

THE RIGHT OF PEACEFUL PROTEST AND THE PROTECTION  
OF DIPLOMATIC PERSONNEL AND PREMISES

by G.M. Harrison  
Department of Foreign Affairs  
Canberra

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Introduction

Diplomats have traditionally been recognised as deserving special protection.(1) Beginning with the first exchanges of envoys around 3000 BC, there has developed over the centuries a body of international law - diplomatic law(2) - governing the conduct of relations between states and establishing the rights of states' representatives to protection, privileges and immunities. Underlying this development was the notion that a diplomatic mission needed to be accorded full facilities for the proper unhindered performance of its functions. On this premise diplomats acquired immunity from the jurisdiction of the receiving state, freedom from taxes and customs duties, freedom of movement and so forth and there developed the notion that a diplomat and diplomatic premises were inviolable.

This extensive body of customary law was codified in the 1960s in two principal conventions.(3) The first, the Vienna Convention on Diplomatic Relations (1961), codified the law relating to diplomatic missions and diplomatic staff. It entered into force in 1963 and now has more than 140 parties. It has force of law in Australia by virtue of the Diplomatic Privileges and Immunities Act 1967. The second, The Vienna Convention on Consular Relations (1963) codified the law relating to consular missions and consular staff. It entered into force in 1967 and now has over 100 parties. Because the Consular Convention remains unratified by many countries, it cannot - unlike the Diplomatic Convention - be said to represent customary law: while, therefore, the Diplomatic convention is, in effect, the law which binds all states, the Consular Convention is binding only between those states party to it. Consular relations with states not party to it are based on bilateral agreements or customary law. The Consular Convention has force of law in Australia by virtue of the Consular Privileges and Immunities Act 1972.(4)

For the purpose of this paper I intend to focus on the protections afforded to diplomatic premises and staff under the Diplomatic Convention. In general, consular premises and staff enjoy similar protection, although with greater restrictions on the inviolability of premises and consular staff.(5) I would emphasise that these protections extend only to diplomatic and consular missions and certain staff of them, and not to other bodies which may be official representatives of a government but enjoy no special status. Thus, for example, the Aeroflot office in New York a frequent target for demonstrations - has no entitlement to special protection. (One form of peaceful protest in Australia has been the establishment of so-called embassies, representing a cause or nation. These "embassies" not only have no protection - they are in effect Made unlawful by the Diplomatic and Consular Mission's Act 1978.)

#### The notion of inviolability

The notion of inviolability of diplomatic premises and personnel was enshrined in the Diplomatic Convention in Articles 22, 24, 29 and 30. Article 22(1) states simply that "the premises of the mission shall be inviolable"(6) and adds that the agents of the receiving state may only enter those premises with the consent of the head of mission. Article 24 provides that "the archives and documents of the mission shall be inviolable at any time and wherever they may be". Articles 29 and 30 extend the same inviolability to the person of a diplomatic agent (7), to his private residence, and to his papers, correspondence and property.(8)

The provision of the Diplomatic Convention most relevant to the question of peaceful protest is Article 22(2), which provides:

The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

At first glance, this article raises a host of questions: what is the extent of the special duty on the receiving state? What amounts to "appropriate steps" to protect the premises of the mission? What is the "peace of the mission" and what amounts to a disturbance of it? What constitutes an impairment of its dignity? The same questions apply equally to the inviolability of the residences of diplomatic agents(9), and similar ones arise with regard to a diplomat's personal inviolability: Article 29 requires the receiving state "to treat him with due respect" and to take "all appropriate steps to Prevent any attack on his person, freedom or dignity".

The net effect of Articles 22 and 29 is to impose upon the receiving state a particularly onerous duty to protect diplomatic premises and agents. When a protest is conducted outside an Embassy, or aimed against staff of an Embassy, there is an immediate risk that that Embassy's peace may be disturbed or its dignity impaired, or that the person, freedom or dignity of its diplomatic staff may be attacked.

#### Is peaceful protest lawful?

The first question to be resolved is therefore whether Articles 22 and 29 constitute an effective prohibition on any and all demonstrations, peaceful or otherwise, against diplomatic missions and personnel. The answer in my view is that they do not, for the following reasons:

First, it is clear from general international practice that most states recognise that people have the right to demonstrate outside diplomatic missions and against diplomatic personnel. Those states which do not recognise that right tend to be those states which allow their citizens no right of demonstration whatsoever.

Second, the International Court of Justice has implicitly accepted that there is a right to demonstrate against diplomatic missions. In the US Diplomatic and Consular Staff in

Tehran Case(10), more commonly known as the Hostages Case, the US sought a declaration from the court that, . inter alia, Iran had infringed both the Diplomatic and Consular Convention by allowing militant students to occupy the US Embassy and Consulates and hold staff hostage. The Court did not in its judgment address directly the restrictions arising under Article 22 of 29 on the conduct of peaceful demonstrations. But it did not argue that such demonstrations were per se unlawful. The thrust of its judgment was to hold Iran liable for its failure to take appropriate steps to protect the missions and personnel in accordance\_ with its special duty under Article 22 and 29. It did not argue that Iran was liable merely because it had allowed the demonstrations to take place.

