

## **Research Assessment #11**

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Higgins, Rosalyn. "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience." *American Journal of International Law*, vol. 79, no. 3, July 1985, pp. 641–51, <https://doi.org/10.2307/2201891>. Accessed 2 Oct. 2020.

**Assessment:**

As someone who has read all different kinds of articles like these, Higgins is not a new Author to me. In fact she is someone who has helped me incredibly throughout my entire research with articles addressing things that I could not find anywhere else. In this article, she goes into depth about the issues the UK was facing with abuses of diplomatic privilege. A sort of prequel to another article I read talking about a UK committee's newer interpretation of diplomatic privilege, this fully details things, like the murder of Constable Fletcher and the ensuing tensions between the UK and Libya after the fact.

This article is something that I can use heavily as a basis for my argument about things needing to change to the VCDR to make things better for diplomatic relations everywhere. I was aware of the incident that left relations between the UK and Libya in tatters for decades, but this account made the connections for what I needed to see how this issue was fueled by the misuse of diplomatic privilege. While there were actions that probably could have been taken, the doubt caused by the ambiguity in the VCDR meant that the situation was left to fester and both sides were angrier because of it. Leading to a severing of relations that left many Libyans in the UK

and many British citizens in Libya without a direct contact to their country, slowing down any function that needs to happen for them and the neutral party running the duties of the embassy a bit more stressed in terms of the citizen's needs. It was an article that in my opinion was very useful and gained the perspective I needed to start working to address the issues in the VCDR.

There were some hiccups, however. Higgins herself addressed the potential issues that could arise from editing and amending the VCDR, like I am trying to do and that the current VCDR has established an uneasy relationship between most states when without it there wouldn't be any proper relationship between governments and the disparities would cause tensions and conflict that the VCDR accounts for. It forced me to do something that I did not think I would have to do when working on this project. Take extreme caution in some cases. The reason being is that I overlooked how fragile these relationships were and Higgins made me question how far can I push and specifically I can get before the reality sets in and relations are severed because the articles aren't satisfactory in the eyes of some states. It is a concept that is extremely worrying. However it is something that I now have to consider and a problem I am glad I ran into, because I already have some critiques that already make my OW ten times better before it is completed. It also makes me keep in mind that, this can only be a proposed revision because in the same way the the people who wrote the original VCDR took a principle and tried to translate it into reality, I am taking some reality and trying to form a newer principle to address the gaps in the bridge between these two concepts.

## EDITORIAL COMMENTS

### THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES: RECENT UNITED KINGDOM EXPERIENCE

It has frequently been observed that there is generally good compliance with the law of diplomatic immunity because here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest. Virtually every state that is host to a foreign diplomatic mission will have its own embassy in the territory of the sending state. Every state wants its own diplomats operating abroad, and its own diplomatic bags, embassies and archives, to receive those protections that are provided by international law. Honoring those same obligations vis-à-vis the diplomatic community in one's own country is widely perceived as a major factor in ensuring that there is no erosion of the international law requirements on diplomatic privileges and immunities.

Diplomatic law governs the conduct of relations between representative organs of a state operating within the territory of another state, and the receiving state. Its purpose is to facilitate international diplomacy, balancing the pursuit of the foreign policy interests of the sending state with respect for the territorial sovereignty of the receiving state. Diplomatic immunity is an exception to the general rule of territorial jurisdiction. It allows diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. But it still contributes to the balancing of interests between the sending and receiving state, because immunity does not entitle diplomats to flout local laws.

There are many types of missions for the conduct of international diplomacy.<sup>1</sup> To a certain extent, each type has become governed by its own specific body of diplomatic law.<sup>2</sup> But permanent missions established by states within each other's territory have become the mainstay of international intercourse. Until the end of the 1950s, the sources of law governing the missions were largely customary.<sup>3</sup> In 1961 there was

<sup>1</sup> For example, visits by heads of government, or other permanent officials; special missions; official representation at ad hoc or periodic conferences; permanent missions at international organizations.

