Timothy G. Nelson
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
(212) 735-2000 (fax)

Attorneys for Defendant Shavendra Silva

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| **VATHSALA DEVI AND SEETHARAM SIVAM,** | : | |
| Plaintiffs, | : | 11-cv-6675 (JPO) |
| -against- | : | ECF case |
| **SHAVENDRA SILVA,** | : | Electronically Filed |
| Defendant. | : | |

**DEFENDANT AMBASSADOR SILVA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO 22 U.S.C. § 254d**

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## FOREIGN AND INTERNATIONAL CASES



## STATUTES

**INTERNATIONAL DOCUMENTS**



**OTHER SOURCES**

Defendant Ambassador Shavendra Silva respectfully submits this Reply in further support of his Motion to Dismiss pursuant to 22 U.S.C. § 254d.[1]

## PRELIMINARY STATEMENT

While admitting that "Defendant Silva is appointed as a diplomat to the United Nations" (Pl. Mem. at 5), and thus conceding that "the issue before this Court is whether Defendant Silva is entitled to diplomatic immunity" (*id.* at 2), Plaintiffs' arguments reveal a fundamental misconception of the nature of diplomatic immunity. In seeking to deny Ambassador Silva's immunity from suit, Plaintiffs disregard the plain terms of three treaties – the Vienna Convention, the CPIUN, and the United Nations Headquarters Agreement – and over a century of federal case law, not to mention recent official statements by the United States Government, emphatically indicating that, with very limited exceptions (none of which are applicable here), *a diplomat is not subject to the civil jurisdiction of the courts of a foreign/receiving state*.[2] Indeed, Plaintiffs fail to identify a ***single*** United States case in support of their position.

Under Article 31 of the Vienna Convention, accredited diplomats enjoy "complete" immunity from civil suit, subject only to three narrow exceptions (none of which are alleged to apply here).[3] Despite Plaintiffs' conclusory claims, there is no federal statute or past case that

---

[1] The Reply refers to Defendant's Initial Submission dated October 14, 2011 ("Initial Mem.") and to Plaintiffs' November 8, 2011 Memorandum of Law in Opposition ("Pl. Mem.") Capitalized terms used herein are as used in the Initial Submission.

[2] *See, e.g.*, William Barnes, Special Assistant to the Direction of the Historical Office, Department of State, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, Dep't St. Bull., Aug. 1, 1960, at 173 ("[Diplomatic immunity] may be traced back to the usages and customs of the earliest peoples of whom we have knowledge through written record") (Exhibit A hereto).

[3] "A diplomatic agent enjoys complete immunity . . . from civil and administrative process [ ] subject to exceptions. He does not enjoy immunity from actions relating to private immovable property when he is involved, in his private capacity, in an issue of succession to *(cont'd)*

strips a current diplomat of civil immunity in the United States simply because the lawsuit relates to events pre-dating his/her appointment. Such an exception would undermine a key rationale for diplomatic immunity – *i.e.*, to allow diplomats to perform their duties in foreign countries without fear of judicial interference. To quote the renowned United States Secretary of State Elihu Root, "the reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of duty in the person of a governmental agent or representative." Quoted in 4 G. Hackworth, *Digest of International Law* 513 (1942); s*ee also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, 25 (May 24) ("*Tehran Hostages*") ("[t]he Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions").[4]

Lacking legal authority, Plaintiffs make glib generalizations, claiming that diplomatic immunity allows defendants to escape liability for what they deem serious wrongs (Pl. Mem. at 1)

---

*(cont'd from previous page)*
such property, or from actions relating to professional or commercial activity outside his official functions." Restatement (Third) of Foreign Relations Law § 464 (1987) (citing Vienna Convention, art. 31). As noted, none of these exceptions apply.

[4] Despite Plaintiffs' claims to the contrary (Pl. Mem. at 5), the fact that Ambassador Silva is appointed as a diplomat to the United Nations, and not to the United States is irrelevant to the question of whether he has diplomatic immunity. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (diplomatic representatives of Zimbabwe mission to the UN were entitled to immunity); Barnes, *supra*, at 180 ("Section 15 of the [United Nations] [H]eadquarters [A]greement . . . provides that the principal resident representatives of member states to the United Nations, and such resident members of their staffs as may be agreed upon between the Secretary-General of the United Nations, the Government of the United States, and the government of the member state concerned, shall be entitled in the United States to the same privileges and immunities as the United States accords to diplomatic officers accredited to it. Those representatives and their staff members, as agreed upon, are in the same position as the diplomatic officers [accredited to the United States]"); *see also id.* (noting that diplomats accredited to the United States possess immunity under 22 U.S.C. §§ 252, 253, and 254).

– thus laying bare a fundamental misunderstanding of diplomatic immunity. "Diplomatic immunity is not immunity from legal liability but immunity from suit." *Empson v. Smith* [1966] 1 Q.B. 426, 438 (Eng. Ct. App.) (Diplock, L.J.). Indeed, as set forth in Article 31(4) of the Vienna Convention, "[t]he immunity of the diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending state." Thus, the dismissal of this case is *jurisdictional*; it does not represent a determination on liability.

In the same vein, Plaintiffs are wrong to claim that the grant of immunity here would violate preemptory norms of international law (known as *jus cogens*). (Pl. Mem. at 14-17.) As the United States Government has explained repeatedly, international law does not recognize a *jus cogens* exception to diplomatic immunity. *See, e.g., Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 129 (D.D.C. 2009). Ambassador Silva is thus entitled to dismissal with prejudice.[5]

## ARGUMENT

### I.
### PLAINTIFFS' NARROW CONSTRUCTION OF ARTICLE 31 OF THE VIENNA CONVENTION IS CONTRARY TO ALL AUTHORITY

### A. The Second Circuit Has Construed Diplomatic Immunity as Absolute

The Second Circuit has described the civil immunity afforded to currently serving diplomats under Article 31 of the Vienna Convention as "absolute." *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (under Article 31, "current diplomatic envoys enjoy *absolute immunity* from civil and criminal process" (emphasis added)), *cert. denied*, 131 S. Ct. 151 (2010). Plaintiffs' claim that *Brzak*'s statement is "dicta" is incorrect; in any event there are numerous other cases to this effect. *See, e.g.*, *Tachiona*, 386 F.3d at 216; *Baoanan v. Baja*, 627 F. Supp. 2d

[5] Consistent with Ambassador Silva's diplomatic immunity, this Reply has not attempted to address the merits of Plaintiffs' claims. We reserve the right to demonstrate that even if there were a *jus cogens* exception (which there is not), the Complaint does not disclose any basis for inferring a *jus cogens* violation or indeed any cognizable claim.

155, 160-61 (S.D.N.Y. 2009) ("Under the [Vienna Convention], a current diplomatic agent enjoys *near-absolute immunity* from civil jurisdiction.") (emphasis added).

*Tachiona* is particularly instructive. In that case, plaintiffs served Zimbabwe President Robert Mugabe and his foreign minister with a complaint alleging breaches of the Alien Tort Claims Act, the Torture Victim Protection Act, and international human rights norms. At the time of service, these defendants were accredited to attend the United Nations as representatives of Zimbabwe, and thus were diplomatically accredited. *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *aff'd in part, rev'd in part*, 386 F.3d 205 (2d Cir. 2004). The United States, whose views are entitled to deference,[6] filed a Suggestion of Immunity in that case in which it stated "Article 31(1) of the Vienna Convention provides that diplomatic agents enjoy comprehensive immunity from civil jurisdiction, again subject to narrow exceptions not applicable here [and] . . . [t]he Diplomatic Relations Act, 22 U.S.C. § 254a *et. seq.* provides that an action against an individual who is entitled to immunity shall be dismissed where immunity is established 'upon motion or suggestion by or on behalf of the individual.'" United States Suggestion of Immunity in *Tachiona* at 7-8, ¶ 7 (Exhibit B hereto) (quoting 22 U.S.C. § 254d). Affirming the district court's dismissal of these claims on diplomatic immunity grounds, the Second Circuit held that the Vienna Convention "[w]ith limited exceptions [as set out in Article

---

[6] The Second Circuit has held that "[r]espect is ordinarily due the reasonable views of the Executive Branch." *Tachiona*, 386 F.3d at 216 (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)) (*citing Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.")). Deference is particularly appropriate in the realm of diplomatic relations, where the Executive bears a responsibility for ensuring the protection of U.S. emissaries serving overseas.

31(1)] . . . broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts." *Tachiona*, 386 F.3d at 215.[7]

*Tachiona* also squarely holds that diplomats accredited to the United Nations enjoy the same immunities as diplomats accredited to the United States. In *Tachiona*, the Second Circuit specifically addresed Article 11(g) of the CPIUN – the treaty provision that expressly extends diplomatic immunity to the representatives of United Nations members. Upholding "an interpretation of section 11(g) that would accord the full protection of Article 31 of the Vienna Convention to temporary U.N. representatives," *id.* at 217, the Second Circuit held that Article 11(g) conferred "more than just 'functional' immunity," and instead should be afforded a "broad" interpretation. *Id.* at 218-19. It noted that this interpretation was supported by the legislative history as well as the practice of the United Nations itself. *Id.*

**B. The United States' Official Construction of Article 31 Supports Dismissal**

Plaintiffs argue that Article 31 of the Vienna Convention only "provides Defendant Silva with immunity only for official acts and certain non-function activity that he commits *during* his mission." (Pl. Mem. at 12.) There is no case that supports this view, which is contrary to the Second Circuit's holdings in *Brzak* and *Tachiona* cited above. Moreover, the United States Government, whose views are entitled to deference, itself has rejected this narrow interpretation of Article 31. Submitting its views in the *Sabbithi* case,[8] the United States Government stated

---

[7] The Second Circuit's interpretation of Article 31 of the Vienna Convention and Article 11(g) of the CPIUN is consistent with the Vienna Convention on the Law of Treaties ("VCLT") under which "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VCLT art. 31(a), May 23, 1969, 1155 U.N.T.S. 311.

[8] *Sabbithi* involved a claim brought by domestic servants against their former employers, a Kuwaiti diplomat and his wife who resided in the United States. The plaintiffs alleged violations *(cont'd)*

that "[t]he Vienna Convention's recognition of the immunity accorded to a diplomat and his family codifies a principle that has long been an integral component of customary international law, and that played an important role in the nation's conduct during and after the time the Constitution was created." United States Statement of Interest in *Sabbithi v. Al Saleh* at 5, ("*Sabbithi* Statement") (Exhibit C hereto). The United States explained that "[u]nder Article 31 . . . a diplomatic agent is entitled to immunity from the civil jurisdiction of the receiving State [subject to the three narrow exceptions set out in Article 31]." *Sabbithi* Statement at 4.

It bears emphasis that diplomatic immunity has been a cornerstone of United States law from this country's very beginnings, and as a result, the United States historically has "supported the absolute view of diplomatic immunity." Thomas Pecoraro, *Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity*, 29 Harv. Int'l L.J. 533, 534, (1988) (attached hereto as Exhibit D). "[R]ecognizing diplomatic immunity as essential to international discourse, [the United States] codified and expanded upon the existing common law when the First Congress passed the Act of April 30, 1790 . . . which stated that diplomatic immunity is virtually absolute." Robert A. Wilson, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 Loy. L.A. Int'l & Comp. L.J. 113, 119 (1984) (attached hereto as Exhibit E). Accordingly, "[u]nder the 1790 Statute, the victim of a diplomat's civil or criminal wrong was unable to obtain legal relief in the United States." *Id.* at 121.

