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## **Introduction**

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

# **PRIVILEGES AND IMMUNITIES TO THE FOREIGN STATES**

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## **THEORIES OF DIPLOMATIC IMMUNITY**

Many different schools of thought have been used in order to defend the legal foundation for the immunities that might be utilized by the diplomatic representative. This article examines three different theories: the extrinsic territory theory, the character theory, and the functional necessity theory.

### **Exterritorial Theory: -**

The simplest and oldest hypothesis, "extraterritoriality," holds that the mission's premises are in the sending state's territory, not the receiving states. To underscore, diplomatic offices and residences are considered part of the sending state.

Diplomatic law and judicial judgements rejected this notion. First, the extraterritoriality hypothesis cannot explain the mission and diplomatic agent's immunity since it is impossible to accomplish. The ambassador may also have a company or property in the receiving state. He must pay rates in the receiving state in this case. This idea has practical applicability since the envoy should be treated as though he is not in the receiving state.

In international law, the prior logic is outmoded.

### **Representative Character Theory: -**

According to the common belief, the state that is doing the receiving ought to deal with the envoy who is representing the sovereign state as if it were dealing directly with the sovereign state itself. In addition, any connection to the dignity of the ambassador is seen to be an attachment to the personal dignity of the sovereign. As a consequence of this, the state that is "receiving" the

embassy must treat the ambassador in the same manner that it treats the presidential envoy in order to guarantee that the ambassador and the presidential envoy are exempt from the jurisdiction of the receiving state. In point of fact, the conclusion that the United Nations Supreme Court came at in the case of *Schooner Exchange v. MacFaddom* lends credence to this idea. One critique may be levelled against the representational theory, which states that it offers protection for official activities but does not provide the basis immunity for private conduct.

### **Functional Necessity Theory: -**

Immunity and privileges are often bestowed to a party under today's diplomatic law on the grounds that there is a "functional requirement." This view proposes that ambassadors are entitled to certain privileges because the diplomatic mission believes that without them, they would be unable to carry out their responsibilities effectively. It is common knowledge that a diplomat will be placed in a precarious circumstance if they are found to be responsible for any kind of legal action, political intervention, or even their own personal behaviour that places them in a perilous situation that depends on the good will of the receiving state to which they are accredited. This is because the diplomat's safety depends on the good will of the state to which they are accredited. In addition, it is vital that the diplomatic agent be granted immunity so that they may carry out their duties in a manner that makes them feel both safer and more comfortable. In the field of diplomatic law, functional theory is sometimes seen as the more practical and expected approach.

## **CIVIL AND CRIMINAL IMMUNITY**

### **Immunity from Civil Jurisdiction**

Although state practise emerged in the seventeenth century, civil jurisdiction immunity developed slower than criminal jurisdiction immunity. Since the State cannot supervise civil actions against diplomatic agents, this immunity emerged. A public authority must start court proceedings, although many persons may initiate civil suits. Due to these issues, civil jurisdiction is exempted since private cases do not impair the receiving state's international relations. Most authors feel diplomatic immunity should be limited, but courts often grant complete protection, with an emphasis on commercial and professional activity. Diplomatic immunity wasn't defined until the Vienna Convention on Diplomatic Relations. Three civil immunity restrictions were created.

“Article 31(1) of the Vienna Convention on Diplomatic Relations states that a diplomatic agent is exempt from civil action unless the following conditions are met: a true action involving private immovable property located in the receiving State's territory; a succession action in which the diplomatic agent acts as executor, administrator, heir, or legatee as a private individual rather than on behalf of the sending State.”

A diplomatic agent may be sued for non-payment of debts or a trader's bill for commodities provided for personal use, resumption of hiring charges or bills for repair or reimbursement for any injury caused to a person or property by motor vehicle accidents, or any other loss or default. “Such cases have no legal remedies, and the injured party must depend on the Ministry of Foreign Affairs to mediate the disagreement. The ministry might ask the mission leader to mediate. In most circumstances, the diplomatic representative wants to retain his or her reputation in both the sending and receiving States, therefore resolving the issue is no difficulty. If the diplomatic agent protests or refuses to compromise, he might be recalled or his immunity cancelled.

### **Diplomatic Immunity from Criminal Jurisdiction**

Diplomatic immunity from criminal jurisdiction is absolute, but civil and administrative jurisdiction is limited. Most courts and pundits support diplomatic agents' complete criminal immunity. According to international law, diplomats cannot be tried in criminal courts. Functional need requires unlimited international linkages to preserve public order, granting immunity from criminal prosecution. Article 31 paragraph 1 of the Vienna Convention on Diplomatic Relations states that "a diplomatic agent shall have immunity from the criminal jurisdiction of the receiving state." This exemption covers all minor and indictable offences, from traffic infractions to conspiring against the receiving state's national security or crimes against humanity.

