

THE EXTEND OF THE IMMUNITY'S INFLUENCE OF THE DIPLOMATIC ENVOY ON CRIMINAL RESPONSIBILITY

Dr. Feras Najeh Jaber Aldairi

Abstract

Equality before the law is one of the cornerstones of modern country, in particular within the scope of the penal code, as the penal code doesn't grant immunity to the criminals in terms of committed crimes, because the murder is murder, but who have an immunity takes it from his work, his position, or his capacity, which would limit the powers of criminal justice to take its normal course, in this sense, the diplomatic immunity for the diplomatic envoy constitutes an attack on in this principle, therefore, it constitutes an obstacle to the application of the law naturally, and this impunity was at sometimes a reason for the diplomatic envoy to evade criminal prosecution in the event that he committed a crime or contributed to its commission or abuse of his immunity, and this diplomatic immunity has a legal basis as it was organized by international conventions, the most important of which is Vienna Convention on Diplomatic Relations 1961 which addressed in its articles the issue of diplomatic immunity impact on the criminal responsibility of the diplomat, subject of our study.

Keywords: Diplomacy, Diplomatic Envoy, Immunity, Criminal Immunity, Judicial immunity.

Introduction

The fact that a state cannot be in isolation from other countries, and the need for it to have contact with them, led to cooperation and intense interaction between countries. As a result of this historical development in international relations, the need arose to send ambassadors and envoys to different States, which is known as diplomatic representation, and it basically and practically embodies the establishment of the sovereignty of the modern state. The formation of permanent diplomatic and consular representation has become an important need for ensuring stability and protection of international relations and interests in an official capacity, so that states, through their permanent representatives, can be fully aware of what developments are happening in other countries, and in order for them to cooperate with each other to address their political, economic, social, cultural and scientific issues. This would have been difficult to accomplish without the constant understanding and communication which the permanent diplomatic missions work to achieve.

The importance of diplomatic relations emerged through the great development that the world is witnessing, and its forms and patterns varied as a result of the importance of relations between countries, and the interest of governments in the international dimension in developing their relationship with each other. Countries have also witnessed a great development in establishing diplomatic relations between them, and the forms of mutual recognition have varied.

Diplomacy is considered the basis for the formation and implementation of countries 's foreign policies and through which the polices of peace and war are operationalized , in addition to its role in achieving the interests of states and individuals. The Vienna Convention of 1961, followed by the Vienna Convention on Consular Relations of 1963, is the legal framework that regulates everything related to diplomatic missions from their inception until their end.

Article 31 of the Vienna Convention of 1961 granted envoys judicial immunity in criminal matters in an absolute manner that is not subject to discussion or interpretation. This immunity primarily serves diplomats in the first place and the relations of the international community additionally. However, what about the rights of citizens and those who have been harmed by the diplomatic envoy's abuse of this immunity?

The diplomatic envoy's enjoyment of penal and judicial immunity is often considered a reason due to which the rights of those affected by the actions of diplomatic representatives are lost. This is because resorting to the judiciary of the approved state involves problems and difficulties that impede doing so. Therefore, how can the state achieve a balance between the right of the diplomatic envoy to impunity, the prevention of any attack on this impunity and the jurisdiction of the state in relation to the crimes committed under it?

Hence, the problem of the study represents the clear position of the Vienna Convention on Diplomatic Relations, 1961 regarding the criminal immunity enjoyed by diplomatic envoys, as Article 31 stipulates the diplomatic immunity of envoys in criminal matters in an absolute manner without being subject to any discussion or interpretation, and if this immunity serves diplomats in the first place and the relations of the international community in the second place, it undoubtedly will affect a very important issue, which is the criminal responsibility. Here, lies the problem of the study because the states that are part to the 1961's Vienna Convention on Diplomatic Relations may find themselves in trouble when these granted immunities conflict with the rights of their citizens who have been affected by the excesses and abuse of diplomats. Thus the researcher's interest in this topic has emerged as a result of the increase in abuses committed by the diplomatic envoys, in an attempt to answer the main question of the study, which is to what extent this immunity affects criminal responsibility and how to address its abusive use by the diplomatic envoy? The following sub-questions are derived from the main question of the study:

- 1- What is meant by diplomatic immunity?
- 2- Who are the members of the diplomatic mission who enjoy immunity?
- 3- What are the tasks and duties assigned to the diplomatic mission?
- 4- What are the immunities and privileges of diplomatic missions?
- 5- How does the domestic law and the judiciary deal with the crimes committed by diplomatic envoys?
- 6- What are the effects of the immunities and privileges enjoyed by diplomatic missions on criminal responsibility?
- 7- How did the Vienna Convention address the criminal responsibility of diplomatic envoys?

The current study is considered important, first due to the importance of diplomatic envoys, as they enjoy a set of diplomatic immunities and privileges that grant them a privileged position and enable them to perform the tasks entrusted to them in the best way possible, this is on the one hand, while on the other hand, the importance of the study is evident in its attempt to help specialists and researchers in the field of legal and political studies in their research on international and criminal law and diplomatic missions' affairs. In addition, the results of this study are useful for researchers to conduct other studies to investigate diplomatic immunity.

In line with the problem of the study and to answer its questions, the objectives of the study included defining the immunity of diplomatic envoys, identifying the types of this impunity and to what extent it protects envoys in the event that it entails criminal responsibility, clarifying the restrictions imposed on the immunity and privileges of diplomatic envoys based on the country's requirements of security to which they are delegated, by highlighting and explaining these restrictions, and examining the legal means that the state uses in order to preserve the safety of its citizens and protect them from any abuse, excesses or exploitation done through the diplomatic envoy's use of his/her immunity or privileges.