<sup>2</sup> E.g., inter alia, Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS No. 6820, 596 UNTS 261; Convention on Special Missions, Annex to GA Res. 2530 (XXIV) (Dec. 8, 1969); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, UN Doc. A/CONF.67/16 (Mar. 4, 1975); United Nations Charter of 1945; Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations of 1947, 33 UNTS 261; and many relevant bilateral agreements.

<sup>3</sup> Some early attempts at codifying certain aspects occurred in 1815 (Congress of Vienna) and in the 1920s under the League of Nations. Some 81 nations participated in the conference leading to the 1961 Vienna Convention, building on the commentary prepared by the International Law Commission after study from 1956 to 1959.

concluded the Vienna Convention on Diplomatic Relations.<sup>4</sup> This treaty is agreed to be largely confirmatory of existing customary law, and it has been ratified by the great majority of states, including states as diverse as the United States and Iran, the United Kingdom and Libya.

For about 15 years it was fairly generally felt that the provisions of the Vienna Convention<sup>5</sup> did indeed provide a fair balance between the interests of the sending and receiving states. But in many of the major capitals of the world, it came to be felt that diplomats were abusing the privileged status given to their vehicles, and in particular parking illegally, causing obstructions and failing to pay traffic fines. This feeling was, of course, compounded in a country such as the United States, which was also host in New York to the United Nations and important specialized agencies. By contrast, there was much less public awareness of traffic violations by the diplomatic community in London.<sup>6</sup> On the other hand,

<sup>4</sup> 23 UST 3227, TIAS No. 7502, 500 UNTS 95.

<sup>5</sup> For convenience, in the context of the matters here under discussion, they may be summarized as follows:

16. The Convention identifies (but not in an exhaustive list) the functions of a diplomatic mission (Article 3). It can hardly need saying that terrorism or other criminal activities can never be justified by reference to these functions. The sending State must secure the approval (*agrément*) of the receiving State for the person it seeks to accredit as head of mission, though no comparable approval is needed for diplomats being sent to other posts, save for military attachés (Article 7). The receiving State reserves the right to notify the sending State, without explanation, that a member of the diplomatic staff is *persona non grata* or that any other member of staff is unacceptable (Article 9). The sending State must accredit a designated head of mission (Article 5). The receiving State may set a limit to the size of the mission (Article 11). There are provisions as to rank and formalities (Articles 13 and 18). Certain privileges relating to the flag and emblem are granted (Article 20). The receiving State is to facilitate the acquisition of mission premises (Article 21) and is under a special duty to protect the mission against intrusion or indignity (Article 22(2)). The premises of the mission are inviolable (Article 22). (Though it is not correct, from a legal point of view, to regard them as "extra-territorial".) The archives and documents of the mission are inviolable whether they are on or off the mission premises. The receiving State is to give full facilities for the performance of the functions of the mission (Article 25) and to protect communications for official purposes (Article 27). In this context, the diplomatic bag shall not be opened or detained (Article 27(3)) and the diplomatic courier shall be protected by the receiving State in the performance of his functions (Article 27(5)). The person of the diplomatic agent is inviolable. He is to be treated with respect, protected against attack, and may not be detained or arrested (Article 29). The diplomatic agent is immune from the criminal jurisdiction of the receiving State (Article 31). Even if diplomatic relations are broken off, or if a mission is recalled, the receiving State must continue to protect the mission, its property and archives (Article 45). The main relevant provisions of the Vienna Convention are annexed to this report.

H.C. FOREIGN AFFAIRS COMMITTEE, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH AN ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES (Dec. 12, 1984).

