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INTRODUCTION

Traditionally, the term "privileges and immunities" in relation to diplomatic agents was employed to designate two groups of rights. Privileges included the personal inviolability of an agent, his residence and property; immunities, his freedom from the jurisdiction of the receiving state. A more modern classification, however, usually encompasses within the term immunities the rights formerly associated with the agent's privileges, i.e., immunity from interference generally, as well as immunity from jurisdiction. Under present day concepts, privileges comprise the additional benefits accorded the agent, e.g., tax and customs concessions. The modern classification[1] is used in this study which is primarily concerned with some principles governing specific immunities and their interpretation and application.

IMMUNITIES FROM INTERFERENCE GENERALLY

INVIOLABILITY OF PERSON

The inviolability of the person of the envoy was the basis from which diplomatic immunities evolved. It remains the kernel of the institution. In the words of Chief Justice McKean in *Respublica v. De Longchamps*[2] the "person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations — he is guilty of a crime against the whole world."

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In this connection, the duties of the receiving state have been described as according a higher degree of protection to the person of the diplomatic agent and his belongings than that accorded to a private person. It extends to his family, suite, servants, houses, carriages, goods, archives, documents of whatever sort and to his official correspondence carried by his couriers or messengers.[3]

The receiving state is under an obligation to ensure this inviolability. "It is the duty of the government to which they are accredited to take all necessary measures to safeguard the inviolability of diplomatic agents and to protect them from any act of violence or insult. Should such an act be committed by a public official, adequate reparation is due, and in extreme cases, serious consequences have sometimes followed."[4]

In the United States, diplomatic inviolability is the subject of comprehensive legislation, the scope of which was recently revised and expanded by a federal Act for the Protection of Foreign Officials and Official Guests of the United States.[5] In a statement of Findings and Declaration of Policy, Section 2 of that Act states that the Congress "recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnaping, and assault has resided in the several States, and that such power should remain with the States. The Congress finds, however, that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States, or against official guests of the United States, adversely affect the foreign relations of the United States. Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with the conduct of foreign affairs."

In Title I of the Act, "foreign official" is defined to include "a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister or other officer of cabinet rank or above of a foreign government, or the chief executive officer of an international organization or any person who has previously served in such capacity, and any member of his family while in the United States." It also includes "any person of foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee."

The Act states that Chapter 51 of Title 18 of the United States Code[6] shall be amended by adding that whoever kills a foreign official or official guest shall be punished as provided under Sections 1111 and 1112 of that title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life. Conspiracy to murder in such circumstances is made punishable by imprisonment for any term of years or for life.

Under Title II of the Act, Section 1201 of Title 28 of the United States Code[7] is amended to include kidnaping where the person seized, confined, inveigled, decoyed, kidnaped, abducted or carried away and held for ransom or reward, is a foreign official or an official guest. The offense is punishable by imprisonment for a term of years or for life, and conspiracy to commit the offense, similarly.

Title III of the Act amends Section 112 of Title 18 of the United States Code[8] and provides that whoever "assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever, in the commission of any such act, uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both." The Section also provides that whoever "wilfully intimidates, coerces, threatens, or harasses a foreign official or an official guest, or wilfully obstructs a foreign official in the performance of his duties, shall be fined not more than $500, or imprisoned not more than six months, or both."

Any person found violating Section 112 of Title 18, may, by virtue of Section 170e of Title 5 of the United States Code[9] be arrested without warrant and delivered into custody by security officers of the Department of State. Such officers are, by the same Section,[10] authorized to carry firearms for the purpose of protecting heads of foreign states, high officials of foreign governments and other distinguished visitors to the United States.

A federal statute, Section 915 of Title 18 of the United States Code,[11] also discourages any false claim of diplomatic status by imposing criminal penalties on anyone who "with intent to defraud within the United States, falsely assumes or pretends to be a diplomatic, consular or other official of a foreign government duly accredited as such to the United States and acts as such, or in such pretended character, demands or obtains or attempts to obtain any money, paper, document or other thing of value."

Article 29 of the Vienna Convention states the rule of diplomatic inviolability as follows: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

The immunity from arrest and detention will be considered more fully in relation to the jurisdictional immunities.

When the inviolability of a diplomatic agent has been infringed, his proper course is to lodge a complaint with the government to which he is accredited, and, failing satisfaction, to turn to his own government for redress.

In the United States, in an appropriate case, proceedings will be instituted against the offender in accordance with Section 112 of Title 18 of the United States Code.[12] An interesting early case with constitutional aspects involved the question of jurisdiction in such instances. In *United States v. Ortega*[13] the defendant Juan Gualberto de Ortega was indicted in the Circuit Court of the United States for the Eastern District of Pennsylvania for violating the law of nations by attacking Hilario de Rivas y Salmón, the chargé d'affaires of the King of Spain, in the United States. The attack was punishable under Section 37, Chapter 36 of the Crimes Act 1790, the predecessor of Section 112 of Title 18 of the United States Code. The jury found a verdict of guilty and the defendant moved in arrest of judgement on the ground that "the circuit court has not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister. As such, under the Constitution of the United States, the Supreme Court should have jurisdiction.[14]

The matter was certified to the Supreme Court of the United States and in delivering the opinion of the Court, Justice Washington held that it was "not a case affecting a public minister within the plain meaning of the Constitution. It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States, and the individual whom they seek to punish, but one in which the minister himself, although he was the person injured by the assault, has no concern either in the event of the prosecution, or in the cost attending it."

Finally, it may be noted that a person offering violence to the person of a diplomatic agent may be criminally liable although he did not know of the agent's status. Judge Washington held in *U.S. v. Ortega*[15] that "in point of law it is immaterial whether the defendant knew that the person assaulted was chargé d' affaires or not."

INVIOLABILITY OF PRIVATE RESIDENCE

General Principles

The inviolability of the premises of a diplomatic mission is a subject more appropriately considered in relation to sovereign immunity, and is beyond the scope of this study. For the sake of completeness, however, the general principles of international law governing the inviolability of a mission may be summarized in the terms of Article 22 of the Vienna Convention,[16] ratified by the United States on December 13, 1972.

"1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.

2. The receiving state is under a 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.

3. The premises of the mission, their furnishings and other property therein and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

The immunity of the private residence of a diplomatic agent is likewise accorded immunity under international law. So are other premises devoted to diplomatic purposes, and any building occupied by him with a view to the execution of his functions, whether the property be that of his government, or his own, or merely rented by him. No officer of the receiving state, and in particular no police officer, tax collector or officer of a court of law can enter his residence, nor without consent discharge any function therein.

Chief Justice McKean in *Respublica v. De Longchamps*[17] described this particular immunity and its rationale. "All the reasons, which establish independency and inviolability of the person of a minister, apply likewise to secure the immunities of his house. It is to be defended from

all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations."

