

## VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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### **Introduction**

In terms of near-universal participation by sovereign States, the high degree of observance among States parties and the influence it has had on the international legal order, the Vienna Convention on Diplomatic Relations may claim to be the most successful of the instruments drawn up under the United Nations framework for codification and progressive development of international law. Its success is due not only to the excellence of the preparatory work by the International Law Commission and the negotiating skills of State representatives at the Conference, but also to the long stability of the basic rules of diplomatic law and to the effectiveness of reciprocity as a sanction against non-compliance.

### **Historical Context**

Among all peoples who wished to engage with each other on a basis other than that of conquest and subjugation, it was practice from the earliest times that the person of the envoy or intermediary between them was sacrosanct. Until it was accepted – originally as a matter of religious scruple – that the herald or emissary could pass safely in order to negotiate terms of truce or agreements to settle quarrels, there could be no peaceful international relations or rules on questions of substance. The personal inviolability accorded to envoys, for example among the ancient Greek cities and among the states of ancient India, became of less importance with the rise of the Roman Empire and later of Byzantium – both of these intent on subjugation rather than co-existence. Diplomacy in the modern sense revived with the Renaissance and during the sixteenth century – a period of violent religious strife – the special protection and immunity from criminal jurisdiction even for ambassadors suspected of conspiracy against the sovereign to whom they were accredited became established in practice among sovereign rulers. By the time of the Congress of Westphalia in 1648, permanent legations were accepted as the normal way of conducting international business among sovereign States, and over the next century detailed rules emerged in relation to the immunity of ambassadors and their accompanying families and staff from civil as well as criminal proceedings, the inviolability of their embassy premises and their exemption from customs duties and from taxes. These rules of customary international law were described in detail by early writers such as Grotius (1625), Bynkershoek (1721) and Vattel (1758).

The first international instrument to codify any aspect of diplomatic law was the Regulation adopted by the Congress of Vienna in 1815 which simplified the complex rules on the classes of heads of diplomatic missions and laid down that precedence among heads of missions should be determined by date of arrival at post. Until then precedence – which guaranteed direct access to the receiving sovereign as well as ceremonial honours – had caused numerous and bitter disputes. Codification among States of immunities and privileges of diplomatic agents did not begin until the Havana Convention of 1928 drawn up among the States of the Pan-American Union – but this did not well reflect current practice either in its terminology or its rules. More influential was the Draft Convention drawn up in 1932 by the Harvard Research in International Law.

The establishment within the United Nations framework of the International Law Commission opened the way to comprehensive codification to confirm what were accepted as well-established – if not universally respected – rules of international law. There remained areas on which State practice was divergent – in particular the privileges and immunities of junior staff, the position of a diplomat who was a national of the host State and the extent of exceptions to the immunity from jurisdiction of a diplomat – so that any convention would contain an element of “progressive development” as well as codification of the law.

### **Negotiating History**

The preparatory work for the Vienna Conference followed the standard United Nations procedure for the codification of international law – applied in fields where there is already extensive State practice, precedent and doctrine. In 1952, Yugoslavia proposed that the topic should be given priority, and after discussion in the Sixth (Legal) Committee, the General Assembly requested the International Law Commission to undertake as a priority topic codification of the law of diplomatic intercourse and immunities. The Commission appointed Mr. Sandström of Sweden as Special Rapporteur and his report formed the basis for the draft articles adopted by the Commission in 1957. These articles were debated in the Sixth Committee of the General Assembly and sent to all members of the United Nations or any of its specialized agencies with an invitation to submit comments. Comments from 21 Governments were taken into account by the Commission who in 1958 prepared revised and extended articles and recommended that they should form the basis for a Convention – a decision endorsed by the General Assembly. Eighty-one States took part in the Conference held at Vienna from 2 March to 14 April 1961 and the Convention was signed on 18 April.

The success of the Conference and of the Convention which it drew up may be ascribed first to the fact that the central rules regulating diplomatic relations had been stable for over 200 years. Although the methods of setting up embassies and communicating with them had radically changed, their basic functions of representing the sending State and protecting its interests and those of its nationals, negotiation with the receiving State, observing and reporting on conditions and developments there remained and still remain unaltered. Secondly, because the establishment of diplomatic relations and of permanent missions takes place by mutual consent, every State is both a sending and receiving State. Its own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity, or may be penalized even for minor restrictions regarding privileges or protocol. There was at the 1961 Vienna Conference no general underlying conflict of interest between opposing groups of States.

