

## **A HISTORY OF DIPLOMATIC IMMUNITY AND THE DEVELOPMENT OF INTERNATIONAL ORGANISATION IMMUNITY**

According to Ross, the concept of diplomatic immunity is based on three theories: personal representation, the theory of extraterritoriality, and the theory of functional necessity.<sup>1</sup> These theories each have their roots in the history of both legal and political thought, as well as in actual diplomatic practice among nations. An understanding of the historical development of these theories may help to highlight some of the contemporary issues relating to diplomatic immunity.

### **Early custom**

Historians recognize that the practice of immunity was common to a wide range of states in ancient times, from classical Greece and Rome to both the Near and Far East, including the ancient Babylonians, Egyptians, Israelites, Indians and Chinese.<sup>2</sup> Initially, at least, the primary concern was the personal freedom and safety of diplomatic envoys. These conditions were seen to be imperative to smooth diplomatic relations and open communications between states. Diplomatic travel needed to be free of the many basic dangers that could present themselves, from attacks by hostile forces to problems posed by difficult terrain. The inviolability of the diplomat, therefore, became a universal if largely customary rule.

An important issue is the extent to which host nations were responsible for the safety of diplomats. Was it a question of a simple respect for the freedom of the diplomat or were there obligations to guarantee their safety? While practice varied, it is clear that the principle of inviolability functioned as a kind of safeguard mechanism, the breach of which might have dreadful consequences and clear implications for state relations. For example, while it was custom in ancient Mesopotamia for a host state to provide troops to escort foreign envoys, the ruler Hammurabi<sup>3</sup> once refused a return escort upon being dissatisfied with the message brought by the envoy of Elam. This was seen to be 'tantamount to breaking off relations'<sup>4</sup> with Elam. Later, Egyptians and the Persians, on at least one occasion, resorted to killing envoys as negotiations for peace failed.<sup>5</sup> These were, however, aberrations. Sources have shown that the Israelites were conscious of the benefits of the respectful treatment of envoys. Most notably in 491 BCE King Darius of Persia refused to have two Spartan nobles killed as vengeance for the murder of two of his own envoys. He said that he would not 'make havoc of all human law' by harming an envoy.<sup>6</sup>

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<sup>1</sup> Mitchell S. Ross, "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities", *International Law and Policy* 173, 1989, p177.

<sup>2</sup> David J. Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001, pp106ff; and Ross, Op. Cit., p176.

<sup>3</sup> Babylonian lawgiver and ruler; king of Babylon 1792b-1750b \_18XXb-1750b.

<sup>4</sup> Munn-Rankin, in Bederman, Op. Cit., p107

<sup>5</sup> Bederman, Op. Cit., p108.

<sup>6</sup> In Herodotus, in Bederman, Op. Cit., p113.

## Diplomatic inviolability and early state sovereignty

One reason for this may have been that diplomatic inviolability implied that the envoy was in some way the personal representation of the state and for this reason enjoyed a very special status, at home as well as abroad. The ancient Greeks invested such importance in the office of the herald that it was considered in some way sacred. Homer refers to ambassadors as 'messengers of Zeus and men', Eustathius considered them a medium between humans and the divine and Xenophon said that ambassadors were 'worthy of all honor'.<sup>7</sup> Equally, in the Roman context, envoys were considered to personify the state and were to be accorded *hospitium*, or host-guest relationship. Cicero stated that the rights of ambassadors were 'fortified with the protection of men and also entrenched around by Divine Law' and that ambassadors should 'be esteemed so sacred and venerable as to go unharmed, not only as between allies, but also when confronted with the weapons of the enemy'.<sup>8</sup>

This is not to say the position of the diplomat was not abused or disrespected. But the breach of customary law and the often disastrous consequences which followed demonstrates the importance of diplomatic inviolability for early states. On the whole, 'ambassadors were not automatically inviolable...they rarely came to harm, and when they did', as Mosely states, 'it was something rather shocking'.<sup>9</sup> Bederman makes the argument that this respect for the inviolability of the ambassador might have led naturally to the extension of immunities.

How, then, did these immunities develop over the coming centuries? It is important to note at this stage that the development of the doctrine of diplomatic immunity among Western states was fundamentally affected by the Roman civil law legacy.

## Roman Civil Law

The immunity of envoys under Roman secular law reinforced the sacred nature of the representatives of the state. In the late republic, the legate became the main representative of the Senate. Again, this was based on *ius gentium*, a loosely defined law of nations. But the implications were clear. Any legate, whether travelling to the provinces or in a foreign land was considered inviolable.

The legal code, the *lex Julia de vi publica*, for example, and later the *Digest*, made these provisions explicit. Importantly, however, they were unclear on whether the same sanctions would apply to foreign ambassadors and provincial representatives.<sup>10</sup> Adding to this uncertainty was debate surrounding the responsibilities of the legate himself. A legate was, for example, liable to a certain extent for property acquired during the

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<sup>7</sup> Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity', *The American Journal of International Law*, Vol. 31, No. 3 (Jul., 1937), pp449-465.