Later court decisions indicate that the immunity applies only to premises used by the diplomatic agent in his official capacity. The rule was considered by Judge Brady in *Byrne v. Herran.*[18] In that case the plaintiff, Byrne, commenced proceedings in a New York court to foreclose a mechanic's lien, and the usual notice of foreclosure plus a bill of particulars were served on the wife (as agent) of the owner, Pedro A. Herran, the minister plenipotentiary of the Republic of Granada whose official residence was in Washington. The plaintiff alleged that the proceedings were in rem, and did not affect the person of the owner. Judge Brady stated that the "general rule of the common law as to real or immovable property is that the laws of the place where such property is situated govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them.

Let us conclude, therefore, says Vattel, that immovable property possessed by a foreign minister does not change its nature in consequence of the character conferred on its owner, but continues subject to the jurisdiction of the state in which it lies. All contests and law suits concerning that property are to be carried on before the tribunals of the country, and those tribunals may decree its seizure in order to satisfy any legal claim.

If, however, the Ambassador lives in a house of his own, that house is excepted from the rule, as actually serving for his immediate use—excepted, says Vattel, "in whatever may affect the present use which the Ambassador makes of it."

Judge Brady continued by stating that if "the house against which the lien in this case is sought to be enforced was erected by the defendant, for his residence as a Minister Plenipotentiary, then it is exempt from sale and cannot be sold. Whether it was so erected or not does not appear, and for that reason the order of the Special Term should be reversed. A Minister Plenipotentiary is not exempt from the application of the lien law as to any house or building which is not used as a mansion for purposes connected with his representative character, and when exemption is claimed it must appear by proof that he is entitled to a suspension of the rule that the lexrei sitae controls."

Article 30, paragraph 1, of the Vienna Convention[19] states as an accepted principle of international law, that the "private residence of a

diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission."

The inviolability of the private residence is subject to the diplomatic agent's obligation to respect the laws and regulations of the receiving state. Although entitled to an unimpeded use of his residence to carry out his proper representative duties, it would obviously be an abuse of inviolability, for example, for him to use his residence to keep a gambling table in a state where gambling is prohibited, or to keep any kind of shop.

The immunity accorded the residence of a diplomatic agent is, nevertheless, extremely broad. In the words of Dr. Hannis Taylor:[20]

". . . While the exact limits of the inviolability of the hôtel are not perfectly defined, a fair result of reasoning on principle and of a comparison of authorities is that the residence of the minister should enjoy absolute immunity from the execution of all compulsory process within its limits, and from all forcible intrusions." Dr. Taylor went on to quote a communication sent by Mr. Buchanan, Secretary of State to Mr. Shields:[21] "If it can be rightfully entered at all without the consent of its occupant it can only be so entered in consequence of an order emanating from the supreme authority of the country in which the minister resides, and for which it will be held responsible by his government."

This underlying principle governs other aspects of the inviolability of the private residence of a diplomatic agent in the United States, and those of his official staff.

Harbouring of Fugitives

The right of asylum is not recognized in the United States, and when signing the Pan-American Convention in 1928, the United States delegation established "an explicit reservation, placing on record that the United States does not recognize or subscribe to, as part of international law, the so-called doctrine of asylum."

The question as to whom a diplomatic agent should accommodate in his private residence is, however, entirely for him to decide, unless the person is a fugitive from justice in the United States. In that case, the fugitive should be surrendered, if such a request is made. Failure to do so would constitute a breach of the obligation to observe the laws and resolutions of the United States, upon which grant of diplomatic privileges and immunities is dependent.

It would also be theoretically possible for the receiving state to prevent its own citizens from seeking refuge in the residence of a foreign diplomatic agent by establishing a police or military cordon at an appropriate distance from the residence[22] provided that it in no way interfered with the ingress or egress of the diplomatic agent's family, colleagues or employees.

Right of Chapel

A second right stemming from the inviolability of the residence of a diplomatic agent is the right of chapel whereby a diplomatic agent is entitled to have a chapel within his residence, wherein the rites of the religion which he professes may be celebrated by a priest or minister.

This right is not of importance in the United States because of the religious toleration guaranteed by the Constitution. It is, moreover, subject to two conditions—one, that it should be permitted to only one of the agents of a sending state, and secondly, that there should not be already a public place for the exercise of the particular religion existing outside the private residence.[23] In view of the widespread religious facilities in the United States, few, if any, diplomatic agents would qualify under the second condition.

Protection from Interference by Demonstrators

Under customary international law, the diplomatic agent is entitled, as an aspect of the inviolability of his residence, to unobstructed ingress without impediment from private parties.

For the purpose of further safeguarding such right, Section 301 of the Act for the Protection of Foreign Officials and Official Guests of the United States[24] makes special provision for the control of demonstrators outside missions and official residences, except in the District of Columbia which is governed by its own legislation to similar effect.

Section 301 amends Section 112 of Title 18 by providing that,

"(c) Whoever within the United States, but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes, or as a mission to an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly—

(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound or noise, for the purpose of intimidating, coercing, threatening or harassing any foreign official or distracting him in the performance of his duties, or

(2) congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (a) or (b) of this section, shall be fined not more than $500 or imprisoned not more than six months, or both."

Subsection (a) and (b) make the assault or intimidation of a foreign official or official guest a federal statutory offense.

INVIOLABILITY OF PAPERS AND CORRESPONDENCE

The right to communicate freely is essential to the execution of the function of a diplomatic agent. In the words of Oppenheim,[25] "to insure the safety and secrecy of the diplomatic dispatches they bear, couriers must be granted exemption from civil and criminal jurisdiction and afforded special protection during the exercise of their office. It is therefore usual to provide them with special passports. It is particularly important to observe that they must have the right of innocent passage through third states, and that, according to general usage, those parts of their baggage which contain diplomatic dispatches, and are sealed with the official seal, must not be opened and searched."

The inviolability of the official correspondence of the mission is, like the inviolability of the mission premises, an aspect of sovereign immunity, and is provided for in Article 27, paragraph 1, of the Vienna Convention.[26] The receiving state must permit and protect free communication on the part of the mission for all official purposes. All appropriate means of communication may be used, except that the consent of the receiving state must be obtained to install and use a wireless transmitter.

Paragraph 2 of Article 27 states that the official correspondence of the mission, namely correspondence relating to the mission and its function shall be inviolable, and regulates the use of the diplomatic bag, diplomatic couriers, and the entrusting of the diplomatic bag to the captain of a commercial aircraft.

The private correspondence of a diplomatic agent is, however, the subject of Article 30, paragraph 2, to the effect that his "papers, correspondence . . . shall likewise enjoy inviolability."

INVIOLABILITY OF PROPERTY

Real Property

As mentioned in relation to the inviolability of the private residence of a diplomatic agent, the inviolability of a diplomatic agent's private property is dependent upon its being useful or necessary in enabling him to carry out his official duties. In *Byrne v. Herran,*[27] a case considered earlier with reference to the principle of inviolability of residence, the Court stated that a "Minister Plenipotentiary is not exempt from the application of the lien law to any house or building which is not used as a mansion for purposes connected with his representative character, and when exemption is claimed it must appear by proof that he is entitled to a suspension of the rule that the lexrei sitae controls."

