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Editor's Note: In this article, Mr. Koffler outlines the doctrine of diplomatic immunity for the lawyer unfamilar with this aspect of international law as it has been applied in the United States. He urges that the United States should ratify the 1961 Vienna Convention on Diplomatic Immunity as a step forward in unifying international practice.

INTRODUCTION

The concept of diplomatic immunity is a well established doctrine of international law.[1] The practice of holding inviolable the person and property of a foreign diplomat, and certain members of his suite and staff, has been the practice of the United States since the founding of the Republic.[2] However, to whom and to what extent these immunities apply has never been entirely determined. While certain principles are well settled,[3] others remain in flux.[4] Frequently, the immediate facts, more than principle or custom, have seemed to determine the law concerning a given situation.[5] Should the Congress of the United States ratify the Vienna Conference on Diplomtic Intercourse and Immunities,[6] many of these problems would be eliminated.

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[1] Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938); Holbrook v. Henderson, 4 Sanford 619 (N.Y. 1851).

[2] The Exchange v. McFadden, 3 U.S. (7 Cranch) 116 (1812).

[3] Bergman v. De Sieyes, 71 F. Supp. 334 (S.D. N.Y. 1884).

[4] Compare Wilson v. Blanco, 4 N.Y. Supp. 714 (1884), with Carbone v. Carbone, 123 Misc. 656, 206 N.Y. Supp. 40 (Sup. Ct. 1924).

[5] Carbone v. Carbone, *supra* note 4. *But see,* United States v. Rosal, 191 F. Supp. 663 (S.D. N.Y. 1960).

[6] The United Nations Conference on Diplomatic Intercourse and Immunities met at the Neue Hofburg in Vienna from March 2 to April 14, 1961 pursuant to General Assembly Resolution 1450 (XIV) which stated the Assembly's decision to convene an international conference of pleni-potentiaries to consider the

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THE BASES OF IMMUNITY

The inviolability of a foreign diplomat is founded upon the law of nations, and not upon the municipal law of any given state.[7] While a sovereign must assent to the grant of such immunity, such assent may well be implied.[8] It is not only unnecessary, but also perhaps inappropriate for municipal law to declare the conferring of immunity which already exists under international law and custom.[9] Preferably such legislation should construe and enforce the existent immunity.[10] This point would be most obvious were the Vienna Conference, which codifies current practice, ratified by the United States.

DURATION OF IMMUNITY

Clearly the inviolacy of a diplomatic mission continues during the entire period of continued diplomatic relationships between the states concerned; however, there is less certainty as to when such immunity attaches to any given individual. Although it has been said that an envoy is entitled to unmolested movement "eundo, morando et redeundo,"[11] diplomatic immunity generally commences the moment an agreement has been secured from the receiving state.[12] The mere possession of a diplomatic title[13] or a diplomatic passport[14] would not, per se, create immunity, unless the individual asserting such status also had a note to the supreme authority of the receiving state from his government setting forth his nomination for diplomatic duties in the receiving state.[15] The significance of the note is illustrated by a case in which an alien lacked all outward manifestations of a

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(Footnotes continued from preceding page)
question of diplomatic intercourse and immunities. The resolution invited "all States members of the United Nations, States members of the specialized agencies and States parties to the Statute of the International Court of Justice" to attend the Conference; eighty-one of them did. The full text of the resolutions of the conference are reproduced at 55 A.J.I.L. 1062 (1961).

[7] Holbrook v. Henderson, 4 Sanford 619 (N.Y. 1851).

[8] United States *ex rel* Casanova v. Fitzpatrick, 214 F. Supp. 425 (S.D. N.Y. 1963).

[9] Carrera v. Carrera, 174 F.2d 496 (D. C. Cir. 1949).

[10] Haley v. State, 200 Md. 72, 88 A.2d 312 (1952).

[11] Scott, *Cases in International Law* 291 (1922), in Stuart, American Diplomatic and Consular Practice 256 n.90 (2d ed. 1952).

[12] Stuart, *op. cit. supra* note 11.

[13] United States v. Melekh, 190 F. Supp. 67 (S.D. N.Y. 1960).