Thus, "the prevailing interpretation of international law and the one which has been followed in American practice is that complete immunity from civil process should be granted under all circumstances." Barnes, *supra*, at 178-79; see also *Sabbithi* Statement at 6

---

*(cont'd from previous page)*
of the Thirteenth Amendment, the Trafficking Victims Protection Act, the Fair Labor Standards Act, and common law tort and contract law.

("Jurisdictional immunities ensure the ability of diplomats to function effectively by insulating them from the disruptions that would accompany litigation in such an environment. This protection was regarded as so important that for almost two centuries the United States accorded diplomats complete immunity. When the United States became a party to the Vienna Convention, it recognized the small number of limited exceptions to diplomatic immunity provided for in the treaty . . . ." (citation omitted)).

The United States' position is consistent with its submissions before the International Court of Justice ("ICJ") in the main international case dealing with diplomatic immunity, the 1980 decision in the *Tehran Hostages* case, as well as the ICJ's holdings. Indeed, in that case, seeking to justify its improper seizure of U.S. diplomatic personnel (a particularly brazen violation of diplomatic immunity), Iran claimed that these personnel were responsible for espionage. *Tehran Hostages* at 38 ¶ 81. Firmly rejecting this plea, the ICJ held that there would be a "grave breach" of Article 31(1) of the Vienna Convention if any diplomat was put on trial for alleged espionage. *See id.* at 37 ¶ 79. It added that if a receiving state has bona fide concerns over the conduct of any diplomat, the Vienna Convention, as a "self-contained" regime, contains its own remedies, including the right to expel diplomats as *persona non grata*. *Id.* at 40, ¶ 86. This, the ICJ made clear is the *maximum* (and sole) remedy against diplomats who incur the displeasure of the local receiving state. *A fortiori*, this holding indicates that Article 31 immunity cannot and should not be lifted, merely because a plaintiff files a lawsuit accusing a diplomat of civil wrongdoing.[9]

---

[9] While *Tehran Hostages* is an extreme and egregious example of diplomatic immunity being violated, it does not take too much imagination to conceive of the kind of civil lawsuits that some foreign plaintiffs would feel entitled to bring against current United States diplomats in overseas courts if Article 31 of the Vienna Convention were construed in the narrow manner urged by Plaintiffs.

## II.
## THERE IS NO *JUS COGENS* EXCEPTION TO DIPLOMATIC IMMUNITY

Without any relevant supporting authority,[10] Plaintiffs claim that this case involves so-called "*jus cogens*" violations, which, they claim, means that the Vienna Convention is overridden. "*Jus cogen* norms are peremptory norms of international law which enjoy the highest status in international law and prevail over both customary international law and treaties." *Sabbithi*, 605 F. Supp. 2d at 129. Plaintiffs argue that international law, and in particular, the law of *jus cogens* "precludes Defendant Silva from invoking diplomatic privileges that are based merely on reciprocity and mutual benefit." (Pl. Mem. at 3.) This is a repeat of arguments made in *Sabbithi*, where plaintiffs argued that the defendants' alleged "human trafficking conduct violated *jus cogen* norms, and as such defendants diplomatic immunity pursuant to the Vienna Convention should be denied." *Sabbithi*, 605 F. Supp. 2d at 129. The United States stated in that case:

> In the view of the United States, there is no *jus cogens* exception to diplomatic immunity. Assuming treaty provisions must comply with *jus cogens* norms, just as they must adhere to constitutional limitations, there is no conflict between the Vienna Convention and *jus cogens* norms, as nothing in the Vienna Convention authorizes any practice that violates any such norm. *Cf.* Hazel Fox, *The Law of State Immunity* 525 (2002) ("State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement."). Further, diplomatic immunity is itself a fundamental principle of international law . . . and there is no evidence that the international community has come to recognize a *jus cogens* exception to diplomatic immunity. *See Jones v. Ministry of Interior*, [2006] UKHL 26, ¶ 27 (U.K. House of Lords 2006) (finding "no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms"). ***Indeed, we [are]***

---

[10] The Plaintiffs cite a non-U.S. case, *Ferrini v. Federal Republic of Germany*, in support of their argument. (Pl. Mem. at 4.) The United States Government's view on the case is as follows: "We are aware of one foreign court that has recognized a *jus cogens* exception in the state immunity context, but that decision has not been followed by other jurisdictions and, in fact, has been forcefully criticized." *Sabbithi* Statement at 22 n.15.

> ***not aware of any United States court that has recognized a jus cogens exception to a diplomat's immunity from its civil jurisdiction.*** A deviation from this international consensus would create an acute risk of reciprocation by other States, potentially subjecting U.S. diplomats to controversial litigation in foreign jurisdictions. *See id.* ¶ 63 ("[I]nternational law . . . is based on the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.").

*Sabbithi* Statement at 20-22 (emphasis added). The *Sabbithi* court, relying on the Statement, thus rejected an attempt to exclude diplomatic immunity. It held that, "[i]n the view of the United States, there is no *jus cogens* exception to diplomatic immunity" and "there is not evidence that the international community has come to recognize a *jus cogens* exception to diplomatic immunity." *Sabbithi*, 605 F. Supp. 2d at 129 (citations and internal quotation marks omitted). Precisely the same holding is warranted here.

## III.
## RECOGNITION OF DIPLOMATIC IMMUNITY IS A CRITICAL COMPONENT OF UNITED STATES FOREIGN POLICY

As the Second Circuit has observed, "[r]ecent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern." *767 Third Ave. Assocs. v. Perm. Mission of Zaire to United Nations*, 988 F.2d 295, 301 (2d Cir. 1993). "[A]ny failure to respect the privileges and immunities accorded to diplomats under the Vienna Convention would contravene the United States's established obligations to its treaty partners and jeopardize the protections reciprocally extended by other nations to United States diplomats stationed abroad." *Sabbithi* Statement at 1-2. Accordingly, "[t]he privileges and immunities accorded to diplomats under the Vienna Convention are vital to the conduct of peaceful international relations and must be respected." *Id.* 24-25.

## IV.
## SERVICE WAS IMPROPER

Finally, despite Plaintiffs' bald claims to the contrary (Pl. Mem. at 18), there is little doubt that service was improper. The Second Circuit addressed this in *Tachiona*: "In line with *767 Third Avenue Associates*, the State Department forcefully argues that Article 29 of the Vienna Convention should be interpreted to preclude service of process on persons entitled to diplomatic immunity, even where such persons are served on behalf of a non-immune, private entity. Not only is the Government's interpretation entitled to 'great weight,' but it is also supported by authority and sound reasoning." *Tachiona*, 386 F.3d 205 at 223 (citations omitted) (internal quotation marks omitted); *see also Tachiona,* 169 F. Supp. 2d at 302 (concluding that "both [defendants] enjoyed diplomatic immunity at the time they were served and . . . the Court therefore lacks a basis for exercise of jurisdiction over them"); *Tachiona,* 386 F.3d at 220-21 (concluding that "diplomatic immunity rendered the service of process a nullity").

## CONCLUSION

For the foregoing reasons and the reasons set forth in Ambassador Silva's Initial Submission, his Motion to Dismiss should be granted.

Dated: November 17, 2011
New York, New York

Respectfully submitted,

By: /s/ Timothy G. Nelson

Timothy G. Nelson
Timothy.G.Nelson@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
(212) 735-2000 (fax)

Attorneys for Defendant

# Exhibit A

# Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice

*by William Barnes*

The freedom from local jurisdiction which diplomatic immunity confers upon certain foreign officials residing in the United States has frequently been a cause of public criticism and misunderstanding. Especially has this been the case when such officials have invoked their immunity to protect themselves from the consequences of acts which, if committed by ordinary citizens, would result in the application of penal sanctions.

This article seeks to dispel such misunderstanding by treating the principle of diplomatic immunity in its historical perspective, bringing out the reasons why the United States, in common with all other countries, recognizes and applies this principle. The legal basis of diplomatic immunity in the United States is also discussed, and examples are given of its application in United States practice.

Diplomatic immunity may be broadly defined as the freedom from local jurisdiction accorded under international law by the receiving state to duly accredited diplomatic officers, their families, and servants. Associated with such immunity is the inviolability which applies to the premises of embassies and legations and the residences of duly accredited diplomatic officers. Diplomatic immunity is a universally recognized principle included in the body of rules known as international law, which civilized nations have accepted as binding them in their intercourse with one another and which is enforcible in U.S. courts.[1]

By custom, courtesy, or international agreement, diplomatic officers usually also enjoy certain privileges in the states to which they are accredited, such as exemptions from local taxation and from the payment of customs duties. Such privileges do not derive from international law but rest for the most part on domestic legislation, generally on the basis of reciprocal treatment. While often associated with diplomatic immunity, these privileges are not, strictly speaking, embraced in that term, and they are not discussed in this article.

## Historical Development of the Concept

The concept of diplomatic immunity in international law may be traced back to the usages and customs of the earliest peoples of whom we have knowledge through written records. It often became necessary for primitive tribes and peoples to communicate and negotiate with one another, for which purpose certain of their members were selected as messengers or envoys. The functions of the envoys were of social significance to both the sending and receiving communities, and it was early realized that reciprocal advantages were to be gained and mutual interests served by granting them special immunities and protection.

Such envoys were sent and received for important negotiations by the kings of the Hittites, Babylonians, Assyrians, Hebrews, and Egyptians. For example, in 1272 B.C. the Hittite King,

• *Mr. Barnes is Special Assistant to the Director of the Historical Office, Department of State.*

[1] While the principle of diplomatic immunity is firmly established in international law, its application in practice varies as among individual states.



557828—60——3

Khetasar, sent messengers to Rameses II of Egypt to propose peace and a treaty of alliance. Immunity was accorded these messengers despite an existing state of war, and they accomplished their mission.[2] The ancient history of China and India records that envoys from neighboring peoples were not regarded as subject to local jurisdiction. Biblical references indicate that any violation of an envoy's immunity was regarded as justifying sharp retaliatory measures. Thus it is recorded in chapters 10 and 11 of the Second Book of Samuel that the entire race of Ammonites perished at the hands of David, King of Israel, because they treated his messengers offensively.

The use of ambassadors by the Greek city-states was a common practice, and their inviolability was recognized as necessary to the carrying on of negotiations. They were not subject to local jurisdiction even when they committed an offense in the receiving state, and any interference with them was considered a serious breach of international good conduct. Thus Thebes declared war on Thessaly because its ambassadors had been arrested and imprisoned, even though there was evidence that the Theban envoys had conspired against the Thessalian Government.[3]

The Romans accepted the practice of the Greeks in regard to diplomatic immunity and embodied the principle in their codes of law. Cicero expressed the Roman attitude toward diplomatic immunity as follows:[4]

> The inviolability of ambassadors is protected both by divine and human law; they are sacred and respected so as to be inviolable not only when in an allied country but also whenever they happen to be in forces of the enemy.

Immunity extended to the ambassador's staff, and his correspondence was held to be inviolable. Under the Roman civil law, ambassadors were accorded an important degree of exemption from local jurisdiction, although certain of its provisions later gave rise for a time to the interpretation that such exemption applied only to acts connected with their diplomatic functions and did not extend to acts performed in a private capacity.

During the Middle Ages the immunity of ambassadors received even greater recognition than in ancient times. Both Gothic and Saxon law provided for special protection and treatment of envoys. The spiritual and temporal power of the papacy imparted a high degree of prestige and honor to papal agents and encouraged a similarly high standard of treatment for diplomatic representatives exchanged by temporal states.

