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Discussions in International Law

W.C. McAuliffe Jr.

DISCUSSIONS IN INTERNATIONAL LAW

by Lieutenant W. C. McAuliffe, Jr.,
U. S. Naval Reserve

(Lieutenant McAuliffe is a student in the correspondence course of International Law. Following are selected excerpts from an outstanding paper submitted for this course. Ed.)

The principle of exterritoriality sets up exemption from the operation of the laws of a state or the jurisdiction of its courts on the basis of a fiction that certain locally situated foreign persons and facilities should be deemed to be "outside" the state. Thus, the principle is actually a rationale for a set of immunities accorded foreign heads of state temporarily present, to their retinues, diplomatic agents and members of their households, to consuls, and to foreign men-of-war and other public vessels in port.[1]

The principle has been keenly criticized. Brierly says:

> The term "exterritoriality" is commonly used to describe the status of a person or thing physically present on a state's territory, but wholly or partly

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withdrawn from the state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has *some* immunity from the local jurisdiction; it does not help us to determine the only important question, namely how far this immunity extends.[2]

In the same vein, Briggs notes:

The theory of *exterritoriality* of ambassadors is based upon the fiction that an ambassador, residing in the State to which he is accredited, should be treated for purposes of jurisdiction as if he were not present. Ogdon traces this theory to the imperfect development in the feudal period of the concept of territorial, as opposed to personal, jurisdiction and the inordinate development of diplomatic privileges in the sixteenth century to cover the ambassador, his family, his suite, his chancellery, his dwelling and, at times, even the quarter of the foreign city in which he lived, all of which were presumed in legal theory to be outside the jurisdiction of the receiving State . . . . Modern theory overwhelmingly rejects the theory of exterritoriality as an explanation of the basis of diplomatic immunities. Thus, Professor Diena in his *Report to the League of Nations Committee of Experts for the Progressive Codification of International Law*, 1926 . . . 20 A.J.I.L. (1926), Spec. Supp., 153, observes: "It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of State X are on territory which is foreign from the point of view of the State in question. There are sound practical as well as theoretical reasons for abandoning the term ex-territoriality. . . ."[3]

Judge Moore said this:

The exemption of diplomatic officers from the local jurisdiction is often described as "extraterritoriality." The word, however, is in relation peculiarly metaphorical and misleading. It is admitted that if the government of the country which the minister represents waives his immunity he may be tried and prosecuted, criminally or civilly, in the local tribunals. His immunity is therefore in reality merely an exemption from process so long as he retains the diplomatic character.[4]

The principle of exterritoriality, of course, has application to a head of state when he travels outside his own territory. Lauterpacht's Oppenheim discusses this situation, first, in terms of monarchs.

However, as regards the consideration due to a monarch, when abroad, from the State on whose territory he is staying, in time of peace, and with the knowledge and the consent of the Government, the following may be noted: . . . He must be granted so-called exterritoriality conformably with the principle *par in parem non habet imperium*, according to which one sovereign cannot have any power over another sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff. The house in which he has taken up residence must enjoy the same exterritoriality as the official residence of an ambassador; no . . . official must be allowed to enter it without his permission . . . . If a foreign sovereign has immovable property in a country, such property is under the jurisdiction of that country. But as soon as the sovereign takes up his residence on the property, it becomes exterritorial for the time being. The wife of a sovereign must likewise be granted exterritoriality, but not other members of a sovereign's family . . . . [A] monarch traveling *incognito* . . . enjoys the same privileges as if travelling not *incognito*. The only difference is that many ceremonial observances . . . are not rendered to him when travelling *incog-*

nito . . . . All privileges mentioned must be granted to a monarch only as long as he is really the Head of a State.[5]

As to the retinue of a monarch, the same treatise states:

> The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute. Several maintain that the home State can claim the privilege of exterritoriality for members of his suite as well as for the sovereign himself; but others deny this. The opinion of the former is probably correct, since it is difficult to see why a sovereign abroad should, as regards the members of his suite, be in an inferior position to a diplomatic envoy.[6]

From this consideration of monarchs, the treatise proceeds to a consideration of the position of presidents of republics.

> In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and, accordingly, the people styles itself the sovereign of the State . . . . [A] president, as in France, and the United States . . . represents the State, at any rate in the totality of its international relations. He is, however, not a sovereign, but a citizen and a subject of the very State of which, as president, he is Head. . . . As to the position of a president when abroad, writers on the Law of Nations do not agree. Some maintain that, since a president is not a sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of exterritoriality. Others distinguish between a president staying abroad in his official capacity as Head of a State and one who is abroad for his private purposes, and they maintain that his home State can only in the first case claim exterritoriality for him. Others again will not admit any difference in the position of a president abroad from that of a monarch abroad . . . . As regards exterritoriality, there seems to be no good reason for distinguishing between the position of a monarch and that of presidents or other Heads of States.[7]

The substantive content of this right of exterritoriality will be discussed next, with reference to diplomatic representatives.

The historical evolution of the principle of exterritoriality as the rationale for a body of traditional diplomatic immunities is not without interest, although it has passed the heyday of its acceptability.

> By long custom, antedating perhaps all other rules of international law, the diplomatic agents sent by one state to another have been regarded as possessing a peculiarly sacred character, in consequence of which they have been accorded special privileges and immunities. The ancient Greeks regarded an attack upon the person of an ambassador as an offense of the gravest nature. The writers of ancient Rome were unanimous in considering an injury to envoys as a deliberate infraction of the *jus gentium*. Grotius wrote in 1625 that there were "two

BIOGRAPHIC SUMMARY

Lieutenant W. C. McAuliffe, Jr., USNR, holds a B.S. degree from the School of Foreign Service, Georgetown University. He is a graduate of Harvard Law School and the Naval Justice School and is a member of the Bar in the District of Columbia, the State of New York, the United States Supreme Court, the Court of Military Appeals, and other Federal courts.

Lieutenant McAuliffe served on active duty on the staff of Commander, Service Squadron Three, as Assistant Staff Legal Officer. In this capacity he received appointments as the U.S. Trial Observer for many Status of Forces Agreement trials in the Japanese Courts of Sasebo and Fukuoka. His special fields of interest are maritime and international trade law.

> points with regard to ambassadors which are everywhere recognized as prescribed by the law of nations, first that they be admitted, and then that they be not violated." The basis upon which this personal immunity rested was generally found in the principle that the ambassador personified the state or sovereign he represented. From this principle developed not only the custom of according special protection to the person of the ambassador but also a comprehensive exemption from the local jurisdiction. In explanation of the privileges and immunities thus granted, writers worked out the fiction of *exterritoriality*, which held that the ambassador and his suite, together with his residence and the surrounding property, were legally outside the territory of the state. This fiction obtained for a time a foothold in international law, and served the useful purpose, on the one hand, of explaining the actual immunities granted to foreign representatives and, on the other hand, of emphasizing the sovereignty and equality of the several states. It was, however, open to the disadvantage not only of being a fiction but of permitting inferences more comprehensive than the position of the ambassador called for. In consequence, it has been less referred to of recent years; and the immunities granted to public ministers are now generally explained as a mere exemption from the local law, based upon the necessity of securing to the minister the fullest freedom in the performance of his official duties.[8]

Lauterpacht's Oppenheim presents a good summary of the substantive content of diplomatic privileges bound up in the principle of exterritoriality. This summary is prefaced with a defense of the principle itself, as follows:

> The exterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the international community is not, as in the case of sovereign Heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, control, and the like, of the receiving States. Exterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "exterritoriality" is nevertheless valuable because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States. The so-called exterritoriality of envoys takes practical form in a body of privileges . . . .[9]

The enumeration of these privileges is as follows:

> The first of these privileges is immunity of domicile . . . . Nowadays the official residences of envoys are, *in a sense and in some respects only*, considered as though they were outside the territory of the receiving States . . . . [I]mmunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys . . . . The second privilege of envoys in reference to their exterritoriality is their exemption from criminal and civil jurisdiction . . . . the rule that an envoy is exempt from civil jurisdiction has certain exceptions: namely, (*a*) if an envoy enters an appearance to an action against himself and allows the action to proceed without pleading his immunity; or (*b*) if he himself brings an action under the jurisdiction of the receiving State, whereupon the courts of the latter have civil jurisdiction over him to the extent, it is submitted, of enforcing the ordinary incidents of procedure, including a set-off or counterclaim by the defendant arising out of the same matter, but even then not so as to enable the latter to recover from the envoy an excess over and above the latter's claim. (*c*) The local courts also have jurisdiction as regards immovable property held within . . . the receiving State by an envoy, not in his official character but as a private individual, and (*d*) in some countries . . . as regards mercantile ventures in which he might engage on the territory of the receiving State . . . . The third privilege of envoys in refer-

> ence to their exterritoriality is exemption from subpoena as witnesses. No envoy can be compelled, or even requested, to appear as a witness in a civil or criminal or administrative court . . . . The fourth privilege of envoys in reference to their exterritoriality is exemption from the police of the receiving States . . . . On the other hand . . . an envoy . . . is expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall . . . . The fifth privilege of envoys in reference to their exterritoriality is exemption from taxes and the like . . . . A sixth privilege of envoys in reference to their exterritoriality is the so-called Right of Chapel . . . . This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State.[10]

A number of precedents and municipal statutes illustrate below some of these specific elements of the privilege of exterritoriality.

In the famous *Nikitschenkoff* case (French Court of Cassation (Criminal) 13 October 1865, *Journal du Palais* (1866), p. 51) the accused, Nikitschenkoff, a private Russian citizen not a member of the legation, had entered the Czar's Paris Embassy and assaulted its First Secretary and two "foreign" (?) servants who came to his assistance. At the request of the First Secretary, the French police entered the Embassy and arrested Nikitschenkoff. It is disputed whether or not the Russian Government ever sought to try the accused by Russian law, on the basis of the exterritoriality of the Embassy. However, the French court did recite its jurisdiction in the following terms, as a preliminary to its decision:

> In view of the contention that the crime with which the accused is charged must be regarded as having been committed by a Russian subject upon another Russian subject or foreigners on the premises of the Russian Embassy in Paris, and, in consequence, in a place situated outside the territory of France and not governed by French law and to which the jurisdiction of French courts cannot be extended:
> Whereas, according to Article 3 of the Code Napoléon, all those who live in the territory [France] are subject to [French] police and security laws;
> Whereas, admitting as exceptions to this rule of public law the immunity which in certain cases, international law accords to the person of foreign diplomatic agents and the legal fiction in virtue of which the premises they occupy are deemed to be situated outside the territory of the sovereign to whom they are accredited;
> Whereas, nevertheless, this legal fiction cannot be extended but constitutes an exception to the rule of territorial jurisdiction . . . and is strictly limited to the ambassador or minister whose independence it is designed to protect and to those of his subordinates who are clothed with the same public character;
> Whereas, the accused is not attached in any sense to the Russian Embassy but, as a foreigner residing for the time in France, was subject to French law; and whereas the place where the crime which he is charged with committing cannot, in so far as he is concerned, be regarded as outside the limits of [French] territory; and whereas it follows that the proceedings and the jurisdiction of the French judiciary are clearly established . . . ;
> Whereas [the proceedings] were actually initiated at the request of agents of the Russian Government . . . in the light of these considerations, the contention advanced is without validity.[11]

Other cases have followed in the same vein as the landmark Nikitschenkoff decision.

> The rejection in the *Nikitschenkoff Case* of the fiction that diplomatic premises are deemed to be exterritorial has been supported in numerous decisions. For example in the *Tro-*

chanoff Case, 37 J.D.I. (1910), 551, the *Tribunal Correctionnel de la Seine* held, on February 8, 1909, that it had jurisdiction over a Bulgarian national who, within the Bulgarian Legation at Paris, had threatened the Bulgarian Minister with death, despite defendant's plea that the act charged must be deemed to have been committed on foreign territory outside the jurisdiction of France. In the *Afghan Embassy Case,* 69 *Entscheidungen des Reichsgerichts in Strafsachen 54, Annual Digest,* 1933-34, Case No. 166, the German Reichsgericht in Criminal Matters on November 8, 1934, reached a similar conclusion with reference to an Afghan national who in 1933, on the premises of the Legation of Afghanistan in Berlin, had murdered the Afghan Minister, the Court observing that according to international law the residential and official premises of a diplomatic representative are not foreign, but national territory, even though, in the interest of function, the local authorities must refrain from the performance of certain official acts on diplomatic premises. A request by the Afghan Government for the extradition of the murderer for trial in Aghanistan had been granted by the German Government but was subsequently waived by the Afghan Government . . . . In *Munir Pacha v. Aristarchi Bey,* 37 J.D.I. (1910), 549, the Civil Tribunal of the Seine, on June 26, 1909, held that it had jurisdiction with reference to a contract signed in the Ottomau Embassy in Paris by Munir, the Turkish Ambassador, and Aristarchi, a Turkish national. The Court denied defendant's contention that, because of the exterritoriality of the diplomatic premises, the contract had been concluded in Turkey. In the *Basiliadis Case,* 49 J.D.I. (1922), 407, the Court of Appeal of Paris on Mareb 1, 1922, reversed a decision of the Civil Tribunal of the Seine, 48 J.D.I. (1921), 185, that a marriage contracted by two Greek subjects in the chapel of the Greek church annexed to the Greek Legation in Paris must, because of the exterritoriality of the diplomatic premises, be regarded as having been performed on Greek territory. In declaring the marriage null and void because not in conformity with French law, the Court observed, "that although the premises of an embassy and of a legation must be regarded as inviolable, the premises and their dependencies [e.g., chapel] nevertheless constitute an integral part of French territory and a marriage there contracted is not contracted in a foreign country." In a decision of March 15, 1921, the Austrian *Oberster Gerichtshof* held that, according to the principles of international law, legation buildings of a foreign sovereign State were inviolable and not subject to attachment or judicial execution . . . .[19]

An assistant naval attaché can evaluate his privileges and responsibilities under international law as a member of a U.S. diplomatic mission. Lauterpacht's Oppenheim states:

> The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to . . . different classes. All those individuals who are officially attached to an envoy are members of the legation, and are appointed by the home State of the envoy. To this . . . class belong the counsellors, attachés, and secretaries of the legation . . . . It is a generally . . . recognized rule of International Law that all members of a legation are as inviolable and exterritorial as the envoy himself.[13]

Thus, it appears that the naval attaché enjoys the body of privileges outlined in the discussion of diplomatic representatives.[14]

In terms of the diplomatic privileges enumerated previously, the following would be an assistant attaché's major diplomatic privileges:

The assistant attaché would enjoy, for himself and his family, an immunity of domicile, particularly a house assigned him by the Embassy and owned by the United States. But the assistant attaché cannot harbor in that dwelling a nonmember of his country's legation who is a fugitive from local authorities. The "right" of asy-

lum is denied in most places outside Latin America. Regardless, the function of extending asylum, within its limited allowed sphere, is solely the province of the head of mission. The assistant attaché and his family can expect to enjoy a complete immunity from local civil and criminal jurisdiction.[15] It is, of course, required by the U.S. Navy that naval attachés conduct themselves as exemplary officers. Therefore, this privilege is most likely to be involved in legitimate disputes on civil matters. The Lauterpacht's Oppenheim description of the British practice in such situations is a fair indication of what may be done in countries where otherwise amicable diplomatic relations prevail:

> . . . [I]n the United Kingdom in case of unsuccessful efforts to obtain satisfaction from a person entitled to diplomatic immunity, the matter is usually referred to the Foreign Office, which seeks either to obtain a waiver of immunity with the view to submission of the dispute to a court or to secure agreement of the diplomatic person in question to resort to private arbitration. Such intervention is, as a rule, successful.[16]

The assistant attaché can expect to enjoy a general exemption from local process such as subpoenas,[17] but in the situation where the assistant attaché finds himself in the position of being an apparently essential witness in a local proceeding, he should consult with and be guided by higher authority and senior diplomatic officers as to whether he will exercise his privilege or appear as a matter of courtesy to the local authorities.

The assistant attaché is possessed of the privilege of exemption from local police jurisdiction. A recent example of application of this principle of exemption is seen in the New York City drive against illegal parking in Manhattan. One New York tabloid newspaper has singled out diplomatic vehicles (which are concentrated in Manhattan due to the presence of United Nations Headquarters) and conducted an inflammatory campaign against the illegal parking of diplomatic vehicles. The police have begun a program of towing away all vehicles illegally parked, including diplomatic autos. But diplomatic vehicles are accorded "special treatment" in that policemen endeavor to locate diplomatic drivers before resort to towing. When they do tow diplomatic vehicles, they charge no fees or fines when the diplomatic vehicle is recovered from police stowage. Thus do New York authorities seek to vindicate the diplomatic privilege. This is really a rough compromise with the competing necessities of diplomatic privilege and the need to move traffic in a direly clogged city. From this difficult example the common sense rule emerges as it exists in all cases: Diplomatic persons enjoying the privilege of freedom from police regulation should endeavor to make reasonable compliance therewith for the sake of the general order in the community to which they have been assigned.[18] Another "hard case" which arose in the United States emphasizes this point:

> On November 27, 1935, the Iranian Minister to the United States, the Honorable Ghaffar Djalal, was arrested in Elkton, Md., for disorderly conduct following the arrest of his chauffeur for reckless driving and speeding. The Minister was handcuffed to a constable who charged that in the argument resulting from the arrest for speeding, the constable had been seized by the throat and that the envoy's wife had attacked him with a cane. The charge against the Minister was dismissed about two hours later by a justice of the peace on the ground of diplomatic immunity. A fine of $5 against the chauffeur was suspended but he was compelled to pay 75 cents as costs. The Minister protested to the Department of State. On December 6, 1935, the Secretary

of State informed the Iranian Minister that the Governor of Maryland had expressed apologies for the incident and that the offending police officers had been tried on a charge of assault, substantially fined, and dismissed from service. In expressing the formal regrets of the United States Government over the incident, Secretary of State Cordell Hull took occasion to remind the Iranian Government that foreign diplomatic officers were expected to observe the local law. Apparently interpreting this qualified apology as a reproof, the Iranian Government indicated its displeasure by recalling its Minister and closing its Legation in the United States. See Hackworth, IV, 515, 459; *New York Times*, Nov. 28, 1935, p. 1, and January 5, 1936, p. 1.[19]

The naval attaché enjoys a diplomatic exemption from "taxation."[20] In different countries, various charges and levies for public services as well as traditional fiscal levies are denominated "taxes." For example, the naval attaché may be exempt from general taxation on earned incomes in the state to which he has been sent, but there may be certain "taxes" charged to pay for services such as water for his house, which he may pay. In British terminology, these are rates, and in Lauterpacht's Oppenheim it is noted:

> Payment of rates imposed for local objects from which the envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although often this is not done.[21]

The U.S. practice with regard to these local taxes and charges is to proceed on the basis of reciprocity.

> Taxation of diplomatic and consular representatives is largely administered and regulated on the basis of reciprocity. At the present time, diplomatic representatives of the United States, their families, and American members of their staffs, stationed abroad, are generally exempt from the payment of local taxes except on personally owned property or businesses. Unless exempted by treaty or agreement, consular officers are subject to local taxes in the city and country in which they reside, but as a matter of courtesy and comity they are frequently exempted from the payment of personal taxes.[22]

A footnote to section 395 in volume I of Lauterpacht's Oppenheim characterizes the "so-called Right of Chapel." Described as "the privileges of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State" by the text, it is qualified by the footnote, which states that this was a "privilege of great value in former times, when freedom of religious worship was unknown in most States; it has at present a historical value only." The accuracy of this qualification is open to dispute in view of the persecution of religion in the Soviet bloc countries. The chapel for the U.S. Embassy in Moscow is one of the few churches functioning without serious inhibition in the Soviet Union. So the right of chapel may have been resuscitated by recent diplomatic arrangements with the Communist states. The problem was recognized even in pre-World War II dealings between the West and the Soviet Union.

> On November 16, 1933, normal diplomatic relations were established between the Soviet Union and the Government of the United States by an interchange of communications between President Roosevelt and Maxim Litvinov, Foreign Secretary of the Soviet Union, who was then in this country. The correspondence discloses the guarantees which were then given to the Government of the United States by the Soviet Union. Specifically, among other provisions, the following rights appertaining to religion were guaranteed to the American citizen in Russia:
>
> 1. The right to free exercise of liberty of conscience and religious

worship, and from all disability or persecution on account of their religious faith or worship.

2. The right to conduct without annoyance or molestation of any kind religious services and rites of a ceremonial nature, including baptismal, confirmation, communion, marriage and burial rites, in the English language.

3. The right, without restriction, to impart religious instruction to their children, either singly or in groups, or to have such instruction imparted by persons whom they may employ for such purpose.

4. That nationals of the United States should be granted rights with reference to free exercise of religion no less favorable than those enjoyed by nationals of the nation most favored in this respect, which assured citizens of the United States that they shall be entitled to hold religious services in churches, houses, or other buildings, rented, according to the laws of the country, in their national language or in any other language which is customary in their religion. They shall be entitled to bury their dead in accordance with their religious practice in burial grounds established and maintained by them with the approval of the competent authorities, so long as they comply with the police regulations of the other party in respect of buildings and public health.[23]

In practice, the above rights have only been effectively enjoyed within our Embassy.

The last privilege to be discussed is that of self-jurisdiction. For the assistant attaché it means that he will be subject to the jurisdiction of the head of mission and to the chain of naval command,[24] independent of the authority of any official of the government to which he is accredited.

Turning to the responsibilities of the assistant naval attaché, we find that these are also clearly defined.[25] Directives of the Navy and State Departments set these forth. Along with these organizational responsibilities, another set of responsibilities stems from applicable international law. One such responsibility is scrupulous avoidance of involvement in matters which involve the state in which the attaché serves and third states.[26] He also has a fundamental responsibility to conform to the general regime of local regulations in the place where he is serving, as noted above.

