

Misuse of Diplomatic Passports

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Abstract

A number of internet consultancies advertise their highly-priced intermediary services for obtaining a genuine diplomatic passport. Clients are promised increased status, tax relief, and diplomatic immunity. Under the *Vienna Convention on Diplomatic Relations 1961*, diplomatic immunity – meaning exemption from lawsuits and prosecution – shall be granted to accredited diplomats only; however several real-life examples prove that genuine diplomatic passports can be obtained from a number of African and Pacific countries and are being used to claim diplomatic immunity even though passport holders have not been officially accredited as diplomats in a host country. This paper firstly describes how a genuine diplomatic passport is obtained, despite the passport holder's lack of accreditation. Secondly, it analyses the evidentiary value such a passport holds under international diplomatic law, especially in regards to proving the passport holder's right to claim diplomatic immunity. It explores how Article 40 of the Vienna Convention on Diplomatic Relations 1961 enables 'fake diplomats' to successfully claim diplomatic immunity, and whether the misuse of genuine diplomatic passports constitutes a new form of white-collar crime.

Background

The wider public generally considers diplomats to be members of an exclusive, prestigious and somewhat mysterious circle (Burton, 1968); "a caricature of pinstriped men gliding their way around a never-ending global cocktail party" (Gyngell & Wesley, 2003). Indeed, a privileged status is afforded to diplomats through international law, which provides them with extensive benefits and immunities not granted to ordinary citizens. These privileges enable diplomats to safely execute their occupational tasks, e.g. facilitating, maintaining and intensifying communication and co-operation between their sending state and the host state (Bolewski, 2004).

Diplomacy (including diplomatic immunity) is a long-standing tradition. The first envoys were exchanged between Greek city states in the 5th Century BC. At first, diplomatic relations were established through bilateral and multilateral agreements, whose regulations developed into international customary law over time (Bolewski, 2007). The privileged status of diplomats was eventually captured in *The Vienna Convention on Diplomatic Relations 1961* (VCDR), which has been signed by over 150 states (Denza 1998; Wagner et al., 2007) and is considered customary international law (Bolewski, 2004; Brown, 1988; ICJ Reports, 1980). The VCDR declares that states take up diplomatic relations by mutual consent, and generally thereafter establish permanent diplomatic missions. Before appointing the head of a mission, the sending state must make certain that the receiving state has given its *agrément* for the person whom the sending state proposes to accredit (Article 4 VCDR). An *agrément* is the formal consent of the receiving state for the appointment of an individual as head of a diplomatic mission (Denza, 1998; Wagner et al., 2007). Other members of diplomatic staff may be freely appointed by the sending state. However the sending state must notify the receiving state of staff appointments, arrivals, and final departures (Article 7 VCDR). This

notification system enables the host state to identify diplomatic agents (Brown, 1988). Only diplomats, whose appointment has been duly accredited or notified, enjoy the privileges and immunities specified in the VCDR (Denza, 1998; Wagner et al., 2007).

Diplomatic immunity, as outlined in Article 31 VCDR, guarantees diplomats safe passage, ensuring intra-governmental communication even during periods of conflict (Bolewski, 2004; Denza, 1998; Wagner et al., 2007). Protection is provided by the receiving state. Diplomats are not subject to its jurisdiction; in other words, they are not susceptible to lawsuits, arrest, search, detention, prosecution, or subpoena as witnesses (Bolewski, 2004; Petrocelli, 2005). Diplomats usually claim diplomatic immunity by presenting a diplomatic passport or diplomatic ID card to the law enforcement agencies of the host state. Diplomatic passports are issued by the sending state. Diplomatic ID cards are issued by most receiving states through their ministry of foreign affairs (Brown, 1988; Deckert, 2009).

