

## THE CURIOUS CASE OF BRIGADIER PRIYANKA FERNANDO

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On the 5th of February 2018, newspapers around the globe were highlighting an incident which occurred at the Independence Day celebrations of Sri Lanka in front of the High Commission of Sri Lanka in the United Kingdom (UK).

The incident was where an officer of the Sri Lanka Army was alleged to have made death threats (throat slitting gesture) to a group of persons of British and Tamil citizens who were protesting opposite the High Commission waving LTTE Flags and allegedly stepping on the Sri Lankan flag.

The incident resulted in an action filed by the aggrieved party in the Westminster Magistrates Court citing breach of UK laws. The Learned Magistrate after having heard the submissions made by the aggrieved party, had issued an arrest warrant on the said officer Brigadier Priyanka Fernando.

The trial was held *in absentia* and on the 21<sup>st</sup> of January 2019, Brigadier Fernando was convicted (in his absence) of threatening the protesters and an arrest warrant was issued.

However, this warrant was later recalled on issues raised that the Brigadier was immune from prosecution owing to his diplomatic immunity.

The purpose of this article is simply to analyse whether the Brigadier can be arrested by the UK according to the main principles of Public International Law, and if not, the reasons as to why he cannot be so.

In order to do this, let us first begin to look at the source of diplomatic immunity which is sovereign immunity, and proceed as follows.

## **The Concept of Sovereign Immunity**

The Concept of Sovereign Immunity in international law is a direct outcome of the following doctrines in international law which is the Doctrine of Sovereignty and the Doctrine of Sovereign Equality.

International Law seeks to primarily govern the international relations between Sovereign States and other institutional subjects of international law. It is also important to understand that international law operates alongside international diplomacy, politics and economics.

Therefore, as Sovereign States are the primary actors in the international arena, the Doctrine of Sovereignty imputes that each State has a right of control to the exclusion of all others the functions of a Sovereign<sup>1</sup>.

### **What is Sovereignty?**

There are many definitions to this type of question. Professor John Austin defined the

Sovereign to be *'illimitable, indivisible and clearly identifiable'*, a source of authority where commands are backed by threats to a group of people who habitually obey them<sup>2</sup>.

This is the very essence of a Sovereign. An absolute ego with absolute authority.

In the **Island of Palmas Arbitration**<sup>3</sup>, Sovereignty was defined as follows; *"Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."*

However in international law, since there are many Sovereign States, and as each State strives to dominate over each other either militarily, politically and/or economically, international law has introduced key doctrines to mitigate the general problems posed by the Doctrine of Sovereignty.

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<sup>1</sup> Island of Palmas Arbitration [1928] 2 RIAA 829

<sup>2</sup> The Providence of Jurisprudence Determined, 1832

<sup>3</sup> Ibid 1

## The Doctrine of Sovereign Equality

The Doctrine of Sovereign Equality is a legal principle in international law which imputes that all states are legally equal despite their physical and practical limitations.

Naturalist Writer Emir de Vattel<sup>4</sup> captured the essence of this doctrine by the following anecdote by saying ‘*A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.*’

This principle is now legally recognized and enshrined in Article 2(1) of the UN Charter which states as follows; “*The Organization is based on the principle of the sovereign equality of all its Members.*”<sup>5</sup>

Furthermore, the consequence of this Doctrine of Sovereign Equality is the Principle of Non Interference in the Domestic Affairs of States, i.e. States by being legally equal to one another will no longer interfere in the domestic affairs of each other.

This principle is also legally enshrined as per Article 2(7) of the UN Charter<sup>6</sup>.

The legal consequence of the above two doctrines is the Doctrine of Sovereign Immunity. This doctrine is encompassed in the maxim that symbolizes the essence of sovereign immunity which is ‘*in par in parem non habet imperium*’ which is ‘legal persons of equal standing cannot have their disputes settled in the courts of one of them. Otherwise, this would be an attack on the dignity of a foreign state’<sup>7</sup>.

## History of Sovereign Immunity

Initially, a State enjoyed **absolute immunity** from proceedings in municipal courts. This immunity was passed on to acts which were not necessarily of a public nature.