In this context, Article 30 of the Vienna Convention[28] which states that the property of a diplomatic agent shall enjoy inviolability, provides that it may be subject to execution in certain cases specified in Article 31. Although these cases will be discussed in greater detail in the section on jurisdictional immunities, it may be mentioned here that they relate to a real action affecting private immovable property situated in the territory of the receiving state, unless the diplomatic agent holds it on behalf of the sending state for the purposes of the mission, an action (which may involve real property) relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state, or an action (which may involve real property) relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions. Inasmuch as professional or commercial activity on the part of diplomatic agents in the United States is prohibited, the last mentioned case is not of great significance here as it would only arise in the case of a forbidden transaction.

Even in these three cases, however, the measures of execution taken must not be such as to infringe the inviolability of the person of the diplomatic agent, or the inviolability of his residence.

For the purpose of further ensuring the protection of the property of foreign governments and foreign officials, Section 401 of the Act for the Protection of Foreign Officials and Official Guests in the United States amends Chapter 45 of Title 18 of the United States Code and enacts that whoever "wilfully injures, or destroys, or attempts to injure, damage or destroy, any property, real or personal, located within the

United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both."[29]

Personal Property

The inviolability of property as regards personal or movable property, primarily refers to goods in the private residence of the diplomatic agent, and also such things as his automobile, boat, aeroplane, bank account, and such other things as are intended for his personal use or essential to his livelihood.

The inviolability of such property from execution is limited by two of the exceptions mentioned in relation to real property, namely an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state, and an action relating to any professional or commercial activity exercised in the receiving state outside his official functions. As in the case of real property, the execution must not be such as to infringe the inviolability of the person or residence of a diplomatic agent.

The obligation of a diplomatic agent to respect the laws and regulations of the receiving state may, however, involve some regulation (usually in exercise of the police power of the receiving state) concerning the use of certain personal property such as guns and automobiles.

The diplomatic agent must comply with automobile registration and driving regulations of the receiving state, but apart from this, the immunity accorded in the United States, to the private property of a diplomatic agent is most extensive. The Department of State will, for example, accept the inviolability of an automobile as the personal property of a diplomatic agent even in cases in which it was not in the possession or under the control of the diplomatic agent at the relevant time.

"The Department recognizes, however, that as a practical matter there will be some limitations on the extent of the inviolability attaching to motor vehicles owned by a diplomatic mission and by members of the mission. For example, the authorities might have to take custody of it or move it if it had been stolen, or involved in a wreck, or parked in such a manner as completely to obstruct the flow of traffic. Motor vehicles also are subject to customs inspections when crossing inter-

national borders, and to safety inspections in connection with registration. It is not practicable to attempt to cover in an international convention all the factual situations that may conceivably occur. All that can be done in such a document is to lay down a general rule, as a guidance, and to assume that any necessary exceptions to that rule will be made in a manner which appears reasonable to both the sending and receiving state."[30]

IMMUNITY FROM JURISDICTION

GENERAL PRINCIPLES

The jurisdictional immunity of diplomatic agents in the United States has been guaranteed by federal statute since 1790.

Under Section 252 of Title 22 of the United States Code[31] whenever "any writ or process is sued out or prosecuted by any person in any court of the United States, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process is void."

Penalty for wrongful suit is provided by Section 253 of Title 22[32] whereby whenever "any writ or process is sued out in violation of the preceding Section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court."

In the case of servants of ministers, jurisdictional immunity is limited by the provisions of Section 254 of Title 22.[33] This section enacts that Sections 252 and 253 shall not apply in a case where the person proceeded against is a citizen or inhabitant of the United States in the service of a public minister, and the process is founded upon a debt contracted before he entered such service. It also enacts that Section 253 shall not apply where the person proceeded against is a domestic servant of a public minister, unless the name of the servant has, before the process issued "been registered in the Department of State and transmitted by the Secretary of State to the Marshal of the District of Colum-

bia who shall, upon receipt thereof, post the same in some public place in his office."

The Diplomatic Relations Act 1967, which was recently resubmitted to the Office of Management and Budget by the Department of State in substantially the same form,[34] extends protection to the larger class of persons covered by the Vienna Convention, such as diplomatic agents in transit, and to persons to whom the treatment prescribed by the Vienna Convention is applied by the Presidential authority under Section 4 of that Act.

Section 5 enacts sanctions in terms which parallel Sections 252 and 253 of Title 22 of the United States Code. Under Section 5(a) whenever "any writ or process is sued out or prosecuted in any court, quasi-judicial body, or administrative tribunal of the United States, or of any State, territory, or possession thereof, against a person or the property of any person entitled to immunity from such suit or process under the Vienna Convention on Diplomatic Relations or pursuant to this Act, such writ or process shall be deemed void."

Section 5(b) enacts that whoever "knowingly obtains, prosecutes, or assists in the execution of such writ or process shall be fined not more than $5,000, or imprisoned not more than one year, or both: Provided, that this paragraph shall not apply unless the name of the person against whom the writ or process is issued has, before the issuance of such writ or process, been published in the Federal Register."

IMMUNITY FROM CRIMINAL JURISDICTION

Although under both customary international law and Article 31, paragraph 1, of the Vienna Convention[35] a "diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state," he is not thereby entitled to treat the laws and regulations of the receiving state with impunity. He remains bound by his obligation to respect them.

The action to be taken by the receiving state in the case of an infringement of its criminal law will depend upon the nature and gravity of the offense, as indicated in the following examples.

Infringement of Traffic Regulations

When the violation is punishable by a monetary penalty, the issue of immunity is not usually raised or formally waived. The diplomatic

agent concerned usually deposits sufficient monies to cover the penalty with the authorities concerned, and this is forfeited if he does not contest the charge.

The issuance of a traffic ticket or traffic violation notice to a diplomatic agent is not a form of judicial process requiring appearance before a tribunal. It is simply, as was held by the Court in *City of New Rochelle on Complaint of Bankland v. Page-Sharp*,[36] an invitation to appear, and does not infringe diplomatic immunity.

Usually in the District of Columbia, when a diplomatic agent receives a traffic ticket, and his government decides that he is to pay it, he forwards the amount to the Central Violations Bureau or the appropriate police precinct by mail, or pays it in person. If the offense is one for which a traffic ticket cannot be given, the diplomatic agent is not arrested, detained or charged since to do so would violate his immunity. The offense is reported by the police to the Department of State, and the matter is brought to the attention of the Embassy concerned. The foreign government may either waive or claim immunity. In the first case, proceedings may then be instituted against the offender. In the second, he may be recalled or otherwise disciplined by his own government. If he remains, the traffic authorities of the receiving state may refuse to renew his diplomatic license plate.