<sup>6</sup> From the period 1974-mid-1984, there was an average of 71,000 canceled parking tickets in London annually. *Id.*, para. 5. The United Kingdom is host to a fairly limited number of international organizations, including the International Maritime Organization (Headquarters Agreement of 1969, Cmd. 3964, later amended three times by exchanges of notes). The privileges and immunities that they have been granted are limited, and they

London has seemed an attractive venue for shoplifting and other offenses. In the period 1974–mid-1984, there were 546 occasions on which persons avoided arrest or prosecution for alleged serious offenses (i.e., offenses carrying a potential sentence of 6 months' imprisonment or greater) because of diplomatic immunity.<sup>7</sup>

In the mid-1970s, more worrying problems developed. It became clear that certain diplomatic missions were holding firearms, contrary to the provisions of local law. Further, it seemed that these firearms were often being imported through the diplomatic bag.<sup>8</sup> In recent years in various Western countries, there have also been terrorist incidents, in which it was believed that the weapons used were provided from diplomatic sources. It was widely thought that certain foreign governments were promoting state terrorism against dissident exiles, through the involvement of their embassies in the country concerned.<sup>9</sup> Normal diplomatic communication with the Libyan Embassy in London was complicated by the fact that (as in other Western capitals) so-called revolutionary committees had taken over the embassy, renamed the embassy the Libyan People's Bureau and refused to designate a person in charge of the mission. The bizarre events of this period, and the response of the United Kingdom Government to them, are beyond the scope of these editorial comments.<sup>10</sup> In February 1980, further internal upheavals occurred in the Libyan People's Bureau in London, giving rise to further diplomatic problems.

On April 17, 1984, an orderly demonstration was held by Libyan opponents of Colonel Qaddafi's Government, on the pavement in St. James's Square, London, opposite the People's Bureau. Both the Foreign Office in London and the British Ambassador in Tripoli had been warned the day before that if the demonstration were to be allowed to go ahead, Libya "would not be responsible for its consequences." Shots were fired from the windows of the Bureau, killing Woman Police Constable Fletcher, who was on duty in the square. The events immediately following were these:

74. . . . The Libyan authorities in Tripoli were immediately asked to instruct those inside the Bureau to leave the building and to allow it to be searched for weapons and explosives. This request was refused. The British Embassy in Tripoli was the scene of hostile demonstrations and certain British citizens were unjustifiably arrested and detained.

have not been a major source of traffic or parking violations. Further, the Foreign and Commonwealth Office indicated that "very few breaches of our law have been committed by persons connected with international organizations." FOREIGN AFFAIRS COMMITTEE REPORT, para. 19 n.26.

<sup>7</sup> *Id.*, para. 5.

<sup>8</sup> Article 27(4) of the Convention, *supra* note 4, provides that the bag may contain only diplomatic documents or articles intended for official use.

<sup>9</sup> For details of such incidents in the United Kingdom, see FOREIGN AFFAIRS COMMITTEE REPORT, paras. 68, 81–83.

<sup>10</sup> But are detailed in *id.*, paras. 69–72.

Neel Mehra: Main conflict in this paper



75. Her Majesty's Government proposed that "as a basis for terminating relations by agreement" that:

(1) Occupants of the Bureau and all other Libyan diplomatic staff in the country should have safe conduct out of the country. (It will be noted that the proposal covered, so far as those on Bureau premises were concerned, those who had no diplomatic status as well as any who might have had such status. The Government indicated that in its view evidence capable of sustaining criminal charges would in any event have been difficult to achieve in respect of such persons.)

(2) Our own diplomats were to leave Libya in safety.

(3) We should be satisfied that all weapons and explosives were removed from the Bureau and that it could no longer be used for terrorist acts.

These proposals were refused.

76. On 20 April a bomb exploded in the luggage hall of Heathrow airport injuring 25 people. The Government have reserved their position as to whether it was connected with the incidents in St. James's Square, though there was wide press speculation that this was in fact the case. On 22 April the Libyans were notified that diplomatic relations would terminate at 6.00 p.m. that day and that all diplomatic staff and other persons in the Bureau were to leave by midnight 29-30 April. Two Libyans (not at the Bureau) were deported after the shooting of WPC Fletcher. Various measures were announced by the Home Secretary for tightening the exercise of his discretionary powers in respect of Libyans already in the country or wishing to enter.

