Дәріс 10

L 10. Procedure for establishing and implementing Consular Relations

Diplomatic relations entail the exercise by the sending government of state functions on the territory of the receiving state by licence of the latter. Having agreed to the establishment of diplomatic relations, the receiving state must enable the sending state to benefit from the content of the licence. Doing so results in a body of privileges and immunities. One explanation, now discredited, for this situation was that the diplomatic agent and the mission premises were ‘exterritorial’, legally assimilated to the territorial jurisdiction of the sending state. The consequences of this theory were never worked out and the law does not rest on any such premise. Indeed it rests on no particular theory or combination of theories, though the system is generally compatible with both the representative theory, which emphasizes the diplomat’s role as agent of a state, and the functional theory, resting on practical necessity. Under the functional model, the immunity is first a statement recognizing the sovereign and independent status of the sending state, as well as the public nature of a diplomat’s acts and his or her consequent immunity from the receiving state’s jurisdiction.

A consular officer, mistaken for *a'*trespasser as he leaves his mis- sion to attend a cultural function, struggles with a police officer and is subsequently charged with assault and battery.' The Vienna Convention on Consular Relations provides that consular officers are immune fromjurisdiction for "acts performed in the exercise of consular functions." Does the Vienna Convention shield the consular officer from suit? The scope of consular immunity is uncertain because courts differ in their application of the Convention's immunity rule. This Note argues that a principled interpretation of the scope of consular immunity consistent with the Vienna Convention requires a functional approach, based on whether immunity for the act giving rise to suit is necessary for the performance of a recognized consular function. Part I describes the Vienna Convention's treatment of consu- lar immunity and examines the disparate standards courts and com- mentators have applied in interpreting the scope of this immunity. Part II argues that functional necessity is the legal basis of consular immunity under the Convention and that the scope of the immunity is defined by balancing the interests of sending and receiving states. Part II further contends that previous standards are inconsistent with this basis. Finally, Part III defines and applies a functional test of im- munity derived from the Vienna Convention, illustrating its consonance with both the theory and policy of the Convention.

DEFINING THE SCOPE OF CONSULAR IMMUNITY

The Vienna Convention codified and progressively developed customary international law6 on consular immunities. As a party to the Convention, the United States is bound by its terms, and its provi- sions are part of United States law. While the Vienna Convention grants consular officers immunity from the civil, criminal, and adminis- trative jurisdiction of the receiving state for "acts performed in the ex- ercise of consular functions," this rule, by itself, has failed to provide courts with sufficient guidance on the scope of the immunity granted and has resulted in various interpretations.

*The Vienna Convention on ConsularRelations*

In the pre-Convention era, the principle that consular officers were immune only for their official acts-acts performed in the exercise of consular functions -was so widely followed in bilateral conventions and so widely accepted by both courts and commentators that it was recognized as a rule of customary international law.' The Vienna Convention on Consular Relations, a product of the efforts of the International Law Commission ("ILC") and the Vienna Conference on Consular Relations,' codified international law on consular immuni- ties by providing: Consular officers and consular employees shall not be amena- ble to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

In codifying the "consular functions" principle, the Vienna Convention maintained the basic difference between consular and diplomatic' immunities: "consular personnel enjoy immunity from legal process only in respect of official acts.

The more limited scope of consular immunity is reflected in the structure of the Vienna Convention and illustrated by comparison with the Diplomatic Convention. While both conventions provide that "it is the duty of all persons enjoying **...** privileges and immunities to re- spect the laws and regulations of the receiving State," and "not to in- terfere in the internal affairs of that State,"laws and regulations cannot be judicially enforced against diplomatic agents because they enjoy complete criminal immunity, and complete civil and administra- tive immunity except insofar as they engage in a limited number of ac- tivities.' In contrast, the duty of consular officers to respect receiving- state laws is judicially enforceable in all cases, except where article 43 grants immunity for acts performed in the exercise of consular functions.

Because consular immunity attaches only to official acts, an important issue for the drafters of the Vienna Convention was how, and indeed whether, to codify consular functions. Eventually, the drafters recognized that if immunity depended upon whether an act was per- formed in the exercise of consular functions, it was vital that courts be able to determine the functions to which immunity would apply.Article 5, a nonexhaustive list of the most important consular functions, emerged after lengthy debate among both members of the ILC and conferees to the Vienna Conference as a compromise between a general definition and a specific enumeration. Problems of interpretation generally arise as to what acts are "performed in the exercise" of the functions listed.

The Department of Consular Service is a structural unit of the Ministry of Foreign Affairs of the Republic of Kazakhstan, whose priority task is to protect the rights and interests of the Republic of Kazakhstan, its citizens and legal entities abroad. It coordinates the implementation by consular offices and honorary consuls of the Republic of Kazakhstan of the legislation of the Republic of Kazakhstan on issues of citizenship, international adoption, legalization and apostille, requesting documents, issuing visas, registration of acts of civil status, documentation, consular registration of citizens of the Republic of Kazakhstan and other consular actions.

The Department of Consular Service maintains cooperation with consular institutions of foreign countries accredited in the Republic of Kazakhstan on the protection of the rights and interests of foreign citizens located in the territory of the Republic of Kazakhstan. In particular, assistance in the issuance, restoration, cancellation, extension and reduction of the validity period of visas of the Republic of Kazakhstan.