Other Criminal Offenses

Recall, Termination and Punishment by Sending State

As stated in Article 31, paragraph 4, of the Vienna Convention,[37] the "immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state." In the case of an offense which is an offense under the law of both the sending and receiving states, the diplomatic agent concerned may be tried and punished in his home state for an offense committed in the receiving state. Failing such action, the receiving state may declare the offender persona non grata or otherwise request his recall.

It may be noted, however, that any incarceration of a diplomatic agent pending a decision as to his place of trial will constitute a violation of his immunity. In a Pennsylvania case, *Ex parte Calbreta*,[38] a secretary attached to the Spanish legation was committed to jail on a state warrant charging him with passing counterfeit checks. The warrant recited the

privileges of the diplomat but committed him pending decision of his sovereign as to whether he should be tried in Spain or in the United States. A federal court refused an application for habeas corpus on the ground that that irrespective of the rights of the petitioner it had authority to quash a writ sued out from a state court and there pending against a public minister.

Exemption from the criminal jurisdiction of the receiving state is most likely to provoke the most urgent action when the alleged crime constitutes a threat to the neutrality or security of the United States, or a violation of laws and regulations made in exercise of its police power.

In 1915, for example, it came to the attention of the Department of State that Captain Boy-Ed and Captain Von Papen, the naval and military attachés to the German Embassy in Washington were connected with illegal activities within the United States. Captain Boy-Ed had directed various attempts to provide German war vessels at sea with coal and other supplies in violation of American neutrality. Captain Von Papen gave money to various persons to sabotage factories and other installations in Canada, and also directed the manufacture of incendiary bombs and their placement in allied vessels.

The German Ambassador was accordingly informed that the continued presence of the attachés in the United States would no longer serve the purpose of their mission and would be unacceptable. They were recalled and returned to Germany under safe-conducts granted by the Allied Powers at the request of the Government of the United States.[39]

Under Article 9, paragraph 1, of the Vienna Convention,[40] "the receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving state."

If the sending state refuses or fails within a reasonable period to carry out its obligations under Article 9, paragraph 1, paragraph 2 of the same Article states that "the receiving state may refuse to recognize the person concerned as a member of the mission."

Expulsion by the Receiving State

Where the conduct of a diplomatic agent constitutes a menace to the receiving state as, for example, if he "should conspire against the safety of the state, he may be restrained and expelled as soon as possible but he may not be punished by the injured state."[41]

Judge John Bassett Moore, the editor of an early (1906) edition of the Digest of International Law[42] expressed the opinion that it was important to draw a distinction between measures of punishment and measures of prevention. This distinction is especially applicable to exercises of the police power to ensure the public health and safety of the receiving state.

In such cases, the immunity from judicial process cannot be perverted into a license to disregard the health and safety of the public, nor can it be construed as precluding the prevention of injuries to person and property, where, but for the exercise of immediate restraint, irreparable damage is threatened.

In approving and commenting upon this view in 1953, an Assistant Legal Adviser at the Department of State cautioned[43] that this principle may only be applied in rare and flagrant cases where the necessity to take immediate and unusual measures is obvious. If a diplomatic agent were placed under arrest, as distinct from protective custody, or if undue force were exerted against him, and if the imminence of the danger to life and property was not such as to make it clear beyond doubt that the measures taken were necessary and proper, the law-enforcing officer might find himself subject to prosecution, and the Government of the United States might find itself obliged to make redress to the foreign government concerned.

IMMUNITY FROM CIVIL AND ADMINISTRATIVE JURISDICTION

The general principles of immunity from jurisdiction discussed earlier apply to civil as well as to criminal jurisdiction in the United States. Some special aspects of immunity from the civil and administrative jurisdiction should, however, be briefly considered. The diplomatic agent enjoys immunity in two respects, immunity from suit and immunity from execution.

Immunity from Suit

General Principles

Sections 252, 253 and 254 of Title 22 of the United States Code have traditionally been interpreted as conferring full immunity from civil process or execution. The provisions of Article 31 of the Vienna Convention[44] therefore represent a limitation, as regards the exceptions maintained therein. The extension of immunity, to immunity from the administrative jurisdiction of the receiving state, however, recognizes the growing importance of the administrative tribunal in the modern state.

Article 31 states that the diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the receiving state except in three cases, namely:

"(a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission;

(b) an action relating to the succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions."

The first exception relates to property owned by the diplomatic agent personally, and not to property held by him on behalf of his government for the purposes of the mission, which would be protected under principles of sovereign immunity.

All states claim jurisdiction over immovable property situated in their territory. In the case of the United States, however, the provisions of Article 31, paragraph 1(a) must be read in the light of United States law regarding inviolability of the private residence of a diplomatic agent. In *Byrne v. Herran*,[45] the court drew a distinction between immovable private property owned by a diplomatic agent as an adjunct to his diplomatic duties, and property not so connected. The court held that a "Minister Plenipotentiary is not exempt from the application of the lien law to any house or building which is not used as a mansion for purposes connected with his representative character."

The reason for the second exception, stated in subparagraph (b), lies in the desirability of succession proceedings being transacted without impediment. A diplomatic agent cannot plead immunity for the purpose of refusing to appear in a suit relating to a succession. This is essentially a public policy consideration and represents a modification in the degree of immunity hitherto accorded a diplomatic agent in the United States.

The third exception set out in subparagraph (c) relating to the commercial or professional activity of a diplomatic agent may seldom be invoked in the United States in view of the fact that a diplomatic agent is under an obligation to refrain from indulging in any such activity.

The position of the Government of the United States is that such activities (except certain cultural activities) are inconsistent with the position of a diplomatic agent, and may result in his being declared persona non grata. Subparagraph (c) does, however, provide that if such illicit activities are engaged in, the persons having commercial or professional relations with the diplomatic agent will not be deprived of their remedies against him. The provision represents, in effect, an extension to the law of diplomatic immunity of a restrictive theory which the United States has recognized for a number of years in relation to sovereign immunity.

The extent and limitations of diplomatic immunity from civil suit in regard to certain specific aspects of the subject are discussed briefly in the following paragraphs.

Service of Process

The protection afforded against service of process on a diplomatic agent by Section 252-254 of Title 22 of the United States Code,[46] by customary international law, and by Section 5 of the Diplomatic Relations Act of 1967,[47] obviously covers process in relation to matters personal to the diplomatic agent.

In *Bergman v. De Sieyes*,[48] for example, where the French Minister to Bolivia was, on his way through New York, served with process in an action for deceit, the United States Court of Appeals, Second Circuit, held that such service was illegal, although some earlier authority had suggested that an ambassador in transit might be served if there was no trespass on his personal inviolability or that of his residence.