In criminal jurisdiction, immunity *ratione personae* refer to the wide extent of the concerned official's conduct, whereas immunity *ratione materiae* refers to the limit of acts performed while executing tasks. The former concerns stance, whereas the later concerns conduct.

### **Immunity *ratione personae***

It is limited to a few authorities, including the president when in office, and has a wide scope. Despite State expertise with civil case issues, criminal actions using immunity before domestic

authorities were rare. The Arrest Warrant case hinges on immunity *ratione personae*. "Under international law, it is well known that...certain holders of high-ranking office in a State, such as Head of State...enjoy immunity from jurisdiction in other States, both civil and criminal," the International Court of Justice said in the Arrest Warrant case. "It is well established in international law that, like diplomatic and consular agents, some holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister for Foreign Affairs, had immunity from civil and criminal jurisdiction in other nations."

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In "Djibouti v. France," the International Court of Justice recognised the immunity *ratione personae* of a Head of State. The court recently upheld a head of state's "full immunity from criminal jurisdiction and inviolability."

It is suggested that other ministers and cabinet ministers be given *ratione personae* immunity from foreign criminal jurisdiction.

### **Immunity *rationemateriae***

Immunity *rationemateriae* concerns State officials' conduct while doing their tasks, unlike immunity *ratione personae*. The literature and domestic courts restrict this immunity.

Immunity *rationemateriae* for international law offences is disputed. In the Arrest Warrant case, the International Court of Justice found that a foreign minister's office's immunity from criminal jurisdiction does not apply to international law offences. However, the court did not discuss *rationemateriae* immunity for a former foreign minister. However, the court's *obiter dicta* implicitly denied such an exception.

Diplomatic immunity from criminal jurisdiction only affected procedure, not latent substantive responsibility. Thus, diplomatic immunity requires the dismissal of all actions against the defendant. Diplomats are immune to all forms of execution, which they may utilise to avoid conviction. During diplomatic immunity, all procedures against the diplomatic agent may be halted, but they are not invalid.

## **ABUSES OF DIPLOMATIC IMMUNITIES**

The idea of diplomatic immunity originated from the precedents that were set by the customary norms of international law. It is conceivable to trace its roots back to the need of protecting officials of foreign governments stationed in a country from the threat of potential retaliation in the case of a crisis on the world stage and of fostering relationships between nations. At the end of the day, "diplomatic immunity is to keep foreign ambassadors out of U.S. courts and to relieve their countries of the need to defend them in court.<sup>1</sup> However, in today's day and age, ambassadors, their families, maids, and other staff members misuse this privilege to avoid punishment for a variety of misdeeds."

### **Abuses in case of civil liability**

Diplomatic immunity protects ambassadors from legal responsibility for workplace injuries. Diplomatic immunity is currently a loophole to shield diplomats from damages and penalties. Diplomatic missions include ambassadors and their offices. Creditors cannot sue missions individually for debts. If a diplomat refuses to pay rent or other debts, a person has less rights. Since they lack legal instruments to guarantee repayment, banking institutions do not lend to ambassadors. Personal purchases by ambassadors are likewise duty-free. Diplomats were accused of profiting from retailing "tax-free" commodities in other jurisdictions. Ambassadors have trouble implementing rules like double-parking restrictions. Thus, ambassadors are not liable for parking tickets, debts, or other taxes.

### **Abuses through criminal act**

The misuse of diplomatic immunity in connection with criminal liability can be separated into two types. The first category covers the use of diplomatic bags to smuggle items into or out of the receiving country, while the second covers offences committed by ambassadors.

### **Offences committed by ambassadors themselves**

It had been noticed that diplomatic operatives had frequently functioned as primary perpetrators. There are no data to back up the allegation, and no comprehensive research had been conducted to establish the total number of offences committed by people who enjoy diplomatic immunity.

However, a number of recent ``examples had emerged that corroborate the argument that the offences committed in such a case are unusual. The following are a few examples of this.

#### *Paris Iraq Gunfire Incident<sup>1</sup>*

This incident occurred in 1978 in Paris. A police officer taking a Palestinian out of their embassy is murdered by a bullet fired from the Iraqi Embassy. This gunshot sparked a big scandal, but the perpetrators had to be allowed go. The French President's spokeswoman officially recognized the seriousness of the crime, but claimed that the accused were immune from prosecution due to diplomatic immunity. The only thing the French government did is propose that the three accused be tried by the Iraqi government.