<sup>8</sup> In Ogdon, op. cit., p451.

<sup>9</sup> Mosely, in Bederman, Op. Cit., p110.

<sup>10</sup> Frey and Frey, p45.

fulfilment of his functions, although even this open to debate.<sup>11</sup> Thus, the codes, by their very vagueness, laid some of the foundations for the limited immunity applied to modern diplomats.

### Medieval and Renaissance Theories of Diplomatic Immunity

Throughout the early medieval period, the powers of 'sovereigns' or magnates were uncertain and ill-defined. The same cannot be said of their envoys. Envoys continued to enjoy many of the customary privileges of their predecessors. Envoys of both secular powers and the Church were accounted for in varying ways by Canon Law, the *leges barbarorum* and other vestiges of the Roman legal tradition. Much was borrowed and adapted but the overall picture is of the sacrosanctity of the envoy.

Papal envoys, or *nuncii*, enjoyed a special protection and a sacred status as representatives of the pope.<sup>12</sup> On their various journeys, local Churches were expected to provide for them as well as their retinues. From the eleventh century, all officers of the Church were expected to take an oath to protect papal envoys.<sup>13</sup> Barbarian codes such as the Salic law set a normal man's *weregild*, or a person's price or worth, at 200 *soledis*; the *weregild* for an ambassador was 1,800! An old Burgundian law provided that an envoy must be granted free lodging, given animals as required and even entertained overnight!<sup>14</sup>

That such provisions were upheld (or at least encouraged) is characteristic of the generally held principle that a man was 'answerable to his own law'. The political instability of the time, with shifting centres of power and only very hazy concepts of territoriality necessitated such flexibility. An extreme case is that of Richard the Lion-Heart, travelling through France to a Crusade. He had thieves and robbers punished along the way. The king of France, though present, did not object.<sup>15</sup>

It was not until the Renaissance of the fifteenth and sixteenth centuries that more modern models of diplomacy emerged. This period saw attempts to justify and rationalise diplomatic immunities. With the revival of interest in classical culture from the twelfth century onwards, it is not surprising that this was mainly achieved by reference to Roman sources. The doctrinal effect was to reinforce the idea that immunity was an expression of the natural law.

Francisco de Vitoria, writing in 1532, stated that the ambassador was considered to come under the international law dictated by common consensus.<sup>16</sup> Hugo Grotius, writing in

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<sup>11</sup> Frey and Frey, p46. A judgment could deprive a legate of one of his slaves but not all of them. Alternatively, the legate could have a case referred to his home province under the *ius revocandi domum* (only if the contract had been concluded before he undertook his duties). The jurist Julianus argued that any restriction on the activities of the legate would distract him from his duties.

<sup>12</sup> Frey and Frey, p78.

<sup>13</sup> Frey and Frey, p79.

<sup>14</sup> Frey and Frey, 91

<sup>15</sup> See Frey and Frey p93.

<sup>16</sup> In Ogdon, op.cit., p455.

seventeenth century and quoting from Livy and Sallust, concluded that 'universal peril is sufficient to establish the justice and advantage of the universal law' and that 'the security of ambassadors outweighs any advantage which accrues from a punishment.'<sup>17</sup> Similar arguments were made by Samuel von Pufendorf (1632-94) the diplomat was a principal component of the law of nations since his role was '*to win or preserve peace*', a common and natural goal.<sup>18</sup>

These general principles were supported by the attitudes of Pierre Ayrault, a sixteenth century judge of the criminal court in Angers. He upheld in a practical sense the basic premise of the inviolability of the diplomat.<sup>19</sup> But Ayrault had also *extended* the legal concept of inviolability by developing the theory of 'extraterritoriality'. Ayrault argued that the diplomat should be accorded complete immunities because he was still legally present in his own land and therefore immune from the jurisdiction of his host.<sup>20</sup> This doctrine, or 'fiction' as it came to be known, had its origins in ideas of the diplomat as representative of the sacrosanct sovereign.

Yet jurists and politicians alike came up against uncertainty in this area. Some have argued that this was a matter of interpretation; others that diplomatic privilege naturally came second to political pragmatism. Indeed, the growing importance of the state and its claim to exclusive jurisdiction tended to restrict diplomatic immunities rather than enhance them, despite the writings of legal theorists.

According to Ogdon, this shift was due to a fundamental, perhaps intentional, misinterpretation of the Roman civil law texts, in particular, the reference in Justinian's *Digest* to provincial ambassadors and *legati*. Legates it appeared, were to be accorded full immunities in Roman law, but it was unclear whether provincial ambassadors were both completely immune from actions while they were resident in Rome. However, in the late sixteenth century, the position of the *legati* came to stand for all ambassadors, writers choosing to ignore this distinction in the Roman law. This (mis)interpretation placed significant limitations on diplomatic immunity and directly challenged the naturalist tradition both at a civil law and criminal law level.