> The immunity of a diplomatic officer does not relieve him of certain duties, incident to his residence, towards the host country. The most elementary duty is that of observing local law. Although a diplomatic officer is immune from the legal consequences of non-observance or violation of local law, his daily life is governed by that law . . . . [T]he only recourse the host country has in the face of persistent law violations by a diplomatic officer is to declare him *persona non grata* and to request the sending State to recall him . . . normally a serious reflection on the conduct of the diplomat. There is one country that has used or abused this declaration as a political tool and a means of harassment, and that is the Soviet Union. Whenever the United States requests the recall of a Russian diplomatic officer or declares him *persona non grata* for valid reasons, the Russians select one of our diplomatic officers, apparently at random, and declare him *persona non grata*. In these cases the declaration is not a substitute for punishment, but political retaliation. Needless to say, this is an abuse . . . . Usually the United States lodges a strong protest against such unfounded action, as it did in the case of Commander R. O. Smith, Assistant Naval Attaché to Moscow, in October 1962.[27]

A naval attaché also has a responsibility to refrain from personal enterprises for profit in the host country.

> Diplomatic officers are prohibited from engaging for their personal profit in any professional or commercial activities in the receiving State. Such activities would be incompatible with the status of the diplomatic agent and his duties towards his own country. Mili-

> tary attachés on diplomatic duty in a foreign country could hardly reconcile such activities with their primary duties toward their service. That there can be rare cases of such activities by diplomatic agents is shown by the fact that the drafters of the Vienna Convention considered it necessary to include Articles 31 and 34 which provide for payment of taxes on income from such activities, and for civil jurisdiction for legal actions developing from such activities.[28]

The assistant naval attaché must also observe such restrictions of the host state as are imposed regarding travel within that state.

> Diplomatic officers are assured the right of freedom of movement and travel in the receiving State. Each nation, however, has the right to impose certain restrictions on this freedom for reasons of its own national security. Laws and regulations of a country establishing so-called zones of entry, restricted zones, security zones and others, must be observed by the attaché in the same manner as other laws. Such restrictions are normally applied on a reciprocal basis and are naturally found mainly among those countries not having the friendliest of relations. One would hardly expect restrictions of this type between the United States and its friendly allies. On the other hand, many of us . . . have heard of travel restrictions imposed by the Soviet Union and by the United States on diplomatic personnel and visitors from the other country. Such restrictions are frequently relaxed or lifted from time to time as political tensions lessen. But while they are in force, they must be observed by the attaché. Violations usually have diplomatic repercussions and may lead to the recall of the attaché.[29]

Because of reduced labor costs in some countries, even an assistant naval attaché may be able to retain servants. Such employment may raise an obligation for him to observe obligations imposed by the local scheme of public social security imposed on employers generally:

> For persons to whom . . . exemption does not apply, the diplomatic officer must observe the social security provisions of the sending State. For instance, a diplomatic officer who brings his own servants into the host country and pays social security for them back home need not pay social security for them in the receiving State. The same holds true if he hires nationals from a third country and pays for social security in that country. If he hires servants locally, he must pay for their social security in accordance with local law. A diplomatic officer may voluntarily participate in the social security system of the host country for persons otherwise exempt, provided that this participation is permitted by the receiving State.[30]

Finally, the naval attaché may have important responsibilities with reference to a Status of Forces Agreement. The assistant attaché may have to render aid to the attaché in meeting these responsibilities.

> The reason for mentioning Status of Forces Agreements . . . is not so much that the attaché may at some time need the assistance of a country representative, but that he may well find himself in the position where he actually has to assume the functions and responsibilities of a country representative. In countries with which the United States has entered into Status of Forces Agreements, procedures have evolved to handle all cases in which military personnel may become subject to the jurisdiction of local courts . . . . Originally, the procedures were meant to apply only in countries with which the United States had such agreements, but eventually they were expanded to apply worldwide . . . . One problem that had to be solved was to whom to give the responsibility of carrying out the procedures established under these directives in those countries in which there were no United States commands . . . . At first it was quite logically given to the service attachés in such a manner that each took care of cases involving members of his own service. Thus the Naval Attaché would handle procedures for United States sailors on shore in the country to which he was

accredited, following Navy Department instructions, provided he had been given that responsibility. In such cases he might have been required to maintain liaison with the foreign government in attempting to effect waiver of jurisdiction so that the offender could be tried by court-martial rather than local civil courts; he would have to obtain local counsel where waiver of jurisdiction could not be obtained, and he would prepare all reports of the incident required . . . . Matters have become somewhat more complicated with the establishment of the Executive Agent system under which only one military attaché in each country is given the responsibility for administrative matters for all three services . . . . The duties of the Executive Agent Attaché in Status of Forces matters are set forth in Joint Army-Navy-Air Force Attaché letter No. 26 of 21 Sept. 1961

Subject: Exercise of criminal Jurisdiction over United States Personnel by Foreign Authorities

To: All United States Army, Navy and Air Force Attachés

1. The Service Attachés designated as Executive Agent by Joint Army-Navy-Air Force Letter No. 5a, dated 28 July 1961, will perform the duties of a designated Commanding Officer or country representative in connection with the exercise of criminal jurisdiction over U.S. personnel by foreign authorities, in those countries where a Service Attaché has been assigned these responsibilities pursuant to appropriate Department of Defense and Theater directives.

2. Administrative reports required to be submitted by attachés under service directives in connection with the exercise of criminal jurisdiction over U.S. personnel by foreign authorities will be accomplished by the Executive Agent. Such reports will be forwarded to the Judge Advocate General of the service of the Executive Agent, using the format prescribed by that service . . . .[31]

In a foreign port, a U.S. flag merchant vessel would not enjoy the same jurisdictional immunities as an American public vessel.[32] At the outset of a consideration of this subject, it should be noted that it is closely related in one important aspect to the Rossiya Case below. In the 20th century, state-owned vessels have engaged in commercial activities under all sorts of arrangements. The rise of Communist states has given impetus to the employment of state-owned vessels for state-controlled commerce. This, of course, is the topic of the Rossiya Case. However, it must also be noted that the United States has in the past chartered war-built, government-owned tonnage to commercial operators.[33] Thus, government-owned U.S. ships have engaged in commercial enterprises, just as Russian ships have.

Leaving the above noted complicating factor for treatment in the discussion of the Rossiya Case, it is possible to assert that the situation is simpler as to the jurisdictional status of a privately owned U.S. flag merchant vessel, operating in completely private commercial service, while in a foreign port.