#### *Sri Lanka Burma pyre Incident<sup>2</sup>*

In 1979, the Burmese Ambassador to Sri Lanka is enraged when he saw that his wife found getting out of the car of a nightclub band member. The next day, residents near the embassy observed the ambassador erecting a pyre on the embassy's back lawn. The police were barred from accessing the embassy because the ambassador claimed it is on Burmese territory. Later, he set fire to his wife's remains on the pyre.

#### *United Nations Brazilian Gunfire Incident<sup>3</sup>*

In 1982, the grandson of a Brazilian ambassador shot an American citizen outside a neighborhoods club. The victim launched a lawsuit against the ambassador as well as the government. These accusations were dropped due to public immunity.

#### *US Guatemalan kidnapping Incident<sup>4</sup>*

In 1983, two Guatemalan ambassadors were involved in the kidnapping of El Salvador's previous ambassador to the US. She is kidnapped for \$1.5 million, which the kidnappers referred to as a

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<sup>1</sup> Randy G Taylor, *Shootout at the Iraqi Embassy in Paris*, <http://www.randytaylor.com/scrapbook/IraqiShootout.html>

<sup>2</sup>*Final Approaches: A Memoir by Gerald Hensley*, (2006, Auckland University Press, NZ)

<sup>3</sup>Veronica L. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned From The 1946 Convention On The Privileges And Immunities Of The United Nations*, 28 Brook. J. Int'l L. 989

<sup>4</sup>Leslie Maitland Werner, *4 More Held In Abduction Of Ex-Envoy's Wife*, <http://www.nytimes.com/1983/07/16/world/4-more-held-in-abduction-of-ex-e...>

"war tax," after she went missing from her Florida home. The ambassadors implicated in the case were arrested only after the State Department is successful in obtaining a waiver of their diplomatic immunity with the Guatemalan government.

#### *United nations North Korea sexual assault Incident<sup>5</sup>*

Nam Chol, a North Korean diplomat, is accused of attacking a lady in a New York Park in 1983. For ten months, he is under the protection of the North Korean Embassy. When his senior is threatened with deportation, he is compelled to leave the embassy. Mr. Chol then surrendered to authorities, who ordered him to leave the country.

#### *London Libyan "People's Bureau" Incident<sup>6</sup>*

“One of the most notable examples that the world had recently observed is what occurred on April 17, 1984 at the London Libyan "People's Bureau." A group of Libyan demonstrators opposing Libyan Leader Colonel Muammar el-Qaddafi were denouncing the leader's treatment of Libyan students in front of the People's Bureau” The demonstration is calm until the crowd is hit by machine gun fire fired by the bureau. More than 10 people were hurt, with five of them critically. One police officer who is managing the demonstrators is also killed by gunfire. The British Police encircled the Bureau, preventing anybody from entering or leaving. The British Home Secretary asked that Libya allow British police to enter the premises in order to collect evidence and identify suspects. This demand is denied by Libyan officials. The Libyan government claimed diplomatic immunity for all embassy occupants, but the British government labelled them persona non grata and evicted them. The British government also severed ties with Libya, which is the only thing it could do under the Vienna Convention.

#### *Britain Nigerian Kidnapping Incident<sup>7</sup>*

This event also occurred in the United Kingdom and is connected to an ex-member of Nigeria's former government, Alhaji Umaru Dikko. Mr. Dikko is kidnapped from his London home in 1984,

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<sup>5</sup> THE REGION; Korean Diplomat Heads for Home, ., <http://www.nytimes.com>

<sup>6</sup>Libyan embassy shots  
killpolicewoman,[http://news.bbc.co.uk/onthisday/hi/dates/stories/april/17/newsid\\_2488000...](http://news.bbc.co.uk/onthisday/hi/dates/stories/april/17/newsid_2488000...)

<sup>7</sup> AdeoyeAkinsanya, *TheDikkoAffairandAnglo-NigerianRelations*, 34*TheInt.Com.L.Q*602(1985)

drugged, and concealed in a diplomatic container headed for Nigeria. The suspects in the kidnapping were also hiding in the container. The Nigerian government refused to cooperate when the British government intended to take action. All Britain could do is expel the ambassadors implicated in the abduction episode under the Vienna Convention.

#### *United Nations Zimbabwe Child abuse Incident<sup>8</sup>*

Karamba, a commercial attache of Zimbabwe's UN mission, is accused of brutally assaulting his children in 1987. Despite the fact that the US did not prosecute him with any crime because of his diplomatic immunity, he is returned to Zimbabwe as quickly as possible.