77. The Bureau was evacuated on 27 April 1984. Those leaving were questioned and electronically searched. Diplomatic bags that left the Bureau were not searched or scanned. The Bureau was sealed, and on 30 April 1984 was entered by the British authorities, in the presence of a representative of the Saudi Arabian Embassy, and searched. Weapons and relevant forensic evidence were found.<sup>11</sup>

There was, as might be expected, general outrage at these events. The public and many legislators were clearly deeply disturbed that the international law of diplomatic immunity apparently prevented the Bureau from being entered, and those responsible from being arrested. More specifically, it was widely felt that diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations. It was suggested that some way should be found of searching diplomatic bags that were suspected of containing either drugs or weapons. And there was a widespread sentiment that premises which were a base for unlawful acts should not be accorded inviolability. It was argued variously that a proper interpretation of the Vienna Convention would support the view that immunity and inviolability fell away when diplomats and missions abused their positions; but that if the Vienna Convention made these desirable

<sup>11</sup> *Id.*, paras. 74-77.

outcomes impossible, then the Convention should be amended or denounced.

These and related issues have now been systematically reviewed in a study prepared by the Foreign Affairs Committee of the United Kingdom House of Commons. This committee received written and oral evidence from the Foreign Secretary and his officials (including the Legal Adviser to the Foreign and Commonwealth Office), from the Home Office, and from others well placed to offer informed views.<sup>12</sup> The detailed report of the Foreign Affairs Committee<sup>13</sup> consists of some 40 pages of analysis and commentary, supplemented by 94 pages of detailed appendixes, including memorandums from the Foreign and Commonwealth Office and submissions by interested parties.

Many detailed points of interest are found in the report. In addition, some important general points emerged. It became clear that diplomatic law is not only about the balancing of legitimate interests between the sending state and the receiving state. There is another factor often at play: the presence abroad, in the territory of the sending state, of an expatriate community of the receiving state. (There were, for example, some 8,000 Britons resident in Libya in April 1984.) The extent to which countries will avail themselves of the opportunities for lawful response to abuse of diplomatic immunities will depend in large measure upon whether that expatriate community is perceived to be at risk. That is something that the balanced text of the Vienna Convention cannot provide against—and by the same token, any amendment of that text or withdrawal from its obligations would not change that reality.

As has been briefly explained above, the Libyan Bureau incident in April 1984 concerned the inviolability of the embassy, the protection of the diplomatic bag from being opened or detained, and the personal immunity of the diplomats in the Bureau.<sup>14</sup>

<sup>12</sup> These included Sir Francis Vallat, former Legal Adviser to the FCO and former member of the International Law Commission, and Sir Ian Sinclair, current member of the ILC and recently retired Legal Adviser to the FCO.

<sup>13</sup> See note 5 *supra*.

<sup>14</sup> Further questions relating to the bag and the status of diplomats arose in connection with the abduction in July 1984 of Umaru Dikko, a former Minister of the deposed Shagari Government in Nigeria. In the words of the FOREIGN AFFAIRS COMMITTEE REPORT, para. 106:

It would appear that he was heavily drugged and placed in a crate. Two large crates arrived at Stansted airport at about 4 pm to be loaded on to a Nigerian Airways aircraft. The crates were attended by a member of the Nigerian Government service, who held a diplomatic passport but was not a member of the mission to the UK and had no diplomatic status in this country. He made no protest when the crates were required to be opened. Members of the staff of the High Commission who were at Stansted were invited to inspect the crates. One crate contained Mr Dikko, who was unconscious, and another man who was conscious and in possession of drugs and syringes. The other crate contained two men, both conscious. A total of 27 people, including the three other than Mr Dikko who were found in the crates, were arrested. Charges were preferred against three persons, none of whom claimed diplomatic immunity at the time, though one has since done so.