[14] *Ibid.*

[15] *Ibid.*

diplomatic personality,[16] but possessed a note from his government to another, setting forth his diplomatic status. The court held that such note, pro forma, is conclusive of the individual's right to diplomatic immunity;[17] the opinion further stated that it is inappropriate for the receiving state to look into the internal relationships between such individual and his government.[18]

Privileges attached to diplomatic status continue during the entire period for which such status is recognized by the receiving state, and for a reasonable period of time thereafter.[19] The contention that a diplomat's immunity terminates immediately upon the cessation of his mission,[20] is contrary to accepted custom and practice. The general and better view permits the diplomat a reasonable period of time to depart. This has been construed to mean that amount of time required by the officer to withdraw with his mission.[21]

Frequent difficulties arise concerning the commencement and duration of diplomatic status and immunity where the government of the sending state has undergone a change in a manner other than that provided for in the constitution or laws of the sending state under which recognition was extended by the receiving state. Since the receiving state frequently moves slowly in extending recognition to the new government of the sending state, the diplomatic mission in the receiving state often represents a government which no longer exists. Nevertheless, so long as the receiving state continues to recognize the continuing status quo, the mission remains inviolable.[22] This is true although the new regime orders the current diplomatic agent to return. The diplomat may refuse to comply with these orders on the grounds that he does not recognize the sending authority as the legally constituted government of the state which he represents. In such case, a receiving state which has not extended recognition to the new government will not inquire into the internal relation-

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[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940), *cert. denied*, 313 U.S. 586 (1941); D'Azambuja v. Pereira, 1 Miles 366 (Pa. 1830).
[20] Arcaya v. Paez, 145 F. Supp. 464 (S.D. N.Y. 1956), *aff'd*, 244 F.2d 958 (2d Cir. 1957); Mongillo v. Vogel, 84 F. Supp. 1007 (E.D. Pa. 1949).
[21] Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940).
[22] United States v. Melekh, 190 F. Supp. 67 (S.D. N.Y. 1960).

ships between a mission and its government.[23] If the new regime sends a new diplomatic agent to the receiving state, and such new envoy is unable to acquire an agreement from the receiving state, he is not entitled to either diplomatic status or immunity.[24]

PERSONS PROTECTED

The immunities enjoyed by the head of a mission extend to members of his official household. This category clearly includes the official diplomatic staff, the ministerial staff, and their families.[25] The extent to which such immunity applies to the domestic suite is far less certain.[26] States have gone to extremes in either granting total immunity to domestics attached to a mission, or in totally withholding such privilege to persons occupying that status. It has been suggested that an appropriate doctrine to adopt in this regard is *"ne impediature legatio"*: that, if the servant must perform the least official duty, he is entitled to immunity.[27]

PROPERTY PROTECTED

The inviolability of diplomatic property is a long established principle of international law and custom. The immunity extended to the official residence of the head of a foreign mission, and to the chancery of such embassy or legation, and to the goods and records and archives therein, is no longer open to serious question.[28] Such immunity, however, clearly does not apply to property of the diplomatic agent which is unconnected with his representative capacity.[29] Thus, while property of an official nature is clearly immune from either public or private invasion in the receiving state, unrelated personal property is fully subject to such invasion. States have substantially differed as to what constitutes diplomatic property.

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[23] *Ibid.*

[24] *Ibid.*

[25] Carbone v. Carbone, 123 Misc. 656, 206 N.Y. Supp. 40 (Sup. Ct. 1924); Magdalena Steam Nav. Co. v. Martin, 2 E & E. 94, 121 Eng. Rep. 36 (Q.B. 1859).

[26] *Ex parte* Cheuk Gar Lim, 285 F. 396 (N.D. Cal. 1922); Herman v. Apetz, 130 Misc. 618, 224 N.Y. Supp. 389 (Sup. Ct. 1927). *But see,* People v. Roy, 21 Misc. 2d 303, 200 N.Y.S.2d 612 (1959).

[27] Stuart, *op. cit. supra* note 11, at 236.

[28] Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1938). United States v. Hand, 26 Fed. Cas. 103 (No. 15297) (C.C.D. Pa. 1810).