> A private ship in a foreign port is fully subject to the local jurisdiction in civil matters, but there are two views of its position in criminal matters. That followed by Great Britain asserts the complete subjection of the ship to the local jurisdiction, and regards any derogation from it as a matter of comity in the discretion of the territorial state. We regard the local jurisdiction as complete, but we do not regard it as exclusive; we exercise a concurrent jurisdiction over British ships in foreign ports, and are ready to concede it over foreign ships in British ports.
>
> The other doctrine is founded on an Opinion of the French Council of State in 1806, referring to two American ships in French ports, the *Sally* and the *Newton*, on each of which one member of the crew had assaulted another. Both the American consuls and the French local authorities claimed jurisdiction, and the Council held that it belonged to the consuls, on the ground that the offences did

not disturb the peace of the port. The Opinion declared in effect that the ships were subjected to French jurisdiction in matters touching the interests of the state, in matters of police, and for offenses committed, even on board, by members of the crew against strangers; but that in matters of internal discipline, including offences by one member of the crew against another, the local authorities ought not to interfere, unless either their assistance was invoked or the peace of the port compromised. This opinion . . . although it has been followed in many continental countries . . . cannot be regarded as an authoritative declaration of the international law on the matter. It is . . . full of ambiguities. If we are asked, for example, what matters "touch the interests of a state," we should be inclined to answer that the whole administration of the criminal law does so very closely. Further, the Opinion says nothing about the position of passengers; it does not indicate the sort of incidents which ought to be regarded as "compromising the peace of the port," nor by whom the point is to be decided; it does not say by whom (e.g., by a consul, by the master, by the accused, or by his victim) the assistance of the port authorities must be invoked in order to justify their interference; it does not even say whether this interference may take the form of assuming jurisdiction. The French courts indeed held, in 1859, when a ship's officer on board an American ship, the *Tempest*, had killed a seaman on the same ship, that some crimes are so serious that without regard to their future consequences, if any, their mere commission compromises the peace of the port, and therefore brings them under the local jurisdiction . . .[30]

That nations have endeavored to regulate the jurisdiction of states over foreign ships in port by treaty is illustrated by Wildenhus' Case, 120 U.S. 1 (1887). This is a landmark decision on the subject of national jurisdiction over visiting foreign merchantmen. In that proceeding, a Belgian citizen killed another Belgian aboard a Belgian ship moored to a dock in Jersey City, N.J. Local authorities boarded the vessel and took custody of the accused. The Belgian Consul thereafter sought a writ of habeas corpus to obtain release of the defendant to him. The Belgian Consul relied upon the treaty of 9 March 1880 between Belgium and the United States. Article IX of that treaty provided:

> The respective . . . consuls . . . and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captain, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb the tranquility and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.

Both accused and victim in this case were members of the crew.

The Supreme Court's opinion by Chief Justice Waite first considered the development of state practice:

> It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement . . . . [T]he English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship . . . . As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

In reaching its decision, the Court reviewed the ways in which treaties granting, or conceding, foreign consular jurisdiction affected the jurisdiction of the authorities of a port over visiting foreign merchantmen. It referred, first, to the Franco-American consular convention which existed at the time of the 1806 opinion in the cases of *Sally* and *Newton*, referred to above. Then the Court proceeded as follows:

> Next came a form of convention which . . . gave the consuls authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquility, and that is substantially all there is in the convention with Belgium which we have now to consider . . . . If the thing done "the disorder," as it is called in the treaty is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board . . . . Neither do they . . . care for anything done on board which relates only to the discipline of the ship . . . . Not so, however, when crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction . . . . It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done . . . . The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction.

The Court concluded that the circumstances of each case would have to be examined to determine its jurisdictional quality. It concluded that the murder in question was such a "disorder" as to vest jurisdiction in the Jersey City port authorities.

More recent decisions of various national courts have proceeded upon

general lines of reasoning similar to the above. But some of their conclusions may seem difficult to harmonize with Wildenhus' Case.

> Compare *People v. Wong Cheng*, 46 P.I. 729 (1922) with *United States v. Look Chaw*, 18 P.I. 573 (1910). In the *Wong Cheng* case the Philippine Supreme Court held that smoking opium on an English vessel anchored two and a half miles from shore in Manila Harbor was an offence for which prosecution in the Philippines was proper. Distinguishing the *Look Chaw* case in which the Court had said that mere possession of opium on a foreign merchant vessel in territorial waters did not constitute a crime triable locally, the Court said: "But to smoke opium within our territorial limits, even though aboard a foreign merchant ship, is certainly a breach of the public order here established, because it causes such drug to produce its pernicious effects within our territory."[35]

The United States encountered great difficulty in this area of international law with the advent of its ill-advised experiment with prohibition. *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923), was litigation which stemmed from an opinion of the Attorney General. On 6 October 1922 the Attorney General responded to a request for advice submitted by the Secretary of the Treasury. The Attorney General's opinion construed the National Prohibition Act and Eighteenth Amendment, and concluded that these two enactments made it illegal: (1) for any domestic or foreign vessel either to bring liquor into U.S. territorial waters, or to carry it while in such waters, whether as sea stores or cargo; or (2) for any U.S. ship to carry liquor even outside U.S. territory. After this opinion was issued, the President took measures for issuance of instructions for enforcement of its conclusions. Ten foreign corporations which operated foreign flag vessels, and two U.S. flag steamship operators sought injunctions against the threatened application of the National Prohibition Act to merchant vessels visiting U.S. ports. All of these ships had made it a practice to carry liquor as sea stores, to be sold as beverage to crew or passengers. This was permitted by the laws of all the non-U.S. ports touched by the ships and was even required by some. After the advent of prohibition in the United States, all shipboard liquor had been purchased aboard and carried into American ports. Lower federal courts refused to enjoin the contemplated enforcement measures, either as to foreign flag vessels in American ports, or on U.S. flag vessels anywhere. The Supreme Court affirmed with respect to all vessels in U.S. territorial waters but reversed as to U.S. flag vessels outside U.S. waters. The Court said this:

> The defendants [i.e., Government officials] further contend that the Amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, as that is a fiction, we think the contention is right.
>
> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion . . . . In principle, therefore, it is settled that the Amendment could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States. And we think it has been made to

> cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended . . . .

The above decision was roundly protested by various of the major maritime states. Briggs tells us that:

> Pursuant to the decision of the United States Supreme Court in *Cunard v. Mellon* . . . the Department of State notified foreign governments on May 3, 1923, "that it is unlawful for any vessel, either foreign or domestic, to bring within the United States or within the territorial waters thereof any liquors whatever for beverage purposes." *U.S. For. Rel.*, 1923, I, 133. Diplomatic protests were made by the Governments of Spain, Great Britain, Belgium, Italy, Sweden, Portugal, Denmark, the Netherlands, Norway, Mexico, and Panama. *Id.* 133-161. Although the protests were largely based upon a claim that by international comity a State should not exercise its unquestioned rights of jurisdiction over foreign private vessels admitted to its national waters except to restrain acts calculated to disturb public order and safety, the real question at issue was the right of the United States to prohibit the entry of foreign vessels laden with alcoholic beverages a right which seems to be firmly grounded on international law.