In the Renaissance period the development of diplomacy by the Italian city-states, which were the first to establish permanent diplomatic missions, served to enhance the prestige and prerogatives of diplomatic agents, even though the practice of diplomacy was strongly influenced by the precepts of Machiavelli and became almost synonymous with treachery and intrigue. The diplomatic practices of the Italian city-states were adopted by the monarchs of Western Europe, who established permanent missions on a reciprocal basis and set up regular diplomatic services to staff them.

During the Renaissance the doctrine of diplomatic immunity was subject to two conflicting interpretations based on opposing views of sovereignty. One interpretation, based on certain provisions of the Roman civil law which restricted diplomatic immunity, asserted the power of the receiving state to exercise jurisdiction over diplomatic agents in certain cases. The other called for the voluntary surrender by a state of its authority over such agents, to give them the maximum of immunity in the exercise of diplomatic functions. The former theory was expressed by such 16th century writers as Conradus Brunus, Alberico Gentile, and Jean Hotman, who believed that diplomatic immunity should be restricted in order to prevent its being invoked in the case of crime or conspiracy and argued that diplomatic agents who troubled the peace of the state should be liable to prosecution.[5]

Despite these opinions and the zeal with which Western rulers were wont to assert their sovereign prerogatives, the law and practice of diplomatic immunity in the 16th and 17th centuries evolved in the direction of giving diplomats complete immunity from criminal and civil jurisdiction. States were led to this course by their recognition of the necessity of undisturbed diplomatic relations and of the political expediency of preserv-

[2] Montell Ogden, *Juridical Bases of Diplomatic Immunity* (Washington, 1936), p. 11.

[3] Graham H. Stuart, *American Diplomatic and Consular Practice*, 2d edition (New York, 1952), p. 115.

[4] Quoted in Stuart, *op. cit.*, p. 117.

[5] Stuart, *op. cit.*, p. 121.

ing peace and friendly relations by treating ambassadors with special consideration.[6]

The theory of diplomatic immunity from criminal jurisdiction did not become firmly established until the appearance of the treatises of Grotius, Zouche, and Bynkershoek in the 17th century. Yet, according to Professor E. R. Adair, the author of an intensive study of the subject,[7]

> . . . throughout the sixteenth and seventeenth centuries no ambassador was ever put to death nor even subjected to any very long imprisonment for crimes committed unless he was a subject of the state to which he had been sent.

Professor Graham H. Stuart observes that this statement is borne out by such incidents as the recall of French Ambassador de Noailles, implicated in a plot against Queen Mary of England in 1556; the dismissal of Spanish Ambassador Mendoza, involved in a plot against Queen Elizabeth in 1583; and the action of the Venetian Senate in 1618 in facilitating the flight of Spanish Ambassador de Cueva, who had organized a conspiracy against the republic.[8]

In the 18th and 19th centuries the doctrine of complete diplomatic immunity was generally recognized in international law and practiced by all civilized states. During this period the legal fictions of "extraterritoriality" and "representative character," derived from the classical writers on international law and their followers, notably Grotius, Bynkershoek, and Vattel, were often advanced to justify the institution of diplomatic immunity. According to the first doctrine, an envoy was immune from local jurisdiction because he was outside of the territory of the receiving state for legal purposes; the second doctrine held him to be immune because he was the personification of his sovereign, who could not be subjected to the jurisdiction of another country.[9]

These legal fictions tended to obscure the fundamental reason for the principle of diplomatic immunity and are no longer accepted as a proper basis for it. The principle needs no other justification for its acceptance in international law than the necessity and importance of protecting the persons and facilitating the work of diplomatic officers engaged in the conduct of relations between states.

The development of international organizations in the modern period has enlarged the scope of diplomatic immunity, since the principle has sometimes been applied, usually on the basis of agreements with the host states, to specified personnel of such organizations. In 1926 Switzerland granted immunity from criminal and civil jurisdiction to certain officials of the League of Nations and recognized the inviolability of its buildings, property, and archives.[10] By an agreement signed in 1928, the Netherlands accorded diplomatic immunity to the members and senior officials of the World Court.[11] A similar agreement was concluded in 1946 providing that members of the International Court of Justice and officials of the Court will, in a general way, be accorded the same treatment as members of a diplomatic mission of comparable rank.[12]

Under an agreement concluded with the United Nations in 1947, the United States accords diplomatic immunity to the principal resident representatives of member states to the United Nations and its specialized agencies and to certain resident members of their staffs.[13] This agreement also recognized the inviolability of the land, buildings, and other property included in the U.N. headquarters district in New York City. Previously, in 1946, following the transfer to the United Nations of certain assets of the League of Nations in Switzerland, that country made an agreement with the United Nations extending certain immunities and privileges to the Organization and to its representatives and officials. Under this agreement full diplomatic immunity is accorded to the Secretary-General and Under Secretaries of the United

[6] Ogden, *op. cit.*, p. 60.

[7] E. R. Adair, *The Extraterritoriality of Ambassadors in the 16th and 17th Centuries* (London, 1929), p. 64.

[8] Stuart, *op. cit.*, pp. 121–122.

[9] Ogden, *op. cit.*, p. 62.

[10] Modus Vivendi Concerning Diplomatic Immunities of League of Nations Officials, Sept. 18, 1926 (text in Manley O. Hudson, *International Legislation* (Washington, 1936), I, 224).

[11] Agreement Concerning the Diplomatic Status of Members of the Permanent Court of International Justice, May 22, 1928 (text in Hudson, *op. cit.*, I, 597).

[12] Exchange of Letters Recording an Agreement Between the International Court of Justice and the Netherlands Relating to Privileges and Immunities of Members of the International Court of Justice [etc.], June 26, 1946 (text in 8 United Nations Treaty Series 61).

[13] Agreement With the United Nations Regarding the Headquarters of the United Nations, June 26, 1947 (61 Stat. 3416). Text also in note to 22 U.S.C. 287 and in 11 United Nations Treaty Series 11.

Nations; other U.N. officials and representatives of members are entitled to specified immunities and privileges, including exemption from legal process with respect to acts performed in their official capacity. In addition, the Organization itself is granted immunity from suit in the Swiss courts, and its property and archives are declared to be inviolable.[14]

From this brief historical review it will be observed that the principle of diplomatic immunity is one of the oldest legal concepts recognized by mankind in the field of foreign relations and that over the centuries it has become firmly established in international law. In both ancient and modern times the main forces compelling the observance of diplomatic immunity have been the necessity of safeguarding persons charged with the conduct of foreign relations, so that they may properly protect their countries' interests, and the recognition of the mutual advantages to be gained by so doing. These considerations governed the conduct of the earliest embassies on record; they were the basis of the special status accorded envoys in ancient Greece and Rome; and they have strongly influenced the development of the doctrine of diplomatic immunity in international law from the Middle Ages to the present day.

## Legal Basis for Diplomatic Immunity in United States

American courts are bound to recognize and apply the law of nations as part of the law of the land.[15] Since diplomatic immunity is a principle of international law, no domestic legislation is necessary to give it effect. Nevertheless, the United States, together with a number of other countries, has seen fit to enact domestic laws on the subject, which are generally declaratory of international law and are designed to give it a specific local application. The first legislation of this character was the act of April 30, 1790 (1 Stat. 117), adopted at the outset of our national existence. This law followed in almost identical language the English statute (7 Anne, ch. 12) promulgated in 1708, which was the first recognition of diplomatic immunity in Anglo-Saxon law.[16]

The principal U.S. laws on the subject are summarized under the following headings:[17]

### *Immunity From Criminal and Civil Jurisdiction*

Foreign diplomatic personnel accredited to the U.S. Government and members of their suites, including their families, employees, and domestic servants, notified to and received by this Government in such capacity, are immune from arrest or imprisonment, and their property may not be seized or attached. Any writ or process sued out against such persons shall be deemed null and void (22 U.S.C. 252). Any person who obtains or executes such a writ or process in violation thereof is liable to fine and/or imprisonment (22 U.S.C. 253).

### *Requirements for Immunity From Judicial Process in Certain Cases*

The exemption from judicial process described above is applicable to American citizens or legal residents of the United States, notified to and accepted by the Department of State, who are in the service of foreign diplomatic missions, except that such persons are not immune from suit upon a debt contracted prior to entry into such service. In the case of domestic servants of ambassadors and public ministers accredited to the United States, the penalty for wrongful suit applies only when the name of the servant has previously been registered in the Department of State and transmitted by the Secretary of State to the Marshal of the District of Columbia, who shall give it appropriate public notice (22 U.S.C. 254).

### *Penalty for Assaulting Diplomatic Officers*

Any person who strikes, wounds, imprisons, or offers violence to the person of a diplomatic officer, in violation of the law of nations, is liable to fine and/or imprisonment (18 U.S.C. 112).

---

[14] Interim Arrangement on Privileges and Immunities of the United Nations Concluded Between the Secretary-General of the United Nations and the Swiss Federal Council, effective July 1, 1946 (text in 1 United Nations Treaty Series 163).

[15] The Constitution (art. I, sec. 8) confers upon Congress the power to punish offenses against international law. See Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston, 1922), I, 11–13.

[16] *British and Foreign State Papers*, I, 903.

[17] For complete texts of American laws and regulations pertinent to the subject, see *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII, United Nations (New York, 1958).

*Prohibition on Picketing of Foreign Diplomatic Missions*

An act of Congress of February 15, 1938 (52 Stat. 30), prohibits the display, without a permit, within 500 feet of any embassy, legation, consular office, or other premises in Washington, D.C., used for official purposes by a foreign government, of any placard or device designed to intimidate or ridicule any foreign government, its officers or representatives, its political or economic acts, or its views and purposes. The act further prohibits the congregation of persons within 500 feet of such premises for any purpose.

*Jurisdiction in Legal Actions or Proceedings Involving Foreign Diplomatic Officers*

The Supreme Court has original and exclusive jurisdiction in actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations. The Supreme Court has original but not exclusive jurisdiction in all actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties (28 U.S.C. 1251).

As a practical matter the Supreme Court is not called upon to exercise such jurisdiction. Ordinarily a diplomatic officer whose conduct gives serious offense would be recalled by his government or expelled. In other cases the government of the sending state may consent to the waiver of a diplomatic officer's immunity, in which event he would be subject to process in domestic tribunals other than the Supreme Court.

**Application of Diplomatic Immunity in U.S. Practice**

Throughout its history the United States has recognized and applied the international law of diplomatic immunity to foreign diplomatic agents in this country and has sought from other nations reciprocal treatment for its own diplomatic officers abroad. The primary reasons for this recognition, both in law and in fact, were stated by Secretary of State Elihu Root in 1906 as follows: [18]

> There are many and various reasons why diplomatic agents . . . should be exempt from the operation of the municipal law at [sic] this country. The first and fundamental reason is the fact that diplomatic officers are universally exempt by well recognized usage incorporated into the Common Law of nations, and this nation, bound as it is to observe International Law in its municipal as well as its foreign policy, cannot, if it would, vary a law common to all. . . .
>
> The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable to the accredited nation it is proper to request his recall; if the request be not honored he may be in extreme cases escorted to the boundary and thus removed from the country. . . .