#### *US India Incident<sup>9</sup>*

In 2013, an Indian consular worker, Devyani Khobragade, is charged with not paying US minimum wages and falsely misrepresenting the amounts to be paid on a visa application for her domestic assistant. She is arrested, strip-searched, and imprisoned in a New York prison after a thorough investigation is initiated against her. India filed a formal protest about the investigation process, and as a result, the privileges provided to American consular officials in India are being reviewed. These are a handful of the numerous documented occasions in which the diplomatic immunity afforded by international law had been grossly abused by those who wield it. Diplomatic immunity had provided a means for ambassadors to commit a crime and then flee the repercussions of that conduct. The receiving state's hands are tied, and in most cases, they are unable to take any action against the offenders. The receiving state may attempt to seek assistance from the exporting nations, although this is usually unsuccessful.

### **SHOULD IMMUNITY BE ABSOLUTE**

The notion of diplomatic rights is developed in Europe in the mid-17th century and had steadily spread around the world since then. The 1961 Vienna Convention on Diplomatic Relations codified these rights by protecting ambassadors from being harassed or punished while on a

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<sup>8</sup>*Court Won't Bar Return of Boy In Abuse Case to Zimbabwe*, <http://www.nytimes.com/1988/01/01/nyregion/court-won-t-bar-return-of-boy>.

<sup>9</sup>*India's foreign minister: Drop charges against diplomat*, <http://edition.cnn.com/2013/12/20/politics/india-us-diplomat/>

diplomatic mission. However, if we look at the precise clauses of that 1961 Vienna Convention on Diplomatic Relations, we may see significant discrepancies. First, Article 29 stipulates that a diplomatic agent's person is untouchable. He is not subject to any sort of arrest or imprisonment. The receiving or host state must treat him with dignity and take all necessary precautions to prevent any harm on his person, freedom, or dignity. Those who commit offences under the guise of "diplomatic immunity" had clearly failed to read, or do not want others to read, the relevant articles of the Convention, which eliminate any absolute blanket coverage for visiting or appointed ambassadors under the guise of "diplomatic immunity."

Unless the host State expressly grants additional privileges and immunities, "a diplomatic agent who is a national of or permanently resident in that State enjoys only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions, according to Article 38 of the Vienna Convention 1961". The preceding article clearly distinguishes between acts performed as part of his official obligations and those performed as a personal act. Personal activities taken beyond the scope of official consular duties are not covered by "diplomatic immunity."

Article 37 of the 1961 convention goes on to reinforce the above limitation on immunity by stating, "*Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties.*"

### **Excluding immunity in case of grave offences**

Although the Vienna Convention makes no attempt to differentiate offences based on their gravity, it may be useful to draw a line between offences of varying gravity and explain the appropriate degree of exemption. "Such people would argue that while diplomatic agents should not be bothered with proceedings for minor or insignificant offences in comparison to the need to ensure effective performance of diplomatic functions, in the case of serious or generally dangerous offences" a diplomat's immunity should not become a basis for his impunity. "The basic reality is that certain offences are deemed minor in one jurisdiction and terrible in another, or they are fully

lawful in one state but criminal actions in another. As a result, most academics categorically claim, and state practise follows, that diplomatic operatives cannot be tried or punished for committing a crime in local courts under any circumstances” The ICJ concurred with the latter point of view, emphasizing that ambassadors are entitled to diplomatic immunity from any criminal jurisdiction under ordinary international law.

Though this may be true in cases where the offences do not affect the entire international community, but only the respective society, “absolute diplomatic immunity from criminal jurisdiction in cases of offences against humanity, war offences, or other serious offences — that is, international offences — should be reconsidered. Indeed, the idea of functional need, or the same relationship between diplomatic immunity and the necessity to fulfil diplomatic tasks efficiently, calls the necessity or legality of diplomatic immunity in such situations into doubt”. It is difficult to maintain that offences such as offences against humanity and war offences are compatible with a diplomat's duties. As a result, one could argue that when ambassadors act like war criminals, for example, they are no longer ambassadors and must relinquish the benefits of diplomatic immunity. Furthermore, one may now point to the Rome Statute of the International Criminal Court (ICC) and its annexes, which are gaining increasing acceptance among nations and may potentially be viewed as proof of customary international law. It is difficult to maintain that offences such as offences against humanity and war offences are compatible with a diplomat's duties. Thus, one may argue that when ambassadors act, for example, like war criminals, they are no longer ambassadors and must forfeit the advantages of those immunity to which ambassadors are normally entitled. Furthermore, one may now point to the Rome Statute of the International Criminal Court (ICC) and its annexes, which are gaining increasing acceptance among nations and may potentially be viewed as proof of customary international law Nations, on the other hand, appear to maintain the stance that a person remains an appointed diplomat, with diplomatic immunity, until his responsibilities are officially terminated. Nonetheless, a diplomat had been convicted as a war criminal on one occasion. In particular, despite his diplomatic rank, the Japanese ambassador to Belgium, General Oshima, is convicted by a military trial in 1948 for war offences committed during WWII.