This study was conducted based on international conventions that include the issue of diplomatic immunity and some of the Arab criminal legislation that deal with the subject of the study which clarify their position regarding the regulation of diplomatic immunity, in order to measure the effectiveness of diplomatic immunity and its impact on the criminal responsibility of envoys as well as to identify how international and criminal law address this issue.

This was achieved through the descriptive analytical approach, as the researcher used the legal analytical approach that involved analyzing, interpreting and describing the legal texts and the provisions of international conventions concerned with the subject of the study along with reviewing of the opinions of jurisprudence to simplify them and make them comprehensible. In addition, the comparative approach was used in reviewing the Arab and foreign legislations that dealt with diplomatic immunity and criminal responsibility of diplomatic envoys.

The hypotheses of the study are summarized as follows:

- 1- What is the immunity of diplomatic envoys and their organization.
- 2- Identifying the types of immunity and the extent to which it protects envoys in the event that entails criminal responsibility.
- 3- Identifying clarifying the restrictions imposed on the immunity and privileges of diplomatic envoys based on the country's requirements of security to which they are delegated
Identifying the most important legal means that the state uses in order to preserve the safety of its citizens and protect them from any abuse, excesses or exploitation done through the diplomatic envoy's use of his/her immunity or privileges.

2. A conceptual introduction to diplomatic immunity

Diplomacy plays an important role in the international relations' domain, because through it these relations are established and strengthened, all matters of concern to different countries are dealt with, the divergent viewpoints as well as conflicting interests are reconciled, conflicts are settled, friendship and understanding between and through countries are strengthened, and confrontation with other countries is achieved. For the international community, diplomacy is the driving force of international life and the source of its activity, and for every country it is considered a tool that, if used correctly, will enable it to obtain all the advantages it seeks.

¹ The diplomatic envoys, whose primary task is to represent their country, must have immunity to protect them and privileges to facilitate their mission.

1.2 Diplomatic representation and immunity

¹ Abu Haif Ali Sadiq, 2005 Diplomatic Law, Al Maaref Institute, Alexandria, p. 87

It is a given that the state which is a part of public international law, has agencies, bodies and people through which its will is established and expressed. When the state forms foreign relations with other countries, a need arises to regulate the process of forming the state's will on issues present due to its foreign relations and to find ways for expressing this will. Due to the importance and sensitivity of this matter, the head of state and the minister of foreign affairs play the primary role in this regard, in addition to entrusting some of their tasks to the diplomatic or consular missions which are sent to a specific country in order to carry them out. This is known as diplomatic representation, and diplomacy as a political function may take place through permanent bilateral diplomatic missions, or through multilateral diplomatic missions or special missions, thus it is no longer limited to exchanging diplomatic missions between countries, but it also includes diplomatic relations between states and international organizations or international organizations among themselves.²

2. What is diplomatic representation: The emergence of diplomacy in primitive times was the result of the living conditions and the human's need for other humans to find a language of understanding and dialogue in order to fulfill their needs, and also to manage their mutual interests in an atmosphere dominated by conflicts and rivalries, especially towards the foreign groups in their regions and even the tribes near them. Primitive peoples have instinctively realized the feasibility of achieving common interests by resorting to peaceful means represented in negotiations and concluding agreements.³ Thus it was imperative for modern states to send their envoys to represent them in other countries in order to establish communication in an effective and coordinated manner and to achieve their goals and convey their ideas through negotiations that take place between countries by specialized representatives. To elaborate the concept of diplomatic representation, we divided this section into two sub-sections. The first is the concept of diplomatic representation, and the second is a discussion of the definition of diplomatic representation in the law. Dr. Smouhi Foq Al-Adeh defined Diplomacy as: "A set of international rules, norms, procedures, protocols and formalities concerned with regulating relations between the subjects of international law, i.e. states, organizations and diplomatic representatives, and which indicates the extent of their rights and duties, conditions for official practice, and the principles that must be followed in order to implement international provisions and principles, as well as to reconcile the interests of different countries."⁴

2.1.2 Diplomatic mission:

Countries practice their international relations through specialized bodies comprised of a group of people with special qualities which is called diplomatic mission, and the person representing these missions is called the diplomatic envoy. Each country has the freedom to choose and appoint its diplomatic envoys who have the ability and competence to represent it in other

² Dr. Abdul Wahid Muhammad Al-Far - Public International Law - Dar Al-Nahda Al-Arabiya - Cairo -1994 - pg. 249

³ Dr. Alaa Abu Amer, The Diplomatic Position, The Establishment of Its Institutions, Its Rules, and Its Laws, First Edition, Amman, Dar Al-Shorug for Publishing and Distribution, 2001, p. 45

⁴ Smouhi Foq Al-Adeh, 1973 Modern Diplomacy, Dar Al-Nahda for Authorship, Translation and Publishing, Damascus, First Edition, p. 3.

countries, However, the state cannot appoint the head of the diplomatic mission except by meeting a condition, which is to obtain prior approval of the country in which he/ she will be accredited. Moreover, The state has the freedom to determine the number of people who make up the mission according to its interests in other countries. Countries send a group of people to other countries to carry out a mission under the leadership of the head of the mission in the receiving country who manages the members of the diplomatic mission and distributes the work among them. Also he must supervise it without being limited to a specific number of members of the mission. This means that the number of members of the mission must be proportional to the importance of relations between the sending country and the receiving country.⁵

The diplomatic job is one of the important jobs in the state apparatus in which the regulations, instructions and laws pertaining to diplomatic envoys are applied.⁶ The diplomatic representative is an employee like all state employees who is entrusted with representing his/her country abroad and carrying out protocol and diplomatic courtesy required during international events. The status of the diplomatic representative is recognized in the country where he/she is accredited.⁷

The Vienna Convention on Diplomatic Relations of 1961 stipulated in Article 1, paragraph (E), that the term "diplomatic envoy" means the head of a mission or one of its diplomatic staff. As such, a diplomatic envoy is the official representative who translates the trends of his country and its positions for the country to which he is sent. The term "diplomatic envoy" is applied to all individuals who represent their countries before the governments of other countries, and whose names are usually included in the list of envoys in the Ministry of Foreign Affairs of the countries they belong to.⁸ Furthermore, this concept extends to include the Minister Plenipotentiary, the counselor Attaché and the assigned personnel, such as the military attaché, the scientific attaché, the commercial attaché and the media attaché. The family members of the diplomatic envoy who reside with him enjoy the same immunities.