It should be emphasized, however, that the United States has never interpreted the principle of diplomatic immunity to mean that a diplomatic officer is freed from the restraints of American or foreign laws and police regulations and exempt from the obligation of observing them, but only that he cannot be arrested, tried, or punished in the event of his failure to respect them.[19] The sanctions that may always be applied against an offending diplomatic officer consist, in ascending degree of severity, of (1) a formal complaint to his government, (2) an official request to that government for his recall, or (3) if such a request is not granted or if the officer's offense is serious enough, a declaration that he is *persona non grata* and an order for him to leave the country forthwith. The United States has made use of all three of these sanctions upon occasion.

The practice of the United States in applying the law of diplomatic immunity is illustrated by the following representative cases, which are grouped under those aspects of the law to which they apply.

*Immunity From Criminal Jurisdiction*

The immunity of diplomatic agents from criminal jurisdiction is so universally recognized that one authority on the subject has declared that no instance can be cited where such an agent has been subjected, without his government's consent, to the criminal jurisdiction of the country to which he was accredited.[20] While a diplomatic representative is thus immune from arrest, trial, or punishment for any criminal offense he may commit in

[18] Green H. Hackworth, *Digest of International Law* (Washington, 1942), IV, 513.

[19] John Bassett Moore, *A Digest of International Law* (Washington, 1906), IV, 678.

[20] Sir Cecil Hurst, *Les Immunités Diplomatiques*, Academie de Droit International, Recueil des Cours, XII, 92, cited by Stuart, *op. cit.*, p. 251.

the country to which he is accredited, the U.S. Government takes the view that this immunity in no wise relieves him from the obligation of observing local laws and regulations. If he fails to do so, he becomes liable to the sanctions already mentioned.

When, in May 1868, Secretary of State William H. Seward learned that two official members of the Prussian Legation had been guilty as principal and second of violating a District of Columbia law against dueling, he brought the matter to the attention of the Prussian Minister. Since the persons in question were "protected by the law of nations from judicial prosecution for a violation of the statute . . . ," Secretary Seward requested the Minister, in the name of the President, to bring the matter to the attention of their Government in order that they might "in a proper manner be made sensible of its displeasure." [21]

If a diplomatic representative should conspire against the safety of the state, he may be restrained and expelled as soon as possible but he may not be punished by the injured state. Several such cases occurred in the United States in the period preceding its entrance into World War I, the most notorious being those of Captain Boy-Ed, naval attaché, and Captain von Papen, military attaché, of the German Embassy, who were guilty of numerous violations of American laws and of their obligations as diplomatic officers. Captain Boy-Ed directed various attempts to provide German war vessels at sea with coal and other supplies in violation of American neutrality, while Captain von Papen furnished money to various individuals to sabotage factories and other installations in Canada and also directed the manufacture of incendiary bombs and their placement on Allied vessels.[22] They were recalled by their Government at the request of the United States.

With the advent of the automobile, by far the greatest number of cases in which diplomatic immunity has been invoked have involved traffic violations. This type of offense, which ranges from relatively minor infractions of parking regulations to the killing or maiming of persons, presents a difficult problem in the application of diplomatic immunity. On the one hand, there is the legal obligation of the host government to respect that immunity and the reciprocal advantage that it gains by so doing; on the other, there is the necessity that the application of the principle should not be regarded in the host state as an intolerable impairment of the public safety.

In November 1935 the Iranian Minister to Washington, while driving through Elkton, Md., was stopped by police, and his chauffeur was charged with exceeding the local speed limit. The Minister and his chauffeur were arrested and taken before a justice of the peace, the Minister himself having been put in handcuffs when he resisted arrest. The justice dismissed the charges, suspended a fine imposed upon the chauffeur, but compelled him to pay costs. The Minister protested to the Department of State. Secretary Cordell Hull replied that he had been informed by the Governor of Maryland that the police officers responsible had been discharged from the public service. The Governor himself expressed apologies for the incident. In expressing the regret of the U.S. Government that the Minister had been discourteously treated, Secretary Hull pointed out that the incident would not have occurred had the chauffeur observed the regulations, and concluded: [23]

> In this connection, I may state that this Government has at all times impressed upon its own diplomatic officers in foreign countries that the enjoyment of diplomatic immunity imposes upon them the obligation and responsibility of according scrupulous regard to the laws and regulations, both national and local, of the countries to which they are accredited. I feel confident that the Iranian Government will share the view that foreign diplomatic officers accredited to the United States will manifest a similar regard for the laws and regulations in force in this country.

### *Immunity From Civil Jurisdiction*

The immunity of diplomatic officers from jurisdiction in civil questions is a principle of international law that did not gain general acceptance until some time after their immunity from criminal jurisdiction was firmly established. A few writers on international law have maintained that diplomatic officers should not be exempt from civil jurisdiction in questions of a private nature, as distinct from those involving the exercise of their official functions. However, the prevailing

[21] Moore, *op. cit.*, IV., 634.

[22] House Committee on Foreign Affairs, Rept. No. 1, 65th Cong., 1st sess. (Serial 7252), pp. 5–9.

[23] Hackworth, *op. cit.*, IV, 515–516.

interpretation of international law and the one which has been followed in American practice is that complete immunity from civil process should be granted under all circumstances. This interpretation is based on the view that the exercise of jurisdiction over a diplomatic officer, regardless of whether the action pertains to his private or official acts, would interfere with and hamper him in the performance of his official functions.

In 1939, when an attachment of property in the possession of the Costa Rican Minister at Washington was contemplated, the Legal Adviser of the Department of State notified the U.S. Marshal for the District of Columbia that writs or processes in either criminal or civil actions could not properly be served on diplomatic representatives.[24]

In 1874, however, when John Jay, American Minister to Austria-Hungary, claimed diplomatic immunity from the civil process of an Austrian court resulting from his termination of a lease on his residence, Secretary of State Hamilton Fish disapproved this action and instructed him as follows:[25]

> An envoy is not clothed with diplomatic immunity to enable him to indulge with impunity in personal controversies, or to escape from liabilities to which he otherwise might be subjected.
>
> The assertion of these immunities should be reserved for more important and delicate occasions, and should never be made use of when the facts of the particular case can expose the envoy to the suspicion that private interest or a desire to escape personal or pecuniary liability is the motive which induced it. . . .

*Immunity From Police Jurisdiction*

The immunity of diplomatic officers from local police jurisdiction is inherent in their immunity from criminal and civil process. While a diplomatic officer cannot lawfully be arrested or taken into custody by the police, the government to which he is accredited has a right to expect that he will obey local laws and regulations.

*Exemption From Giving Testimony*

The immunity of a diplomatic officer from criminal and civil jurisdiction includes his exemption from the obligation to testify in court even though his testimony should be essential to obtain conviction. This immunity, however, may be waived.

In 1923 a summons was issued to the Secretary of the Peruvian Embassy in Washington directing him to appear in a local court to testify on behalf of the United States. The Department of State pointed out to the Attorney General that, in view of the immunity of foreign diplomatic officers from the jurisdiction of local courts, the summons should not have been served and requested him to take measures to prevent the service of such papers thereafter on foreign diplomatic representatives.[26]

The Venezuelan Minister in Washington, who had witnessed the assassination of President Garfield on July 2, 1881, asked and received the permission of his Government to waive his immunity, and he testified in court against the assassin.[27]

*Waiver of Immunities*

The immunity of American diplomatic officers abroad may not be waived except with the consent of the Secretary of State. Whenever a chief of mission considers it desirable to waive immunity, he must request the Secretary's consent, setting forth facts and reasons.[28]

*Duration of Immunity*

Immunity begins when the diplomatic agent arrives in the country to which he is accredited, continues during the period of his sojourn, and extends until his departure within a reasonable time after the termination of his mission.[29]

*Immunity of Diplomatic Couriers*

Diplomatic couriers are regarded by all governments as immune from local jurisdiction when traveling through foreign territory, and the diplomatic pouches which they carry, bearing the official seal of their governments, may not be opened or searched.[30] This immunity is based on the right of diplomatic representatives to communicate freely with their governments, which is

[24] Hackworth, *op. cit.*, IV, 534.
[25] Moore, *op. cit.*, IV, 637.
[26] Hackworth, *op. cit.*, IV, 553.
[27] Moore, *op. cit.*, IV, 644–645.
[28] Foreign Service Manual, vol. 1, pt. I, sec. 221.4.
[29] Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, Sir Nevile Bland, ed. (London, New York, and Toronto, 1957), p. 179.
[30] Foreign Service Manual, vol. 1, pt. I, sec. 221.3.

generally recognized as essential to the diplomatic function although it has sometimes been interfered with or curtailed in time of war or civil disturbance.

*Effect of War on Diplomatic Immunity*

Prior to World War II it was generally maintained that the outbreak of war between a diplomatic representative's country and that to which he was accredited did not affect his diplomatic immunity.[31] In such an event it was held that the host government was bound to take every precaution against insult or violence being directed against him or his family. In World War II both the Allied and Axis Powers interned each other's diplomatic personnel until arrangements could be made for their exchange. This practice, which was justified on grounds of internal security, involved the exercise of wide police powers over enemy diplomats. While in theory they remained immune from the local jurisdiction, in practice the restrictions to which they were subjected as a result of their internment represented an important modification of the traditional concept of diplomatic immunity in time of war.

*Inviolability of Office, Archives, and Residence*

Except in case of public emergency, such as fire or other disaster, or matters affecting the public safety, the premises occupied by foreign diplomatic missions in the United States are immune from local jurisdiction.[32] The immunity applies to premises occupied as offices or as residences of officers of the mission, the property contained therein, and the records and archives of the mission. Such premises cannot be entered or searched, nor can such property or records be detained or examined by the local authorities, even under process of law.

In 1924 agents of the Internal Revenue Bureau and members of the District police force, acting under a search warrant, entered rooms occupied by an attaché of the Hungarian Legation. The Hungarian Minister protested the violation of the attaché's domicile. The Secretary of State wrote the Chargé d'Affaires ad interim of Hungary, enclosing letters from the Superintendent of the Police Department and the Assistant Secretary of the Treasury, in which an apology was offered and regret expressed.[33]

**Persons Entitled to Diplomatic and "Limited" Immunity**

The categories of persons entitled to diplomatic immunity in the United States, the bases on which such immunity is granted, and other relevant information may be summarized as follows:

(a) *Diplomatic officers duly accredited to the Government of the United States, members of their immediate families residing with them and dependent upon them for support, and servants of such officers, regardless of nationality.* Immunity is accorded to such persons on the basis of universally accepted principles of international law which have been incorporated in domestic legislation (22 U.S.C. 252, 253, and 254).

(b) *Employees of diplomatic missions in Washington, regardless of nationality.* The immunity of such employees does not extend to members of their families, who are subject to local jurisdiction. It is accorded on the basis of a provision of the act of April 30, 1790 (1 Stat. 118, ch. 9, par. 27; 22 U.S.C. 254), and is subject to the condition that citizens or inhabitants of the United States are not immune from suit upon a debt contracted prior to entry into the service of a diplomatic mission.

(c) *Certain members of permanent delegations to the United Nations.* Section 15 of the headquarters agreement between the United States and the United Nations, signed June 26, 1947, provides that the principal resident representatives of member states to the United Nations, and such resident members of their staffs as may be agreed upon between the Secretary-General of the United Nations, the Government of the United States, and the government of the member state concerned, shall be entitled in the United States to the same privileges and immunities as the United States accords to diplomatic officers accredited to it. These representatives and their staff members, as agreed upon, are in the same position as the diplomatic officers listed under paragraph (a) above, with the exception that the immunity covers themselves and members of their families but not their servants.

[31] Satow, *op. cit.*, p. 179.

[32] Foreign Service Manual, vol. 1, pt. I, sec. 231.3.