This same author shifts from the subject of criminal enforcement to the area of civil matters as follows:

> The governing principle in civil as in criminal jurisdiction is that the foreign private vessel enters subject to the local law. In matters not affecting local interests the coastal State may decline to exercise jurisdiction; but, in the absence of treaty provisions to the contrary, it remains the judge of whether or not its interests require the exercise of jurisdiction or the enforcement of its laws against foreign vessels. Thus in *Brown v. Duchesne*, 19 How. 183, 198 (1856), the U.S. Supreme Court, after observing that "Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country," proceeded to hold that the patent laws in force were not intended by Congress to apply to foreign ships temporarily in our ports. Statutes controlling the employment and wages of seamen . . . have been enforced, in relation to foreign vessels even to the extent of impairing the obligation of a foreign contract. See *Strathearn Steamship Co. v. Dillon*, 252 U.S. 348 (1920), where Dillon, a British subject who had shipped on a British vessel in a British port under articles stipulating that wages were payable at the end of the voyage, was permitted by the U.S. Supreme Court to collect one-half the wages due him when his vessel put into an American port, pursuant to . . . 46 U.S.C.A. 597, which was made expressly applicable to seamen on foreign vessels in U.S. waters . . . . Professor Hyde doubts whether, in the absence of treaty, any rule of international law prohibits a State from "exercising through its local courts jurisdiction over civil controversies between masters and members of a crew, when the judicial aid of its tribunals is invoked by the latter, and notably, when a libel *in rem* is filed against the [foreign] ship." Hyde, I, 742. In such cases the applicable law may be the flag-law, or, by legislative mandate, it might be the law of the coastal State.[36]

It seems appropriate to conclude this discussion of jurisdictional immunities with the cogent statement of the general rules, formulated by a leading American scholar of maritime law:

> The exemption from local jurisdiction *in rem* is clearest cut in the case of foreign fighting ships. But fleet auxiliaries, and ships used for government purposes other than warfare, are within the exemption. Vessels of ordinary merchant character may also share in the exemption in so far as they are in government use for non-mercantile purposes.[37]

The Rossiya Case involved the claim to immunity of a state-owned vessel engaged in wholly commercial pursuits in foreign ports. Various nations have

allotted state-owned vessels to trading activities, under a great variety of arrangements. International law as to their jurisdictional immunities is in an unclear state of complex evolution, although the United States has taken steps to clarify its national practice, in the wake of the Rossiya matter. Other nations are equally concerned:

> British practice has hitherto made no distinction between public ships engaged in commerce and others. In *The Parlement Belge* (1880) 5 P.D. 197, a Belgian mail ship had collided with an English ship in Dover Harbour, and although it was proved that the ship, the property of the King of the Belgians, was used by him partly for trading purposes, the Court held that it could not deal with the claim of the English owners. . . . [H]owever it can hardly be said that international law requires immunity to be extended to public ships engaged in ordinary commercial undertakings; many states have never done so, and in recent years national trading has become so common that their exemption from the jurisdiction of national courts sometimes works gross injustice. The abuse was dealt with at a conference held in Brussels in 1926, and a convention was formed of which the main provisions are: that vessels owned or operated by states, and their cargoes and passengers, are to be subject to the same liability in respect of claims as those privately owned; but ships of war and non-trading vessels may not be arrested or detained in a foreign port, and proceedings must be taken against them in the courts of the country to which they belong. The convention is not to apply in time of war. It is in force between a few states, but it has not been ratified by Great Britain.[38]

The U.S. Supreme Court took up the question of the jurisdiction of U.S. courts over foreign state vessels in commercial activities, in *Berizzi Bros. v. The Pesaro*, 271 U.S. 562 (1926), in which an *in rem* proceeding was brought in a federal court because of the alleged nondelivery of a cargo of silk accepted in Italy for delivery in New York. The carrying vessel was concededly "owned, possessed, and controlled" by the Italian Government, but not connected with Italian military or naval forces.[39] *Pesaro* was employed in the carriage of goods for hire in international ocean commerce. Justice Van Devanter's opinion stated that:

> The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal District Court exercising admiralty jurisdiction.

The Supreme Court concluded that the district courts did not have such jurisdiction.

In *Republic of Mexico v. Hoffman: The Baja California*, 324 U.S. 30 (1945), the question was:

> . . . whether, in the absence of the adoption of any guiding policy by the Executive Branch of the government the federal courts should recognize the immunity from a suit *in rem* in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.

The Mexican Government held title to *Baja California*, but a private Mexican corporation operated her. The Supreme Court noted that:

> It has been held below, as in *The Navemar*, to be decisive of the case that the vessel when seized by judicial process was not in the possession and service of the foreign government. Here both courts have found that the Republic of Mexico is the owner of the seized vessel. The State Department has certified that it recognizes such ownership, but it has refrained from certifying that it allows the immunity or recognizes ownership of the vessel without possession by the Mexican Government as a ground for immunity. It does not appear that the

> Department has ever allowed a claim of immunity on that ground, and we are cited to no case in which a federal court has done so . . . . We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

The initial letter (29 March 1948) of the Soviet Embassy in the Rossiya matter *only* asserted *ownership* of the vessel.[40] Since the letter did not mention operation or control by the state, the case at that stage was like the *Baja California*.

In *The Navemar*, 303 U.S. 68 (1938), referred to above, the State Department had refused to accept a claim of immunity of the attached Spanish vessel. The Spanish Civil War was then in progress. Around the world the contending regimes were trying to gain control of Spanish-flag vessels. It was alleged that at the time she was libelled, *Navemar* had already been expropriated from a Spanish national by the recognized Spanish Government. The Supreme Court declined to recognize immunity again, on the basis that the ship was not shown to have been in the possession and public service of the Spanish Sovereign. She was, presumably, a merchantman engaged in mercantile pursuits.

Other municipal courts around the world have passed on comparable questions. Their answers are varied. We are tempted to hope that Military Sea Transportation Service vessels would everywhere be viewed as engaged in the public, and naval, service of the United States. But *quaere*: if all foreign courts would take this view of a government-owned ship operated by a civilian company under a General Agency Agreement, in a foreign port, laden only with a cargo of exchange merchandise, or USAFI textbooks, or the household effects of civilian technical representatives serving equipment deployed overseas.

The "Tate Letter"[41] made it clear that a Maritime Administration-owned ship, chartered to a civilian operator for purely civilian pursuits, would likely not be made the subject of any claim of immunity in a foreign port by the Department of State. It must be borne in mind that there are all sorts of arrangements involving government vessels and state trading and private trading combinations which may or may not produce a "public vessel," entitled to immunity. The "Tate Letter" makes it clear that Rossiya would not be granted immunity now.

> Government ships, foreign or domestic, may be used for what might be called public purposes, such as warships, which are the most obvious examples of public ships. From the warships, the public purpose vessels shade off into coast guard vessels, lighthouse vessels, dredge boats, etc. From the direct government ownership and operation of merchant ships, the class shades off also into privately owned ships, which are requisitioned or leased by the government for its use in peace or war and for public affairs. The non-commercial class includes also vessels owned or used by states and municipalities: police boats, fire boats, city dumping scows, and such. The merchant ships of the government also shade off from those owned and operated by the government directly to private ships merely operated by the government or more frequently nowadays the government-owned ships run by private operators. Governments have devised, also, corporations of which they own the stock, while the corporation "owns" and operates the vessels. Furthermore, the governments have subsidized private owners heavily by selling them former government-owned ships at bargain prices, by "mail contracts,"

by undisguised subsidies, by cheap loans, or by all of these various devices, so that governments have established a financial interest for themselves in many "private" merchant vessels. This is the fact situation against which is laid the general doctrine of sovereign immunity, not only for the vessels, for the injuries they do, but for supply contracts, freight contracts, charter parties and other obligations, otherwise enforceable against a private person, which the government's or the ship's officers may enter in behalf of the ships in the course of their operation. . . . By an amendment to the Bankruptcy Act, dated June 22, 1938 . . . 11 U.S.C.A. Sec. 1101, if a company in foreign trade on whose vessels the government has mortgages gets into a proceeding in equity, bankruptcy, or admiralty the court may appoint the U.S. Maritime Commission . . . sole trustee or receiver and during the operation of the vessels by the Commission the vessels shall be considered vessels of the United States within the meaning of the Suits in Admiralty Act, 46 U.S.C.A. Sec. 741 *et seq.*[42]