His claim is being pursued through the English courts, but has not so far succeeded. This

## INVIOABILITY OF THE PREMISES OF AN EMBASSY

Article 22(1) of the Convention provides that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Article 22(3) further provides that "[t]he premises of the mission . . . shall be immune from search, requisition, attachment or execution." It is clear, notwithstanding popular and ill-informed views to the contrary,<sup>15</sup> that inviolability of premises is not lost by the perpetration from them of unlawful acts. Both the International Law Commission in its preparatory work and the conference at which the Vienna Convention was drafted deliberately rejected<sup>16</sup> the idea of specified exceptions in the face of manifest abuse. Inviolability had to be absolute if the door was not to be opened to possible abuse by the receiving state.<sup>17</sup>

That being said, there are still two difficult related issues that require mention. They concern, respectively, the relationship of general treaty principles on the one hand, and of the concept of self-defense on the other, to the notions of inviolability under the Convention. Although a fundamental breach of treaty (which the use of embassy premises for terrorism surely is) would normally allow another state party to the treaty to be relieved of its obligations vis-à-vis the violating state, the drafting history of the Vienna Convention seems to make the operation of this principle inappropriate. This conclusion is buttressed by the fact that the Vienna Convention provides for its own remedies in case it is violated—the severing of diplomatic relations is available as a response to what one could term "a fundamental breach."

Is there a principle of self-defense that continues to exist side by side with the Convention, allowing the authorities of the receiving state to take certain action against an embassy, notwithstanding Article 22 of the Convention? In a very interesting statement, the Legal Adviser to the Foreign and Commonwealth Office took the view that "self defence applies not only to action taken directly against a state but also to action directed against members of that state."<sup>18</sup> Sir John Freeland thought that where the classic requirements ("A necessity of self defence, instant, overwhelming, leaving no choice of means and moment for deliberation"<sup>19</sup>) were met, forcible entry of embassy premises might be justified in self-defense. (He did not believe that the events as they unfolded in London on April 17,

Neel Mehra: Severing relations not always proper solution

Neel Mehra: As later noted, this justification in highly extreme circumstances, not even April 17 applied.

plaintiff claims that as he is a diplomat accredited to a country other than the United Kingdom, he is entitled to immunity in the United Kingdom.

<sup>15</sup> See Ambassador Arthur Goldberg, *The Murder in St. James's Square*, ENCOUNTER, November 1984, at 67-70; and response by Sir Ian Sinclair, *id.*, November 1985, at 76-78.

<sup>16</sup> M. HARDY, MODERN DIPLOMATIC LAW 44 (1968).

<sup>17</sup> See evidence of Sir Francis Vallat, who had participated at the conference leading to the formulation of the Convention. FOREIGN AFFAIRS COMMITTEE REPORT, para. 91.

<sup>18</sup> *Id.*, para. 94.

<sup>19</sup> The Caroline, 29 BRIT. FOREIGN & ST. PAPERS 1137-38 (1840-41); 30 *id.* at 195-96 (1841-42).



1984 met that test.) This writer remains skeptical as to the applicability at all of the international law concept of self-defense to violent acts by the representatives of one state within the territory of another, directed against the latter's citizens.

#### SEARCHING OF DIPLOMATIC BAGS

Two main grounds have been advanced for suggesting that one does not have to treat as mandatory the provision in Article 27(3) of the Convention that "[t]he diplomatic bag shall not be opened or detained." The first is that the inviolability of the bag is to protect diplomatic materials, but not materials that do not fall in that category—and indeed constitute an abuse of the diplomatic bag. The second is that abuse by members of a mission of the functions protected under the Convention entails forfeiture of the protection of the Convention. The *travaux préparatoires* of the Convention are not quite as categorical on these related points as they are on the lack of any exception allowing uninvited entry onto diplomatic premises. But they are still clear enough, and the policy considerations are the same. There is no way of ascertaining that a bag contains illicit materials save by examination; and that possibility gives too much opportunity to a receiving state to interfere with the proper flow of diplomatic materials. Even those states that have suffered most in recent years from the abusive use of the diplomatic bag that has undoubtedly occurred show little enthusiasm for a departure from the prohibition of search in Article 27(3).<sup>20</sup>