[33] Hackworth, *op. cit.*, IV, 564.

(d) *Certain members of permanent delegations to the Organization of American States at Washington.* In accordance with a bilateral agreement between the United States and the Organization of American States, concluded under the authority of the act of July 10, 1952 (66 Stat. 516, ch. 628; 22 U.S.C. 288g), the permanent resident representatives of member states of the Organization (other than the United States) and certain members of their staffs are accorded diplomatic immunity on the same basis as the U.N. officials in paragraph (c) above.

(e) *Principal representatives of member states to the North Atlantic Treaty Organization at Washington and agreed members of their official staffs.* Under articles 12 and 13 of the multilateral agreement on the status of the North Atlantic Treaty Organization, national representatives and international staff, effective May 18, 1954,[34] such representatives and staff members are entitled to receive in the territory of member states of NATO the same privileges and immunities accorded to diplomatic representatives and their official staff of comparable rank.

*Lists of Persons Entitled to Diplomatic Immunity*

The *Diplomatic List*, published every other month by the Department of State, contains the names of all regularly accredited diplomatic officers of embassies and legations in Washington, together with the names of their wives and adult daughters. The names of young children of such officers, as well as those of their dependent sons attending school or college, are not listed in the *Diplomatic List*, but they are entitled to diplomatic immunity. At the present time approximately 1,300 officers and 1,100 wives and daughters are listed.

The Department also publishes a bimonthly *List of Employees of Diplomatic Missions Not Printed in the Diplomatic List*, which contains the names of all official employees of diplomatic missions in Washington, as well as the names of all servants of accredited diplomatic officers. The persons listed, all of whom are entitled to diplomatic immunity, now number approximately 2,400.

Subject to the Department's review and approval, the U.S. Mission to the United Nations at New York City issues every other month a list of members of permanent missions to the United Nations entitled to diplomatic privileges and immunities. Approximately 1,000 such persons, including members of their families, are listed at present.

While no special lists are issued to cover the foreign representatives to NATO and the OAS and members of their staffs who are entitled to diplomatic immunity, their names are registered with the Department of State. Including family members, they number about 250 in the case of NATO and 100 in the case of OAS.

The total number of persons entitled to diplomatic immunity in the United States today is estimated at 7,000, including wives and family members. All officials in the above categories are provided with identification cards issued by the Department of State, but such cards are not issued to their wives or family members.

*Limited Immunity Accorded to Personnel of International Organizations*

Section 7(b) of the International Organizations Immunities Act of December 29, 1945 (59 Stat. 669; 22 U.S.C. 288g), provides that representatives in or to public international organizations of which the United States is a member, and officers and employees of such organizations, shall be immune from suit and legal process relating to acts performed by them in their official capacity. This immunity is limited, and its applicability in particular cases is a question of fact to be proved in court. The immunities, privileges, and exemptions provided by the act have been extended by Executive orders to some 20 international organizations maintaining their headquarters or branch offices in the United States, including the United Nations and a number of its affiliated specialized agencies.

*Immunities Accorded to Foreign Consular Officers*

Consular officers are subject to local jurisdiction for acts not performed in their official capacity. However, as a matter of international comity, a consular officer is not usually arrested or prosecuted for the commission of minor offenses. The United States has concluded a number of treaties and conventions which contain provisions according special privileges and immunities on a reciprocal basis to consular officers of one country in the territory of the other. The immunity of a

[34] United States Treaties and Other International Agreements, vol. 5, pt. 1, 1954 (Washington, 1955), p. 1087.

particular consular officer in this country would depend upon the applicable treaty provisions. Such immunity does not extend to his wife or other members of his family, who are subject to local jurisdiction. The Department of State issues annually a list of foreign consular officers recognized by the United States, of whom there are now about 2,000.

### Summary and Conclusion

The principle of diplomatic immunity originated in ancient times and has developed over the centuries into a universally recognized doctrine in international law. Its fundamental purpose is the protection of the channels of diplomatic intercourse by exempting diplomatic representatives from local jurisdiction so that they may perform their official functions with complete freedom, independence, and security. This exemption is granted as a voluntary limitation on the jurisdiction of the receiving state and is based on the expectation that reciprocal immunity will be accorded its own diplomatic representatives abroad.

The United States has, since its independence, recognized and applied the principle of diplomatic immunity, and the decisions of U.S. courts and jurists and the practices of the U.S. Government have helped to develop and clarify the concept. Congress has enacted domestic statutes to give specific effect to the international law of diplomatic immunity, and the Department of State has consistently sought to obtain, on the basis of international law and reciprocity, the same immunities for American diplomatic representatives as are accorded by this Government to foreign diplomatic officers accredited to it.

The United States adheres to a broad and liberal interpretation of diplomatic immunity, emphasizing the inviolability of the diplomatic agent's person and the national advantage that is served by the untrammeled exercise of his functions. At the same time, it considers that a person entitled to diplomatic immunity is not relieved thereby from the obligation to respect American laws. Should such a person perform acts which endanger the safety of the community or the nation, this country holds that the proper remedy is not to subject him to its jurisdiction but rather to invoke against him the sanctions of his own government by asking for his recall.

## Congressional Documents Relating to Foreign Policy

### 86th Congress, 2d Session

Increasing Penalties for Violation of the Migratory Bird Treaty Act. Report to accompany H.R. 12533. June 9, 1960. 4 pp.

United States Foreign Policy: Middle East. Staff study prepared for the use of the Senate Foreign Relations Committee. No. 13. June 9, 1960. 115 pp. [Committee print] [1]

Exempting From the District of Columbia Income Tax Compensation Paid to Alien Employees by Certain International Organizations. Report to accompany S. 2954. H. Rept. 1790. June 11, 1960. 7 pp.

Mutual Security and Related Agencies Appropriation Bill, 1961. Report to accompany H. Rept. 12619. H. Rept. 1798. June 13, 1960. 24 pp.

Crediting Periods of Internment During World War II to Certain Federal Employees of Japanese Ancestry. Hearing before the Post Office and Civil Service Committee on H.R. 7810, a bill to credit periods of internment during World War II to certain Federal employees of Japanese ancestry for purposes of the Civil Service Retirement Act and the Annual and Sick Leave Act of 1951. June 13, 1960. 6 pp.

Providing for Adjustments in Annuities Under the Foreign Service Retirement and Disability System. Supplemental report to accompany S. 1502. H. Rept. 1626, part 2. June 14, 1960. 2 pp.

Treaty of Mutual Cooperation and Security With Japan. Report to accompany Ex. F, 86th Congress, 2d session. S. Ex. Rept. 8. June 14, 1960. 6 pp.

The Antarctic Treaty. Hearings before the Senate Foreign Relations Committee on Ex. B, 86th Congress, 2d session. June 14, 1960. 105 pp.

Import Duties on Certain Coarse Wool. Conference report to accompany H.R. 9322. H. Rept. 1883. June 16, 1960. 2 pp.

Comparisons of the United States and Soviet Economies: Supplemental Statement on Costs and Benefits to the Soviet Union of Its Bloc and Pact System—Comparisons With the Western Alliance System. Prepared by the Central Intelligence Agency in cooperation with the Departments of State and Defense for the Subcommittee on Economic Statistics of the Joint Economic Committee. June 17, 1960. 50 pp. [Joint committee print]

Suspension of Import Duties on Certain Shoe Lathes and Casein. Conference report to accompany H.R. 9862. June 16, 1960. H. Rept. 1884. 3 pp.

Foreign Service Act Amendments of 1960. Report to accompany H.R. 12547. H. Rept. 1890; June 16, 1960. 81 pp.

International Health Research Act of 1960. Report to accompany H.J. Res. 649. H. Rept. 1915. June 17, 1960. 28 pp.

Crediting for Retirement and Leave Purposes of Certain Internment Periods of Employees of Japanese Ancestry in World War II. Report to accompany H.R. 7810. H. Rept. 1920. June 20, 1960. 7 pp.

Rotation of Civilian Employees of the Defense Establishment Assigned to Duty Outside the United States. Report to accompany H.R. 10605. S. Rept. 1624. June 21, 1960. 6 pp.

Informal Entries of Imported Merchandise. Report to accompany H.R. 9240. H. Rept. 1938. June 22, 1960. 2 pp.

---

[1] This study replaces one prepared by the Institute for Mediterranean Affairs, Inc., which was listed with other studies in this series in BULLETIN of Feb. 22, 1960, p. 273.

# Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[illegible] TACHIONA,

Plaintiffs,

00 Civ. 6666 (VM)

[illegible] MUGABE, STAN [illegible] JOAN MOYO,

Defendants.

RECEIVED
FEB 27
CHAMBERS OF
JUDGE MARRERO

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.

SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for the United States of America
100 Church Street
New York, New York
Tel. (212) 637-2[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ADELLA CHIMINYA TACHIONA, et al., | : | |
| Plaintiffs, | : | |
| v. | : | 00 Civ. 6666 (VM) |
| ROBERT GABRIEL MUGABE, STAN MUDENGE, JONATHAN MOYO, et al., | : | |
| Defendants. | : | |

SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

The United States of America, by its attorney, Mary Jo White, United States Attorney for the Southern District of New York, pursuant to 28 U.S.C. § 517,[1] hereby respectfully informs the Court of the interest of the United States in the pending lawsuit against defendants Robert Gabriel Mugabe, the President and sitting head of state of Zimbabwe, and Stan Mudenge, the Minister of Foreign Affairs of Zimbabwe, and suggests to the Court the immunity of President Mugabe and Foreign Minister Mudenge.[2] Regarding defendant Zimbabwe African National Union-

[1] Pursuant to 28 U.S.C. § 517, "any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . ."

[2] The Complaint also named Jonathan Moyo, Minister of State for Information and Publicity, as a defendant. However, it appears Information Minister Moyo has not been served, and the Motion for Default Judgment does not seek judgment against him. In these circumstances, the United States does not address his immunity from suit, if any, at this time.

Patriotic Front ("ZANU-PF"), the United States advises that, during their September 2000 visit to New York City, Messrs. Mugabe and Mudenge had "personal inviolability" and could not be served with legal process in any capacity, including as representatives of ZANU-PF. In support of its interest and suggestion, the United States asserts as follows:

1. The United States has an interest in this action against the President of Zimbabwe and his Foreign Minister insofar as the case involves the question of immunity from the Court's jurisdiction of the head of state and the foreign minister of a foreign country. The interest of the United States arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against the President and the Foreign Minister would be incompatible with the United States' foreign policy interests. As discussed below, this Court should give effect to this determination.

2. The Acting Legal Adviser of the United States Department of State has informed the Department of Justice that the Government of Zimbabwe on November 1, 2000 formally requested the Government of the United States to suggest the immunity of the President and the Foreign Minister from this lawsuit. Letter from James H. Thessin to Stuart E. Schiffer, dated February 21, 2001 (copy attached as Exhibit 1). The Acting Legal Adviser has further informed the Department of Justice

that the "Department of State recognizes and allows the immunity of President Mugabe and Foreign Minister Mudenge from this suit." Id.

3. Under customary rules of international law recognized and applied in the United States, and pursuant to this Suggestion of Immunity, President Mugabe, as the head of a foreign state, is immune from the Court's jurisdiction in this case. See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994), aff'd, 79 F.3d 1145 (5th Cir. 1996); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994). In addition, Foreign Minister Mudenge also is immune from the Court's jurisdiction in this case.[3] See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 138 (1812) (Marshall, C.J.)