For e.g. even commercial activity fell under this immunity, therefore if any contract became frustrated or difficult to perform,

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<sup>4</sup> The Law of Nations 1759 London 1797 edition 75, <[http://files.libertyfund.org/files/2246/Vattel\\_1519\\_LFeBk.pdf](http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf)> accessed 04 October 2019

<sup>5</sup> United Nations Charter 1945, Article 2(1)

<sup>6</sup> United Nations Charter 1945, Article 2(7)

<sup>7</sup> De Haber V Queen of Portugal (1951) 17 QB 171

parties would rely on sovereign immunity to escape any legal obligations.

In the case of *The Parlement Belge (1878)*, the defendant ship was owned by the King of the Belgians. It was a mail boat engaged in the channel crossings which had been involved in a collision.

The Court<sup>8</sup> initially held that as the mail ship was only involved in commercial enterprise and as such it was not entitled to immunity. However this decision was overruled by the Court of Appeal<sup>9</sup> which held that it was entitled to immunity as it was of absolute immunity.

### Qualified (Restrictive) Immunity

The overreliance of absolute immunity in areas such as commercial activity made this rule of absolute immunity increasingly difficult to justify. This was because people began to abuse this rule and this in turn led to an overall lack of trust between states.

However, in the landmark US case of *The Schooner Exchange*<sup>10</sup>, the restrictive approach was applied where the case led to the categorisation of acts of which sovereign immunity was distinguished and recognised only for only certain acts.

Thus, state immunity would only apply to acts of *public or official capacity of a state (jure imperii)* and acts which immunity would no longer apply were those which were *private or commercial acts (jure gestionis)*.

As a result, a State could now only claim immunity in relation to acts jure imperii (sovereign or public acts).

Thus in the Privy Council case of *The Philippine Admiral*<sup>11</sup> the precedent regarding absolute immunity was broken.

This was followed in *Trendex v Central Bank of Nigeria*<sup>12</sup> where the plaintiff sued the Central Bank of Nigeria for refusing to honour a letter of credit in respect of a contract for the supply of cement. The

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<sup>8</sup> (1879) 4 PD 129

<sup>9</sup> CA (1880) LR 5 PD 197

<sup>10</sup> 11 U.S. (7 Cranch) 116 (1812)

<sup>11</sup> [1976] 2 W.L.R. 214 (P.C.), affg [1975] 3 C.L. 32 (Hong Kong Sup. Ct.).

<sup>12</sup> [1977] 1 QB 529

defendant relied on the defence of its action being similar to a state and thus argued that it was protected by sovereign immunity.

The Court of Appeal held that the Central Bank of Nigeria was a separate entity from the Government of Nigeria and thus was not entitled to immunity.

Lord Denning in the case stated that international law now recognised the *doctrine of restrictive immunity* and that a distinction must be drawn between acts *jure imperii* and acts *jure gestionis*.

### **The case of Head of State and Diplomatic Immunity**

Historically, the Head of a State (HOS) was closely associated with a State. Both entities enjoyed under customary international law, absolute immunity in all areas of their activities, ranging from civil to criminal action.

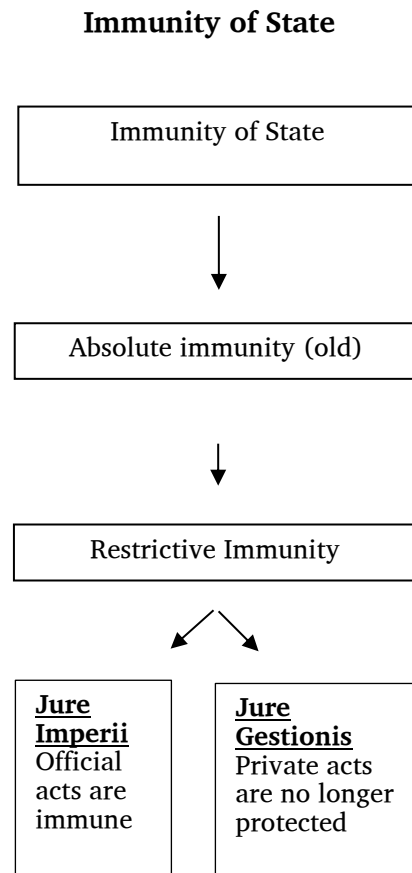
However today, under qualified immunity (restrictive immunity), a State and its agents enjoy immunity only in respect of

government acts (acts *jure imperii*) and not in respect of private acts (*jure gestionis*).