The Legal Adviser to the Foreign and Commonwealth Office took the view, on balance, that electronic scanning is not unlawful under the Convention. Acknowledging that some regard scanning as "constructive opening," Sir John Freeland noted that<sup>21</sup> Article 27 of the Convention requires only that the bag not be "opened or detained" and does not accord full inviolability. In the view of the Government, scanning or other remote examination by equipment or dogs would not be unlawful under Article 27. However, the Government was at pains to point out that it did not in fact scan, nor did it wish to do so. It expressed doubts on technical grounds about the advantage to be gained from doing so (scanning can identify the existence of a problem, but its precise nature would often require the opening of the bag); further, various techniques exist for

<sup>20</sup> This question is before the International Law Commission in the context of its work on the status of the diplomatic courier and the unaccompanied diplomatic bag. One possibility is that in a new instrument states should be given the option to reserve the right to apply the safeguard found in Article 35(3) of the Convention on Consular Relations, *supra* note 2, which provides that if the receiving state has serious reason to believe the bag contains nonpermitted articles, it may request that the bag be opened in its presence. If this request is refused, the bag shall be returned to its place of origin. For the operation of reservations in the terms under the Vienna Convention on Diplomatic Relations, and the UK position thereon, see FOREIGN AFFAIRS COMMITTEE REPORT, paras. 98–191.

<sup>21</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 29.

Neel Mehra: No bag protection if diplomat has already lost protection under the VC

Neel Mehra: Considering the age of this source, there could be ways that illicit materials can be ascertained without direct examination thanks to newer more commonplace security technologies. However, there would be some discrepancies as to what does not constitute examination which could further validate this point.

Neel Mehra: My point in my last comment

Neel Mehra: While this is a valid point, there is still the idea that securities technology has come a long way.

disguising the exact identity of items that might be revealed by a scan.<sup>22</sup> Obviously, there was also concern about adverse reciprocal consequences if scanning were to be introduced. It is not correct that states acting lawfully have nothing to fear from scanning: such a practice might reveal sensitive information about, e.g., types of ciphers in use by the sending state.

The United Kingdom's decision not to search the diplomatic bags of the Libyans expelled from the Bureau was generally assumed by the press and television reporters at the time to be part and parcel of the obligations laid upon the United Kingdom by the Vienna Convention. The United Kingdom Government, while not positively affirming this, did not take any of the parliamentary opportunities to explain that this was not quite the case. In fact, Libya's accession to the Vienna Convention had been qualified by a reservation that provided that were it to entertain

strong doubts that the contents of a diplomatic pouch include items which may not be sent by diplomatic pouch in accordance with paragraph 4 of article 27 of said Convention, the Socialist People's Libyan Arab Jamahiriya reserves its right to request the opening of such pouch in the presence of an official representative of the diplomatic mission concerned. If such request is denied by the authorities of the sending state, the diplomatic pouch shall be returned to its place of origin.<sup>23</sup>

The United Kingdom made no objection to this reservation, believing that it was not incompatible with the object and purpose of the Convention, and that it represented customary international law as it was before the Convention. Indeed, the United Kingdom had introduced an unsuccessful amendment to Article 27 to much the same effect.<sup>24</sup>

In fact, the Libyans have never relied upon this reservation to ask for a search. Nonetheless, the potential effect of the reservation was there. The Libyan reservation had opened the possibility of searching the bag and it was not necessary for Libya to have made even a request for a search for that reservation to be used reciprocally by a nonobjecting party to the Convention. In response to questioning by the committee, the Legal Adviser to the Foreign and Commonwealth Office confirmed the legal position, and further agreed that, therefore, the decision not to search the bags was political and not legal. The committee in its report did not dissent from the political judgment made.<sup>25</sup>

Whether remedies available under and within the Convention should be used will always be subject to political judgment. And sometimes it may be convenient for a government to let it be supposed, in exercising

<sup>22</sup> *Id.*, paras. 31-34. This matter, too, is under consideration by the International Law Commission, with a proposal to prohibit any kind of examination directly or through electronic or mechanical devices.