By the end of the sixteenth century, therefore, it was generally considered that diplomats were immune for actions committed prior to their mission, but were liable for any actions committed while in the host country. Evidence of this is seen in matters concerning commercial transactions. Gentili stated quite confidently: "I hold that an ambassador should be subject to legal procedure on every contract which he enters into during his embassy."<sup>21</sup> Even in criminal matters, Sir Edward Coke was clear that if an ambassador committed a serious crime *contra ius gentium* he was not to be handed over to his own sovereign but should be tried as 'any other private Alien'.<sup>22</sup> Even the Spanish Code

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<sup>17</sup> In Ogdon, op. cit., p457.

<sup>18</sup> In Ogdon, p457.

<sup>19</sup> In Ogdon, op. cit. pp455-456.

<sup>20</sup> See Frey, L. and Frey, M., *The History of Diplomatic Immunity*, Ohio State University Press, 1999, p193.

<sup>21</sup> *De legationibus libri tres*, in Ogdon, p459.

<sup>22</sup> In Ogdon, p460.

system<sup>23</sup>, heavily reliant on the Roman law, made provision for actions to be brought against envoys that contracted debts while on their mission. But there remained uncertainty in practice and substantial precedent developed on both sides.

But Monarchs were certainly less likely to uphold such legal positions if their relations with other states could be threatened. The law in these cases was fluid and much depended on practical considerations. The leading case comes in the 1580s: that of the Spanish ambassador Mendoza who was accused of conspiracy against the sovereign, Queen Elizabeth. A serious accusation, there is no doubt. But according to Gentili and Hotman, who advised the Queen in this instance, the custom of diplomatic immunity weighed heavier even than national law. In fact, the customary law of nations gelled nicely with that other hidden prerogative: political expediency. Mendoza was not prosecuted and allowed to return home.

### **The growth of 'regular diplomacy'**

At the same time, the sixteenth and seventeenth centuries saw broad historical developments that led to what we might describe as 'regular' diplomacy, with the setting up of permanent embassies. This had begun as early as the fifteenth century<sup>24</sup> when the Italian city states, went about setting up an extensive network of diplomatic relations. At the centre of this network was the envoy, who tended to base himself in host territory. In fact, the practice of diplomacy in Italy had become so vital to political relations (and therefore political survival) that even Machiavelli felt it necessary to advise on norms of diplomatic behaviour.<sup>25</sup> According to Machiavelli, the diplomat had to fulfil his function 'sufficiently' not merely 'faithfully' as the embassy bestowed great 'honour' on the position of the diplomat. This entailed respect for the dignity of the host power and sensitivity to the specific political circumstances of the day. Theories of diplomacy grew as the practice of creating permanent embassies gradually spread north of the Alps.

Perhaps the greatest exponents, certainly the most elaborate, of this new diplomacy were the French. The massive expansion of the French bureaucracy under Louis XVI (1642-1659) saw diplomacy become an art form. In 1685, at a time of peace, the French monarch had twenty 'established' ambassadors resident in, *inter alia*, Rome, Venice, Constantinople, England, Spain, Denmark and Switzerland.<sup>26</sup>

This diplomatic 'reach' became more important after the **Treaty of Westphalia**. This treaty, signed by the European powers after the Thirty Years War in 1648, established in Europe the basis of the modern state system. With massive economic, social and political change there emerged in Europe what has become known as the 'Westphalia System': replacing pan-European hegemony we see the development of a collection of 'relatively

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<sup>23</sup> *Las Siete Partidas*

<sup>24</sup> Grotius makes reference to this practice in his *De Jure Belli ac Pacis*, noting that the practice was neither universally accepted nor widespread. See Maurice Keens-Soper, 'Francois de Callieres and Diplomatic Theory', *The Historical Journal*, Vol. 16, No. 3 (Sept. 1973), p489.

<sup>25</sup> In a *Memoriale* of 1522, quoted in W. E. Wiethoff, 'A Machiavellian Paradigm for Diplomatic Communication', *Journal of Politics*, Vol. 43, No. 4 (Nov. 1981), p1093.

<sup>26</sup> Keens-Soper, *op. cit.*, p491.

strong territorially-based political units, capable of exerting control domestically, but obliged to accept the existence of similarly formed political units externally.’<sup>27</sup>

For the French diplomat, Francois de Callieres (1645-1717), this system entailed equilibrium of power, distributed among a plurality of nations. In the light of France’s declining ability to assert itself militarily, this makes sense. Diplomacy therefore became a means of maintaining this ‘balance of power’ in the best interests of the state. De Callieres wrote extensively on the role of the diplomat in this period, notably in his treatise on the subject, *De la Manière de Négociier avec les Souverains* published in 1716. While not his focus, the issue of diplomatic immunity is touched on by De Callieres. It is clear that French thinking at least still considered the fundamentals of diplomatic immunity a necessity. For De Callieres, states tolerated these ‘honourable spies’, their inviolability and their extraterritoriality, to enable effective communication.