The diplomat must have high competencies and superior capabilities in addition to being characterized by high statesmanship, superior intelligence and wit. He also must be professional, experienced in his work, open to keep pace with the rapid developments in our world in various political, scientific, economic and technical aspects, and to be a successful administrator. Throughout the ages, the attributes and tasks of diplomatic envoys have evolved remarkably, which was reflected in the great growth of diplomatic relations between countries, and consequently imposed an urgent need to lay down specific foundations and very precise regulations that states adhere to when selecting diplomatic envoys.⁹ These regulations included

⁵ Sabarini, Ghazi Hassan 2009, Contemporary Diplomacy, Legal Study, 1st Edition, Amman, Jordan, Dar Al-Thaqafah for Publishing and Distribution, pg. 94.

⁶ Muhammad Fadel Zaki, 1978 Diplomacy between theory and practice, 4th Edition Baghdad, Baghdad University Press, p.111.

⁷ The Diplomatic Position, The Establishment of Its Institutions, Its Rules, and Its Laws, First Edition, Amman, Dar Al-Shorouq for Publishing and Distribution, p. 129.

⁸ See the text of Article 1H of the 1961 Vienna Convention.

⁹ Al-Dakkak, Muhammad Al-Saeed, and Hussein Mustafa Salama, 1993, Public International Law, Al-Dar Al-Jami'yah, Cairo, p. 229.

the envoy's qualifications both scientific and practical that make him/her worthy of representing his/her country in international forums.¹⁰

2.2 Diplomatic immunity

The Vienna Convention of 1961 regulated diplomatic immunities and privileges, and justified their presence that they enable the mission and diplomatic envoys to carry out the tasks entrusted to them in the best way possible, as it affirmed in its preamble that the purpose of granting diplomatic privileges and immunities is not to benefit individuals, but rather to ensure the effective performance of diplomatic missions as a representation of their countries.¹¹ Moreover, these immunities and privileges aim to help diplomatic envoys to perform their duties with ease, peace of mind and freedom, and to ensure that they are not subjected to any coercive measures such as pressure, extortion, arrest, threats, deportation, and bribery, which could endanger their life, freedom, property, and family members. The host country must protect the envoy¹² as well as his residence, and it must also guarantee his freedom of movement within its territory in order to enable him/her to perform his/her official duties. To elaborate diplomatic immunity, this section is divided into two sub-sections, the first addresses what diplomatic immunity is and the second presents the most important immunities and privileges enjoyed by diplomatic envoys.

1.2.2 The legal basis for diplomatic immunity

The Vienna Convention, which was adopted on April 18, 1961 and came into force in 1964 (the number of signatory states is 190 states as of June 2015), regulated the legal basis for diplomatic immunity by clarifying the types of immunities that protect diplomats as follows: Immunity from any form of arrest or detention (Article 29): This means that it is not permissible to detain or arrest a person holding a diplomatic status. Immunity from judicial or legal procedures (Article 31): A diplomat may not be tried by any court in the country in which he/she works. This immunity is effective regardless of the seriousness of the alleged offense (felony or misdemeanor), or the acts committed during the exercise of diplomatic functions. Article 31 also specifies that the diplomatic agent is not obliged to present evidence as a witness. However, the diplomat's state can waive immunity from judiciary, and it is noted that while the principle of immunity today does not extend to the most serious crimes such as crimes against peace, war crimes, crimes against humanity, and genocide, the 1961 Geneva Convention (in addition to the United Nations Convention of 1946 as later clarified), do not support this position and confirm that immunity is general.

The inviolability of residence or property (Article 30): This protection is the same as the one

¹⁰ Sheikh Khaled Hassan 1999, *Diplomacy and Diplomatic Law*, Department of the National Library, Cairo, p. 281

¹¹ The jurist Kayeh believes that judicial immunity is a special treatment granted to some persons, such as diplomats, with the aim of allowing them to freely perform their duties, but with the use of this special treatment, these people elude the penalties of the law. Judicial immunity must be distinguished from the authority of local courts, and Judicial immunity must last as long as the reason for which this immunity was granted lasts, as it is temporary unlike the non-admissibility of cases and the lack of validity of courts, which are permanent. Dr. Hanan Akhamis - *The History of Diplomacy*, chapter Seven - 9-1-2004.
<http://pulpit.alwatanvoice.com/articles/2004/10/09/10975.html>

¹² - The diplomatic envoy - as stipulated in the fifth paragraph of Article 1 of the Vienna Convention on Diplomatic Relations concluded on 4/18/1961 - means the head of the diplomatic mission or one of its diplomatic staff.

provided for the premises of diplomatic missions. Also, inspections and confiscations are prohibited in the diplomat's residence. This inviolability principle applies to the diplomat's documents, correspondences, and property with the term "property" including various objects such as bags, cars, salary, etc., and these privileges are granted to diplomats when they are registered at the host country (that is, the name of the diplomat is enlisted in the list of registered individuals based on which they are practically considered diplomats by the host country).