[29] Byrne v. Herran, 1 Daly 344 (C.P. N.Y. 1863).

WAIVER

A frequent problem involves the question whether diplomatic immunity of person or property, once granted, is subject to waiver. An often made contention is that the immunity granted to an individual or his property is not in personam, but rather assent to that rule of practice among nations against the invasion of another sovereign through the personification of agents delegated by such sovereign.[30] This view grants nothing to the diplomatic agent but merely utilizes him as a means of awarding a privilege to his sovereign; the diplomat is merely a legal conduit, and thus he has nothing to waive. A contrary, and better, view regards the agent as the representative of the sovereign and grants the diplomat such immunity as befits his representative status for its duration.[31] Since the diplomatic agent, and not the sovereign, enjoys the privilege of immunity under this rationale, the agent may waive such immunity without the consent of his sovereign.[32] The United States, has adopted an intermediate position: while a diplomat may waive his personal immunity, the head of the mission must consent, either directly or indirectly, to a violation of the premises of the mission.[33] Without regard to either rationale above, as a practical matter, the family and domestic suite of a foreign diplomat are generally permitted to waive their personal immunity when they desire to do so, without the consent of the sending state.

NATIONALS SERVING IN THE RECEIVING STATE

Often nationals of a receiving state are employed by a foreign diplomatic mission located in that state, in either an official or an unofficial capacity, although historically persons were granted any diplomatic immunity which attached to their positions regardless of nationality,[34] nations no longer agree upon this matter. Some nations will not receive their own nationals in any diplomatic capacity. This rule may present a significant problem to newly independent nations who often lack a sufficient number of

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[30] United States v. Benner, 24 Fed. Cas. 1084 (No. 14568) (C.C. E.D. Pa. 1830).
[31] Herman v. Apetz, 130 Misc. 618, 224 N.Y. Supp. 389 (Sup. Ct. 1927).
[32] *Ibid.*
[33] See Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).
[34] Stuart, *op. cit. supra* note 11, at 236.

their own nationals to properly staff their foreign missions and must rely on the citizens of the receiving state. However, since receiving states which follow this rule generally have no objection to receiving nationals of a third state in the employ of the sending state, the problem stated is somewhat overcome. The United States does not object to the employment of its own nationals as ministers of a foreign mission. However this country will not grant such persons the privileges and immunities of diplomatic status; their names will not be placed on the diplomatic list.[35] There is a seemingly valid rationale for this position: while there is no objection to a mission employing persons of its own choice for the performance of required services, it is most inconvenient for citizens of the receiving state to enjoy immunity from the official jurisdiction of that state.

INVIOLABILITY OF THE DIPLOMATIC PERSON

It is fundamental to the basic concept of diplomatic representation that the person of a diplomatic agent be fully and completely inviolable.[36] This immunity applies not only to the head of the mission but also to his family and to his entire official household, including their families. This concept or principle of diplomatic immunity against invasion of the persons of the diplomatic agent is the source of all the other forms of diplomatic immunity. If the foreign diplomatic representative is not free from interference with his person, he cannot fully carry out the proper functions of his position, and any further immunities granted would be of small value.

Inviolacy of the diplomatic person is a principle applicable to creatures both public and private. Thus official staff of a foreign mission is not in any way subject to the official will of the receiving state. Moreover, the receiving state has a positive obligation to take appropriate measures to insure the inviolability of the persons of the representatives of the sending state from either public or private[37] invasions. Consistent with this principle the United States has made it a federal criminal offense[38] to offer

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[35] *Ibid.*

[36] United States v. Benner, 24 Fed. Cas. 1084 (No. 14568) (C.C.E.D. Pa. 1830).

[37] Haley v. State, 200 Md. 72, 88 A.2d 312 (1952).