A diplomatic agent is also protected from service of process where it is sought to make his sovereign, not the agent personally, liable. In *United*

States ex. rel. Cardashian v. Snyder, United States Marshal, et al.,[49] Vahan Cardashian brought an action in the Supreme Court of the District of Columbia against the Government of Turkey claiming $20,000 with interest for services alleged to have been rendered. The summons was directed to the Government of Turkey, but the United States Marshal, on the advice of the District Attorney, refused to serve the summons on the Ambassador for Turkey. Cardashian then petitioned the court for a writ of mandamus to compel the Marshal to make service of process upon the Ambassador. The Supreme Court of the District of Columbia dismissed the petition, and on appeal the judgment was affirmed.

The question as to whether service of process on a diplomatic agent, as an agent of his sovereign, was an attack on his person, freedom or dignity was considered in greater detail in *Hellenic Lines Ltd. v. Moore*.[50] In that case the libel against the Republic of Tunisia, and the summons addressed to the Republic was requested to be served upon the Ambassador of Tunis in the United States. Moore, the United States Marshal, did not execute the summons and made a return to the effect that the "within named principal agent having diplomatic immunity and being listed in the Diplomatic List of the State Department cannot be served at Washington, D.C. . . ." Hellenic Lines Ltd. then filed a mandamus action in the District Court to compel the United States Marshal to serve the summons "in conformity with the dignity and respect to be accorded representatives of a foreign government." Moore moved for dismissal which was granted.

On appeal, the United States Court of Appeals considered whether the Marshal's return was sufficient and decided that it was. Chief Judge Bazelon held that "although courts will not allow a Marshal to avoid his duty to serve process merely because he notices the availability of a defense to the suit, they must protect him if the service would violate international law and might subject him to the criminal law of the United States. Since we think that the Ambassador's diplomatic immunity would have been violated by any compulsory service of process on him by the Marshal, we conclude that the return was sufficient, and the district court's dismissal was proper."

In considering whether service of process on a diplomatic agent as an agent of his sending state was an attack on his person, freedom or dignity prohibited by principles of diplomatic immunity, Judge Bazelon observed that because application of the doctrine of diplomatic immunity exempts a person from the legal procedures necessary to ordered society

and often deprives others of remedies for harm they have suffered, courts hesitate to invoke the doctrine in a novel situation unless its purposes will certainly be served. These purposes, as expressed in the Preamble to the Vienna Convention, are to "contribute to the development of friendly relations among nations" and "to ensure the efficient performance of the functions of diplomatic missions".

Judge Bazelon continued that the court had "requested the views of the Department of State concerning the effect of service in this type of case on international relations and on the performance of diplomatic duties. The Department replied that service would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions. We conclude that the purposes of diplomatic immunity forbid service in this case. Therefore, the Ambassador is not subject to service of process, and the return was adequate."

It may be noted that in this case, an approach had been made to the Ambassador for Tunis to ask him if he would accept service voluntarily. This he refused.

Also of interest is the description by the Department of State, of the manner in which a diplomatic agent might be embarrassed if service of process upon him were allowed. "An ambassador and his government would in all likelihood consider that he had been hampered in the performance of his duties if, for example, (a) the ambassador felt obliged to restrict his movements to avoid finding himself in the presence of a process server; or (b) he were diverted from the performance of his foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances; or (c) the manner of service had been publicly embarrassing to him and called attention to the infringement of his personal inviolability."[51]

Pre-diplomatic Acts

A diplomatic agent's immunity from suit, extends to acts performed by him before attainment of diplomatic status. This principle was demonstrated in *Arcaya v. Paez.*[52] The defendant, while Consul General of Venezuela in New York, publicized Venezuelan newspaper articles which reflected unfavourably on the political, professional, social and moral standing of the plaintiff, and were alleged to be defamatory. An action for libel was commenced against him on March 16, 1956. Defendant

informed the Ambassador of Venezuela of the suit, and on April 10th, 1956, the Ambassador wrote to the Secretary of State requesting that the Department of State suggest to the Court that the suit should be dismissed upon a plea of immunity on behalf of the Government of Venezuela. The Minister of Foreign Relations of Venezuela informed the defendant, by a letter dated three days later, that by order of the President and by order of that Ministry, defendant had been appointed Alternate Representative of the Delegation of the Republic of Venezuela before the United Nations with a rank of Envoy Extraordinary and Minister Plenipotentiary.

In considering whether one of the immunities of a representative to the United Nations is immunity from further prosecution of a suit begun before the acquisition of status as such representative, District Judge Dimock referred to the maxim of Grotius *"omnis coactio abesse a legato debet,"*[53] and the opinion of Lord Campbell in *Magdalena Steam Navigation v. Martin.*[54] Lord Campbell was of the opinion that the immunity of ambassadors was not limited to freedom from service of process. He regarded the ambassador's protection from the necessity of retaining an attorney in an action for libel, of subpoenaing witnesses for his defense, and of personally attending the trial where he might be needed to instruct his legal advisers, as part of the protection to which he was entitled under the law of nations. No one had suggested that any court had ever held otherwise or suggested any good reason why a court should do so. District Judge Dimock therefore held that the action should not, at that time, be permitted to proceed against the defendant.

Judge Dimock did not, however, dismiss the action. He merely stayed it for such time and only for such time as the defendant retained his status as Alternate Resident Representative of the Republic of Venezuela to the United Nations with the rank of Envoy Extraordinary and Minister Plenipotentiary. "If", said Judge Dimock, "the summons had been served on defendant after he had attained the rank of a diplomatic envoy he would have been the victim of an unlawful act upon which plaintiff could base no rights. Here, however, plaintiff has lawfully served a summons on him. By that act the plaintiff had obtained at least two valuable rights, including the right to prosecute the action despite the subsequent expiration of the period limited for the institution of an action for libel. Must plaintiff lose these rights because of defendant's promotion? I see no reason for such a deprivation. It will not interfere with defendant's efficiency as alternate representative to the United Nations to have the action pend dormant while he fulfills

the duties of his new office. If and when defendant loses his status and the immunity that goes with it, plaintiff ought to be allowed to proceed with his action."

In addition to the preservation of the right of action of the party who had lawfully commenced the action before the agent had obtained his diplomatic status, Judge Dimock also referred to the non-applicability, in the circumstances, of the rule which extends an ambassador's immunity for the time reasonably necessary to permit him to depart after loss of status. "The purpose of that rule is to protect him against the service of process until he gets away. Here he needs no protection against the prosecution of the pending action until he gets away. On the contrary, prosecution of the action while he is here is more favourable to him than prosecution after he has left."

Immunity from Execution

The immunity from civil and administrative jurisdiction of the sending state enjoyed by a diplomatic agent includes protection of his goods from execution. This immunity may be considered an aspect of the inviolability of the property of a diplomatic agent, discussed earlier.

Immunity from execution is confirmed by Section 252 of Title 22 of the United States Code[55] which enacts that whenever "any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of a foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void."

The penalty for infringing the provisions of Section 252, are prescribed in Section 253.[56] "Whenever any writ or process is sued out in violation of the preceding Section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the law of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court."