Third, Parliaments are reluctant to prohibit demonstrations outside missions. This issue was canvassed thoroughly in the Report of the House of Commons Foreign Affairs Committee on the Abuse of Diplomatic Immunities and Privileges, (11) set up to examine the application of the Vienna Convention in the UK after the shooting of a policewoman in front of the Libyan People's Bureau in April 1984. It was suggested to the Committee by Professor Draper (12) that the "peace" of a diplomatic mission was different from the Queen's peace (i.e. the peace of the general community). He argued that allowing "demonstrators to form up behind barriers placed for the purpose in the immediate frontage of the Libyan mission premises" (13) was incompatible with Article 22.

This view was not shared by the FC0's principal representative at the hearing, Sir Antony Acland, (14) nor the Committee itself, which concluded:

... the receiving state's duty to protect the peace of the mission cannot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving state. (15)

Finally, and parochially, Australian practice is to regard peaceful demonstrations against diplomatic missions and diplomatic personnel as lawful. This practice has the support of the judiciary. In Wright v McQualter(16), Kerr J commented on a demonstration outside the US Embassy as follows:

As a political body it (the Embassy) must presumably accommodate itself to the existence of strong disagreement with some of the policies of its government and to the direct and forceful verbal expression of such disapproval.  
(17)

The duty of states under Articles 22 and 29 should therefore not be construed as extending to a requirement to prohibit all demonstrations.

#### Non-peaceful protest

Obviously the duty does extend to a requirement to prevent non-peaceful demonstrations. There is a considerable body of law - both international and domestic - to cover acts which might be regarded as protest but which are themselves criminal in nature. The inviolability provisions of the Vienna Conventions have been substantially developed by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973.(18) The Convention makes it an offence to commit murder, kidnapping Or other attack on the person or liberty of an internationally protected person; (19) to commit a violent attack on the official premises, private accommodation or means of transport of such a person; and to commit threats, attempts or actsof ˆcomplicity in such attacks. (20) The ˆConvention now has 68 parties, including Australia, which gives effect to the Convention in the Crites (Internationally Protected Persons) Act 1976.

The judgement of the ICJ in the Hostages Case has also confirmed the unlawfulness at customary law of any invasion of mission premises or seizure of mission staff. Iran was found to be

liable on two principal counts. It had failed to fulfil its special duty to protect the mission at the time of the seizure (at that stage the "students" were not acting with the support of the regime); and the regime's subsequent support for the students, which made them in effect agents of the Iranian Government, made the Iranian Government culpable for the acts of the demonstrators.

Many states have domestic legislation aimed specifically at the protection of diplomatic premises and personnel from violent attack. In Australia, Part III of the Public Order (Protection of Persons and Property) Act 1971 is expressly designed to give substance to Australia's undertakings under the Vienna Conventions to protect diplomatic premises and personnel. (22) It makes it an offence inter alia to cause actual bodily harm to persons or damage to property(23), to assault(24), harass or otherwise interfere with protected person(25), to behave in an offensive, threatening or insulting manner towards a protected person(26) or unreasonably to obstruct a protected person. (27) There are also provisions relating to possession and use of missiles and weapons (28) and to trespass on protected premises. (29)

#### Peaceful but unlawful protest

The principal issue here, however, is under what circumstances would ostensibly peaceful protest nevertheless constitute a breach of a .state's obligations under the Vienna Conventions if it failed to protect a mission or diplomat from such protest?

Leaving Articles 22 and 29 aside for the moment, . there are other provisions of the Convention which are relevant to any peaceful protest aimed against, diplomatic premises and personnel; for example:

under Article 24, (30) any protest which constitutes interference with the archives and documents of a mission would be a breach of the Convention.

under 'Article 26, (31) interference with the freedom of movement of members of a diplomatic mission could well constitute a breach of the Convention. The House of Commons Report, for example, . concluded that there was a requirement that work at the mission could continue normally and that there was "untrammelled access and-egress".(32) This provision is Particularly relevant to picketing. Any interference with the movement of diplomatic personnel in and out of a mission as a result of picketing- no matter how peaceful that picketing might be would constitute a breach of the Convention.

under Article. 27, (33) the receiving state is required to permit and protect free communication onthe part of the mission for all official purposes. Similarly, the correspond- ence of a diplomatic agent is protected under Article 30(2).(34) Consequently any interference with an Embassy's telephone service, for example, or a ban on delivering mail to a diplomat's residence would put the receiving state in breach of the Convention. Any interference whatsoever - including mere delay- of a diplomatic bag arguably amounts to **breach** of Article 27(3).(35) A ban on carriage of the bag by an airline union, for example, might put the receiving state in breach.