The Master Plan

Because diplomatic privileges and immunities provide many advantages, diplomatic passports are desirable objects for individuals who do not belong to the diplomatic corps. Responding to demand, a number of internet consultancies (for example www.ptshamrock.com; www.ptclub.com; and www.freebooter.com) promote themselves as intermediary service providers who can obtain genuine diplomatic passports from foreign jurisdictions. Consultancy fees range from 25,000 to 125,000 Euro. Clients are promised not only increased societal status and tax relief, but also diplomatic immunity (Deckert, 2009). One may suspect these offers of being nothing more than internet scams, and expect that advertisers would not deliver what they promise after receiving the initial non-refundable referral fee of around 5,000 Euro. However, further indicators suggest that they might not be

acting in bad faith. At least two publications (Cotter, 1998; Von Braunfels, 2003) explain how a genuine diplomatic passport can be obtained without using expensive consultancy services. Furthermore, several real-life examples of ‘fake diplomats’ claiming diplomatic immunity using a genuine diplomatic passport are known through court cases and the media. Brown (1988) describes the example of Meier, born in Canada and a former US citizen, who presented a Tongan diplomatic passport – including a diplomatic visa issued by the Australian High Commission in Fiji – when he was arrested in Australia. He claimed to be on a diplomatic mission, preparing for the Tongan King’s visit to countries throughout Asia and the Pacific. The magistrate wrongly ruled that Meier was to be granted diplomatic immunity. The King of Tonga himself recalled the passport after being interviewed about the incident.

The two known publications that explain how a genuine diplomatic passport can be directly obtained from a foreign country are *Der Vertrauliche Diplomatenreport* (The Confidential Diplomatic Report) by Charles Cotter and *Gentlemen’s Digest* by York von Braunfels (both only available in German). Identical wordings and misspellings in both publications suggest that the author is one person, using different pseudonyms. Reading like a ‘master plan’, the author first describes how diplomatic status and privileges are officially achieved, referring to the VCDR. Then, Cotter proposes two ways to obtain diplomatic status without resorting to a “dismal office job at the embassy” (1998): by either employing a consultant, or obtaining a diplomatic passport directly from government agencies in another country. The latter strategy is subsequently described in detail. The prospective passport holder is advised to contact representatives of a (preferably poor) state, offering financial or material assistance to support government programmes. During negotiations, he or she is advised to stress that aid may be provided faster and more easily if the benefactor was issued a diplomatic passport. He or she shall argue that such a document would allow the benefactor to travel freely and accomplish

their mission more efficiently. If the head of state or the ministry of foreign affairs (depending on domestic laws) is successfully convinced, they will issue the benefactor with a genuine diplomatic passport. However, the passport holder will not be deployed to an embassy, meaning that no receiving state will be notified of his or her 'appointment'. Regardless, the 'master plan' assures readers that they will be granted diplomatic immunity when presenting the passport to law enforcement agencies in their own or another country. It is claimed that the passport holder will be able to avoid arrest, speeding fines, house searches, and drink driving charges (Von Braunfels, 2003; Cotter, 1998).

Although it cannot be specified how prevalent this practice is, it is certainly not just another manifestation of the widespread use of fraudulent (non-diplomatic) passports in the context of irregular migration. This is an entirely different phenomenon as diplomatic passports are knowingly issued to business people by governments that should reasonably expect that passport holders engage in shady business dealings or forms of organised crime.

This raises questions: Does a genuine diplomatic passport by itself provide sufficient proof for claims of diplomatic immunity? Do law enforcement agencies grant diplomatic immunity based on a diplomatic passport alone? (The example by Brown cited above indicates that this might well be the case.) Does this behaviour constitute a white-collar crime?

Cogency of Proof: Diplomatic Passport and Diplomatic Immunity

Common legal principle suggests that the burden of proof rests with the individual claiming diplomatic immunity, because immunity provides the individual with advantages (Deckert, 2009). Since the VCDR does not specify how diplomatic staff should prove their rights to diplomatic immunity, regulations on the cogency of proof provided by a diplomatic passport

vary from country to country (Wagner et al., 2007). In many Western jurisdictions, only diplomatic ID cards issued by the receiving state are determinative of immunity status. A diplomatic passport only proves that the issuing state wishes the passport holder to fulfil a diplomatic function (Deckert, 2009). Hence, diplomatic passports are often considered only indicative to the passport holder's exceptional position (Brown, 1998; Deckert, 2009; Rudd, 2008). For example, in the United States, law enforcement agencies may only grant immunity when a diplomatic ID card issued by the Department of State is provided. Other documents, including diplomatic passports, are deemed inconclusive. In cases where a diplomatic ID card cannot be presented and immediate confirmation of an individual's status is required, law enforcement officers are expected to verify immunity status by contacting the U.S. State Department on a 24-hour hotline (U.S. Department of State, 2010).