De Callieres was not a legal theorist but, for him, such a relationship corresponded to principles of order and civilized behaviour. Diplomacy must be conducted in a ‘*juste milieu*’<sup>28</sup> where the key values are confidence, compromise and moderation. In this sense De Callieres’ work distils much of the tradition and custom of diplomacy. But such idealism tended to hide the ongoing legal uncertainties and difficulties that still plagued the diplomatic service, largely due to confusion over immunities.

### **International disputes and the law of immunities.**

As permanent embassies spread, so a conflict between the alleged status of the diplomat and national laws came to light. This was certainly the case in England. Up until 1708, there was no legal precedent for immunities being granted to visiting envoys in English law. While theories of diplomatic immunity abounded (mainly those of Coke and Grotius, discussed above) there was little support given to these theories by law or practice. In fact, as the Mendoza case demonstrates, the status of the diplomat in the sixteenth and seventeenth centuries was largely a question of politics. As Mattingley puts it:

‘Ambassadors were not, as a class, much given to homicide, robbery with violence or the more spectacular forms of rape...the crimes [they] were likely to be charged with were political.’<sup>29</sup>

In this respect, examples abound. In 1511 the Papal ‘nuncio’ communicated politically sensitive information to the French and was consequently locked in the Tower, a ‘flagrant violation of his immunity’.<sup>30</sup> And in 1569, the Spanish Ambassador was imprisoned in his house and reduced to the status of a normal citizen for acting beyond the instructions

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<sup>27</sup> Chris Brown, *Understanding International Relations*, Palgrave, Basingstoke, 2001, p70.

<sup>28</sup> Keens-Soper, op. cit., p503

<sup>29</sup> Mattingley, *Renaissance Diplomacy* 66, p274, note 8.

<sup>30</sup> Buckley, Margeret, ‘Origins of Diplomatic Immunity in England’, 21 *University of Miami Legal Review* 363, 1966-67, p352

of his sovereign.<sup>31</sup> Equally, the Privy Council, fearful of provoking war with France, chose *not* to punish the French ambassador in 1556. He had been found party to a plot to overthrow Queen Mary but was recalled so as not to violate *ius gentium*, the law of nations.<sup>32</sup> Far from providing clarity, these examples demonstrate the absence of substantive law on this subject and deference to the royal prerogative in political decision making.

This was to change, however, when the English Parliament introduced the *Diplomatic Privileges Act* 1708. This can be seen as the first attempt to legislate on diplomatic immunity and arose from the famous *Mattueof's Case*. In 1708, the Russian Ambassador to Britain attempted to leave the country, having incurred debts during his stay. His debtors attempted to stop him leaving and held him under arrest in pub. Once again, the legal position was uncertain. To what extent was the diplomat immune? Were the actions of the debtors illegal? The Tsar, Peter the Great, was clear on the matter. He regarded the situation as criminal and demanded that the offenders be punished. Accordingly, the men were tried for the assault and arrest of the ambassador.<sup>33</sup> But in 1708, it was not a crime to arrest private persons for debt, and there was no statutory provision making it an offence to arrest an ambassador for debt. The Act of 1708, however, provided that 'no judicial proceedings could be brought against diplomats or their servants and that it was an offence to commence proceedings.'<sup>34</sup> It has been argued that pressure from the Tsar was the primary reason for the Act.<sup>35</sup> Nevertheless, it brought the issue of diplomatic immunity into English common law<sup>36</sup> and legislation for the first time.

We can make two general observations at this point. The first is that this move to place diplomatic privileges and immunities under statutory provision was, *prima facie*, a positive step. From the point of view of rule of law, it took the issue of immunity away from the discretionary prerogative of the sovereign and provided a clear statement of the legal position of the ambassador and his retinue. But, second, by providing for *absolute* immunity in statute, and thereby protecting the diplomat, it potentially left these immunities open to abuse. This is not to say that they were not abused anyway but this precedent provided stronger protection in the law for representatives of states.

### A revolution in diplomacy?

Certainly the French Revolutionaries of 1789 were suspicious of the diplomatic service, as had been the emancipatory thinkers of the Enlightenment. Drawing on critiques of the *philosophes*, revolutionaries attacked the secrecy, luxury, privileges and the 'mysteries'

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<sup>31</sup> Ibid., p352.

<sup>32</sup> Ibid., p352.

<sup>33</sup> Ibid., p356.

<sup>34</sup> Barnett, H., *Constitutional and Administrative Law*, Cavendish Publishing, 5<sup>th</sup> Ed., London, 2004, p146.

<sup>35</sup> Prof. Berriedale Keith, 12 *Journal of Comparative Legislation and International Law* 126.