The exception to this symmetry of interests lies in the matter of communications between the embassy and its sending State – and this was apparent at the Vienna Conference where probably the most controversial issue was whether sending States were entitled as of right to install and use a wireless transmitter. Although the right of free communication between the sending State and its missions abroad was long established in terms of the inviolability of couriers and the diplomatic despatches which they carried – so that any interference was covert and denied if discovered – in 1961 only those States with advanced technological resources operated transmitters. Other States expressed concern that these transmitters might be used for broadcasting local propaganda, and that because they were situated in inviolable premises beyond the control of the receiving State they might lead to breaches of the International Telecommunication Convention. An amendment which would have expressly required not only the consent of the receiving

State for a wireless transmitter but also “proper arrangements for its use in accordance with the laws of the receiving State and international regulations” was adopted by the Committee of the Whole Conference against the wishes of all major States. In plenary session, however, a compromise was reached, and the above words within quotes – which might have implied a right of inspection for the receiving State – were withdrawn.

This example illustrates the readiness of the delegates to the 1961 Vienna Conference to seek compromise solutions which would make the final Convention text acceptable to the Governments and national parliaments who would later decide on ratification rather than to press home the advantage of numbers. A similarly constructive approach was also shown over the controversial matter of the diplomatic bag. Under previous customary practice it was permissible for a receiving State suspecting that a diplomatic bag contained material other than permitted official documents and equipment to challenge the courier – upon which the sending State could either return the suspect bag unopened or submit it to inspection supervised by the authorities of both States. There was prolonged controversy in the International Law Commission as to whether this possibility should be retained, but ultimately it was decided that although there was a duty on the sending State to use the bag only for diplomatic documents or articles for official use, the bag could not be opened or detained under any circumstances. Despite numerous amendments and arguments in the Conference, this was the rule ultimately adopted in article 27.

A third question where previous State practice was inconsistent was the extent of immunities and privileges accorded to the administrative and technical staff of a mission – junior employees without diplomatic rank such as secretaries, translators and senior security staff. In some States these had been given the same immunities and privileges as diplomats while in others their immunity was limited to their official acts. The International Law Commission, after much argument, proposed that they should be given full diplomatic immunities and privileges and some States at the Conference supported this approach, while others expressed concern – in particular at possible abuse of customs privileges. The Conference limited exemption from customs duties for junior staff to articles imported on first arrival at post and later – after it seemed that there might be a total failure to agree on the immunity to be given to administrative and technical staff – accepted a United Kingdom compromise under which they would enjoy full immunity from criminal proceedings, but would not enjoy immunity from civil and administrative proceedings for acts performed outside the course of their duties. They can therefore be sued in respect of a road traffic accident occurring while they are off duty or for other matters unrelated to their work for the mission.

### **Key Provisions**

The Vienna Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations on a basis of consent between independent sovereign States. It specifies the functions of diplomatic missions, the formal rules regulating appointments, declarations of *persona non grata* of a diplomat who has in some way given offence, and precedence among heads of mission. It sets out the special rules – privileges and immunities – which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments. It makes provision for withdrawal of a mission – which may take place on grounds of economy or physical security – and for breach of diplomatic relations which may occur in response to abuse of immunity or severe deterioration in relations between sending and receiving States. In either of these cases – or where

permanent missions have not been established – a framework is provided for the interests of each sending State to be protected in the receiving State by a third State.

Article 22 confirms the inviolability of mission premises – barring any right of entry by law enforcement officers of the receiving State and imposing on the receiving State a special duty to protect the premises against intrusion, damage, disturbance of the peace or infringement of dignity. Even in response to abuse of this inviolability or emergency, the premises may not be entered without the consent of the head of mission. Article 24 ensures the inviolability of mission archives and documents – even outside mission premises – so that the receiving State may not seize or inspect them or permit their use in legal proceedings.

Article 27 guarantees free communication between a mission and its sending State by all appropriate means, and ensures that the diplomatic bag carrying such communications may not be opened or detained even on suspicion of abuse. Given the purposes of diplomatic missions, secure communication for information and instructions is probably the most essential of all immunities.

Article 29 provides inviolability for the person of diplomats and article 31 establishes their immunity from civil and criminal jurisdiction – with precise exceptions to immunity from civil jurisdiction where previous State practice had varied. Immunity from jurisdiction – like other immunities and privileges – may be waived by the sending State, and article 32 specifies the rules on waiver. Article 34 sets out the tax exemption accorded to diplomats along with detailed exceptions in respect of matters unrelated to their official duties or to ordinary life in the receiving State. Article 36 provides for exemption from customs duties on diplomatic imports throughout a diplomat's posting.

Articles 37 sets out a complex code for the treatment of families and junior staff – where as pointed out above previous practice was varied and negotiation of a compromise difficult. Article 38 bars from all privileges and immunities, except for immunity for their official acts, nationals and permanent residents of the receiving State. These two provisions in many States drastically reduced the numbers of those persons more likely to bring into disrepute the system of privileges and immunities and were fully in accordance with the basic justification applied throughout the Convention of limiting immunities to what is essential to ensure the efficient performance of the functions of diplomatic missions as representing States.