However, the practice of entirely disregarding diplomatic passports as evidence for diplomatic immunity ignores a number of valid situations; for example, when diplomats have recently joined a diplomatic mission and have not yet received a diplomatic ID card (U.S. Department of State, 2010; Deckert, 2009). It especially ignores Article 40 VCDR, which guarantees diplomatic immunity to diplomats passing through the territory of a third state, while proceeding to take up (or to return to) his or her post, or returning to his or her own country. In these cases, the diplomat is not registered in the transit country; nor has he or she been issued with a diplomatic ID card. Confirmation of diplomatic status can take up to 24 hours, which is not expedient in most transit situations (Deckert, 2009).

In light of Article 40 VCDR and the sensitivity of diplomatic relations, 'transit states' often accept diplomatic passports as conclusive evidence for the right to claim diplomatic immunity. Brown (1988) describes the case of an Algerian diplomat who passed through the

Netherlands on his way to Brazil. In Amsterdam, a large number of weapons were confiscated from him, but the diplomat was allowed to continue his journey. Ministerial instructions require German law enforcement agencies to carefully evaluate all possible evidence when faced with an individual claiming diplomatic immunity through a foreign diplomatic passport. Only in urgent cases may authorities enquire with the German Foreign Office or directly with the relevant embassy. However, such an enquiry must be justified, and facts that militate against the individual's alleged status as a diplomat must be provided (Gemeinsames Ministerialblatt, 1993). Hence, enquiries are omitted if there is no emergency situation, or if doubt about the person's exceptional position is not expressed. Even in emergency situations, an enquiry with the German Foreign Office is not required, as signalled by the use of the word 'may' in the ministerial guidelines. The only conceivable indicator that an individual is not entitled to diplomatic immunity is doubt about the passport's authenticity. Because the 'master plan' approach provides individuals with genuine diplomatic passports, such doubt cannot arise. Therefore 'fake diplomats' with genuine diplomatic passports may successfully claim diplomatic immunity in jurisdictions which accept diplomatic passports as conclusive evidence (Deckert, 2009).

Even a 'fake diplomat' *without* a diplomatic passport has been known to be granted diplomatic immunity. In Berlin/Germany, a Greek member of the European Patent Office caused a car accident at three o'clock in the morning. When he handed over his red Employee ID – which looked similar to a diplomatic passport – the arresting police officer granted him diplomatic immunity and let him go. The driver did not even claim to be a diplomat. The mistake was only revealed when the German Foreign Office received the accident report (Schnedelbach & Kopietz, 2005). The dark figure of similar incidents can only be estimated. However, if police officers in Berlin, who are thought to have regular contact with state

officials, grant diplomatic immunity in view of any red passport (and diplomatic passports are not necessarily red) then the actions of law enforcement officers further removed from diplomatic hubs (such as capital cities) are highly questionable.

Misuse of Diplomatic Passports a Crime?

Only a few months ago, four Nepalese state officials were accused of making their diplomatic passports available to forgers (The Kathmandu Post, 2011); this supports the view that diplomatic passports are desirable objects in criminal circles. Forging a diplomatic passport is considered a criminal activity in most jurisdictions. However if diplomatic passports are issued to the passport holder by foreign state officials, as recommended by the ‘master plan’, then the document is technically genuine, not forged.