Lauterpacht's Oppenheim summarizes the British approach to this problem area as follows:

In Great Britain . . . as . . . the result of a series of decisions, of which *The Parlement Belge* . . . in 1880 may fairly be regarded as the starting-point of the movement in favour of immunity: (*a*) a British court . . . will not exercise jurisdiction over a ship *which is the property of a foreign State*, whether she is actually engaged in the public service or is being used in the ordinary way of a shipowner's business, as, for instance, being let out under a charter-party; nor can any maritime lien attach . . . to such a ship so as to be enforceable against it if and when it is [later] transferred to private ownership. (*b*) Ships *which are not the property of a foreign State*, but are chartered or requisitioned by it or otherwise in its possession and control, may not be arrested by process of the Admiralty Court while subject to such possession and control, nor . . . will any action lie against the foreign State; nor can any maritime lien attach, to the ship in respect of damage done by her or salvage services rendered to her while she was subject to such possession and control; but when the governmental possession and control cease to operate and she is redelivered to her owner, an action *in personam* will lie against him in respect of salvage services rendered to her while in governmental possession and control, if he has derived benefit from those services. There are now only a few States which adhere without qualifications to the practice of conceding jurisdictional immunities to State-owned ships engaged in commerce. This is so although only a relatively small number of States have so far ratified the Brussels Convention of 1926 which abolishes that privilege as between the contracting parties.[43]

The "Tate Letter" of 19 May 1952 from the Acting Legal Adviser, Department of State, to Acting Attorney General Perlman contained a summary of the practice of a number of states in terms of two basic theories of sovereign immunity which have emerged. The letter stated these theories in this way:

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The "Tate Letter" proceeded, after

its summary of trends in other nations, to state the newly formalized U.S. position:

> It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activites makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

A recent writer has pointed out that this letter is not the final word on this subject. His presentation emphasizes the doubt of the procedural aspects of asserting sovereign immunity, which will undoubtedly influence the further evolution of the rules of sovereign immunity.

> The Tate letter did not spell out the distinction between private or commercial and public acts, and it did not go into the other complications that were bound to develop. For instance, if in certain circumstances sovereign states were no longer to be granted immunity (at least as far as the State Department was concerned), how was a suit against a sovereign to be commenced? It had always been thought that an ambassador or other diplomatic representative could not be personally served with legal process. Similarly, consular representatives are not proper "agents" for purposes of receiving service of process addressed to a foreign government. Not until the adoption of so-called "long-arm statutes" for service of process in State court proceedings, plus their assimilation by reference into Federal practice . . . did the possibility arise of commencing suits against a sovereign without attaching the sovereign's property. But which property was subject to attachment? It soon appeared that regardless of the cause of action, certain governmental property, for example, a bank account held in the name of the foreign government, was immune. In other words, not only must the cause of action appear to relate to a "private" or "commercial" activity of the defendant government, but the defendant's property on which jurisdiction is sought to be founded must be commercial in character. Probably although this is not clear the property attached and the claim sued upon need not have a direct relation: A commercial vessel belonging to state A might be the basis for a *quasi in rem* action not only by the ship's chandler, but also by the person who had sold shoes to A's army or bought beef from A's agricultural export agency, assuming the latter are considered commercial claims. Would such claims be considered commercial for the purpose of overcoming a plea of sovereign immunity . . . . Only one United States court appears to have addressed itself specifically to the question of the distinction between commercial and governmental acts set forth but not defined in the Tate letter. In *Victory Transport, Inc. v. Comisaria de Abastecimientos y Transportes* [336 F. 2d 354 (2d Cir., 1964) digested in 59 A.J.I.L. 388 (1965); cert. denied, 381 U.S. 934 (1965)], the Court of Appeals for the Second Circuit expressly upheld the Tate doctrine, on the ground that "it makes no sense for the courts to deny a litigant his day in court and

to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed." The court set forth five categories of acts falling within the concept of "public acts": (1) internal administrative acts, such as the expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; and (5) public loans. Causes of action arising out of these kinds of acts would not subject the sovereign to suit without its consent . . . . It may be pointed out that the Second Circuit's attempt at definition is not very precise.[44]

FOOTNOTES

1. This definition was synthesized from the authorities consulted for the discussion which follows.
2. James L. Brierly, *The Law of Nations*, 5th ed. (Oxford, Eng.: Clarendon Press, 1955), p. 187.
3. Herbert W. Briggs, *The Law of Nations*, 2d ed. (New York: Appleton-Century-Crofts, 1952), p. 762.
4. John B. Moore, *A Digest of International Law* (Washington: U.S. Govt. Print. Off., 1906), v. IV, p. 630.
5. L. Oppenheim, *International Law*, 8th ed. (London: Longmans, Green, 1955), v. I, secs. 348 and 350, p. 759-761.
6. *Ibid.*, sec. 349.
7. *Ibid.*, sec. 354, 356.
8. Charles G. Fenwick, *International Law*, 3d rev. ed. (New York: Appleton-Century-Crofts, 1952), p. 467-68.
9. Oppenheim, I, sec. 389, p. 792-93.
10. *Ibid.*, sec. 390-96, p. 793-805.
11. This text of the opinion appears in Briggs, *op. cit.*, at p. 788. In the same work, at p. 767-69, are set forth "Regulations Concerning Diplomatic Missions . . . of Foreign States in the Territory of the Union of Soviet Socialist Republics: Approved by the Central Executive Committee and the Council of the Commissars of the People of the U.S.S.R., January 14, 1927," Section 4 of which recognizes that premises occupied by diplomatic missions are inviolable. Briggs notes (at p. 789-90):

    > Although the consent of the chief of mission is required before local authorities may enter upon diplomatic premises, practice sanctions exceptions in cases of emergency such as fire or imminent danger of crimes of violence . . . Section 4 of the Soviet Regulations, above, after establishing the inviolability of these premises, adds that "nevertheless, the inviolability of these premises gives no right to retain anyone there by force." On October 3, 1929, M. Biezedowsky, First Counsellor of the Soviet Embassy in Paris, appeared at a French police station and asked their aid in releasing his wife and daughter who were being held by the GPU in the Soviet Embassy. He reported that an agent of the GPU had arrived that day at the Embassy to order his return to Moscow to be judged for political divergencies. Biezedowsky resolved to quit the Embassy and after packing his bags had been prevented from leaving the premises. He jumped out of a window into a courtyard in the Rue de Grenelle and made his escape. The French police officials decided that in the absence of the Russian Ambassador, M. Biezedowsky had authority to waive the "exterritoriality" of the Embassy premises and, despite the resistance of Embassy personnel directed by the GPU agent, secured the release of his wife and child.

    See *Le Temps* (Paris, 4 October 1929), p. 4.
12. Briggs, p. 790-91.
13. Oppenheim, I, secs. 401-402, p. 809-810.
14. U.S. Dept. of State, "Diplomatic Privileges and Immunities Abroad," *Foreign Service Manual* (Washington: U.S. Govt. Print. Off., n.d.), sec. 221.12.
15. *Ibid.*, sec. 221.11. See also Oppenheim, I, sec. 404.
16. Oppenheim, I, sec. 342, p. 801.
17. U.S. Dept. of State, "Diplomatic Privileges and Immunities Abroad," sec. 221.11.
18. Oppenheim, I, sec. 393, p. 802.