---

[3] In dicta, some courts have used language that might be read out of context to suggest that immunity can only apply to the person who is the recognized head of state. See, e.g., El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69, 82 n.10 (D.D.C. 1999), rev'd in part, 216 F.3d 29 (D.C. Cir. 2000); Jungquist v. Nahyan, 940 F. Supp. 312, 321 (D.D.C. 1996), rev'd on other grounds, 115 F.3d 1020 (D.C. Cir. 1997). In these cases, however, the courts did not have occasion to consider the applicability of the doctrine to a foreign minister, or to address customary international law that traditionally has recognized the immunity of foreign ministers. See The Schooner Exchange, 11 U.S. (7 Cranch) at 138; see also Kline v. Kaneko, 141 Misc. 2d 787, 789, 535 N.Y.S.2d 303, 305 (Sup. Ct. N.Y. Co. 1988) (immunity for spouse of head of state), aff'd w/o op., 154 A.D.2d 959, 546 N.Y.S.2d 504 (1st Dep't 1989); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (immunity for head of government rather than head of state), aff'd in part and rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990).

(recognizing that, under customary international law, "the immunity which all civilized nations allow to foreign ministers" is coextensive with the immunity of the sovereign); Kim v. Kim Yong Shik, Civ. No. 12565 (Cir. Ct., 1st Cir., Hawaii 1963), cited at 58 Am. J. Int'l L. 186 (1964) (recognizing immunity of foreign minister) (copy attached as Exhibit 2).

4. The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex Parte Peru, 318 U.S. 578, 588-89 (1943). In Ex Parte Peru, the Supreme Court, without further review of the Executive Branch's determination of immunity, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that the courts' retention of jurisdiction would jeopardize the conduct of foreign relations. Ex Parte Peru, 318 U.S. at 589. See also Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974). Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. Ex Parte Peru, 318 U.S. at 588. See also Hoffman, 324 U.S. at 35.[4]

[4] The conclusive effect of the Executive Branch's suggestion of immunity in this case is not affected by enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602, et seq. Prior to passage of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred the determination of the immunity of

5. The courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch. See, e.g., First American Corp., 948 F. Supp. at 1119 (suggestion by executive branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); Alicog, 860 F. Supp. at 382 (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of complaint against King Fahd for false imprisonment and abuse); Lafontant, 844 F. Supp. at 132-33 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion by Executive Branch of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), aff'd in part and rev'd in part on other grounds, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990); Gerritsen, slip op. at

---

foreign states from the Executive Branch to the courts. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610. The FSIA, however, did not alter Executive Branch authority to suggest head of state immunity for foreign leaders, or affect the binding nature of such suggestions of immunity. See, e.g., First American Corp., 948 F. Supp. at 1119; see also Gerritsen v. De la Madrid, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 21, 1986) (copy attached as Exhibit 3); Estate of Domingo v. Marcos, No. C82-1055V, slip op. at 3-4 (W.D. Wash. July 14, 1983) (copy attached as Exhibit 4).

7-9 (in suit against Mexican President De la Madrid and others for conspiracy to deprive plaintiff of constitutional rights, action against President De la Madrid dismissed pursuant to suggestion of immunity); Domingo, slip op. at 2-4 (action alleging political conspiracy by, among others, then President Ferdinand Marcos and then First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity); Psinakis v. Marcos, No. C-75-1725-RHS (N.D. Cal. 1975), result reported in Sovereign Immunity, 1975 Digest of U.S. Practice in Int'l Law § 7, at 344-45 (copy attached as Exhibit 5) (libel action against then President Marcos dismissed pursuant to suggestion of immunity); Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce suit against head of state dismissed pursuant to suggestion of immunity); Guardian F. v. Archdiocese of San Antonio, Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (copy attached as Exhibit 6) (suggestion of immunity required dismissal of suit against Pope John Paul II).

6. Judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. Spacil, 489 F.2d at 619. First, as the court in Spacil explained,

> [s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy.

Id. (citing United States v. Lee, 106 U.S. 196, 209 (1882)); see also Ex Parte Peru, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. See Spacil, 489 F.2d at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. Id. Finally, and "[p]erhaps more importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." Id.

7. In addition to head of state immunity, in this case, as representatives of the Government of Zimbabwe to the United Nations Millennium Summit, President Mugabe and Foreign Minister Mudenge are also entitled to diplomatic immunity under the Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, United States accession, April 29, 1970, 21 U.S.T. 1418 (the "UN General Convention"), and the Vienna Convention on Diplomatic Relations, done April 18, 1961, United States accession, December 13, 1972, 23 U.S.T. 3227 (the "Vienna Convention"). Article IV, Section 11, of the UN General Convention provides that representatives of Member States to United Nations conferences are entitled to the privileges and immunities enjoyed by diplomatic envoys, subject to exceptions not applicable here. Article 31(1) of the Vienna Convention provides that diplomatic agents enjoy comprehensive immunity

from civil jurisdiction, again subject to narrow exceptions not applicable here. Immunity extends to such representatives throughout the course of their U.N. visit, and would apply from the time of entry into the United States until departure or expiry of a reasonable period following conclusion of their U.N. business. See Vienna Convention, article 39(1) and (2). The Diplomatic Relations Act, 22 U.S.C. § 254a, et seq., provides that an action against an individual who is entitled to immunity shall be dismissed where immunity is established "upon motion or suggestion by or on behalf of the individual." 22 U.S.C. § 254d.

8. Finally, the Motion for Default Judgment in this case seeks judgment against defendant Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), the ruling political party in Zimbabwe. Plaintiffs assert service of the suit on ZANU-PF through service on President Mugabe and Foreign Minister Mudenge as officers and representatives of ZANU-PF. However, under both the head of state and diplomatic immunity doctrines, President Mugabe and Foreign Minister Mudenge had "personal inviolability" and could not be served with legal process in any capacity, including on behalf of ZANU-PF. As a leading commentator on diplomatic law states, "serving process on the diplomat . . . cannot be done by the authorities of the receiving State because of his inviolability." Eileen Denza, Diplomatic Law, 2d Ed., at pp. 265-66 (copy attached as Exhibit 7). Thus, neither

President Mugabe nor Foreign Minister Mudenge could be served with legal process as representatives of ZANU-PF.

## Conclusion

For the foregoing reasons, the United States respectfully suggests the immunity of President Mugabe and Foreign Minister Mudenge in this action.

Dated: New York, New York
February 23, 2001

Respectfully submitted,

MARY JO WHITE
United States Attorney
Attorney for the
United States of America

By: David S. Jones
DAVID S. JONES (DJ-5276)
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
Telephone: (212) 637-2739

Of Counsel:

Stephen D. McCreary
Attorney-Adviser
Office of Diplomatic Law
and Litigation
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Attorneys for the United States
Department of State

# Exhibit C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **MANI KUMARI SABBITHI, et al.,** | |
| **Plaintiffs,** | |
| **v.** | **Civil Action No. 07-115 (EGS)** |
| **MAJOR WALEED KH N.S. AL SALEH, et al.,** | |
| **Defendants.** | |

**STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

**TABLE OF CONTENTS**

## INTRODUCTION

The United States of America, by and through undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] and in response to the Court's invitation to the United States Department of State to communicate its views on this case.

This action was brought against a Kuwaiti diplomat, Major Waleed KH N.S. Al Saleh ("Major Al Saleh"), and his wife, Maysaa KH A.O.A. Al Omar ("Ms. Al Omar"), by their former domestic servants. Plaintiffs allege that they were brought into the United States and forced to work under conditions that violate the Thirteenth Amendment, the Trafficking Victims Protection Act, the Fair Labor Standards Act, and common law tort and contract law. Defendants assert that their privileges and immunities under the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR"), done Apr. 18, 1961, 23 U.S.T. 3227, render them immune to the civil jurisdiction of United States courts. Plaintiffs respond that Defendants should be denied immunity because human trafficking is a "commercial activity" that falls outside the protections of the Vienna Convention. Plaintiffs also argue that diplomatic immunity cannot deprive the Court of jurisdiction over alleged violations of the Thirteenth Amendment, jus cogens norms prohibiting slavery, or the Trafficking Victims Protection Act ("TVPA").

The United States submits the following views because it has important interests in the proper interpretation and application of the Vienna Convention in United States courts. Indeed, any failure to respect the privileges and immunities accorded to diplomats under the Vienna Convention would contravene the United States's established obligations to its treaty partners and jeopardize the

[1] 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

protections reciprocally extended by other nations to United States diplomats stationed abroad.

As explained below, a diplomat's employment of a domestic worker is not a "commercial activity" under Article 31(1)(c) of the Vienna Convention but, rather, an activity incidental to the diplomatic assignment, to which immunity attaches notwithstanding the characterization of Defendants' alleged conduct as constituting human trafficking. Moreover, under United States law, diplomatic immunity precludes jurisdiction over constitutional claims, including those that may arise under the Thirteenth Amendment, as well as over alleged violations of jus cogens norms and the TVPA.

**BACKGROUND**

According to the Complaint, Plaintiffs are three nationals of India who worked as domestic servants to Major Al Saleh and Ms. Al Omar in Kuwait before accompanying them to the United States, where Plaintiffs lived and worked in the couple's McLean, Virginia, home between July 2005 and January 2006. See Compl. ¶¶ 6-8, 17, 29, 38. Plaintiffs allege that Defendants obtained visas on their behalf by submitting deceptive employment contracts to U.S. officials in Kuwait, see id. ¶¶ 24-25, 30-33, 43-45; confiscated their passports after their arrival in the United States, see id. ¶¶ 49; and abused them psychologically and physically, see id. ¶¶ 57-88. Plaintiffs assert that they were paid unlawfully low wages, which were forwarded to their relatives abroad rather than paid to them directly. See id. ¶¶ 89-93. Plaintiffs also allege that they were rarely permitted to leave Defendants' home without supervision, see id. ¶ 83, and eventually escaped by enlisting the help of a sympathetic neighbor, who contacted the authorities, see id. ¶¶ 96-97, 102.

Plaintiffs filed this action on January 18, 2007, and served Defendants on January 24, 2007.[2]

[2] The State of Kuwait is also named as a Defendant but has not been served. As used in this Statement of Interest, "Defendants" refers only to Major Al Saleh and Ms. Al Omar.

The Department of State has certified that Major Al Saleh was notified as a diplomatic agent at the Embassy of Kuwait on August 20, 2004, and continued to serve in that capacity throughout the period in which the alleged conduct took place. See Letter from Gladys Boluda, Assistant Chief of Protocol, U.S. Department of State (Mar. 15, 2007) (Ex. 2 to Defs.' Motion to Dismiss and to Quash Service of Process). At the same time, Ms. Al Omar was notified to the Department of State as a Kuwaiti national and Major Al Saleh's spouse residing in his household. Id. The Department of State's certification of Defendants' diplomatic status is conclusive, see Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949), and is not in dispute.