Referring to Section 132a of the German Criminal Code, Bolewski (2003) considers the illegitimate use of diplomatic titles to be a criminal offence in Germany. Section 132a states that whoever uses domestic or foreign designations of office or government service, titles, or public honours without authorisation, shall be punished with imprisonment for not more than one year or with a fine. In light of this section, careful examination is required to identify those who have the right to authorise the use of foreign designations of office or government service – including, in this case, diplomatic titles. Accredited diplomats use two different types of diplomatic titles: their domestic diplomatic designation, and an international rank. In order to establish comparability between diplomats from different countries, the Congress of Vienna of 1815 established a system of diplomatic ranks which has been formalised internationally (Denza, 1998; Markel, 1951). The international ranks are: Ambassador, Minister, Minister-Counselor, Counselor, First Secretary, Second Secretary, Third Secretary, Attaché, and Assistant Attaché. International ranks are generally assigned by the sending

state. However, most receiving states have reserved the right to approve the rank (Kahle, 1995). If a receiving state has reserved the right to approve the international rank of a diplomat, it must be considered the authorising agency in accordance with Section 132a of the German Criminal Code. However, if a diplomat is not accredited in any country, an authorisation process has not taken place; therefore the diplomatic title recorded in any diplomatic passport is assigned by the issuing state, and hence remains a foreign designation. Under international law, foreign diplomatic titles are not subject to approval by domestic jurisdictions. Because the exclusive authorisation of foreign diplomatic titles rests with the issuing state, the use of such designations abroad cannot constitute a criminal offence. Also, the use of such titles cannot be considered fraud or false certification since the diplomatic designation has been officially issued to the passport holder (Deckert, 2009).

The examples above illustrate that diplomatic immunity *is* indeed granted to 'fake diplomats'. If diplomatic immunity is granted in situations where rigorous law enforcement should usually occur, the passport holder's claims to diplomatic immunity serve the purpose of concealing other offences. Considering that, according to Article 27 VCDR, diplomats' bags are exempt from being opened or searched, criminal organisations that work across borders may find the advantages of a genuine diplomatic passport appealing. As far as is known to the author, the sole act of *claiming* nonexistent diplomatic immunity is not criminalised in any jurisdiction. This raises the question of whether it *should* be criminalised.

Criminological and Legal Considerations

Bolewski (2003) informs that some "diplomatic missions in Germany [...] have recently started issuing German nationals with diplomatic passports of their state – presumably for financial consideration – or giving them blank passports." He further reflects on the effects

that such misuse of diplomatic passports has on national and transnational criminal activities: “These holders of foreign diplomatic passports [...] use these documents and titles in business transactions and in their dealings with authorities in order to appear particularly trustworthy or to prove their entitlement to privileges and immunities [...] or to provide “official” support for visa applications by third parties to German missions abroad. Occasionally such persons use their links with foreign diplomatic missions to procure diplomatic passports for other non-entitled persons in return for financial consideration.” Diplomatic passports are used to ‘prove’ claims to diplomatic immunity in order to conceal white-collar offences (Bolewski, 2003); whereas the acts of issuing the passport, as well as claiming nonexistent diplomatic immunity, have attributes of white-collar crime as described by Newburn (2007) and Croall (2001):

As part of their occupational role, some government representatives have the opportunity to issue genuine diplomatic passports without accrediting passport holders as diplomats in other jurisdictions. This involves the abuse of trust inherent in the occupational role as international customary law expects only authentic diplomatic agents to be issued with diplomatic documents (Wagner et al., 2007).

A reasonable amount of insider knowledge is required in order to exhibit the behaviours described in the fifty-three page long ‘master plan’. In addition, knowledge about the VCDR, diplomatic conventions, and local law enforcement guidelines is required so that the passport holder can behave in an appropriate manner when claiming diplomatic immunity.

At the scene, the passport holder appears to act legitimately in claiming diplomatic immunity when presenting the genuine diplomatic passport to law enforcement agencies.

Often there is no complaint made, as law enforcement agencies often do not realise that they have granted diplomatic immunity to a ‘fake diplomat’. If a complaint is laid, this occurs long after the incident; cases of ‘fake diplomats’ are often only revealed by ministries of foreign affairs through documentation forwarded by law enforcement agencies.

Claiming diplomatic immunity despite a lack of entitlement does not pose an immediate physical threat to anyone.