These examples all illustrate ways in which peaceful protest might nevertheless be contrary to international law. -Let us now return to Articles 22 and 29 and examine some of the issues they raise. As already indicated the language they use is ambiguous and open to several interpretations. .Inevitably, the process of interpretation becomes subjective.: states determine for themselves and on the basis of reciprocity what substance they wish to .give-those,provisions."

What then might constitute "damage" to a mission within Article 22(2)? It could be argues, for example, that the painting of slogans or graffiti on the exterior wall of an embassy amounts to damage. What constitutes "an intrusion"? Is it necessary for there to be a trespass upon mission premises or would, for example, the holding of banners or placards over the wall of an



Embassy amount to an intrusion? (In Australia, the Public Order Act makes it an offence to trespass on protected premises (36) t this could be construed as an interpretation by the legislature that "intrusion" does require a trespass.) It is of interest that several countries 'require demonstrations to-remain several hundred feet away from Embassy premises, to avoid either damage to or intrusion upon the Embassy. (37)

Even less certain is what is encompassed by-the phrase "impairment of dignity". Can the shouting of slogans denouncing a particular country or regime amount to an impairment of the dignity of a mission? What about the burning of flags and effigies? Again some answer can be found in the restrictions placed by states on demonstrations against diplomatic missions. Some states do not allow flags to be flown. (38) In France, banners insulting to foreign heads of state are prohibited. was interested interested to hear that, at a recent demonstration outside the Soviet Embassy in Canberra police asked demonstrators to remove a coffin commemorating the deaths of victims of the 1- Chernobyl accident. This may well have been an instance in which responsible authorities felt that the dignity of the mission was being impaired.

There has been some judicial determination in Australia of what might constitute impairment of the dignity of a mission. In Wright v McOualter (39), Kerr J regarded a peaceful demonstration outside the US Embassy at which slogans such-as "Get Out of Vietnam" were shouted and at which there was no risk of intrusion or damage as probably not amounting to an impairment of the Embassy's dignity. (His Honour did not say what the situation would be if the slogans were themselves inherently offensive or insulting, and not simply calling for a change in US foreign policy.)

The protection of diplomatic personnel likewise involves difficult judgments as to what would constitute a breach of the Convention. Under Article 29, the receiving state is required

to treat a diplomatic agent "with due respect" and to take "all appropriate steps to prevent any attack on his person, freedom or dignity". This is a remarkably high duty of care. The dignity of a diplomat may be a fragile thing, easily attacked, and readily impaired.

The Australian Parliament has given effect to Australia's, duty of care under Article 29 in section 18 of the Public Order Act, which makes it an offence to harass a protected person. As Andrew Hiller argues, (40) the word "harass" is a word of very wide import, although it may to some extent be read down by the context in which it appears. Nevertheless, it is quite conceivable that a form of peaceful protest could amount to harassment within the meaning of the Act.

#### Application of domestic law

I should mention in passing that there is no difficulty about applying domestic legislation giving effect to the Convention to diplomatic missions. Missions are not the territory of the sending state; they simply have immunity from the jurisdiction of the receiving state. But that immunity does not extend to residents of the receiving state who break the law on the premises of the mission. A person who trespasses upon diplomatic premises, for example, has committed an offence under the domestic law of the receiving state, and cannot claim that the offence occurred on the territory of a foreign state. (41) The principal restriction arising from immunity is that the agents of the receiving state can only enter diplomatic premises with the consent of the receiving state. But once that consent is given, there is nothing to prevent the domestic police force arresting protesters on the premises of the foreign mission.

## LIABILITY

There is, therefore, some potential for a state to be in breach of the Convention as a result of a peaceful demonstration. What are the consequences of such a breach? The duty imposed on states under Article 22 is described as special, not absolute; in practice the fact that there has been damage to, or incursion upon, an Embassy, or that its peace has been broken- or -dignity impaired, gives rise to an inference that the receiving state has failed to carry out its duty to protect the mission. Nevertheless, the duty is not absolute; the Australian Government for example interprets Article 22 as meaning "that its duty is to take appropriate steps, on the best information.. available, to anticipate any intrusion or damage, disturbance of the peace of the mission or impairment of its dignity". (42)

When a breach does occur, the issue is usually resolved by negotiation,- although occasionally legal steps will be taken to seek a legal remedy, as the US did by taking the Hostages Case to the ICJ. These negotiations may not. always be easy: often the receiving state will feel that it has taken sufficient measures to comply with Article 22, while the sending state will be insistent that a breach of the Article has occurred. This is particularly so when the state aggrieved is one which would not itself permit any form of protest and feels that it is not receiving treatment comparable to that which it affords missions in its own territory. There is considerable scope for issues of this kind to develop into, and sometimes damaging differences in the bilateral relationship. It is therefore at times an important judgment to make as to whether or when to intervene in a protest. .As a former officer of the Department of Foreign Affairs, and an expert on the law of diplomatic privileges and immunities, Bill Bray, has written:

"It is a difficult path for the police to tread in controlling a demonstration to find a balance between reasonable freedom to protest and the proper duty of the Australian Government under Article 22 of the Convention. "(43)

## Footnotes

1. For a brief history of diplomats' protection see Selth: The Terrorist Threat to Diplomacy An Australian Perspective, Canberra Papers on Strategic and Defence, No. 35; Strategic and Defence Studies Centre, RSPS, ANU. 1986<sup>-</sup> (Chapter 1).
2. The House of Commons Foreign Affairs Committee, in its 1984 Report on the Abuse of Diplomatic Privileges and Immunities, defined diplomatic law as follows (at p vii, para 9):

Diplomatic law is concerned with the body of legal rules that governs the conduct of relations between, on the one hand, representative organs of a state operating within the territory of another state, and on the other hand, the receiving state.
3. Other Conventions establishing the rights and duties of states' representatives are the Convention on the Representation of States in their relations with International Organisations of a Universal Character and the Convention on Special Missions.
4. See also the International Organisations (Privileges and Immunities) Act 1963, which gives effect to the privileges and immunities of international organisations and their staff in Australia.
5. The corresponding provisions in the Consular Convention to those cited from the Diplomatic Convention are Article 31 (Inviolability of the consular premises), Article 33 (Inviolability of the consular archives and documents), Article 40 (Protection of consular officers), Article 41 (Personal inviolability of consular officers).

6. The "premises of the mission" are defined in Article 1 of the Diplomatic Convention as "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".
  - A diplomatic agent is defined in Article 1 as "the head of the mission or a member of the diplomatic staff of the mission".
8. The members of the family of a diplomatic agent forming part of his household enjoy the same inviolability by virtue of Article 37 of the Convention.
9. By virtue of Article 30 (1).
10. 1980 ICJ Reports,
11. Printed in London December 1984 by order of the House of Commons by Her Majesty's Stationery Office.
12. Appendix 7 to the Report, at pp 76 ff.
13. See the Report at p. xvi.
14. Op cit.
15. See the Report at p. xvii.
16. (1970) 17 FLR 305.
17. Quoted in Public Order and the Law Andrew Hiller, the Law Book Co. 1983, at P.187.
- 18 & 19. An internationally Protected person is defined in Article 1 of the Convention to include Heads of State, Heads of Government and Foreign Ministers (and their families) and any State or organisation representative entitled under

international law to special protection from any attack on his or her person, freedom or dignity (and members of his/her family forming part of his/her household).

20. IPP Convention, Article 2.

21. The Hostages Case is neatly digested in Harris, Cases and Materials on International Law, at 274 ff.

22. Section 14 provides:

The provisions of this Part are intended to assist in giving effect, on the part of Australia, to the special duty imposed by international law on a state that receives a diplomatic or special mission, or consents to the establishment of a consular post, to take appropriate steps to protect the premises of the mission or post against intrusion or damage, to prevent any attack on the person, freedom or dignity of the personnel of the mission or post and to prevent disturbance of the peace, or impairment of the dignity, of the mission or post.

23. Section 16.

24. Sub-section 18(a).

25. Sub-section 18(b).

26. Sub-section 18(c).

27. Sub-section 18(d).

28. Section 19.

29. Section 20.

30. Article 24 provides:

The archives and documents of the mission shall be inviolable at all times.

31. Article 26 provides:

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

32. op. cit. para 48 p xvii.

33. Article 27(1) provides inter alia that "the receiving state shall permit and protect free communication on the part of the mission for all official purposes".

34. Article 30(2) provides that a diplomatic agent's "papers, correspondence and ... his property, shall likewise enjoy inviolability".

35. Article 27(3) provides that "the diplomatic bag shall not be opened or detained".

36. Section 20.

37. e.g. in Manila there is an ordinance prohibiting demonstrations within 500 feet of missions, and in Tel Aviv a requirement that they remain on the other side of the road.

38. e.g. in Tel Aviv. Misuse of flags in Australia - at least in some circumstances - is prohibited by the Diplomatic and Consular Missions Act 1978.

39. op cit. Cited in Hiller at p.187.

40. Hiller, at p. 191.

41. See- Fatemi v. US (192 A2d 525); R v. Petroff and Daskaloff (1971) 17 FLR 438.
42. See: "Diplomatic and Consular Immunities and Privileges, in Australia" by W.H. Bray in International Law in Australia, ed Ryan, Law Book Co, 1984 at 350.
43. Bray op. cit.