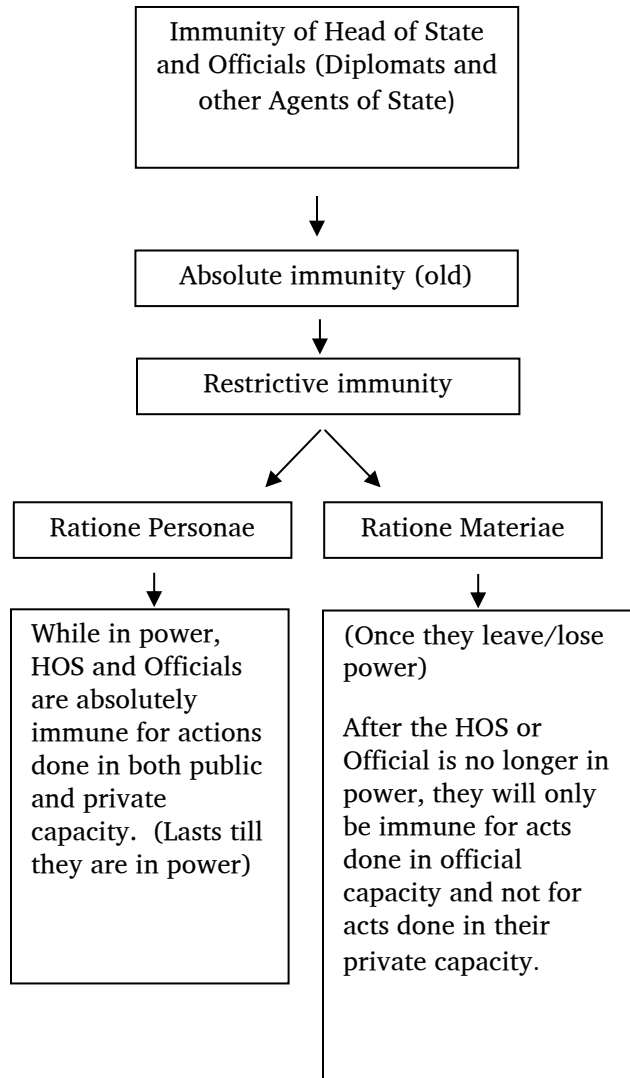
This restriction of immunity (acts *jure imperii*) when applied to agents of State which includes Head of State, Diplomats and other high ranking officials come in the form of two applications which are;

- 1) *Ratione Materiae* immunity &
- 2) *Ratione Personae* immunity.

This application of restriction of immunity on their power is better explained in the following diagram;



## Immunity of Head of State and State Officials



For e.g., the decision of a Head of State to declare war is an official act. Therefore such a person can never be brought to a Court of Law even after leaving office as such an act is of an official nature.

However if such a Head of State decides to engage in some illegally activity without

following any procedure of law, no action may take place as such a person, while in power, will be protected from *ratione personae* immunity.

Legal action can be then taken against only when such a Head of State leaves or loses power. As such an act would fall beyond his executive function he would not be able to protect himself under *ratione materiae* immunity and as such he can be brought to face justice.

### **Brigadier Priyanka Fernando**

According to the diagram above, Brigadier Priyanka Fernando went to the UK with diplomat and/or consular authority from Sri Lanka.

As an agent of Sri Lanka, he is protected by immunity *ratione personae*, and his action even though one may argue goes outside the line of his duty is still protected as he is still an agent of the State.