<sup>36</sup> This is despite arguments that the custom of diplomatic privileges and immunities and the 'law of nations' were already part of the common law. See Buckley, op. cit., pp357 ff.

of diplomatic relations.<sup>37</sup> The revolutionary Jerome Petion, a lawyer and former Mayor of Paris, opposed giving power to diplomats who were driven by:

‘their ambition, their passion, their immoderate desire for vainglory; they attacked their neighbours; they believed themselves just when they were strong; they troubled the peace of all Europe and poured out the gold and the blood of the French in great waves.’<sup>38</sup>

Others went further, arguing that ‘based on reason, foreign policy and diplomacy would become unnecessary...the new world would be a world without diplomats.’<sup>39</sup> The revolutionaries were particularly critical of permanent ambassadors, who were regarded as dangerous because they were spies and ‘ambitious intriguers who revelled in outward luxury and show.’<sup>40</sup> The French were not alone. Thomas Jefferson shared the same view of the diplomatic service. He regarded the diplomats as the ‘pest of the peace of the world, as the workshop in which nearly all the wars of Europe are manufactured.’<sup>41</sup>

But to what extent did the French ‘revolution’ bring about the changes it promised in the practice of diplomacy and in diplomatic privileges in particular? According to Linda and Marsha Frey, such changes were limited. The new republic argued for a more ‘open’ and ‘honest’ diplomacy and attempted to dismantle the Diplomatic Committee and extricate France from the European state system. But these efforts were undone largely because they undermined the basic ability of the new Republic to function on the international stage. While initially only willing to engage with like republics (the US and Switzerland), France was forced to accept envoys from all over Europe. Thus, little changed and if it did this was only at a superficial level, new symbols replacing the old.<sup>42</sup> Indeed, functional elements of the old administration also resurfaced, including many of the privileges and immunities.

Little had changed in the status of the diplomat by the nineteenth century. Convention largely underpinned state practice, despite rather diverse applications of these conventions in national law and politics, functionality and reciprocity remaining fundamental. But with the advent of the industrial revolution and increasingly wider contact between states around the world, two developments occur. First, we see a clearer legal picture of the status of the modern sovereign state as well as efforts to unify, regulate and to some degree, limit the diplomatic privileges and immunities of these states. Second, and paradoxically, there developed new areas of immunity and privilege with the creation of non-governmental international organisations.

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<sup>37</sup> For example Jacques Benigne Bossuet and Louis de Rouvroy. Other writers considered international affairs a system of anarchy, unscrupulous and rife with corruption. See Frey and Frey

<sup>38</sup> Quoted in Frey and Frey, op. cit., p714.

<sup>39</sup> Felix Gilbert, in Frey and Frey, p716

<sup>40</sup> The sentiments of the journalist Louis Marie Prudhomme, in *Revolutions de Paris*, no. 92 (Paris, April 16, 1791), paraphrased by Frey and Frey, p716.

<sup>41</sup> Quoted in Frey and Frey, p717.

<sup>42</sup> Interestingly here, the authors draw on the work of cultural anthropologist Clifford Geertz who points out that new regimes rely on old cultural frameworks in order to justify and legitimise their power. See Frey and Frey, pp709ff.



## A modern doctrine of state immunity

At the core of the issue of diplomatic immunity is the concept of state sovereignty. As we have seen, prior to the nineteenth century this notion had been a loose one, resting on the ancient concept of the sovereign monarch. This concept was bolstered in international law by the influential decision of Chief Justice Marshall in *The Schooner Exchange v McFadden* 1812<sup>43</sup>, which established for the first time a restrictive theory of state immunity. This case involved a privately owned American vessel which was seized in the mid-Atlantic by the French government. In France it was fitted out as a public ship. Later, the vessel was forced to take shelter in a Philadelphia port where it was labelled by the former owner. The issue was whether domestic or international law provided the basis for jurisdiction of a U.S. court over a foreign warship.<sup>44</sup> In his decision Marshall emphasised status over function. He found that the ship was a foreign warship and that it therefore enjoyed immunity from jurisdiction in U.S. courts. In his judgment he laid out the general principles of the modern doctrine of absolute sovereign immunity:

- 1) The jurisdiction of the courts is a branch of the nation's jurisdiction as an independent sovereign power;
- 2) the jurisdiction of the nation is unlimited and absolute within its own territory and any restriction upon it is a diminution of its sovereignty;
- 3) all exceptions, express or implied, can derive only from the sovereign;
- 4) all distinct sovereignties in the world have equal rights and equal independence;
- 5) all nations of the world have consented to relax their complete jurisdiction in *certain circumstances*, because intercourse between nations has a mutual benefit; and
- 6) where nations have consented either explicitly or implicitly, to relax their jurisdiction, subjection to jurisdiction is a violation of international practice and a diminution of sovereignty because it is an affront to the equality and independence of the foreign sovereign.<sup>45</sup>

By allowing only for *certain circumstances* in which jurisdiction is relaxed Marshall's decision gave rise to a restrictive theory of state sovereignty in which immunity applies only to public acts done in the sovereign character of the State, and not to private acts. This forms the basis of the modern distinction between acts *jure gestionis* (those falling under private law) and acts *jure imperii* (acts in exercise of the sovereign power).