<sup>23</sup> MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, UN Doc. ST/LEG/SER.E/2, at 55 (1983).

<sup>24</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 99.

<sup>25</sup> *Id.*, para. 101.

political judgment, that its hands are tied by the requirements of international law.

#### CRIMINAL OFFENSES AND PERSONAL IMMUNITIES

39. The person of a diplomatic agent is inviolable and he may not be arrested or detained (Article 29, Vienna Convention on Diplomatic Relations). A diplomatic agent is immune from the criminal jurisdiction of the receiving State, and immune from the civil and administrative jurisdiction save in certain specified cases (Article 39). He is further exempt from local taxes (Article 34). These privileges and immunities are extended to the members of his family forming part of his household, provided that they are not nationals of the receiving State (Article 37). The same privileges and immunities are extended to the members of the administrative and technical staffs of the mission, with the same provisions for their families. The only difference is that immunity from civil and administrative jurisdiction will only be in respect of acts performed within the course of their duties.

42. All persons enjoying privileges and immunities under the Convention (or similar conventions applicable to consular staff or staff of international organisations) are under a duty to respect the laws and regulations of the receiving State, and not to interfere in its internal affairs (Article 41). That a diplomat is indeed bound by the laws of the receiving State is underlined by the provision of Article 31(1) that his immunity does not exempt him from the jurisdiction of the sending State. At the same time, it is not correct that when a diplomat violates this duty he loses his immunity. Such a reading is inconsistent with the immunities given, which operate precisely in respect of such alleged violations, and which, in the case of diplomatic agents, apply even to unofficial acts. An argument can be made that when diplomats act in fact as terrorists, they are not diplomats at all, and thus must lose the benefit of those immunities that diplomats are entitled to. But the right view seems to be that a person remains an accredited diplomat until the receiving State requires him to be withdrawn.

This view would seem to accord with the general ethos of the Convention that there should be no exceptions to its terms.<sup>26</sup>

The Foreign Affairs Committee felt that this was not an intolerable situation and that the Convention provided a remedy in the ability of the receiving state to declare a diplomat *persona non grata*. In cases concerning offenses against the security of the state, offending diplomats were routinely declared *persona non grata*. But there had been other occasions where interference in internal affairs was suspected, or where local law had been violated, or where threats had been issued, and no request had been made for the person or persons to be withdrawn. The committee recommended a greater readiness to use this remedy.

This study was based, as has been explained above, on the submission of detailed evidence from a wide variety of interested parties, and oral examination of witnesses. It concluded that amendment<sup>27</sup> of the Vienna

<sup>26</sup> *Id.*, paras. 39 and 42.

<sup>27</sup> The amendments considered included limiting the immunity from jurisdiction of accredited diplomats, technical and administrative staff, and their families; removing personal



Convention was not only virtually impossible to achieve, but of doubtful desirability:

[I]t is doubtful whether, from the UK's point of view, amendment is even desirable. In respect of all these matters we were constantly reminded of the importance of reciprocity—namely, that the privileges and immunities operate to provide a very real protection for our diplomats and their families overseas, and that action should not be taken which would expose them to personal danger or make the carrying out of their diplomatic tasks more difficult or even impossible. The UK maintains a substantial number of diplomatic posts overseas and there is little doubt that, in many of these posts, the protections afforded by the Convention are necessary for the effective and safe performance of their functions.<sup>28</sup>

More difficult was the issue whether security in the streets of London could and should be facilitated by changing the practice regarding demonstrations outside embassies. Unlike the United States and certain other states, the United Kingdom has no statutory requirement prohibiting demonstrations within a specified distance of diplomatic premises. The matter is simply dealt with by local acts allowing for the direction of routes of processions and demonstrations, the maintenance of order and prevention of obstructions,<sup>29</sup> and the control of public order generally.<sup>30</sup> There is no special power given to police commissioners in respect of offenses at or near diplomatic premises.