The arrest warrant issued by the Learned Magistrate of the Westminster Magistrate Court was in fact wrong in law as it in fact

violates the age old maxim of sovereign immunity ‘*in par in parem non habet imperium*’ as well as violates the inviolability of diplomatic agents guaranteed under the Vienna Convention on Diplomatic Relations 1961.

Such an act may lead to an equal reciprocal step by the Sending State as was seen in the landmark *US Diplomatic and Consular Staff in Iran (US V Iran)*<sup>13</sup>, where the International Court of Justice stated that diplomatic immunity is ‘*essential for the maintenance of relations between states and is accepted throughout the world by nations of all creeds, cultures and political complexion*’.

### **Other Issues of Sovereign Immunity**

This Doctrine of Sovereign Immunity has been further criticised and challenged on four grounds.

#### **1) Sovereign Immunity is incompatible with International Criminal Law**

The Doctrine of Sovereign Immunity has been criticised to be incompatible with international criminal law as it aims to shield Heads of State and other high ranking officials from being accountable for grave human right abuses.

#### **2) The Creation of the International Criminal Court**

The International Criminal Court (ICC) is the first permanent, independent international criminal court of the world whose main task is to try individuals accused of committing the most serious crimes of genocide, crimes against humanity and war crimes.

The ICC by virtue of Article 27(2)<sup>14</sup> of the Rome Statute has the power to summon and shall not be barred by the general immunities or special

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<sup>13</sup> International Court of Justice (ICJ), 12 May 1981

<sup>14</sup> The Rome Statute of the International Criminal Court 2002, Article 27(2)

procedural rules which may attach to the official capacity of a person, and has the power to exercise its jurisdiction over any such person.

In such a situation the Executive of such a country can be summoned by the ICC at any given time.

However the power of ICC to issue such summons primarily depends on whether a State has signed and ratified its convention, i.e. any State who signs and ratifies the Rome Statute will lose any right to their traditional immunities. Only then will the ICC be able to wield such power.

As such any country that has not signed or ratified this convention shall not be bound by its' summons.

### **3) The emergence of Jus Cogens Rules**

The recognition by the international community that some rules of international law are of a *jus cogens nature* has led to a challenge of sovereign immunity.

Jus Cogens are principles considered so fundamental that it overrides all other sources of law including even the Charter of the United Nations and accordingly, even the laws of immunity has been considerably challenged by this phenomena.

E.g., genocide, torture, etc.

### **4) Human Rights**

Sovereign Immunity is further criticised as it has clashed with basic human rights such as the right to access to a court, the right to a remedy and/or the right to effective protection.



## **Ways in which Brigadier Priyanka Fernando could have been summoned.**

It should be noted that there are ways in which the Brigadier could be summoned to face charges in the United Kingdom.

Given below are some ways the said Brigadier may be warranted;

1. If Sri Lanka had waived<sup>15</sup> the Officer's diplomatic and consular authority, while he was in the UK at the time of the order of the Magistrate, then he could have been charged and arrested.
2. If the officer after having serving his term and upon expiry of his authority visits the UK again as a private individual, he may be arrested.

However, given the sensitivity of the case, such an action would probably be highly unlikely.

## **Conclusion**

Accordingly, it is clear that Brigadier Priyanka Fernando cannot be arrested in the UK as at the time of the incident he was an agent of the State who is also protected by sovereign immunity and also diplomatic immunity guaranteed by the Vienna Convention of Diplomatic Relations.

To deny this right would lead to negative international relations between Sri Lanka and the United Kingdom and a possible legal dispute in the International Court of Justice (ICJ) as has been seen in the previous cases like the *US Diplomatic and Consular Staff in Iran (US V Iran)*<sup>16</sup> where the ICJ ordered Iran to pay reparations to the US

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<sup>15</sup> Vienna Convention of Diplomatic Relations 1961, Article 32(1)

<sup>16</sup> Ibid 13

for violating the said Vienna Convention.

Thus in conclusion, it is clear that the study of immunity as done with the case of Brigadier Priyanka Fernando is not a straight forward one as it involves an understanding and appreciation of several doctrines and principles of Public International Law.