Establishing a Case for Immunity from Jurisdiction

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States like its citizens and residents do not exist in silos. International relations catapulted by globalisation have created an increasingly interconnected global village. Irrespective of the populist backlash on globalisation, the importance of international relations has not vitiated, as a matter of fact, it has become even more relevant. However, one must understand the critical nuances of the international legal regime and especially the law which governs the actors/ agents of nations. States' interaction is a double-edged sword. They seek the promotion of exports and also public relations (less euphemistically known as propaganda) while meandering over what must be done and what cannot be done. Since time immemorial, diplomats and other envoys have needed privileges and immunities for the effective performance of their functions in the receiving state. The preamble to the Vienna Convention recites that 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states'.

Centralization and De-Centralization of International Law

Law on state immunity highlights the legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction (the legislative, judicial and administrative powers) of another state. Domestic legislation on state immunity form customary law and are sometimes incorporated in international treaties like the 1972 European Convention on State Immunity- an homage to the centralisation of international law. In extension, centralization of such international law gained traction in 1978. The British Parliament passed the State Immunity Act in 1978, Section 3 of which provides that foreign states do not enjoy immunity in respect of their commercial transactions. Other common law countries followed suit.

International instruments, such as the European Convention on State Immunity 1972, which states have been reluctant to ratify or the Montreal Draft Convention on State Immunity equally start from the principle of qualified immunity. By 1992, the consensus in the International Law Commission of the United Nations on its Draft Articles on the Jurisdictional Immunities of States and Their Property was also developing in favour of the restrictive theory of immunity.

The prevailing trend nowadays, at least in the practice of many states, is to adopt a doctrine of qualified immunity—that is, they grant immunity to foreign states only in respect of their governmental acts (acta iure imperii), not in respect of their commercial acts (acta iure gestionis). However, a universally accepted classification test to determine the distinction between governmental and commercial acts is not always precise. This in turn, has made the law on state

immunity complicated. If the area in question concerns the exercise of ‘classical’ state functions, such as the use of the army in an armed conflict, the matter is clear.
Determination of Jurisdiction

In 1989, in Argentine Republic v. Amerada Hess Shipping Corp, for example, the US Supreme Court found no difficulty in granting immunity to Argentina against a claim filed by the owner of a tanker that had been attacked and damaged on the high seas by the Argentinian air force in the Falklands war. The Court also rejected the contention raised by the claimant against sovereign immunity that the Argentinian act had been a violation of international law.

Where no universally accepted classification test to determine the distinction between governmental and commercial acts remains, some states base the distinction between acts de jure imperii and acta de jure gestionis, on the ‘nature’ of the act (objective test). Others base it on the purpose of the act (subjective test); for instance, the purchase of military equipment for the army would be regarded as a commercial act. Under the first test and as a governmental act under the second test. It may seem that such borderline cases are exceptional and that they are easier to settle under the current trend to look at the ‘nature’ of the activity (objective test).

There are various exceptions to the immunity conferred by the act of state doctrine; for instance, it cannot be pleaded as a defence to charges of war crimes, crimes against peace, or crimes against humanity. In the Rainbow Warrior case, for example, there was no commission of crimes of this nature by the two French agents. The incident rather falls within the category of cases in which immunity from local jurisdiction (in this case that of New Zealand) over official agents entering another country illegally with the official purpose of committing unlawful acts cannot be established. Thus, the French government made no formal immunity claim for the two French agents in the New Zealand proceedings, even after French state responsibility for the attack was admitted.

Diplomatic immunity

The rules of diplomatic immunity are ‘essential for the maintenance of relations between states and are accepted throughout the world by nations of all creeds, cultures and political complexions’. Major breaches of these rules, such as Iran’s behaviour towards the United States diplomats who were held as hostages in 1979–81, while extremely rare, receive disproportionate publicity because of that rarity.

Article 29 of the Vienna Convention provides that diplomats shall not be liable to any form of arrest or detention, and that appropriate steps must be taken to protect them from attack. Terrorists often attack diplomats, but receiving states almost always do their best to protect diplomats in such circumstances. The approval is given by Iran to the ‘militants’ who seized

United States diplomats in Iran in November 1979 were correctly described by the International Court of Justice as 'unique', and was condemned unanimously by the Court and the Security Council. Iran attempted to excuse its actions claiming that the United States and its diplomats had acted unlawfully towards Iran (for example, by intervening in Iran's internal affairs, starting from the CIA-supported overthrow of the government of Mossadegh in 1951 to protect American and British oil interests), but the Court held that these charges, even if they had been proved, would not have justified Iran's violation of diplomatic immunity; the obligation to respect the rules of diplomatic immunity is an absolute obligation which must be obeyed in all circumstances.

Conclusion

The question of immunity and jurisdiction leaves a gaping hole in the practice of international relations and allows circumvention from jurisdiction. Immunity is used as a veil or a shield to hide perpetrators and criminals from jurisdiction. However, Courts and Tribunals have established crafty mechanisms to penalize and establish a system of accountability. Leaders of such practice are listed and discussed above. International conventions and treaties too have tried to establish a regime of international law and practice. However, the requirement of immunity must not be undermined as it allows diplomats and head of missions to function autonomously.