[38] 22 U.S.C. § 255 (1948).

violence to the person of a foreign person of diplomatic status. In some instances, this law may be applicable even though the defendant was unaware of the diplomat's status at the time the offense was committed.[39]

JURISDICTION IMMUNITY

A diplomatic agent's immunity from local jurisdiction is one of the most important privileges he enjoys. For 250 years, the existence and scope of this form of immunity have been stated in statutory form. In 1708, the Diplomatic Privileges Act provided:

> (A) ll writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of an ambassador or other publick minister . . . may be arrested or imprisoned, or his or their chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void.[40]

This legislation remains in full force and effect in Britain. In the United States, federal legislation voids any judicial process providing for the arrest or imprisonment of a public minister.[41]

CRIMINAL JURISDICTION

It has been said that there is no recorded history of a criminal prosecution of a person entitled to diplomatic immunity in a receiving state without such person's consent. Whether or not this is a valid statement of diplomatic history, certainly any attempt to invoke the criminal jurisdiction of the receiving state upon a minister who is accredited to, and has been received by, such state violates the law of nations. Where a person enjoying diplomatic privilege has committed an act which is deemed to be in violation of the criminal law of the receiving state, the appropriate action for the receiving is to request the recall of such person. Should the sending government fail to promptly honor this request, the receiving state may declare the offending diplomatic

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[39] United States v. Ortega, 27 Fed. Cas. 359 (No. 15971) (C.C.E.D. Pa. 1825).

[40] Diplomatic Privileges Act, 1708, 7 Anne, c. 12.

[41] Rev. Stat. § 4063-64 (1875), 22 U.S.C. § 252-53 (1959).

officer to be persona non grata, and demand his rapid departure from the territory of the receiving state. Whether or not the foreign diplomat will be held to account to his government for the infraction of the criminal laws of the receiving state is entirely up to that government. However, there is substantial authority for the view that an offending diplomat should be held liable for his acts, because otherwise, the diplomatic community would have little fear of engaging in sundry violations of the law.

CIVIL JURISDICTION

The freedom of a public minister from civil jurisdiction may not be absolute. Nations agree that a public minister is immune from civil process in any matter which directly or indirectly concerns his official duties. However, countries disagree about whether or not such immunity carries over to the personal affairs of such a diplomatic person. While the majority grants total and complete immunity from all civil jurisdiction of any kind, a minority has voiced a contrary view. The latter, and perhaps the better, view would not grant immunity from local civil jurisdiction in matters totally unrelated to the official duties of the minister, but concerned entirely with some commercial or professional venture in which he is engaged. Generally, when a person enjoying such immunity commences a civil suit against a national of the receiving state, such national may enter a counterclaim against the diplomatic agent. However, while the agent has waived his immunity as to the counterclaim by filing suit against the national, the minister has not waived his right to be protected from enforcement of the civil judgment should the national be successful in the litigation.[42]

STATUS OF DIPLOMATS IN TRANSIT

A diplomatic agent passing through a second state, in transit to or from a receiving state, is not entitled to privileges and immunities indentical to those enjoyed by public ministers who have been received by the second state.[43] The extent to which such person will be entitled to normal immunities extended to diplomatic persons will largely be determined by the facts sur-

[42] Stuart, *op. cit. supra* note 11, at 255.
[43] Carbone v. Carbone, 123 Misc. 656, 206 N.Y. Supp. 40 (Sup. Ct. 1924).

rounding his presence in the second state. In almost every instance,[44] he would be entitled to freedom from criminal jurisdiction in the second state. There is substantially divided opinion as to whether or not he is entitled to immunity from civil jurisdiction in the second state through which he is passing.[45]

CONCLUSION

Like many fields of international law and practice, the rules and customs which may appropriately be applied to the privileges and immunities to which diplomatic agents may be entitled are not fully determined. Frequently, more than one practice, each fully justified by qualified rationale, may be applied to a given fact situation. It would seem that uniformity, rather than choice of rule, would be particularly well suited for the practice of diplomatic law. In a field which, by its very nature, must include by reference the municipal law of all of the states on earth, each with its own diverse background and structure, a single and uniform rule of law is obviously essential. The adoption of the proposed Vienna Conference should bring the principle of a single universal rule much closer to fruition.

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[44] Holbrook v. Henderson, 4 Sanford 619 (N.Y. 1851).

[45] Bergman v. De Sieyes, 71 F. Supp. 334 (S.D. N.Y. 1884). *But see,* Carbone v. Carbone, 123 Misc. 656, 206 N.Y. Supp. 40 (Sup. Ct. 1924).