Section 254 of Title 22 of the United States Code[57] governs the immunity of a person who is a citizen or inhabitant of the United States

in the service of a foreign public minister. It also excepts from immunity from issue of process, the domestic servant of a public minister unless the name of the servant has, before the issuing of process, been registered in the Department of State and transmitted by the Secretary of State to the marshal of the District of Columbia who must have posted it in some public place in his office.

Article 31, paragraph 3, of the Vienna Convention[58] states that no "measures of execution may be taken in respect of a diplomatic agent except in cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or his residence."

The cases referred to under sub-paragraph (a), (b) and (c) include:

(a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

As mentioned in relation to immunity from suit, the subparagraph (a) case will only arise in the case of a diplomatic agent's real property which is not connected with his official functions. In *Byrne v. Herran*,[59] for example, a minister was held not to be immune from execution, under the New York law regulating mechanic's liens, upon property which had nothing to do with the performance of his official duties. His official residence was, in fact, in Washington.

The cases mentioned in subparagraphs (b) and (c) will necessarily be of little importance in the United States. The formulation of subparagraph (b) as a means of expediting the administration of estates is a public policy measure, but in view of the requirement of many, if not all, of the jurisdictions in the United States, that an executor or administrator must be qualified as to residence or domicile under the law of the State in which he will act, the non-domiciliary status of a diplomatic agent may preclude him from acting in such capacity.

As regards subparagraph (c), the fact that diplomatic agents are not permitted to carry on any professional or commercial activity, other than cultural activities, in the United States, makes the sub-paragraph of importance only in so far as it guarantees that the appropriate remedy shall be available to persons who have had dealings with delinquent diplomatic agents.

It must, however, be noted that any execution levied under the exceptions listed in Article 31, paragraph 1, of the Vienna Convention,[60] is subject to the provision in paragraph 3 of that Article that the measures concerned can be taken without infringing the inviolability of the diplomatic agent's person or his residence. Even under the exceptions, therefore, the scope of execution is limited.

Finally, the Vienna Convention emphasizes that immunity from suit and immunity from execution are treated as distinct proceedings when a question of waiver is involved. The fact that immunity from jurisdiction is waived does not imply that immunity from execution is also waived. Under Article 32, paragraph 4,[61] waiver of "immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."

Immunity from Requirement to Give Evidence

A diplomatic agent cannot be compelled to attend court to give evidence in criminal, civil or administrative proceedings, for the same reasons that he cannot be sued. The service of a subpoena upon him, and the time taken attending court might well interfere with his duties as representative of the sending state.

In accordance with his obligation to respect the laws and regulations of the receiving state, a diplomatic agent should, however, co-operate with the authorities of the receiving state to make available whatever information he may possess. Sometimes, however, less than full compliance with the legal requirements of the receiving state, may render information given informally of little assistance in legal proceedings.

An early example in which immunity from the requirement to give evidence was claimed, occurred in 1856 when the Netherlands minister at Washington was requested by the Secretary of State to appear in court, to give evidence regarding a homicide committed in his presence. The

Minister refused. The Government of the United States then made representations to the Government of the Netherlands, appealing to its general sense of justice, while agreeing that by virtue of international usage and the law of the United States, the Minister had a right to refuse. The Government of the Netherlands refused to allow the Minister to give evidence in court, but authorized the Minister to give his evidence in writing. The Minister accordingly offered to do so, although he would not submit to cross-examination. The offer was declined, as the District Attorney pointed out that such a written statement would not be receivable in evidence.[62]

A diplomatic agent is, of course, quite competent as a witness, and he may give evidence when his government permits him to do so. The Government of Venezuela, for example, specifically authorized the Minister for Venezuela to waive his immunity and appear as a witness for the prosecution against Guiteau for the assassination of President Garfield.[63]

An attempt to codify this immunity conferred by customary international law was made in the Pan American Convention of February 20, 1928, Article 21 of which stated that persons "enjoying immunity from jurisdiction may refuse to appear as witnesses before the territorial courts."

Article 31, paragraph 2, of the Vienna Convention[64] states that a "diplomatic agent is not obliged to give evidence as a witness." This paragraph was the subject of some debate as the United States Government was of the opinion that it should contain some exceptions to correspond with the exceptions mentioned in paragraph 1 of that Article in relation to claims against a diplomatic agent in respect of his private property not connected with his official duty, certain succession matters and professional and commercial activities. The United States also felt that provision should be made to protect a diplomatic agent from being compelled to give evidence relating to a counter claim where the diplomatic agent himself brought the action.

It was decided, however, that these cases should not be referred to, because they basically involved circumstances in which a diplomatic agent would be asked to give testimony in his own interest. If he declined to do so, he would have to bear the consequences. As regards proceedings brought by a diplomatic agent, the question of submission to the jurisdiction would arise.[65]

Limits to Immunity from Civil and Administrative Jurisdiction

As previously observed the privileges and immunities of a diplomatic agent are conditional upon his observing a standard of respect in relation to the laws and regulations of the receiving state. They are also dependent upon there having been no waiver of privilege or immunity by the sending state, a topic which is beyond the scope of this study.

In certain circumstances there may, however, be other limits to the claim of a privilege or immunity, and some of these are mentioned in the following paragraphs.

Suit by a diplomatic agent.

Although the question of the initiation of proceedings in the receiving state, by a diplomatic agent should perhaps more properly be considered as an aspect of waiver, it may also be conveniently discussed in relation to the limits to immunity from civil and administrative jurisdiction.

Where a sovereign commences proceedings in the court of another state, it thereby necessarily submits to the local jurisdiction, and waives its immunity. The same result is found where the foreign sovereign intervenes in a case in its own interest. In the words of Circuit Judge Haynsworth in *Flota Marítima Browning de Cuba, S.A. v. m/v Ciudad de La Habana,*[66] "Cuba came into the case as claimant of the ship. It sought affirmatively judicial determination of that claim and, by its answer, of the adverse claim of the libelant. Of course it could have appeared specifically as claimant, asserting its claim of jurisdictional immunity, but when it did not, when it filed its answer, it lost forever the right to assert jurisdictional immunity."

The case in which a diplomatic agent himself starts proceedings is somewhat more complex. If he commences an action or suit with the permission of the sending state, similar considerations to those in the case of a sovereign will apply, namely waiver of immunity and submission to the local jurisdiction.

He must, therefore, prosecute the matter in accordance with the law of the receiving state, and is liable to defences by way of counterclaim to the action. If he succeeds in the trial court, and the defendant appeals, he cannot object to the jurisdiction of the superior court.

Where, however, the diplomatic agent does not act with the permission of his government, the commencement by him of proceedings would appear to constitute an unauthorized, and therefore ineffective waiver of his immunity. In such circumstances, the Department of State would have to inform the court in which proceedings had been started, that the sending state did not consent to any waiver of immunity, or alternatively, the sending state might terminate the mission of the diplomatic agent concerned.

Article 32, paragraph 3, of the Vienna Convention[67] states that the "initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim." This must, however, be read in the context of paragraphs 1 and 2 of that Article regulating waiver by the sending state.