2.2.2 The end of the diplomatic envoy's duties and immunity: The Vienna Convention of 1961 regulated diplomatic immunities and privileges, and justified the reason for its existence that it was necessary to enable the diplomatic mission and envoys to carry out the tasks entrusted to them in the best way possible, as it affirmed in its preamble that the purpose of granting diplomatic privileges and immunities is not to benefit individuals, but rather to ensure the effective performance of diplomatic missions as a representation of their countries.¹³ The agreement also mentioned in Article 43 cases for terminating the mission of a diplomatic envoy, but it was in general without mentioning all the cases in which this procedure is undertaken. However, the international jurisprudence and custom have introduced some reasons that may lead to the end of the diplomat's mission.¹⁴ The jurists have divided these reasons into reasons related to the diplomat's mission, reasons arising from the will of the country in which the diplomat is assigned, and other general reasons.

Article 39 of the 1961 Vienna Convention defined the time frame for the enjoyment of immunities and privileges by diplomatic envoys:

"Every individual who has the right to privileges and immunities enjoys these privileges and immunities as soon as he/she enters the territories of the receiving state with the intention of reaching his/her place of work - but if he/she is present in the country's territories, then from the time the Ministry of Foreign Affairs is notified of his/her appointment or when another agreed upon ministry is notified.

3.2.2 Types of diplomatic immunities: Based on the customary norms, international courtesies and what was stipulated in the Vienna Convention of 1961, diplomatic immunities and privileges can be classified in terms of their content and their beneficiaries into two categories: immunities and privileges of the diplomatic mission in general, and the immunities and privileges of a diplomatic envoy in particular.

2 Immunities and privileges of the diplomatic mission: One of the most important immunities and privileges enjoyed by diplomatic missions is its right to facilitate the acquisition of the diplomatic mission's headquarters which includes the inviolability of its premises, property, archives, correspondence, and means of transportation, in addition to achieving work-related,

¹³ The jurist Kaych believes that judicial immunity is a special treatment granted to some persons, such as diplomats, with the aim of allowing them to freely perform their duties, but with the use of this special treatment, these people elude the penalties of the law. Judicial immunity must be distinguished from the authority of local courts, and Judicial immunity must last as long as the reason for which this immunity was granted lasts, as it is temporary unlike the non-admissibility of cases and the lack of validity of courts, which are permanent. Dr. Hanan Akhamis - The History of Diplomacy, chapter Seven - 9-1-2004.

<http://pulpit.alwatanvoice.com/articles/2004/10/09/10975.html>

¹⁴ Dr. Ahmed Abu Al-Wafa, previous reference, p. 217

financial, customs and tax facilitations. This was referred to in general terms in Article 25 of the Vienna Convention of 1961 AD as it emphasized the need for the accredited state to grant all the facilities necessary for the diplomatic mission to enable it to perform its duties to the fullest extent, the most important of which is facilitating the possession of the mission headquarters. Article 21 of the 1961 Vienna Convention stipulates that the host country must facilitate the acquisition of real estate necessary for the diplomatic mission, whether within the framework of its national legislation or in any other way, as well as assisting the mission in obtaining adequate housing for its members. In this regard, no specific legal method has been specified for the acquisition of the mission's premise or the housing of its members, whether by ownership, lease, loan, or any other appropriate method.

Noted that Article 12 of the 1961 Vienna Convention stipulated the possibility for the sending country to open offices affiliated to its diplomatic mission outside the location of the mission, but after obtaining the approval of the host country.¹⁵

2.3.2.2 Immunity of the diplomatic envoy: These immunities and privileges are intended for the diplomatic envoys to perform their duties with ease, peace of mind, and freedom, and to ensure that they are not subjected to any coercive measures such as pressure, extortion, arrest, threats, deportation, and bribery, which could endanger their life, freedom, and property.¹⁶ The most important of these immunities and privileges are as follows :

- 1- Respecting and protecting the diplomatic envoy.¹⁷
- 2- Inviolability of the diplomatic envoy's home, property, and archives
- 3- Diplomatic envoy's Freedom of movement and mobility.¹⁸
- 4- Tax and customs exemptions for the diplomatic envoy
- 5- Judicial and Executive Immunity of the Diplomatic Envoy: Articles 31 and 32 of the Vienna Convention of 1961 regulate issues related to the judicial and executive immunity of a diplomatic envoy. This privilege will be further discussed in the second chapter of this study. Article 39 of the Vienna Convention of 1961 stipulated that diplomatic envoys enjoy immunities and privileges as soon as they arrives in the territory of the host country to assume his duties, or once the Ministry of Foreign Affairs in the host country is notified or any other agreed ministry if he is residing in its territory.¹⁹

The envoy's right of to enjoy diplomatic immunities and privileges ends from the moment he/she leaves the territories of the host country or after a reasonable period of time in order to liquidate his/her work and arrange the procedures for his/her final departure.

3.2 The effect of diplomatic immunity on criminal responsibility: The position of the Vienna Convention on Diplomatic Relations of 1961 is clear regarding the criminal protection

¹⁵ - Dr. Maher Malandi - Dr. Majid Al-Hamwi - previous reference - 116.

¹⁶ The diplomatic envoy - as stipulated in the fifth paragraph of Article 1 of the Vienna Convention on Diplomatic Relations concluded on 4/18/1961 - means the head of the diplomatic mission or one of its diplomatic staff.

¹⁷ Dr. Fawy Al Mallah - Security Powers, and Diplomatic Immunities and Privileges – Mansha'et Al Maaref - Alexandria - 1993 - P.142

¹⁸ - Dr. Ali Hussain Al-Shami - previous reference - pg. 273.

¹⁹ Article 39 of the 1961 Vienna Convention on International Relations.

(immunity) that diplomats enjoy, because Article 11 of it stipulates that the immunity of diplomats in criminal matters is absolute and is not subject to any discussion or interpretation . It is noteworthy that the fact that the diplomat is not subject to the criminal justice of the host country does not mean that he is not held accountable for any crimes committed , as the trial is something and his/her responsibility is something else. The host country in this case may ask the sending state to prosecute its envoy and impose a punishment. To elaborate the effect of diplomatic immunity on criminal responsibility, This chapter was divided into two sections, the first discusses the criminal responsibility of diplomatic envoys, and the second addresses the judicial immunity of diplomatic envoys.