Article 22 of the Vienna Convention nonetheless places on the receiving state "a special duty to prevent any disturbance of the peace of the mission or impairment of its dignity." Article 22 (together with other articles) is given the force of law in the United Kingdom by the Diplomatic Privileges Act 1964.<sup>31</sup> The view was offered in certain quarters that the absence of legislation to keep demonstrations at a certain distance from embassies is incompatible with the obligations under Article 22.<sup>32</sup>

Is the peace of the mission or the impairment of its dignity prevented by peaceful demonstrations in the immediate vicinity? Or is the better view that Article 22 is not meant to insulate the foreign mission from expressions of public opinion within the receiving state (provided always that there is free and safe access and egress for the members of the mission, and no real fear of danger to mission staff or damage to the premises)?

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immunity after participation in acts of state terrorism; obligatory opening of the diplomatic bag upon request following reasonable suspicion or return of the bag to its point of origin; withdrawal of the inviolability of diplomatic premises if they have been used for acts of state terrorism; electronic scanning of the diplomatic bag (insofar as that would entail a formal amendment).

<sup>28</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 56.

<sup>29</sup> Metropolitan Police Act 1839, 2 & 3 Vict., ch. 47, §52.

<sup>30</sup> Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, §3.

<sup>31</sup> Ch. 81.

<sup>32</sup> See, e.g., Memorandum of Professor Colonel G. I. A. D. Draper, FOREIGN AFFAIRS COMMITTEE REPORT, App. 6, at 74.



During the summer of 1984, a police commander moved a demonstration away from the east pavement of Trafalgar Square outside the South African High Commission, arresting those who refused to move. This incident was interesting in several respects. Demonstrations had taken place on the east pavement of Trafalgar Square every Friday for 2 years. On this occasion, though the demonstration did not differ from those held previously, the responsible police commander took the view that it violated the Diplomatic Privileges Act. He arrived at this view without consulting the Foreign and Commonwealth Office. The Magistrates Court that dealt with the case of one of the persons arrested found that impairment of dignity required abusing or insulting behavior, and that political demonstrations per se do not amount to such.<sup>33</sup>

The present writer welcomes this robust approach to Article 22 of the Convention, and also the decision of the Foreign Affairs Committee not to recommend statutory distances for demonstrations. As the committee noted, a breakdown of public order outside the mission premises (for which there are appropriate statutory powers) would put in jeopardy the fulfilling of obligations under Article 22; "an orderly expression of opposition to the policies of the sending State cannot of itself do so."<sup>34</sup>

At the end of the day, terroristic abuse of diplomatic status can be controlled neither by moving demonstrations away from embassies nor by trying to amend the Vienna Convention. What is needed is close coordination between the various parts of government, and international security cooperation.<sup>35</sup> Governments must keep themselves more fully informed than they have sometimes appeared to be in the past, and should not, for the sake of promoting trade or other reasons, seek to accommodate those who are reluctant to conform to the requirements of the Vienna Convention. Above all, those remedies available for abuse in the Convention—especially the power to limit the size of the mission, to declare a diplomat persona non grata—should be used with firmness and vigor, and not just reserved for matters related to espionage.

As is so often the case, legal means are at hand; but they need to be matched by political will.

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On April 23, 1985, the Government issued its reply to the Foreign Affairs Committee's report (Cmd. 9497). It accepted all the major recommendations of the report. The Government's report will be briefly reviewed in the next issue of the *Journal*.

ROSALYN HIGGINS\*

<sup>33</sup> Regina v. Roques, Bow Street Magistrates Court, June 1984. For details, see FOREIGN AFFAIRS COMMITTEE REPORT, para. 50.

<sup>34</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 48. This was a difficult issue for the committee, and a different view was strongly urged by one member, Ivan Lawrence, Q.C., M.P. See *id.* at xlvii.

<sup>35</sup> See *id.*, paras. 125–126, 116–118.

\* The present writer acted as specialist adviser to the Foreign Affairs Committee at all stages of its work.

Neel Mehra: This could be a direct critique of what I am trying to do but the adjustments I am proposing are not so big that it would be an unneeded solution.