Can, on the other hand, manslaughter, murder, or conspiracy be regarded consistent with diplomatic functions? The majority believes that, in order to maintain clarity and avoid idiosyncratic interpretations of the Vienna Convention by nations, “We should maintain our position that diplomatic immunity from criminal prosecution is unqualified and unqualified. After all, the sending state retains full control over its ambassadors, and it would face international pressure to punish ambassadors who committed grave offences that harmed the interests of all nations”. However, sending countries had demonstrated little interest in prosecuting their own ambassadors for offences committed overseas. Another issue is that many nations lack jurisdiction over offences committed overseas. There are also other procedural issues, such as obtaining the presence of witnesses in the sending state, that render the sending state's continuing jurisdiction useless. However, this does not preclude sending countries from bringing their ambassadors to trial when they return to their home nation. For example, a French diplomat is convicted in France for killing a colleague following a violent brawl in Angola, while a US chargé d'affaires is prosecuted in Equatorial Guinea for the death of a colleague.

### **Limiting immunity to official acts**

It had been argued that diplomatic agents should only be granted diplomatic immunity in conjunction with activities that are part of their official duties. As a result, any criminal acts that are private in nature or done in conjunction with private activities fall within the jurisdiction of the receiving state, and the latter had the authority to adjudicate over the offending diplomat. On the one hand, this might pose severe issues when determining whether an activity is undertaken in “a private capacity or as part of official responsibilities, as defined in article 3. Indeed, a Portuguese court previously ruled that article 3 establishes the broad framework for diplomatic activities and must be construed to include all such incidental actions that are required for the fulfilment of the main functions stated in that article”. The International Court of Justice (ICJ) adopts a similar stance, holding that no distinction can be made between acts undertaken in an official capacity and those alleged to have been conducted in a private capacity. Even though certain acts appear to be outside the scope of the ambassador's official responsibilities, such actions may nevertheless be of an official nature if the diplomat is directed to do so by his sending state. Can diplomatic representatives and their sending nations, on the other hand, ever legitimately and convincingly argue that committing severe offences qualifies as performing official functions? (Unless such

offences were committed inadvertently while performing diplomatic duties)? All forms of violence against people, such as murder, rape, assault, and battery, are considered serious offences, but self-defense is not one of them.

“The scope of official functions is also important in another scenario. In truth, not all acts committed by a diplomatic agent are forever exempt from the receiving state's jurisdiction”. When a diplomatic agent's duty ends, he loses diplomatic immunity and may be sued for all activities other than those done in the performance of his official responsibilities. Of course, the diplomat had a fair amount of time to leave the receiving state before losing his immunity, but if he decides to return, he may face criminal charges. One may legitimately claim that “murder, rape, causing serious bodily harm, kidnapping, war offences, and offences against humanity are not official responsibilities and can be prosecuted by the receiving state. The latter may even seek the expulsion of the former diplomat from the sending state or from other governments with territorial authority over him”. However, the use of such an option is once again called into question, because “the sending state is unlikely to extradite its own diplomat, and if it wanted the diplomat prosecuted, it might have waived his immunity or tried him itself”.

### **CONCLUSION**

The options for prosecuting ambassadors or other state officials who had committed major offences but are protected by personal inviolability and diplomatic immunity are severely restricted, both in quantity and effectiveness. As modifications to the Vienna Convention are unlikely to be achieved by treaties or custom, we must expect for increased preparedness on the part of sending nations, in collaboration with receiving nations, to assure the prosecution of dangerous offenders. “Hopefully, in the future, we will be able to depend on procedures before the ICC, which should be the least biased and limited. The problem is that the principle of reciprocity prevents nations from making potentially beneficial changes to diplomatic law through practise by establishing a hierarchy between diplomatic law and human rights and international humanitarian law on the one hand, and human rights and international humanitarian law on the other”. However, in addition to ensuring prosecution, receiving nations should place a greater emphasis on crime prevention by requesting that Sending nations provide general and possibly criminal background

information on ambassadors, as well as explanations for why they left previous postings (if not due to normal termination of functions), and by contacting countries where the diplomat in question served prior terms and seeking information whether any issues arose.