1.3.2 Criminal responsibility of the diplomatic envoy: The penal protection of diplomatic envoys has become an essential element in the exercise of the diplomatic function, and it has occupied a prominent position in the diplomatic representation system, as it has constituted an appropriate environment for the success of their duties in the country to which they were sent. In order to unify the penal protection of diplomatic envoys, the international community has resorted to establishing international treaties that guarantee the stability and unification of the international immunity of the diplomatic envoy among countries, and the most important of these agreements is the Vienna Convention of 1961 in addition to other agreements for this purpose.

2.3.2 The legal basis for the criminal immunity of a diplomatic envoy

The criminal law, with its two parts, the mandate and penalty, applies with its orders and prohibitions to all individuals residing in the state without exception on the basis of equality before the criminal law. This entails that all individuals present in the territory of the state, whether citizens or foreigners residing in the state or visiting it, must comply to the criminal law and its jurisdiction. This is the general principle. However, this principle is not absolute, as there are exceptions to it represented in the immunity of some individuals for political and functional considerations from being subject to the provisions of the criminal law. These exceptions are explicitly stipulated either in international, customary or domestic law and these individuals enjoying immunity are members of the corps .²⁰Moreover, these members have general immunity that covers all acts committed by them, whether they are related to their official work or not, that is, whatever the type of crime and, regardless whether the victim is a regular person from the host country, an employee , a foreigner, or someone that enjoys immunity, such as a diplomatic envoy, minister, or deputy in the National Assembly, immunity is applicable.²¹

3.3.2 Substantive and procedural protections for the diplomatic envoy: the inviolability of diplomats is intended to protect them against assault and to preserve their dignity, whether the source of any assault is ordinary citizens of the state or its employees. Hence, the host country has a duty to protect diplomats, prevent attacks on them, and impose harsh punishments on whoever commits assaults. The inviolability of the person remains even in the event that the

²⁰ Dr. Rami Suleiman Abd al-Rahman 2002, , The Entry Into Force of the Criminal Law in terms of location, 1st Edition, Dar (Al-Israa, Jordan, p. 114

²¹ Dr. Suhail Hussein Al-Fatlawi, The Judicial Immunity of Diplomatic Envoys in Iraq, p. 329

diplomat commits crimes, and therefore he/she may not be arrested or detained because these measures constitute a serious breach of inviolability. First: minor crimes and serious crimes:

The majority of international law jurists acknowledge the necessity of criminal protection for diplomatic envoys, regardless of the degree of the crime committed by them, depending on the fact that the judiciary of their country will hold them accountable for their actions in the host country. However, to what extent does the diplomatic immunity of the diplomatic envoys in the host country secure protection in case he commits a crime, whether this crime is a minor crime or a serious one?

Second: Diplomatic immunity is an impunity

Most of the constitutions in the world stipulate the state's right to punishment in addition to its right to criminalize, in order to enable it to respond to attacks threatening the safety of its members, regardless of the status of the perpetrator. The right of the state to criminalize means the power possessed by the state, according to which it determines what acts are considered a crime, while its right to punishment means that it has the right to track down, arrest and bring the criminal to trial before the regional judiciary to be punished for the offense he/she has committed, in addition to having judiciary implement sanctions decided by its courts.

However, there are legal excuses, when available, that lead to exemption from punishment despite the commission of the crime with all its elements, which are referred to as impunity.²²

2 4.3. Criminal procedural protection for diplomatic envoys

The Vienna Convention on Diplomatic Relations has settled on the inadmissibility of subjecting diplomats to the jurisdiction of the host country in the event that they commit crimes of any kind, and that the actions under taken by host countries in such cases must not exceed expulsion. The following explains the procedural criminal protection of diplomatic envoys and the effect of diplomatic immunity on it.

5.3.2 Judicial immunity of diplomatic envoys: The importance of judicial immunity for diplomatic envoys is highlighted by the fact that it works to provide an atmosphere of freedom to act with ease away from the interference of the country to which he is delegated. The international custom has settled on granting envoys that immunity which was also confirmed by international agreements, but this capacity has been exploited in some cases to act with impunity, as unfortunately some countries gave some of the perpetrators of crimes a diplomatic status to prevent them from appearing before the courts. However, the international community noted that, and introduced Article 27 of the Statute of the International Criminal Court, according to which, the official capacity is irrelevant when subject to the jurisdiction of the court, and thus the diplomatic capacity no longer prevented being subject to the jurisdiction of the International Criminal Court if a diplomatic envoy commits any of the crimes mentioned in the Statute of the International Criminal Court.

Moreover, Since international law has recognized the principle of the judicial immunity enjoyed by diplomatic envoys, international law jurists have made their own efforts to search for a justification for resolving the contradiction between the state's sovereignty in imposing

²² Abd al-Salam al-Tuwayji 1971, *The Barriers of Criminal Responsibility*, Institute for Arab Research and Studies, Egypt, p. 54.

the jurisdiction of its courts on all individuals residing in its territory and the principle of judicial immunity, which is considered an exception to the state's jurisdiction. Several theories in this regard were presented, including:

First: the absence of territorial existence theory

The theory of the absence of territorial existence or territorial extension (outside the region) is one of the theories mentioned by former international law jurists that states that jurisdiction of a state applies to all its citizens, whether they reside in its territory or abroad ²³

Adopting this theory broadens the jurisdiction of the sending country's court to include crimes committed within the diplomatic mission and make diplomatic envoys act according to the laws of their country and not the laws of the host country. It is noted that if an act is permitted according to the laws of the envoy's country, but violates the laws of the host country in a way the latter cannot prevent him from such act because it is not considered a violation of the laws of his/her country. This contradicts what has been worked on in different countries and what was confirmed by the Vienna Convention on Diplomatic Relations of 1961 in Article 41, stipulating that :

((Without prejudice to any immunities or privileges assigned to them, individuals who benefit from these immunities and privileges are obliged to respect the laws and regulations of the country in which they are accredited.

