where injury or death occurs by the firing of a weapon without justification from a foreign embassy in the U.K. into the street outside, it is submitted that both the tortious act and the damage occurs on the territory of the receiving state. Both occur "... in the United Kingdom". The foreign embassy is in the United Kingdom. It is not foreign territory: Radwan v Radwan [1973] Fam: 24; 1948 II Year Book International Law Commission 94,95. Even if a foreign embassy were foreign territory (a theory not generally accepted) it could be argued that under general principles of jurisdiction, particularly the concept of objective territorial jurisdiction the courts of the state where the damage occurs would be able to assume jurisdiction, subject of course to any contrary provision of any relevant domestic legislation, or indeed its domestic common law.

Should the criminal act be perpetrated from the diplomatic mission by a person who is not an accredited diplomatic agent, then no immunity would attach to that person. When he or she leaves the diplomatic mission, the receiving state's criminal procedure could be applied.

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