Diplomatic and administrative measures.

The ultimate sanction for any transgression of the laws and regulations of the receiving state lies in the power of the receiving state to declare the agent persona non grata and to require his recall.

In addition to the inter-governmental responses to the defaults of a diplomatic agent, indirect methods may be employed in certain circumstances to assist a person aggrieved by the agent's action.

An example arises in connection with automobile insurance claims for accidents for which a diplomatic agent has been responsible. Diplomatic agents are not under any obligation to take out such insurance. If they do so, however, the case is usually settled out of court by the insurance company — unless the sending state waives the immunity of the agent to enable him to be sued — which seldom happens.

In such circumstances an insurance company is at some disadvantage. Most policies are written so that the company is subrogated to all defences which the insured may have. The plea of diplomatic immunity advanced by special appearance, is not, however, a defense going to the merits of the case, being merely in effect a declaration that the court is without jurisdiction, nor is it available to the insurance company, which is obviously not entitled to plead it. There have accordingly been instances of insurance companies refusing to pay claims involving diplomatic agents.

Dr. M. M. Whiteman gives as an example the case of a diplomatic agent in Washington, who was involved in a traffic accident causing injury to four persons and property damage.[68] The agent's Embassy contended that the insurance company should make reparation in accordance with the policy of insurance, and declined to waive his immunity on the ground that such waiver was unnecessary. The insurance company then refused to negotiate with an injured party on the grounds that as the diplomatic agent could not be sued, there was no legal liability.

The attorney for the injured party informed the Department of State, who advised him informally to bring the matter to the attention of the supervisory authorities of the District of Columbia having jurisdiction over the licensing of insurance companies. As a result, the local representative of the insurance company subsequently informed the Department of State that when the extent of the damage and injury to the parties had been determined, settlement would be made to the limit of the policy.

Needless to say, such measures against third parties must be strictly within the legal limits permissible, and must not directly or indirectly involve any infringement of the inviolability of the diplomatic agent or his property.

Suit Against Diplomatic Agent in Sending State.

In cases in which diplomatic immunity has not been waived, and diplomatic or administrative measures to assist a party aggrieved by the action of a diplomatic agent have been of no avail, the possibility of bringing an action against the agent in the sending state remains.

The fact that diplomatic agents retain their domicile in their own country renders them amenable to suit there. This principle was stated by Judge O'Gorman in *Wilson v. Blanco*.[69] A diplomatic agent "is always considered as retaining his original domicile, and may be proceeded against in the competent court of his own country, and here he cannot set up the plea of absence in the service of the state as a bar to the suit in the domestic forum, since the law supposes him still to be present there."

In accordance with this view, Article 31, paragraph 4, of the Vienna Convention states that the "immunity of a diplomatic agent from the

jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state."

Although this paragraph was allowed to stand as a general statement of principle, it is open to objection in that the matter dealt with is essentially within the province of municipal law. Even with such a provision, however, an aggrieved party will not necessarily secure a remedy in the courts of the diplomatic agent's domicile. Acts which may constitute a criminal offence, or the basis for a cause of action in the receiving state may not be recognized as such in the sending state. In addition, municipal law may provide that acts committed beyond state limits are outside its jurisdiction.

Where a remedy is available against the diplomatic agent, by the law of the sending state, the aggrieved party must, of course, comply with the municipal laws for service in such a case, which might provide for process naming a diplomatic agent to be addressed to the local Ministry for Foreign Affairs.

If the diplomatic agent has returned to his domicile and is no longer accredited to the United States, but has property or business interests here, proceedings may be taken against him in the United States in a proper case. Rule 4(i) of the Federal Rules of Civil Procedure[71] states that when the federal or state law authorizes service upon a party not an inhabitant of or found within the state in which the district court sits, and service is to be effected upon the party in a foreign country, it is sufficient if service of the summons and complaint is made: "(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivering to him personally, ...; or (D) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service."

The same rule provides for proof of service. If service is not made by a United States marshal or his deputy, an affidavit of service shall

be made, although failure to make proof of service does not affect the validity of the service. Service may also be made by the law of the foreign country, or by order of the court. When service is by mail, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Jurisdiction of a Diplomatic Agent

Inasmuch as a diplomatic agent may be invested by the sending state with jurisdiction over his compatriots in certain cases, the exercise of such jurisdiction represents a certain independence of, and immunity from, the application of the laws of the receiving state, and as such may be briefly considered in connection with the subject of jurisdictional immunity.

This jurisdiction was of greater importance in the past, both in the field of criminal law, when ambassadors were formerly invested with greater powers, and in the field of civil law, where many functions previously exercised by diplomatic agents are now performed by consuls. For completeness, however, some mention should be made of this jurisdiction.

Subject to the obligation of a diplomatic agent to respect the criminal law of the receiving state, and to hand over fugitives from its criminal justice, the head of mission may yet enjoy a measure of criminal jurisdiction compatible with that of the receiving state, over the members of his suite.

In the words of Oppenheim[72] an "envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilized state would nowadays allow an envoy himself to try a member of his retinue, though in former centuries this used to happen."

Even in early times, however, a distinction was drawn between an offense against the sending state, or a national of the sending state, committed within the Embassy, in which case the head of mission claimed the right to send home the accused in fetters to the courts of his own country for punishment, and an offense committed outside the Embassy against a subject of the receiving state, or against public order, in which case, in order to avoid disputes, the envoy either dismissed the offender from his service, or handed him over to the local authorities on their request.

If the offender, however, was himself one of the diplomatic staff, the head of the mission would have to obtain the permission of the sending state to dismiss him, so that he might be surrendered to the local authorities or sent home for punishment.[73]

In modern times the criminal jurisdiction may possibly be exercised in relation to minor regulations of the sending state and internal disciplinary matters.

In addition to his duties as representative of the sending state, a diplomatic agent may be empowered by that state to carry out certain legal and administrative procedures for the benefit of his fellow-nationals residing in the receiving state. Many of these functions are now performed by consuls. They may include notarization of documents, registration of births, marriages and deaths, and issuance of passports.

Any such functions must not, however, be performed in contravention of the laws and regulations of the receiving state. Oppenheim observes[74] that a "state must be careful not to order its envoys to perform tasks which are by the law of the receiving state exclusively reserved to its own officials. Thus, for instance, a state whose laws compel persons who intend marriage to conclude it in the presence of its registrars, need not allow a foreign envoy to legalize a marriage of compatriots before its registration by the official registrar. So, too, a state need not allow a foreign envoy to perform an act which is reserved for its jurisdiction as, for instance, the examination of witnesses on oath."

In the United States, accordingly, any marriage celebrated in an Embassy must also, to be valid in the United States, comply with the law of the state in which it is celebrated.