19. Briggs, p. 773.
20. U.S. Dept. of State, "Tax Exemptions Accorded United States Representatives Abroad," *Foreign Service Manual* (Washington: U.S. Govt. Print. Off., n.d.), sec. 260.
21. Oppenheim, I, p. 803.
22. U.S. Dept. of State, "Tax Exemptions," sec. 261.
23. Joseph E. Davies, *Mission to Moscow* (New York: Simon and Schuster, 1949), p. 118-119. Mr. Davies served as U.S. Ambassador to the Soviet Union from 1936 to 1939. At p. 129 of the book he notes that in his time there was one clergyman living in the French Embassy, ministering to all Westerners.
24. L. B. Watson, "The Naval Attache and International Law," *JAG Journal*, September 1963, p. 143.
25. The responsibilities of an assistant U.S. naval attaché can be contrasted with the remarks of Col. Oleg V. Penkovskiy, of Soviet military intelligence, and those of his editors in *The Penkovskiy Papers* (New York: Doubleday, 1965). (Quotations and citations here are from the 1966 Avon paperback edition.) Editor's Introduction, p. 78:

> Penkovskiy's intelligence experience was . . . as an attaché, an instructor, scientific and technical expert, and foreign liaison specialist. . . . [D]escribing the GRU, he has been able to supply a peculiar insight into Soviet intelligence operations in foreign countries, as well as measures taken against foreigners inside the U.S.S.R. As he wrote this section barely four years ago, the people he writes about are for the most part still on active service and the numbers he uses are reasonably accurate. It is sobering to contemplate the total he gives of 3,000 staff intelligence officers out of the 5,200 Soviet representatives in the Soviet embassies and consulates in some seventy-two non-Communist countries. Add to this Penkovskiy's calculations about the number of Soviet representatives "co-opted" for work with intelligence organs and the number of "pure" Soviet diplomats shrinks to something less than 20 per cent of the total. One is tempted to ask, with Penkovskiy, "Where have the legitimate Soviet diplomats gone?"

Penkovskiy wrote: p. 84, 86, 87, 89-91, 95, 98-99.

> Prior to my trip to Turkey I thought that the Ministry of Foreign Affairs and the embassies were important organizations with authority. But now I know there is only the Central Committee CPSU, and in the embassy two intelligence *rezidenturas:* GRU and KGB. They are the ones who handle everything. The Ministry of Foreign Affairs stays in the background. The GRU is of course part of the Soviet General Staff. The entire work of the General Staff, especially of the GRU, is supervised by the Central Committee CPSU, which has for this purpose certain special sections. . . .
>
> Organizationally, the GRU breaks down as follows: The *1st Directorate* — Illegals; Chief Rear Admiral L. K. Bekrenev . . . Rear Admiral Leonid Konstantinovitch Bekrenev was Chief of the Illegals Directorate of the GRU until his assignment to the U.S. in 1962 as the Soviet Naval Attaché. He departed for the U.S.S.R. early in 1963 probably as a result of Kenkovskiy's arrest and disclosures to the Soviet interrogators. . . .
>
> *Naval Intelligence Directorate* - No longer exists; a small section or group remains for the co-ordination of intelligence on the naval forces. . . .
>
> An Illegal *resident* is the head of the network and has his own communications channels to Moscow, separate from the communication channels of any other Illegals' network in the same country and separate from the communications used by officers of the *rezidentura* under cover of the Soviet Embassy or other official Soviet representation, as in the United Nations in New York. . . . Bekrenev has done a fairly good job of organizing the Illegals' work, but apparently the results are not too good because he is constantly scolded and criticized by Serov. At a Party meeting of the 1st Directorate, Serov tore Bekrenev to pieces. He said that Bekrenev did not work hard enough, hence the Illegals' network was weak. Special emphasis in that respect was placed upon our "principal enemy" - the U.S.A. Serov claimed that all our attachés were doing was collecting newspapers and rubbish; everything that was of value came from the Illegals. . . .
>
> Intelligence officers of the legal *rezidenturas* always use their official cover, such as assistant attaché. . . .
>
> *KGB and GRU personnel in Soviet embassies:* . . . In a Soviet consulate, almost 100 per cent of the personnel are KGB, with one or two GRU officers included. Even the GRU has always had a hard time trying to use consular cover for its people; every opening is taken by the KGB. In an embassy the KGB spies on all personnel, including us in the GRU. The KGB men watch absolutely everything that goes on. . . . In the past the senior military attachés were automatically also the GRU *residents* in their respective embassies. This is not true any more; they were too easy to expose. Now the job of *resident* is assigned to another man who usually operates under a civilian cover in the embassy. He may be an ambassador, counsellor, first or second secretary. Of course, a military attaché is also a GRU intelligence officer, but never the *resident*. This reorganization also provided the GRU with the opportunity to have an extra GRU officer in the embassy. The *resident* usually is a colonel or a general. The military attachés were relieved of their duties as *residents* by a special decree of the Central Committee CPSU dated January 22, 1961.

26. Oppenheim, I, sec. 400.

27. Watson, p. 145-146.
28. *Ibid.*, p. 146, citing the Vienna Convention on Diplomatic Relations of 14 April 1961, which was signed by 45 states, including the United States.
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. For an outstanding presentation on this topic, see Note: "Jurisdiction over Foreign Private Vessels in National Waters," in Briggs, p. 348-355.
33. Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* (Brooklyn: Foundation Press, 1957), sec. 11-5.
34. Brierly, p. 194-95.
35. William W. Bishop, *International Law; Cases and Materials* (New York: Prentice-Hall, 1953), p. 389-90.
36. Briggs, p. 352-53.
37. Gustavus H. Robinson, *Handbook of Admiralty Law in the United States* (St. Paul: West, 1939), sec. 31, p. 248. It is a remarkably accurate statement, considering its vintage, for the law as it now exists in the wake of the "Tate letter."
38. Brierly, p. 192-93. The United States is not a party to this convention. See Bishop, p. 428
39. *Pesaro's* lack of connection with Italian military or naval forces is the fundamental distinction between the typical state-owned merchant vessel, and merchant *type* ships owned and operated by the Military Sea Transportation Service of the United States.
40. For text of the letter, see Naval War College *Supplementary Reference Material*, v. II, p. H-1.
41. Jack B. Tate, "Changed Policy Concerning the Granting of Sovereign Immunities to Foreign Governments," *The Department of State Bulletin*, 23 June 1952, p. 984.
42. Robinson, p. 248-49. Through successive reorganizations, the described functions of the former U.S. Maritime Commission are today performed by the Federal Maritime Commission.
43. Oppenheim, I, sec. 451a, p. 856-58.
44. A. F. Lowenfeld, "The Sabbatino Amendment — International Law Meets Civil Procedure," *The American Journal of International Law*, October 1965, p. 899.

Ψ

When I say that officers today must go far beyond the official curriculum, I say it, not because I do not believe in the traditional relationship between the civilian and military, but you must be more than the servants of national policy. You must be prepared to play a constructive role in the development of national policy.

John F. Kennedy: To the graduating class, U.S. Naval Academy, June 1961

To insure safety at sea, the best that science can devise and that naval organization can provide must be regarded only as an aid, and never as a substitute for good seamanship, self-reliance, and sense of ultimate responsibility which are the first requisites in a seaman and naval officer.

C. W. Nimitz: Letter to U.S. Pacific Fleet, 13 February 1945