Second: The theory of representativeness

This theory considers that a state and the head of state enjoy judicial immunity in foreign courts, and since diplomatic envoys are considered representatives of their state and head of state, they derive judicial immunity from them. In fact, the exemption from the jurisdiction of the host state is an exemption for the envoy's state and head of state according to the rules of international law.²⁴

However, this theory has been criticized, because the diplomatic envoy does not enjoy the legal status enjoyed by the president of state, as some constitutions stipulate that the head of state is infallible, and therefore it is not permissible to hold him/her accountable for the acts he/she committed. In addition, this approach leads to narrowing the scope of judicial immunity enjoyed by diplomatic envoys, because the head of state does not enjoy the judicial immunity enjoyed by diplomatic envoys.²⁵

Third: The theory of functional necessity

This theory claims that the basis for granting diplomatic envoys immunities and diplomatic privileges lies in the fact that they are a vital necessity due to the working conditions and the envoys need to carry out their work tasks in the territory of the country to which they are sent and within the territory of a third country that envoys may need to pass through according to their work conditions.

The idea of judicial immunity was introduced in order to properly exercise the affairs of the diplomatic post with the aim of consolidating international relations, and this requires that

²³ Dr. Salad al-Din Aamer, previous source, p. 757.

²⁴ Dr. Muhammad Abdul Aziz Sarhan, Law on Diplomatic and Consular Relations, Ain Shams Press, Cairo, 1974, p. 17.

²⁵ Dr. Suhail Al-Fatlawi, Diplomatic Law, previous reference, p. 259.

diplomatic envoys enjoy complete independence and is not being subject to the national jurisdiction of the host state).²⁶

Fourth: The position of the Vienna Convention on the basis of the diplomatic immunity of diplomatic envoys

The following was stated in the preamble to the Vienna Convention on Diplomatic Relations of 1961 (The purposes of these privileges and immunities are not to benefit individuals but to ensure the effective performance of the diplomatic missions as representatives of their states) . Views differed regarding the interpretation of the above text, but the most prominent view claimed that judicial immunity derives its basis from international law itself, as the provisions of the convention were formulated in peremptory terms and denied states of freedom of discretion.

4.2 Immunity of diplomatic envoys before the International Criminal Court

The international community and many relevant international conventions established that diplomatic envoys enjoy judicial immunity in law, and they may not be subjected to any form of arrest or detention, as was previously explained.²⁷ However, after the establishment of the International Criminal Court in 1998, diplomatic envoys no longer enjoyed that immunity before The International Criminal Court with regard to the crimes enlisted in its statute based on Article 27 in the second paragraph therein that states (Provided that immunities and special procedural rules that may be related to the official status of a person, whether in national or international law, do not prevent the court from exercising its jurisdiction over this person). What are the procedures of the criminal court in this matter and how did it deal with the immunity of diplomatic envoys?

2 Authorized parties to initiate a lawsuit against a diplomatic envoy

Diplomat enjoy immunity that exempts them from appearing before the courts, but there is an exception which makes diplomatic envoys subject to the jurisdiction of the International Criminal Court, and that is in the case of committing the crimes stipulated in the statute of the court. Not every crime committed by a diplomat is subject to the jurisdiction of the International Criminal Court, only the ones mentioned in Article 5, which are crimes against humanity, the crime of genocide, aggression, and war crimes, thus The Rome Statute of the International Criminal Court had specified the bodies that have the right to initiate a lawsuit if a diplomat commits a crime, namely:

First: the countries

The state party to the statute has the right to refer to the public prosecutor in any case in which there appears to be one or more committed crimes within the jurisdiction of the court or to have it investigate the case with the aim of deciding whether to indict one or more specific persons for committing crimes. Each case is considered as much as possible according to the relevant

²⁶ Dr. Suhail Al-Fatlawi, Diplomatic Law, previous reference, p. 259

²⁷ See the text of Article 29, 31 of the Vienna Convention on Diplomatic Relations of 1961. See the text of M / 29/31 of the 1969 Special Missions conventions. See the text of Article 28/30 of the Vienna Convention for the Representation of States in their Relations with International Organizations that have an International Character, 1975

circumstances and is accompanied by supporting documents related to the case.²⁸ If the country of the diplomatic envoy which is a party to the court's statute was the one that notified the court of committed crimes under its jurisdiction and one of its diplomats was involved, then the state must hand him/her over in case he/she was residing there, but if he/she was in the host state, then it must waive his immunity in order for the host state to hand him/her over.

However, if the country in which the envoy is accredited is the one that requested the court to prosecute the diplomat for committing the crimes listed within the jurisdiction of the International Criminal Court, then in this case it cannot hand him/her over to the court unless his/her state waives his/her immunity²⁹

Second: Public Prosecution

The public prosecutor may initiate investigations on his own on the basis of information related to crimes within the jurisdiction of the court under Article 15 of the Statute of the International Criminal Court. As the public prosecutor analyzes the seriousness of the information received he/she may, for this purpose, seek additional information from states, United Nations agencies, intergovernmental and non-governmental organizations, or any other reliable sources deemed appropriate, with the possibility of receiving written or oral testimonies at the seat of the court.³⁰ In addition, the public prosecutor notifies the referrals either through a state party to the Rome Statute or the Security Council under Chapter VII of the Charter in any case in which it appears that one or more crimes enlisted within the jurisdiction of the court have been committed.³¹ If the Public Prosecutor concludes that there is a reasonable basis to proceed with the investigation, he submits to the Pre-Trial Chamber a request for permission to conduct an investigation accompanied by any supporting materials he/she has obtained. Victims may conduct pleadings with the Pre-Trial Chamber in accordance with the procedural rules and the rules of evidence and if the Pre-Trial Chamber, after studying the request and the supporting materials, considers that there is a reasonable basis for the initiation of the investigation and that the case appears to fall within the jurisdiction of the court, it authorizes the commencement of the investigation, without prejudice to what the court decides later regarding the jurisdiction. If the Pre-Trial Chamber refuses to authorize the investigation, this does not preclude the prosecutor from submitting a subsequent request based on new facts or evidence relating to the same case.