CONCLUSION

In concluding consideration of specific diplomatic immunities, it may be observed that the basis for the successful operation of the system lies in an interaction between restraint in making claims of immunity on the part of the sending state, and toleration to permit the greatest measure of freedom compatible with its own welfare, on the part of the receiving state—the whole conception being the while sustained by the principle of reciprocity.

In their interpretation and application of these principles, judges in the United States have, from the earliest days of the Republic, manifested

a deep understanding of the importance of diplomatic immunity in facilitating communication between nations.

While formulating a remarkably lucid and consistent set of principles, the courts have remained faithful to a rule of beneficial construction when the subject of diplomatic immunity has been brought before them—with the effect of giving as wide an immunity to the diplomatic agents of foreign states, as may be desired for those of the United States. As a result, the principles enunciated by judges in the United States on the subject of diplomatic immunity, are found, in many cases, to antedate the appearance of conclusions to the same effect in such a modern consensus as the Vienna Convention.

NOTES

[1]G. Stuart, American Diplomatic and Consular Practice, 2d ed. 1952.

[2]*Respublica v. De Longchamps,* 1 Dall. 120, 123 (Pa. Oyer and Terminer 1784) 1 U.S. 111 at 116 (1784).

[3]E. Satow, A Guide to Diplomatic Practice, 4th ed. 176 (1957).

[4]Id. 177.

[5]18 U.S.C. sec. 112; 78 Stat. 610, amended by P.L. 92-539 sec. 301 (Oct. 24, 1972).

[6]18 U.S.C. sec. 116, amended by P.L. 92-539 sec. 101 (Oct. 24, 1972).

[7]18 U.S.C. sec. 1201, amended by P.L. 92-539 sec. 201 (Oct. 24, 1972).

[8]18 U.S.C. 112, amended by P.L. 92-539 sec. 301 (Oct. 24, 1972).

[9]5 U.S.C. sec. 170e-1.

[10]5 U.S.C. sec. 170e.

[11]18 U.S.C. sec. 915.

[12]18 U.S.C. sec. 112.

[13]*U.S. v. Ortega,* 24 U.S. (11 Wheat) 466 (1826).

[14]U.S. Const. Art. III, sec. 2.

[15]*U.S. v. Ortega,* 27 F. Cas. No. 15-971, 4 Wash. C.C. 531, 24 U.S. (11 Wheat) 466 (1826).

[16]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[17]*Respublica v .De Longchamps,* 1 Dall. 120, 123 (Pa. Oyer and Terminer 1784) 1 U.S. 111 at 116 (1784).

[18]*Byrne v. Herran,* 1 Daly (N.Y.) 344 (Ct. of Pleas 1863).

[19]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[20]E. Satow, A Guide to Diplomatic Practice, 4th ed. 215 (1957).

[21]Id.

[22]Id. 214.

[23]Id. 227.

[24]P.L. 92-539 (Oct. 24, 1972), amending 18 U.S.C. sec. 112.

[25]E. Satow, A Guide to Diplomatic Practice. 4th ed. 180 (1957).

[26]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[27]*Byrne v. Herran*, 1 Daly (N.Y.) 344 (Ct. of Pleas 1863).

[28]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[29]P.L. 92-539 sec. 401 (Oct. 24, 1972), amending 18 U.S.C. Chapter 45.

[30]Acting Sec. of State Harriman to U.S. Legation Sofia, aerogram June 8, 1964. 7 M. Whiteman, Digest of International Law, 162.

[31]22 U.S.C.S. sec. 252.

[32]22 U.S.C.S. sec. 253.

[33]22 U.S.C.S. sec. 254.

[34]Diplomatic Relations Act 1967. S. 1577. Resubmitted.

[35]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[36]*City of New Rochelle v. Page-sharpe*. 196 Misc. 8, 91 N.Y.S.2d 290 (Cty. Ct. 1949).

[37]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[38]*Ex parte Calbreta* (Pa.) 4 F. Cas. No. 2278, 1 Wash. CC 232.

[39]E. Satow, A Guide to Diplomatic Practice, 4th ed. 196 (1957).

[40]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[41]Dept. of State, XLIII Bulletin No. 1101, Aug. 1, 1960. 173, 177-178, 4 G. Hackworth, Digest of International Law 515 et seq. (1942).

[42]4 J. Moore, Digest of International Law 678-680 (1906).

[43]Assist. Legal Adviser for Diplomatic and Consular Affairs (Cameron) to R. M. Carswell, letter Oct. 28, 1953. 7 M. Whiteman, Digest of International Law (1970).

[44]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[45]*Byrne v. Herran*, 1 Daly (N.Y.) 344 (Ct. of Pleas 1863).

[46]22 U.S.C.S. secs. 252-254.

[47]Diplomatic Relations Act 1967 S. 1577. Resubmitted.

[48]*Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir 1948).

[49]*U.S. ex. rel. Cardashian v. Snyder*, 44 F.2d 895, 896 (Ct. App. D.C. 1930).

[50]*Hellenic Lines Ltd. v. Moore*, 120 U.S. App. D.C. 288, 345 F.2d 978 (1965).

[51]Acting Legal Adviser Meeker, Dept. of State, to Clerk of U.S. Ct. App. (D.C. Cir.) (Paulson). Letter June 13, 1965. W. Friedmann, O. Lissitzyn, and R. Pugh. Cases and Materials on International Law, 705 Note 8 (1969).

[52]*Arcaya v. Paez*, 145 F.Supp. 464, 467 (S.D.N.Y. 1956), Aff'd 244 F.2d 958 (2d Cir 1957).

[53]H. Grotius, De Jure Belli et Pacis 2, c 18.5.9.

[54]*Magdalena Steam Navigation v. Martin*, 2 El and El 94, 114.

[55]22 U.S.C.S. sec. 252.

[56]22 U.S.C.S. sec. 253.

[57]22 U.S.C.S. sec. 254.

[58]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[59]*Byrne v. Herran*, 1 Daly (N.Y.) 344 (Ct. of Pleas 1863).

[60]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[61]Id.

[62]E. Satow, A Guide to Diplomatic Practice, 4th ed. 201 (1957).

[63]Id. 202.

[64]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[65]Dept. of State, Position Paper for U.S. Delegation to Vienna Convention on Diplomatic Relations. 7 M. Whiteman, Digest of International Law (1970).

[66]*Flota Marítima Browning de Cuba S.A. v. M/Y Ciudad de La Habana*, 335 F.2d 219 (4th Cir 1964).

[67]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[68]Acting Sec. of State to U.S. Rep. to the U.N., Instruction June 27, 1949. 7 M. Whiteman, Digest of International Law 167 (1970).

[69]*Wilson v. Blanco*, 56 N.Y. Super. 4 N.Y.S. 714 (1889).

[70]The Vienna Convention on Diplomatic Relations, 1961; 500 UNTS.

[71]Federal Rules of Civil Procedure as amended through July 1, 1968, Rule 4(i).

[72]E. Satow, A Guide to Diplomatic Practice, 4th ed. 205 (1957).

[73]Id.

[74]Id.