Another opportunity to regulate some aspects of international law and custom came with the end of the Napoleonic wars. The *Regulation of the Congress of Vienna* (1815), for example, following the ideas of Vattel and Bynkershoek emphasised the functional over the personal approach to immunities. It did this by dividing diplomats into three classes:

- i) Ambassadors, legates and nuncios
- ii) Envoys, ministers and others accredited to Heads of State
- iii) *Charges d'affaires* accredited to ministers of foreign affairs.<sup>46</sup>

<sup>43</sup> *The Schooner Exchange v McFadden*, 11 U.S. (7 Cranch) 478 (1812), cited in Siewert, (n. 5).

<sup>44</sup> Paraphrased in Siewert, p265.

<sup>45</sup> Cited in Siewert, p766.

<sup>46</sup> Article 4 of *Regulation* also provided that precedence was to be decided not by the rank of the sending state but by the date of official notification of arrival. See Eileen Young, "The Development of the Law of Diplomatic Relations" in *British Yearbook of International Law*, 141, 1964, pp167ff.

This structure was soon adopted by the majority of states and provided the basis for Article 14 of the Vienna Convention on Diplomatic Relations. The effect was to clarify for the first time the distinction between embassy staff and minor or auxiliary staff, with the further effect of reducing the privileges of the latter.<sup>47</sup>

*Functionality*, therefore, was becoming the primary justification for limited immunities. Some commentators suggested that immunities might one day disappear altogether as 'sufficient protection would be given to the ambassador by his status as public guest of a civilised nation.'<sup>48</sup> But there remained strong difference of opinion in international circles. This was evident when the Institute of International Law drafted and adopted the *Regulation of Cambridge* in 1895. The initial draft lent heavily to the side of limited immunities. It proposed general immunities (from civil and criminal jurisdiction) only to the head of the mission, his wife, and the person indicated as his representative or substitute.<sup>49</sup> For others, immunity would be limited to their official functions. After much debate, however, the decision was made that broad immunities should be maintained for all officially accredited members of the diplomatic staff and their families.<sup>50</sup> Significantly, though, the *Regulation* was clear that immunity in terms of private acts ended when functions ended, but remained in relation to official acts.<sup>51</sup> So here we see the Institute, despite the concerns of some, forced to bow to the weight of customary practice.

### The immunities of international organisations

As international relations became more complex, and the growth of commerce and trade more intricate, so too did issues relating to immunity. The establishment of various post-war **international organisations** posed significant legal challenges for the international community. Again, the question was one of jurisdiction. There was a need to protect these organisations from interference from host states.<sup>52</sup> Being subject to international law and without a territory of their own, international organisations required provisions for immunity. But what law applies to an organisation with no territory of its own yet operating on the territory of an existing state (or non-state)? Traditionally, *absolute* immunity had been applied.<sup>53</sup> This was justified on two grounds:

- i) It is undesirable for the national courts of different states to define the status and responsibilities of international organisations.

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<sup>47</sup> Ibid., p170. For example, Diplomatic couriers came to be treated separately and were only considered inviolable on purely functional grounds.

<sup>48</sup> From, Young, op. cit., p170.

<sup>49</sup> Young, p171.

<sup>50</sup> Ibid., p171.

<sup>51</sup> Ibid., p171.

<sup>52</sup> Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or Bypass', 51 JCLQ 1, 3, 2002.

<sup>53</sup> P Sands and P Klein, (eds.) *Bowett's Law of International Institutions* (Sweet and Maxwell, London 2001), p491.

- ii) Nor should these states be allowed to interpret the legality of actions of an international organisation at the risk of prejudice of governments and individuals.<sup>54</sup>

The establishment of international organisations is usually associated with the post-war periods of the early twentieth century (1919-, and 1945- ) and begins what is considered a new international liberalist approach, largely advocated by the U.S. and Britain. The idea was to facilitate negotiation and provide support to states in social and economic need. But such changes, significant though they were, had their predecessors in the active creation and support of international organisations at least a century before the end of the First World War. These organisations also enjoyed the privileges and immunities of conventional states.

For example, each member of the *Comisión Directiva* of the Atlantic Confederate Navy (Colombia, Central America, Mexico) was granted the immunities and exemptions of a diplomatic agent under the Panama Congress of 1826.<sup>55</sup> Diplomatic privileges were also granted to the International Finance Control Commission of Greece under the Hellenic Statute 1898.<sup>56</sup> Under a German-French treaty as early as 1804 the privileges of 'independence and immunity' were given to the Central Commission for the Navigation of the Rhine<sup>57</sup> and granted permanently to the European Danube Commission. Similar privileges were granted to the judges of the Permanent Court of Arbitration<sup>58</sup> and were envisaged for the Court of Arbitral Justice and the International Prize Court. While these cases were exceptions, they set precedents for the extension of immunities in the later twentieth century and demonstrate an interesting offshoot of the doctrine of absolute immunity.