If, after the initial study, the public prosecutor concludes that the information provided does not constitute a reasonable basis for conducting the investigation, he/she must inform the information providers about it, and this does not prevent the public prosecutor from considering other information presented to him/her about the same case in light of new facts or evidence.³²

Third: the UN Security Council

The Security Council may refer to the public prosecutor any case in which it appears that one

²⁸ C / 14 Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998.

²⁹ Dr. Suhail Al-Fatlawi, Diplomatic Immunity, Previous Reference, pg. 363

³⁰ See Article 15, paragraph 1, 2 of the Statute of the International Criminal Court

³¹ Dr. Baraa Munther Kamal Abd al-Latif 2008, The Judicial System of the International Criminal Court, Dar Al-Hamed for Publishing and Distribution, Edirne, 1st Edition, pp. 106-107.

³² See Paragraph (3, 4, and 5) of Article 15 of the Statute of the International Criminal Court.

or more crimes within the jurisdiction of the court have been committed. Thus when the Security Council decides to refer a case, the Secretary-General of the United Nations immediately refers the Security Council's written decision to the public prosecutor, accompanied by documents and other materials. Which is closely related to the decision of the Security Council and in return, the information provided by the court is transmitted to the Security Council through the Secretary-General.

Not only that, but the statute gave the Security Council a privilege that differs in its content from the authority of initiating a lawsuit by one of the parties and or by the public prosecutor. As the second paragraph of Article (12) of the statute stated that the Security Council has the right to refer the case to the court, even if it was an international crime, and none of the concerned countries accepted its jurisdiction, then it stipulated the exemption of the Security Council's referrals from the requirements of the consensual rule (which requires approval of the concerned countries to bring the case before the International Criminal Court)³³ On the other hand, the Security Council, in accordance with Article 16 of the Statute of the International Criminal Court, has the right to take a decision by which it is recommended not to initiate or stop the investigation and prosecution at any stage of the investigation and trial. This authority granted to the Security Council constitutes a limitation that restricts the court's continuation to exercise its jurisdiction in any case, at any stage, and for a period of one year, renewable for unlimited times.³⁴

2 The judicial immunity of diplomatic envoys

International custom, most of the domestic laws of states, governmental practices and international conventions recognized this immunity. Article (12) of the Institute of International Law of 1895 stipulated the criminal immunity of diplomatic envoys and their family members, but it affirmed that they are subject to the criminal law of their country in the event that they commits a felony in the host state. Article (19) of the Havana Convention of 1928 stipulated that (Diplomatic employees are completely exempted from being subject to civil or criminal jurisdiction in the host state, and they may not be prosecuted or tried except by the courts of their own state).

Article (16) of the Regulation on Diplomatic Immunities and Privileges approved by the Cambridge meeting in 1895 stipulated that (Judicial immunity shall continue even in the event of a serious breach of public order and public security, as well as in the event that a felony is committed against state security without undermining the right of the host state to take the preventive measures it deems appropriate. Article (11) of the statute approved by the Institute of International Law of 1929 and Article (19) of the Harvard Rights Institute project of 1932 stipulated the same thing.

Finally, Article (31) of the Vienna Convention on Diplomatic Relations of 1961 stipulated that (diplomatic envoys enjoy judicial immunity with regard to the criminal jurisdiction of the host state).³⁵

³³ Dr. Baraa Munther Kamal, previous reference, pp. 136-138.

³⁴ Baraa Munther Kamal, previous source., Pp. 138-145.

³⁵ Dr.. Ghazi Hassan Sabarini, previous source, p. 164.

3- Conclusion, Findings and Recommendations:

1.3 Conclusion

Immunity of diplomatic envoys includes exemption from the host state's criminal jurisdiction. In the event that a diplomatic envoy commits a crime in the country he/she is sent to, international custom requires that the local state summons him and impose the appropriate punishment on him/her, as his immunity prevents the host country from arresting and trying him.

After conducting this research on the influence of diplomatic envoys' immunity on criminal responsibility, shedding light on the details of this impunity and its concept, and presenting a deep analysis of the substance of this immunity, a discussion of the duties of the diplomat, and the role of the Vienna Convention for International Relations in organizing the issue of the penal protection of diplomatic envoys, we concluded a number of results and recommendations as follows:

Results

- 1) The immunity of members of the diplomatic corps is established according to international rules, that is, international conventions.
- 2) The absence of an independent international mechanism to prosecute and hold accountable those who violate the legal rules governing the protection of diplomatic and consular missions and consular and diplomatic envoys.
- 3) The judicial immunity enjoyed by diplomatic envoys is not absolute, but rather a temporary exemption from the regional judiciary in the country to which they were sent, because the diplomats remain subject to the law and jurisdiction of their country, and it can be so. Moreover, they might be interrogated before its courts about what they refused to inform the state where they were delegated due to judicial immunity.
- 4) There is an existing contradiction between the state's sovereignty in imposing the jurisdiction of its courts over all individuals residing in its territory and the principle of judicial immunity, which is considered an exception from the state's jurisdiction.
- 5) Diplomatic immunities and privileges are divided in terms of the elements they cover and the beneficiaries thereof into two categories: the immunities and privileges of the diplomatic mission in general, and the immunities and privileges of the diplomatic envoys in particular.
- 6) If the penal code of the country in which the diplomatic envoy is accredited stipulates that he/she is not subject to criminal jurisdiction regarding the crimes he/she commits in the host country because of his/her diplomatic capacity, it does not exempt him/her from being subjected to the jurisdiction of the International Criminal Court.
- 7) Diplomats are subject to the jurisdiction of the International Criminal Court in the event that they commit crimes enlisted in the statute of the court. However, not every crime committed by a diplomat subjects him/her to the jurisdiction of the International Criminal Court, rather only the crimes mentioned in Article 5, which are crimes against humanity, genocide, aggression and war crimes.
- 8) Diplomatic immunities and privileges are not granted to diplomatic envoys in a personal

capacity, rather in a functional capacity, in order to facilitate the performance of their duties. If they lose their job status, they will no longer enjoy diplomatic immunities and privileges.