Establishing responsibility is problematic as government representatives should not issue passport holders with documents in the first place (Wagner et al., 2007). On the other hand, states enjoy great autonomy in issuing national documents. Strict regulations and law enforcement regarding proof of entitlement to diplomatic immunity could possibly prevent ‘fake diplomats’ from successfully claiming diplomatic immunity. Hence domestic legal administration and law enforcement agencies could be held responsible.

The situation has an ambiguous legal status because the VCDR, respecting nation states’ autonomy, does not explicitly forbid governments from issuing diplomatic passports to people who are not accredited in another jurisdiction. The act of claiming diplomatic immunity when being pursued by law enforcement agencies for another offence can be viewed as an execution of the offender’s legal right to avoid self-incrimination (Deckert, 2009).

The considerable amount of money required to obtain a genuine diplomatic passport, be it from government officials directly or through a consultant, limits this behaviour to an ‘elite’ subset of people with already high social status, which white-collar offenders typically have.

However, as opposed to most white-collar criminal behaviour (Newburn, 2007), claiming diplomatic immunity has no direct financial impact on any victim. The only possible outcome achieved is the non-pursuit of other offences by law enforcement agencies, i.e. avoiding prosecution and subsequent incarceration or fines. Thus, any financial effect attributable to the non-pursued offences would be indirect through revenue obtained by secondary criminality.

Although false claims to diplomatic immunity exhibit most of the key characteristics of white-collar crime, it could be argued that many countries, like the U.S., have strict guidelines in place for law enforcement officers that prevent that ‘fake diplomats’ from successfully claiming diplomatic immunity. On one hand, there are a number of obstacles that avert rigorous law enforcement: the transit regulation of Article 40 VCDR as described above; the lack of an international database to allow law enforcement agencies immediate access to information on accredited diplomats worldwide; and the fragility of diplomatic relationships. Bolewski (2004) explains that diplomatic immunity is a sensitive issue, and disturbances may taint diplomatic relations with the sending state. When authentic diplomats, who can only present a diplomatic passport, are held by law enforcement agencies of the receiving state for an inappropriately long time, the sending state may apply the diplomatic principle of reciprocity to diplomatic agents stationed in its jurisdiction (Deckert, 2009). On the other hand, improved law enforcement guidelines, international information exchange about accredited diplomats, and education of law enforcement officers could be sufficient to prevent the success of false claims to diplomatic immunity.

Currently, as with most white-collar offences (Newburn, 2007), the misuse of diplomatic passports is self-regulated through diplomatic negotiations. Bolewski, a seasoned diplomat

himself, cites a number of measures that the German Foreign Office has undertaken in the past in order to discontinue such conduct (2003). The German Foreign Office sends “a written warning to the person concerned, stressing that such actions are contrary to good morals [...]. The effect of such communications depends on the wrongdoer’s willingness to admit to acting improperly and to take corrective action. If foreign diplomatic [...] posts are involved, the standard forms of diplomatic dialogue may be employed, also vis-à-vis the relevant foreign ministries, in order to convince foreign institutions or persons to respect the law in Germany. In a recent case, this fruitful dialogue led to an embassy [...] cancelling the diplomatic passport it had issued to an unauthorised person.”

Conclusion

As long as international law or bilateral agreements do not limit governmental sovereignty in this regard, national authorities are free to issue diplomatic passports to anybody. Governmental sovereignty also covers the right to ensure that foreign diplomatic passports are only used in accordance with international regulations. In compliance with the VCDR, national legislators are free to regulate the use of diplomatic passports through law enforcement policies or statutory law.

The misuse of diplomatic passports for purposes of shady business dealings and secondary criminality is not dissimilar to the use of fraudulent passports. As with fraudulent passports, potential harms include drug and arms dealing and human trafficking. Considering that the ‘diplomatic bag’, which enjoys diplomatic immunity from search or seizure, also covers shipping containers sheds light on possible dimensions of secondary criminality. Furthermore, non-criminal harms are posed to diplomatic security, international political relationships, and the very institution of diplomatic immunity. The misuse of diplomatic

passports fits the accepted notions of white-collar crime. Although it has no direct financial impact on any victim, secondary criminality for which the passport is intentionally used may well victimise a number of individuals.

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