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The Protection of Japanese Diplomatic and Consular Premises in China

Replies and Comments

Dr. Noëlle Quénivet
Researcher

For comments
noelle.quenivet@rub.de

Tel: +49.234.3227956

On the Web

<http://www.ifhv.de>

Focus

Article 22(2) of the Vienna Convention on Diplomatic Relations, 18 April 1961

"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."

United States Diplomatic and Consular Staff in Tehran (US v. Iran), 24 May 1980, ICJ, Judgement

International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001

Alfred L.W. Short v. Iran, Iran-US Claims Tribunal, 16 Iran-U.S. Cl. Trib. Rep. 76 (1987)

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), 27 June 1986, ICJ, Judgement

In April 2005, Chinese citizens protested in the streets of several major cities such as Shanghai, Shenyang, Beijing, and Hong Kong against Japan. Further, the demonstrators damaged Japanese property. In particular they pelted the Japanese consulate in Shanghai with stones. Also in Shenyang demonstrators hurled bottles and eggs at the Japanese consulate. According to some press reports the police did little to stop the angry crowd from throwing stones and other projectiles at Japan's diplomatic missions. The Chinese authorities warned the demonstrators against the participation in "unapproved demonstrations or activities that may affect social stability". Japan asked for compensation for the attacks and requested an apology. So far it has received neither compensation nor an apology from the Chinese government.

First, it must be noted that diplomatic and consular premises enjoy a special protection. According to article 22(2) of the 1961 Vienna Convention on Diplomatic Relations State parties are responsible for maintaining peace and order around other States' diplomatic facilities. The same holds true for consular premises protected by article 31(3) of the 1963 Vienna Convention on Consular Relations. In the *Tehran Hostage* case the International Court of Justice found that these obligations established by the Vienna Conventions of 1961 and 1963 are also obligations under general international law. Hence, the International Court of Justice found that Iran was responsible for breach of its own obligations, that of preventing the acts of the students against diplomatic premises (para. 61). *In casu* it is difficult to assess whether China has failed its obligations under the Vienna Convention on Diplomatic Relations as the damages mentioned in the *Tehran Hostage* case were extremely serious and the Iranian government had not adopted any measures to prevent them. In this instance, the Chinese authorities have called for restraint and the police kept protesters away, though they let them throw eggs and rocks at the diplomatic and consular premises. However, as the Chinese authorities were able in some cities such as Beijing to contain the crowd and in others not such as in Shanghai, one may legitimately raise the question as to whether this was linked to the inability of the forces to contain the mass or the unwillingness to do so. In the latter case, it is more likely that China be held responsible for the damages caused to the Japanese diplomatic and consular buildings.

Second, one must examine whether the acts committed by the demonstrators can be imputed to the Chinese State and thereby engage China's State responsibility towards Japan. In this regard, international law has established a rather high threshold. For example, the ICJ held Iran responsible for the damages caused to the American embassy by Iranian demonstrators because both the Iranian Foreign Minister and the Ayatollah himself publicly endorsed the act (para. 79). The Court concluded that "the approval given to these facts [...] and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State." (para. 74) The necessity to prove that the State officially endorsed the acts of the private persons sets an extremely high threshold in terms of State responsibility. In particular, the State needs to make clear that it wants the acts to be regarded as its own (see also Article 11 of the document on State responsibility). There is no doubt that China cannot be held liable for the damages caused to the Japanese consular and diplomatic premises as it has not endorsed the acts.

Another type of responsibility flows from article 8 of the document on State responsibility which refers to individuals or groups "acting on the instructions" of, or under the direction or control of the State. The Commentary to this article explains that this standard is meant to be fairly high, requiring either express or specific instructions given by the State. It must be stressed that the test requires both direction and control, thus setting a rather high threshold. Further, the test used by the US-Iran Claims Tribunal in the *Short* case also points at the necessity to demonstrate that the unlawful statements contain specific instructions. Both cases imply that direct statements need to be made by the State authorities to hold the State liable for acts committed by private persons. Again, China cannot be held responsible for the damages caused by its citizens to Japanese property.

A lower threshold seemed to have been established by the ICJ in the *Nicaragua* case decided in 1986. The adopted standard was that of "effective control" which provides that financial support, the planning of the operations as well as the selection of their targets is insufficient to attach liability to the State for the actions of individuals. Again, in this instance, it cannot be demonstrated that China directed or enforced the perpetration of unlawful acts.

Consequently, the damages suffered by Japan cannot be imputed to the Chinese State. However, China may have violated the 1961 and 1963 Vienna Conventions on Diplomatic/Consular Relations.

Responsibility

BOFAXE are published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum: IFHV, NA 02/33 Ruhr-Universität Bochum, 44780 Bochum, Germany. Tel: +49.234.3227366, Fax: +49.234.3214208.

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