The granting of diplomatic privileges and immunities to these and other organisations says a great deal about the nature of international law at the turn of the century and fits the prevailing 'positivist' nature of international legal thought of the time. These immunities were created on an *ad hoc* basis, structured through a variety of international treaties and conventions. In this sense it was highly adaptable and not necessarily restricted by broader ethical considerations.<sup>59</sup> A state, it was thought, was 'under no obligations except those which it has accepted by valid agreement or clear acquiescence in a general custom'.<sup>60</sup>

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<sup>54</sup> See Amsterdam International Law Clinic, p13.

<sup>55</sup> Josef L. Kunz, 'Privileges and Immunities of International Organisations', in *The American Journal of International Law*, Vol. 41, No.4 (Oct., 1947), p828, (n. 1)

<sup>56</sup> *Ibid.*,

<sup>57</sup> *Ibid.*, p828, (n. 4).

<sup>58</sup> Under the Hague Convention, October 18, 1907. Kunz, p829, (n. 7).

<sup>59</sup> It should be noted that the United States felt, prior to 1941, that these immunities should only be due to members of diplomatic missions. See, Kunz, *op. cit.*, p830.

<sup>60</sup> Quincy Wright, "Legal Positivism and the Nuremberg Judgement", *The American Journal of International Law*, Vol. 42, No. 2 (April, 1948), p405.

While further development of the common law and a reconsideration of the principles of the *Schooner Exchange* led to the erosion of state immunities between the nineteenth and twentieth centuries,<sup>61</sup> the same cannot be said for the immunities of international organisations. Rather, with the end of the First World War and the creation of the **League of Nations**, international organisations came to take on a more robust ‘legal personality’. In other words, international organisations were recognised as having international ‘rights and obligations’, including rights to enter into agreements and conclude treaties with states and other organisations.<sup>62</sup> These included the International Court of Justice and the International Labour Organisation (ILO). But in defining the position of international organisations and their personnel vis-à-vis national law, a problem was created by the granting of diplomatic privileges and immunities to non-diplomatic functionaries.

The same problems and uncertainties continue to exist in the realm of diplomatic immunities today. In their book *The History of Diplomatic Immunity*, Frey and Frey argue that immunities were confused by the ‘theoretically inexact’<sup>63</sup> equation of the international organisation officials with diplomatic agents.<sup>64</sup> This is seen to have been a process of assimilation and a situation which needs rethinking.

Some of the difficulties posed by this situation can be seen in Switzerland, where as early as 1919, the Swiss joined the League of Nations and made Geneva its home. These difficulties arose in areas such as the categorisation of officials, taxation and family law. The Staff Regulations of the League stated that immunities ‘furnish no excuse to the officials who enjoy them for the non-performance of the private obligations or failure to observe laws and police regulations.’<sup>65</sup> And the ILO held that immunities amounted to ‘a more than ordinary authority’.<sup>66</sup>

### **Current Problems in the United Nations**

Current problems with the functional immunity of the United Nations stem from the historical origins of functional immunity for the International Organisations. As examined by Pingel-Lenuzza and the Amsterdam International Law Clinic<sup>67</sup>, the problems result primarily from the immunity from jurisdiction the organisations enjoy under domestic and international law.

An analysis of the problems with the UN’s current immunity reveals flaws in an absolutist concept, designed in an era when international organisations were thought of as

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<sup>61</sup> Siewart, op. cit., p794.

<sup>62</sup> See, for example, MN Shaw *International Law*, 4<sup>th</sup> Ed., Cambridge University Press, 2000, p53.

<sup>63</sup> Adatci-de Visscher report quoted in Kunz, Op. Cit., p15.

<sup>64</sup> Frey and Frey, p542.

<sup>65</sup> Hill, in Frey and Frey, p551.

<sup>66</sup> Frey and Frey, 551.

<sup>67</sup> Pingel-Lenuzza I “International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass” (2002) 51 JCLQ vol 1 at 3, and AILC paper , “The (Non-) Application of International Law by the ILO Administrative Tribunal: possible legal avenues for establishing responsibility,” Amsterdam International Law Clinic paper supervised by Dr habil. Erika de Wet, Joost P.J. van Wielink, LL.M., by Bohre, VA, von Dewall, SE, LL.M., Middel, IJ and Steer, CE (July 2004), at page 11.

inviolable, almost beyond a sovereign state – so delicate they needed protection from outside interference. This was in an age when sovereign states themselves were far less subject to law suit than is the case, now.