The record in this case indicates that Defendants have since returned to Kuwait.[3] According to a letter filed by Plaintiffs as an exhibit to their Sur-Reply, following an investigation into Plaintiffs' allegations, the Criminal Section of the Department of Justice's Civil Rights Division asked the Department of State to request that Kuwait waive Ms. Al Omar's immunity so that she could be

---

[3] That Defendants are no longer in the United States has no bearing on the central issue now before the Court — namely, whether Defendants were immune from service of process when it was attempted in January 2007. If they were, the attempted service was a nullity, and the Court lacks personal jurisdiction over them. See Tachiona v. Mugabe, 169 F. Supp. 2d 259, 302 (S.D.N.Y. 2001) (concluding that "both [defendants] enjoyed diplomatic immunity at the time they were served and . . . the Court therefore lacks a basis for exercise of jurisdiction over them"), aff'd in relevant part and rev'd in part, 386 F.3d 205, 220-21 (2d Cir. 2004) (concluding that "diplomatic immunity rendered the service of process a nullity"); Aidi v. Yaron, 672 F. Supp. 516, 517 (D.D.C. 1987) (diplomatic immunity "provides protection from the exercise of jurisdiction by a federal court" and renders "service of process . . . void"); Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 980 (D.C. Cir. 1965) (concluding that "diplomatic immunity would have been violated by any compulsory service of process"); Carrera v. Carrera, 174 F.2d 496, 498 (D.C. Cir. 1949) ("It has long been a settled rule of law that foreign diplomatic representatives are exempt from all local processes in the country to which they are accredited.") (citation omitted); see generally Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Given that the record does not indicate that service has been effected at a time when Defendants were not immune from service of process, the United States does not at this time address the separate question whether Defendants enjoy "residual immunity" under Article 39(2) of the Vienna Convention. See Defs.' Resp. to Pls.' Sur-Reply at 2-6.

prosecuted for alleged violations of 18 U.S.C. § 1589 (forced labor). See Letter from Robert Moossy, Director, Human Trafficking Prosecution Unit, Criminal Section, Civil Rights Division, U.S. Department of Justice to Claudia Flores, Staff Attorney, Women's Rights Project, American Civil Liberties Union (Oct. 31, 2007) (Ex. A to Pls.' Sur-Reply).[4] Although Kuwait declined to waive Ms. Al Omar's immunity, Defendants departed the United States. See id.

**DISCUSSION**

Under Article 31 of the Vienna Convention on Diplomatic Relations, a diplomatic agent is entitled to immunity from the civil jurisdiction of the receiving State, except, as relevant here, in the case of "[a]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." VCDR art. 31(1)(c). The family members of a diplomatic agent forming part of his household enjoy a similar immunity pursuant to Article 37 of the Vienna Convention.[5] In an attempt to defeat Defendants' assertion of immunity, Plaintiffs raise four arguments. They principally argue that (1) Defendants' alleged trafficking activities fall within the Vienna Convention's "commercial activity" exception. Failing that, they contend that diplomatic immunity cannot shield alleged violations of (2) the Thirteenth Amendment; (3) jus cogens norms prohibiting slavery; or (4) the Trafficking Victims Protection Act.

---

[4] In general, when the Department of State is informed by a prosecutor that, absent immunity, criminal charges would be brought against a diplomat, it is the policy of the Department of State to request that the sending State waive the diplomat's immunity so that the allegations can be fully adjudicated. See U.S. Dep't of State, Foreign Affairs Manual, 2 FAM 233.3 (Dec. 14, 2006), available at www.state.gov/m/a/dir/regs. For sufficiently serious offenses, if waiver is declined the Department of State will generally require the diplomat's departure from the United States. See id.

[5] Article 37(1) provides: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36."

## I. The Employment of a Domestic Worker Does Not Constitute "Commercial Activity" Under Article 31(1)(c) of the Vienna Convention

In the view of the United States, the employment of a domestic worker by a diplomat is not a "commercial activity" under Article 31(1)(c) of the Vienna Convention. The "commercial activity" exception focuses on the pursuit of trade or business activity that is unrelated to the diplomatic assignment; it does not encompass contractual relationships for goods and services that are incidental to the daily life of the diplomat and his family in the receiving State. As explained below, this position is consistent with the origins and purposes of diplomatic immunity, and is confirmed by the Vienna Convention's negotiating history. See De Geofroy v. Riggs, 133 U.S. 258, 271 (1890) (treaties are "contracts between independent nations" and, as such, should be construed "so as to carry out the apparent intention of the parties"); Tabion v. Mufti, 877 F. Supp. 285, 287 (E.D. Va. 1995) ("[B]ecause the signatories' intent is paramount, courts 'may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'") (quoting Air France v. Saks, 470 U.S. 392, 397 (1985)). Moreover, this view has been endorsed by the only United States courts that, to our knowledge, have addressed the issue. See Tabion v. Mufti, 877 F. Supp. 285 (E.D. Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996); Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007).

### A. The United States's view is consistent with the origins and purposes of diplomatic immunity

The Vienna Convention's recognition of the immunity accorded to a diplomat and his family codifies a principle that has long been an integral component of customary international law, and that played an important role in the nation's conduct during and after the time the Constitution was created. See, e.g., The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 143 (1812) ("[I]t is impossible to conceive . . . that a Prince who sends an ambassador or any other minister can have

any intention of subjecting him to the authority of a foreign power . . . .") (quoting Emmerich de Vattel[6]); Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 70 (1969) (reprint of 1803 ed.) (rights of ambassadors were a matter of universal concern recognized in English common law and were adopted by the United States). As the preamble to the Vienna Convention explains, diplomatic immunities are accorded "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." By necessity, diplomats must carry out their duties in a foreign — sometimes hostile — environment. Jurisdictional immunities ensure the ability of diplomats to function effectively by insulating them from the disruptions that would accompany litigation in such an environment. This protection was regarded as so important that for almost two centuries the United States accorded diplomats complete immunity. See 22 U.S.C. §§ 252–54 (enacted 1790; repealed 1978); S. Rep. 95-958, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 1936 (1790 statute was "adapted from English statues [sic] dating back to the reign of Queen Anne"). When the United States became a party to the Vienna Convention, it recognized the small number of limited exceptions to diplomatic immunity provided for in the treaty, including Article 31(1)(c)'s "commercial activity" exception.

Consistent with the Vienna Convention's purposes, the term "commercial activity" as used in Article 31(1)(c) focuses on the pursuit of trade or business activity unrelated to diplomatic work. Such commercial activity is normally undertaken for profit or remuneration and, if engaged in by the diplomat himself (as opposed to a member of his family), is undertaken in contravention of Article 42, which provides that a "diplomatic agent shall not in the receiving State practice for personal profit

[6] Emmerich de Vattel was an international jurist who greatly influenced the Framers of the Constitution. See U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978).

any professional or commercial activity." Indeed, Article 31(1)(c) works in conjunction with Article 42 to make clear that, if a diplomat does engage in such an activity, he does not have immunity from related civil actions. Conversely, the term "commercial activity" in Article 31(1)(c) does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and the diplomat's family in the receiving State.

This longstanding interpretation is entitled to great weight. See Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.") (citation omitted). Deference is particularly appropriate in the case of the Vienna Convention, which forms the framework of the Department of State's conduct of diplomatic relations with virtually every country in the world, and which the Department accordingly interprets and applies on a regular basis, taking into account not only the interests of the foreign states with diplomatic representation in the United States, but the interests of the United States in sending diplomats abroad.

**B. The negotiating history of the Vienna Convention confirms the United States's view**

The United States's interpretation of Article 31(1)(c) is not only consistent with the purposes of diplomatic immunity, but is confirmed by the Vienna Convention's negotiating history. See Tabion, 877 F. Supp. at 292. The final version of the Vienna Convention evolved from an initial draft developed in a series of meetings of the United Nations International Law Commission ("ILC"), a body of international law experts. The ILC draft was then considered by States at a formal diplomatic conference convened by the United Nations in 1961. In each forum, it was clear that, under the Vienna Convention, diplomats would continue to enjoy their traditional immunities for contracts incidental to everyday life.

The ILC began its work in earnest by considering a draft for the Codification of the Law Relating to Diplomatic Intercourse and Immunities proposed by its Special Rapporteur in 1955. The draft contained no exception to immunity for commercial activity. See Report Presented by Mr. A.E.F. Sandstrom, Special Rapporteur, U.N. Doc. A/CN.4/91, reprinted in [1955] 2 Y.B. Int'l L. Comm'n 11-12, 16, U.N. Doc. A/CN.4/SER.A/1955/Add.1. An amendment providing an exception to immunity for acts "relating to a professional activity outside [the diplomatic agent's] official duties" was first introduced into the Draft Articles at the 402nd meeting of the ILC, during its Ninth Session, on May 22, 1957. Summary Records of the 402nd Meeting, [1957] 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/SER.A/1957. The author of the proposed amendment, Mr. Verdross, based his proposal on Article 13 of the 1929 resolution of the Institute of International Law, which referred only to "professional" activity. The proposed amendment was also described as being akin to Article 24 of the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities (the "Harvard Draft"), which referred to "business" as well as "professional" activity as follows:

> A receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession.

Id. at 97 (quoting Art. 24, ¶ 2 of the Harvard Draft). That Mr. Verdross's proposed amendment was not intended to address ordinary contractual relationships for goods and services incidental to daily life is evidenced by his reference to the Harvard Draft and his observation that the cases to which the amendment related were "comparatively rare." Id. Indeed, some ILC members suggested that the proposal was unnecessary because it was aimed at activity in which diplomats rarely engaged. Id. at 97-98.

The provisional draft resulting from the ILC's Ninth Session in 1957 would have eliminated civil and administrative immunity for actions "relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions." Reports of the Commission to the General Assembly, U.N. Doc. A/3623, reprinted in [1957] 2 Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/SER.A/1957/Add.1. This provisional draft was submitted to governments for comment. See Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur, U.N. Doc.A/CN.4/116 (1958). In response to the Australian member's comment that the term "commercial activity" required some definition, the Special Rapporteur explained that "the use of the words 'commercial activity' as part of the phrase 'a professional or commercial activity' indicates that it is not a single act of commerce which is meant, by [sic] a continuous activity." Id. at 56.[7] When the United States's member commented that the commercial activity exception went beyond existing international law, the Special Rapporteur responded by describing the exception in terms of activity that was

---

[7] Eileen Denza, a leading authority on diplomatic law, described the Vienna Convention's use of "commercial activity" in these terms:

> It is clear that the ideas of remuneration and of a continuous activity are central to the purpose of Article 31(1)(c). Although the provision is drafted in unnecessarily wide terms it is not intended to cover commercial contracts incidental to the ordinary conduct of life in the receiving State. If one accepts that Article 31(1)(c) is to be interpreted in this sense it becomes clear that whereas the speculative activities of a diplomat on the Stock Exchange would come within the exception to immunity, contracts of personal loan would not, nor would contracts entered into for the purpose of educating the children of a diplomatic agent or otherwise supplying him and his family with any kind of goods or services.

Denza, Diplomatic Law, 166-67 (1st ed. 1976) (emphasis in original). Indeed, Denza quotes the decision of the Fourth Circuit in Tabion as correctly describing the scope of Article 31(1)(c). See Denza, Diplomatic Law, 305 (3d ed. 2008).

inconsistent with diplomatic status:

> In case (c), the considerations were as follows. A condition of the exercise of a liberal profession or commercial activity must be that the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities conducted in the country. It would be quite improper if a diplomatic agent, ignoring the restraints which his status ought to have imposed upon him, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.

Id. at 55-56 (emphasis added).

At its Tenth Session in 1958, the ILC adopted a final draft that contained a commercial activity exception to civil and administrative immunity. As the records from this session show, both the Rapporteur and the ILC Chairman viewed the commercial activity exception as focusing on the pursuit of private trade or business activity. They responded to a member's comment that he had understood the commercial activity exception to cover even isolated commercial transactions as follows:

> Sir Gerald FITZMAURICE, Rapporteur, doubted the advisability of Mr. Zourek's suggestion. Paragraph 1(c) of the article applied to cases where a diplomatic agent conducted a regular course of business 'on the side.' Such isolated transactions as, for instance, buying or selling a picture, were precisely typical of the transactions not subject to the civil jurisdiction of the receiving State. Annoying as it might be for the other parties to such transactions in the event of a dispute, it was essential not to except such transactions from the general rule for, once any breach was made in the principle, the door would be open to a gradual whittling away of the diplomatic agent's immunities from jurisdiction.
>
> The CHAIRMAN pointed out that the article referred to 'commercial activity.' A single transaction would hardly constitute 'commercial activity.' Of course, even a single plunge in the waters of trade might suffice, but it must be in the waters of trade.