### **Influence of the Vienna Convention on Diplomatic Relations**

The Convention has established itself as a cornerstone of modern international relations. Despite the need for implementing national legislation in a number of States, it came into force following 22 ratifications only three years from its adoption and almost all States in the world are now parties. The *régime* it sets out for the conduct of diplomatic relations has become remarkably uniform as reservations made by ratifying States on a few points which had been controversial during the negotiations have in many cases been withdrawn or simply never applied. The Convention has proved resilient to attack on its fundamental principles. This came during the 1980s from those alarmed at the opportunities it provided for abuse – as demonstrated in particular when following the murder of a policewoman by shooting from the premises of the Libyan diplomatic mission in London the United Kingdom broke diplomatic relations and all those within the mission left England under the shield of immunity. More recently attacks have come from scholars concerned at the conflict between immunity and the human right of access to justice, or at immunity for violators of international criminal law and in particular torturers. But in

practice there has been remarkably little erosion of the immunities of diplomats as it has been widely accepted that the Convention rules limit immunities to what is essential for the functioning of diplomacy.

The focus of public concern has instead shifted to the vulnerability of diplomats to terrorist attacks. These might take the form of kidnapping diplomats with demands for ransom or release of prisoners – a serious problem in the 1970s until brought somewhat under control by collective determination by Governments that taking “all appropriate measures” to protect diplomats did not mean capitulating to blackmail. Alternatively terrorism might involve besieging or bombing embassies – most horrifically the United States Embassies in Kenya and Tanzania in 1998. For the most part, parties to the Convention are in no way complicit in these attacks and have done their best to provide protection – sometimes helped by wealthier sending States. The striking exception was the detention for over a year of the hostages in the United States Embassy in Tehran with the acquiescence of the relatively new revolutionary Government of Iran. The United States brought proceedings against Iran before the International Court of Justice basing itself mostly on the Vienna Convention on Diplomatic Relations including the Optional Protocol on the Settlement of Disputes to which both States were parties. Iran did not make serious efforts to justify its conduct in legal terms before the Court and the Court’s Judgment in the *United States Diplomatic and Consular Staff in Tehran case (I.C.J. Reports, 1980)* contains important analysis of many of the principles in the Convention and greatly assisted the United States in retaining the support of the international community and securing eventual release – brokered by Algeria – of the hostages. More recently, the International Court upheld a counter-claim by Uganda in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (I.C.J. Reports 2005)* that Congolese soldiers had occupied the Ugandan diplomatic mission in Kinshasa and violated article 29 of the Convention by threatening and maltreating staff on the premises.

In national courts there have been hundreds of cases where the Vienna Convention has been applied, since many of its most frequently invoked provisions concern whether a national court may assume jurisdiction over civil or criminal proceedings and what evidence may be admissible in national proceedings. Most of these cases concern ambiguities in the text on such questions as the true meaning of the exceptions to immunity from civil jurisdiction, the construction of the term “permanent resident”, the protection of an embassy’s bank account from enforcement proceedings, or the balance to be struck between protecting the dignity of embassy premises and permitting effective exercise of human rights to demonstrate and to speak freely. Unlike the cases described in the previous paragraph, they did not involve fundamental breaches of the Convention.

The Convention has also been extensively drawn on by later treaties regulating immunities and privileges. Its provisions were used as a starting point in drawing up the 1963 Vienna Convention on Consular Relations and the 1969 New York Convention on Special Missions – in the latter case with unfortunate results in that insufficient account was taken of the differences between permanent missions and most special missions so that the Convention has attracted only limited support. It is used as a point of reference for determining the treatment to be accorded to the premises, archives and senior officers of a substantial number of international organizations. Sometimes it is used on a similar basis for agreements with the host State regulating the status of military forces or civilian missions despatched either by international organizations or by States providing military or civilian assistance. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property contains references to its provisions, since in the nature of things

the rules on state immunity and on diplomatic immunity, though different in their origins and justification, are closely intertwined. As for the treatment given to heads of State, heads of Government and foreign ministers in their personal capacity – though practice is somewhat varied – it is accepted that the rules in the Vienna Convention on Diplomatic Relations form a guide and perhaps a minimum standard.

## **Related Material**

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Convention regarding Diplomatic Officers, Havana, 20 February 1928, League of Nations, *Treaty Series*, vol. CLV, p. 261.

Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 261.

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United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004 (A/59/508).

### ***B. Jurisprudence***

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International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, *I.C.J. Reports 2005*.

### ***C. Documents***

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