9) The Rome Statute stipulates that diplomatic envoys do not enjoy diplomatic immunity in the jurisdiction of the International Criminal Court.

10) Diplomatic envoys enjoyment of judicial and penal immunity leads in most cases to the loss of the rights in compensation for those affected by the actions of these envoys.

Recommendations

1) There is a need to establish a permanent diplomatic criminal court to try diplomats who commit serious crimes, especially those related to war crimes.

2) To Simplify procedures to enable diplomatic envoys to testify before the court, especially in felonies, if they express their desire to do so.

3) To exclude from the scope of diplomatic immunity serious crimes that threaten the political, economic or social system of the state which endanger the lives of citizens.

4) That the Vienna Convention on Diplomatic Relations includes a text requiring the sending state to send a (judicial memorandum) to the host state after the trial has taken place to state that the envoy has been tried in its national courts and a final judgment has been issued against him, with a certified copy of the verdict attached.

5) To enact international legislation confirming that diplomatic envoys will continue to enjoy penal and judicial immunity during their travel by land and transit to another country, and that these immunities are not subject to the transit state.

6) The phenomenon of abuse of criminal immunity by diplomatic envoys and their lack of respect for the laws of the host countries has become widespread, which made it necessary to find ways to achieve a balance between the two ideas of impunity and respect for security in the country to which diplomats are sent.

7) To amend the text of Article 29 of the Vienna Convention on International Relations, which allows the authorities of the host country to arrest diplomatic envoys, even temporarily, for the purpose of investigating or interrogating them regarding the crime they committed.

8) To establish an international diplomatic criminal court specialized in examining disputes in which one of the parties is a diplomatic envoy, or to amend the jurisdiction rules of the International Criminal Court.

9) To amend Article 34 of the statute of the International Court of Justice to include in its jurisdiction the serious violations committed by diplomats in the host countries.

10) To tighten control over diplomatic envoys, especially in cases when they are outside official duties.

References

Abu Amer Alaa 2001 The diplomatic position, the establishment of its institutions, its rules, and its laws, 1st edition, Amman, Jordan, Dar Al-Shorouk for Publishing and Distribution.

Abu Haif Ali Sadiq, 2005 Diplomatic law, Manch'et Al Maarif, Alexandria.

Baraa Munther Kamal Abd al-Latif 2008, The Judicial System of the International Criminal Court, Dar Al-Hamid for Publishing and Distribution, Jordan, 1st Edition. - 107

Rami Suleiman Abd al-Rahman 2002, The Entry Into Force of the Criminal Law in terms of location, 1st floor, Dar Al-Israa, Jordan.

Suhail Hussein Al-Fatlawi, The Judicial Immunity of Diplomatic Envoys in Iraq, p. 329

Dakkak, Muhammad Al-Saeed, and Hussein Mustafa Salama, 1993, Public International Law, Al-Dar Al-Jami'yah, Cairo.

Smouhi Foq Al-Adeh, 1973 Modern Diplomacy, Dar Al-Nahda for Authorship, Translation and Publishing, Damascus, First Edition.

Sheikh Khaled Hassan 1999 Diplomacy and diplomatic law, Department of the National Library, Cairo.

Sabarini, Ghazi Hassan 2009, Contemporary Diplomacy, Legal Study, 1st Edition, Amman, Jordan, Dar Al Thaqafa for Publishing and Distribution.

Abd al-Salam al-Tuwayji 1971, Barriers To Criminal Responsibility, Institute for Arab Research and Studies, Egypt.

Abdul Wahid Muhammad Al-Far - International Public Law - Dar Al-Nahda Al-Arabiya - Cairo -1994.

Abu Amer Alaa 2001 The diplomatic position, the establishment of its institutions, its rules, and its laws, 1st edition, Amman, Jordan, Dar Al-Shorouk for Publishing and Distribution.

Fawy Al Mallah - Security Powers, Diplomatic Immunities and Privileges - Al Maaref Establishment - Alexandria - 1993.

Judge Atef Fahd Al-Magharez, a previous source, pp. 45-55, Dr. Suhail Al-Fatlawi, diplomatic immunity.

Muhammad Abdul Aziz Sarhan, Law on Diplomatic and Consular Relations, Ain Shams Press, Cairo, 1974.

Muhammad Fadel Zaki, 1978 Diplomacy between theory and practice, 4th Edition Baghdad, University of Baghdad Press.

Master and PhD Theses

1. Ibrahim Al-Karaf 1994 Diplomats and international workers immunity - PhD Thesis - Damascus University.

2. Abd al-Rahman Lahrash, 2005, Abuse of diplomatic immunity in light of the 1961 Vienna Convention, PhD thesis, Faculty of Law, University of Annaba.

Laws and conventions

- The Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998.

The Special Missions Convention of 1969.

Vienna Convention on Diplomatic Relations of 1961.

Regulation of the Institute of International Law of 1895.

The Jordanian diplomatic corps regulation of 1993 and its amendments.

Havana convention of 1928.