

RAYMOND DAVIS: DIPLOMATIC IMMUNITY V. US IMPUNITY

What happens with the Raymond Davis case, in the end, will likely not have very much to do with the Vienna Conventions. For that matter, we likely will never have enough of the unadulterated facts to know what should happen under the Vienna Conventions. But let's suspend reality and see where an examination of the Vienna Conventions and the competing facts in the Davis case might take us.

As several reports have pointed out, there are numerous Vienna Conventions and the two that are likely to apply to Davis are the Vienna Convention of 1961 on Diplomatic Relations and the Vienna Convention of 1963 on Consular Relations. The VCs get wrapped in and out of discussions of passports and visa – so let's separate and reassemble.

Diplomatic Passport. Our State Department issues passports needed for travel to other countries. Because of the State Department's sole control over this document, it is looked at skeptically by Pakistanis in the Davis matter. The US says that, while it was not on him when he was captured and while it may have some discrepancies with other documents, Raymond Davis has a US issued diplomatic passport. Some have gone so far as to make this the equivalent of having diplomatic immunity, without anything more.

But that's not how it works. Diplomatic immunity is derived, under VC 1961, by being validly attached to the embassy (mission) of a nation in which the "diplomat" is located. A diplomatic passport has no effect to attach someone to an embassy or mission. For example, a diplomat validly attached to the embassy in Iraq could travel to Germany on a diplomatic passport, but would not have immunity in Germany if they were

not validly attached to the German embassy. So the question isn't whether or not Davis had a diplomatic passport (or whether, if so, it was issued to an alias or issued after the fact), but whether he was validly attached to the US embassy at the time of his altercation in Pakistan.

Attachment to the US Mission/Embassy. For someone other than the head of mission, the general rule is that the sending nation (US) can "freely appoint" diplomats to its mission staff (Article 7), with a few caveats, and are then merely required to notify the receiving nation's foreign ministry of the appointment/addition. The first caveat, also in Article 7, is that if the person being appointed is a military attaché, "the receiving State may require their names to be submitted beforehand, for its approval." Until recently you could have said that no one has been saying that Davis is anything but ex-military, however, some of the stories now being circulated include rumors that he is a part of American Task Force 373 black operations. (No comment on how reliable any of it is – most things are likely not reliable, but just to show the way in which the VCs might be impacted by differing facts). So for military personnel being appointed to the embassy, the receiving state is supposed to get names in advance and have the thumbs up or down.

Another caveat is the "birther" issue. Article 8 specifies that diplomats attached to an embassy should be of the nationality of the sending state. If they are not, consent to their attachment and coverage as a diplomat may be withdrawn at any time by the receiving nation. This is one storyline we haven't heard anything on yet, but just wait – I'm betting with so many security services and diplomatic extensions with so many competing interests involved, someone, somewhere, will float this one too – that Davis is not an American national.

Then there is the *non grata* designation laid out in Article 9. While not as immediate as a

withdrawal of consent under Article 8, under Article 9 someone can be declared *non grata* even in advance of being presented. So if, for example, Davis was already on a *non grata* list from Pakistan before he arrived in Pakistan, or if Davis is not his name and under his other name he is listed as non grata, then he could never have been validly attached. If he was not on a *non grata* list before he was attached, but he was then put on one, then the sending State is supposed to recall them and presumably has a reasonable amount of time to accomplish that recall.

Article 11 also allows the receiving state to bar certain categories (not just persons – under the non grata designation) of officials, as long as it is done on a non-discriminatory basis. So, for example, mercenaries or intelligence officers might be barred. The VC 1961 doesn't really speak to someone being attached under a false name – another assertion that has been made in the Davis case.

Was Davis validly attached to embassy staff? One thing that the US and Pakistan seem to agree upon is that there was some kind of an effort to place Davis with the Islamabad staff prior to his shoot out. His name was supposedly submitted to the foreign ministry on January 20, 2011. Then something happened. Perhaps someone noticed the similarity to the name of a deceased General, Raymond Gilbert Davis, but more likely there was something else going on.

In any event, the Pakistan Foreign Ministry didn't go along with the designation of Davis from the US and apparently the US response was to pull him from the designated staff. On January 25, 2 days before the shooting, Davis' name was not on a list of embassy staff submitted to the FM. It wasn't until a day after the shooting that a new list was produced that included his name. And in the interim, the Pakistan FM was refusing to go along with the US designation that Davis was a diplomat assigned to the the embassy. After tremendous pressure

from the US on many fronts, the FM, Qureshi, has now been replaced but he is still adamant (without giving details as to why) that Davis was not validly placed on embassy staff and has said he will testify if called upon.

Was Davis validly attached to the embassy? We don't know – we don't know the answer to questions such as Davis' real name (if not Davis); what happened on January 20 when his name was submitted; whether he is military; whether he is a US national; whether he (under this or another name) was on a non grata list; or whether he is a member of a class of officials that are all barred, etc. And even if we did, it does get more complicated.

Visa. In addition to a passport for getting into a country, in some nations our citizens need visas to travel within the country. Being a diplomat attached to an embassy does not allow them to travel freely elsewhere in the countryside. Davis apparently had a business visa on him when he was captured. Whether the decision to accept a business visa in order to be able to travel in the country has an affect on underlying diplomatic status, if it had existed, is beyond my scope and capabilities – you need a real international law expert like Jack Goldsmith or the Johns – Yoo and Bellinger – for that. Or not.

Consulate attachment. In addition to Davis' name not appearing on the Jan. 25th list, the US embassy on the day of the shooting indicated that he was attached to the US consulate in Lahore, and documents on Davis' person indicated that he was attached to the US Consulate in Peshawar. If he was a consular employee, instead of attached to the embassy in Islamabad, then he would be covered by the VC 1963, which provide immunity for consular employees, but a more limited immunity (to consular employees engaged in consular activities and only if there is no "grave crime" at issue.

How the arguments would be made that Davis was on consular activities (for which consulate, at

which point in time, and doing what) when captured with his guns, disguises, etc. remains to be seen but the argument for no grave crime being at issue will obviously revolve around the story of self defense in a robbery attempt. If someone could prove out that the actions were self defense and that Davis was engaged in appropriate consular activity, even under the Vienna Convention of 1963, he might be entitled to immunity, but there would need to be a much more extensive amount of hearings (involving all facts and circumstances of the shootings) than those under a claim of immunity under the Vienna Convention of 1961, and those would get into any number of things that likely everyone involved would want to avoid.

So this would be how immunity would work, and all the unresolved issues, if things like the Conventions and law mattered. The one thing that a succession of US supported dictatorships, corrupted democracies, and the Bush and Obama governments have proven, though, is that the thing that will matter the very least, in the end, are treaties, conventions and laws.