Today, sovereign states are in theory, regularly subject to legal suit for negligence, where government responsibilities of a public nature exist. These responsibilities extend from the obligations of local government (local governments have responsibilities with regard to zoning, garbage collection, maintenance of local parks and playgrounds, etc), through to a range of public and private law issues which must be addressed through the governance structure of the nation state and its legal system. But while an ordinary government and its ministers are accountable to their people, through election, and subject to law suits (administrative, criminal and civil) in relation to decisions (or failure to act) of that government's administrative arm, the United Nations enjoys wide-ranging immunities; an automatic presumption of immunity from all civil or criminal liability in any nation state.

Unless adequate measures are taken to balance this immunity, inherited from a time when advanced legal systems, including an advanced concept of individual, or human rights, did not exist, then it will continue to outweigh the importance of human rights, tipping the justice scales, when compared to an ordinary legal system.

The obvious solution is to ensure an adequate, alternative legal system exists, either through mechanisms which adequately ensure sufficient legal protection for all of those effected – perhaps the most complex part of the problem. What does one do to protect third party victims of human rights abuse<sup>68</sup> from UN employees who would abuse them, when the UN's current internal justice system has been described as “dysfunctional”, and effectively told to throw away the current model in favour of a complete overhaul, by a distinguished, UN-appointed, Justice Panel<sup>69</sup>.

Problems arising from inadequate *fora* for resolution of civil and criminal disputes, in particular, are discussed in submissions made to the UN Redesign Panel, (see “current projects” at [www.caio-ch.org](http://www.caio-ch.org)).

Perhaps it is most important, however, in contextualising the current problems arising from immunity, to see, through the perspective of history, outlined in brief above, that placing diplomats into a special category, through according them separate status, has historically, given rise to a complex set of problems, that arise largely from the result that diplomats may in practice, be above the law.

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<sup>68</sup> Probably the most common form of abuse recently seen is sexual abuse of refugee girls in UNHCR camps by UNHCR employees throughout Sierra Leone, Liberia and Guinea but other examples include rape or other abuse by Blue Helmets, in field situations. Historically, we recall that armies of all ages have committed raped and pillage – can international law find a workable solution to this problem?

<sup>69</sup> The UN Redesign Panel included the eminent former Australian High Court Justice, Mary Gaudron QC, together with Justice Louis Otis from Canada.

Such obvious injustice could be remedied, in the case of the UN's internal justice system, by appropriate amendments, in particular, to Headquarters Agreements.

Were the Headquarters Agreements with International Organisation host states to be amended to remove the unilateral discretion of the Secretary-General, clearly not a person with the status of independent Prosecutor – who would ordinarily not require such a request for permission, before commencing her enquiry, then the problem caused by the evident conflict of interest might well be reduced.

In fact, it is rare that criminal, or potentially criminal acts committed in Headquarters [as oppose to field]<sup>70</sup> operations are successfully prosecuted, in practice. It is easy to see why the immunity is rarely lifted to enable prosecutions; not many managing directors of multinational companies would permit themselves to be prosecuted if they had the unilateral choice to simply refuse to be subject to the jurisdiction of the court.

Reform of the discretionary power of the Secretary-General of international organisations is required. One solution would be to commission an independent judicial panel composed of senior independent judges and legal practitioners, to make judicial determinations on a biannual basis. The key to success in such an initiative would be the complete independence of such a committee from the UN and its international organisations, to ensure independence of decision-making.

As subjects of international law, international organisations should follow basic principles of international law. Yet staff of international organisations are unable to enforce legal rights enjoyed by nationals resident in member States having ratified the conventions<sup>71</sup>. The United Nations immunity prevents the application of national laws directly, which directly affords impunity and fails to guarantee accountability. The present system is far removed from best practice in administrative and employment law and sets a poor example for those states which are in the process of developing their legal systems. One can only hope for positive and creative developments in the fields of international and public international law, in the future.

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**Supervised by Sarah Hunt**  
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<sup>70</sup> For a thorough overview of this topic, often involving sexual abuse of young refugees or local inhabitants, see “Working Paper on the Accountability of International Personnel taking part in Peace Support Operations” (E/CN.4/Sub.2/2005/42), by Professor Françoise Hampson, [CAIO President] in her capacity as a member of the UN Sub-Commission on the Promotion and Protection of Human Rights.

<sup>71</sup> See legal opinion, G Robertson QC, at [www.caio-ch.org](http://www.caio-ch.org), under “legal links” also refer to Vincent A. Böhre, Sophia E. von Dewall, LL.M., Ingeborg J. Middel, Cassandra E. Steer, “The (Non-) Application of International Law by the ILO Administrative tribunal: Possible legal avenues for establishing responsibility”, Amsterdam International Law Clinic, July 2004 and Nicole E. Kuijer, Susan L. Park M.I.A., Judicial Independence of the ILO Administrative Tribunal: The potential for reform, Amsterdam International Law Clinic, April 2005.