Summary Records of the 476th Meeting, [1958] 1 Y.B. Int'l L. Comm'n 244 U.N. Doc. A/CN.4/SER.A/1958. The ILC's official Commentary on this provision, as adopted in 1958, also

shows that the term "commercial activity" did not encompass the usual procurement of goods and services needed in the diplomat's daily life, but rather focused on activities that were normally inconsistent with a diplomat's position. In that Commentary, the commercial activity exception was explained as follows:

> The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared persona non grata. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.

Report of the Commission to the General Assembly, U.N. Doc. A/3859, reprinted in [1958] 2 Y.B. Int'l L. Comm'n 98, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

The ILC's final draft was considered at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. The Department of State's instructions to the United States delegation at that Conference expressed the following understanding of the commercial activity exception:

> Although states have generally accorded complete immunity to diplomatic agents from criminal jurisdiction, there has been a reluctance in some countries to accord complete immunity from civil jurisdiction particularly where diplomats engage in commercial or professional activities which are unrelated to their official functions. While American diplomatic officers are forbidden to engage in such activities in the country of their assignment, other states have not all been so inclined to restrict the activities of their diplomatic agents. Subparagraph c) of paragraph 1 would enable persons in the receiving State who have professional and business dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.

> . . . While it may be argued that to permit a diplomat to be subjected to a lawsuit in such a case could interfere with the performance of his functions, that would seem to be a risk the sending State should[] be required to take when it permits its diplomatic agents to engage in commercial or professional activities of a non-diplomatic nature.

7 Digest of Int'l Law 406-07 (Whiteman 1970) (emphasis added).

The United States's view — that the commercial activity exception in Article 31(1)(c) focused on the kind of activity for profit in which diplomats should not be engaging — was borne out in the treatment of the issue at the Conference. Commercial activity was considered in the context of a new article proposed by the delegate from Colombia, which became Article 42 of the Vienna Convention, and provides that "[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." The delegates' discussion of Colombia's proposed amendment demonstrates that the delegates envisioned Article 42 as addressing only the pursuit of active trade or business activity. See U.N. Conference on Diplomatic Intercourse and Immunities: Official Records, Vol. I at 212 (1962), U.N. Doc. A. CONF.20/14 (statement of representative of Ceylon that "the supporters of the proposed new article had in mind a regular professional activity from which a permanent income was derived, and not an occasional activity, particularly of a cultural character"); id. at 213 (statement of representative of Italy favoring the proposal "provided that it was made clear . . . that the intention was to prevent diplomats from engaging in gainful activities such as commerce, industry or a regular profession"); id. at 213 (statement of representative of Malaya that the proposal "should be limited to commercial activity for personal profit").

Moreover, the Conference delegates saw the commercial activity exception in Article 31(1)(c) and the ban on commercial activity in Article 42 as closely intertwined. Indeed, the delegates from Colombia and Italy proposed deletion of Article 31(1)(c)'s commercial activity exception, viewing

is as unnecessary in light of the prohibition in Article 42. However, the Conference voted to retain the exception following a discussion in plenary session in which several delegates pointed out that there could be no assurance that diplomatic agents would not engage in prohibited activities, and that, in any event, Article 42's ban did not apply to diplomats' family members, who would otherwise enjoy immunity for such activities. See U.N. Conference on Diplomatic Intercourse and Immunities: Official Records, supra, at 19-21.[8] All other proposals to provide additional exceptions to immunity for claims for damages caused by a diplomatic agent were rejected. See U.N. Conference on Diplomatic Intercourse and Immunities: Report of the Delegation of the United States of America, Dep't of State Pub. 7289, at 17 (1962).[9]

---

[8] Numerous commentators have discussed the commercial activity exception of Article 31(1)(c) in terms that indicate that the scope of the phrase "professional or commercial activity" parallels the prohibition on a diplomat's engaging in private professional and commercial activity that is prohibited in Article 42. See, e.g., B.S. Murty, The International Law of Diplomacy: The Diplomatic Instrument and World Public Order 356 (1989) ("'Professional or commercial' should be interpreted alike in Art. 31(1) and Art. 42."); Grant V. McClanahan, Diplomatic Immunity 130-31 (1989) (although Art. 42 bars diplomats from engaging in commercial or professional activity, Art. 31(1)(c) "covers the few cases where a diplomat's own government and the receiving government waive objections"); Ludwik Dembinski, The Modern Law of Diplomacy 207 (1988) (professional and commercial activity by diplomats is prohibited and the exception is only to make clear that there igovernment immunity); Jonathan Brown, Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations, 37 Int'l & Comp. L.Q. 53, 76 (1988) (relating "commercial activity" to the activities barred by Art. 42); Satow's Guide to Diplomatic Practice 126-27 (5th ed. 1979) (noting that the exception of Art. 31(1)(c) is "most important" not for diplomats but for their family members who may be employed); Philippe Cahier & Luke T. Lee, Vienna Conventions on Diplomatic and Consular Relations 29 (1989) (Art. 31(1)(c) is "probably redundant" because Art. 42 "forbids the diplomatic agent from engaging in such activities"); Michael Hardy, Modern Diplomatic Law 62 (1968) (discussing Art. 31(1)(c) with reference to Art. 42); cf. also Restatement (Third) of Foreign Relations Law of the United States § 464, Reporters' Note 9, at 468 (1986).

[9] Amici's suggestion that the Vienna Convention's drafting history reveals uncertainty over whether the "commercial activity" exception was intended to embrace a diplomat's employment of a domestic servant is mistaken. See Brief of Break the Chain et al. as Amici Curiae (in support of Plaintiffs) at 20-21 & nn. 96-97. Amici correctly note that, in debating whether the introductory words "In principle" should be retained in Article 40 bis, which later became Article 42, the U.S. representative commented that "there was no agreed definition of the meaning of 'commercial

In sum, as the Vienna Convention's drafting and negotiating history makes clear, diplomats are engaged in "professional or commercial" activity within the meaning of Article 31(1)(c) when they engage in a business, trade, or profession for profit.[10] When diplomats enter into contractual relationships for personal goods or services incidental to residing in the host country, including the employment of domestic workers, they are not engaged in "commercial activity" as that term is used in the Vienna Convention. Accordingly, diplomats are immune from suits arising out of such contractual relationships.

### C. Tabion and Gonzales Paredes — the only domestic cases to have addressed the issue — were correctly decided

The United States's view of Article 31(1)(c) has been endorsed by the only domestic courts that, to our knowledge, have addressed the scope of the "commercial activity" exception. In Tabion v. Mufti, 877 F. Supp. 285 (E.D. Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996), a foreign diplomat and his wife were sued by their former domestic servant for, among other things, alleged violations of the Fair Labor Standards Act, breach of contract, and false imprisonment. Id. at 286. The

---

activity.'" U.N. Conference on Diplomatic Intercourse and Immunities: Official Records, supra, at 21. By way of example, however, the representative elaborated that he thought it unclear whether a diplomat "who was a stockholder and member of the board of directors of the parent company in the sending State" would be considered to have engaged in "commercial activity" in the receiving State if the company also operated there. Id. There is no indication that the representative thought it unclear that a contract for domestic services — or any other contract for goods or services incident to a diplomat's daily life — falls outside the exception. See id. This is consistent with the United States's official understanding, as expressed in its instructions to its delegation to that Conference, that Article 31(1)(c) was intended to reach only a diplomat's commercial or professional activities that are inconsistent with his diplomatic character. See 7 Digest of Int'l Law 406, supra. In short, even if there was some uncertainty over the outer contours of "commercial activity," the negotiating history makes clear that a diplomat's employment of a domestic servant does not qualify.

[10] It is immaterial that Article 31(1)(c) does not contain the phrase "for profit" because it is clear from the negotiating history that the drafters understood it in that light. Treaties are to be interpreted in good faith to fulfill the intent of the parties. See, e.g., DeGeofroy, 133 U.S. at 271.

plaintiff, who worked for the defendants in Jordan before accompanying them to the United States, alleged that she was promised a lawful minimum wage and reasonable working hours, but instead had her passport confiscated, was forced to work long hours with little pay, and was essentially imprisoned in the defendants' home. See id. Asserting diplomatic immunity, the defendants moved to quash; in response, the plaintiff argued that the defendants' conduct fell within Article 31(1)(c)'s "commercial activity" exception. Id. at 287.

Relying on both the Vienna Convention's negotiating history and the position proffered by the United States,[11] the district court correctly held that the defendants were immune from suit because their employment relationship with the plaintiff was not "commercial activity." See id. at 292. The district court noted that the treaty's negotiating history "points persuasively to the conclusion that Article 31(1)(c) was not intended to carve out a broad exception to diplomatic immunity for a diplomat's daily contractual transactions for personal goods and services." Id. at 291. The district court also noted that the United States's view — that the term "commercial activity" focuses on the pursuit of trade or business activity — was "significant" and "add[ed] substantial force" to the court's holding. See id. at 292.

Finding the district court's opinion "well-reasoned," the Fourth Circuit affirmed, concluding that "the phrase 'commercial activity,' as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean 'commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.'" 73 F.3d at 538 (quoting VCDR art. 31(1)(c)). The court continued: "Day-to-day living services such as dry cleaning or domestic help were not meant to be

[11] The district courts in Tabion and Gonzalez Paredes invited the United States to submit its views on the proper interpretation of Article 31(1)(c). See Tabion, 877 F. Supp. at 292; Letter to the Hon. John B. Bellinger, III, Gonzalez Paredes v. Vila, No. 06-89 (D.D.C.) (Nov. 1, 2006) [Dkt. #18]. The United States's position in this case is consistent with its position in both prior cases.

treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them." Id. at 538-39.

Similarly, in Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007), a foreign diplomat and his wife were sued by their former domestic servant for alleged violations of the Fair Labor Standards Act, various District of Columbia wage laws, and breach of contract. Id. at 189. The plaintiff, who was hired in Argentina to provide domestic and childcare services to the defendants in the United States, alleged that the defendants required her to work long hours for low pay and with limited time off. Id. at 190; see also Compl. ¶ 25, Gonzalez Paredes v. Vila, No. 06-89 (D.D.C.) (Jan. 18, 2006) [Dkt. #1]. In response to the defendants' assertion of diplomatic immunity, the plaintiff in Gonzalez Paredes, like the plaintiff in Tabion, argued that the defendants' employment of her was a "commercial activity" excepted from the protections of the Vienna Convention. 479 F. Supp. 2d at 193. Notwithstanding the plaintiff's argument that diplomats indirectly profit from such arrangements for domestic services because they are, in effect, underpaying for labor, the Gonzalez Paredes court found "no reason to disagree" with the Fourth Circuit's conclusion in Tabion "that a contract for domestic services such as the one at issue in this case is not itself a commercial activity within the meaning of Article 31(1)(c) of the Vienna Convention." Id. at 193 & n.7. In reaching this conclusion, the court found that the United States's view was "entitled to great deference." Id.[12]

---

[12] Amici identify two foreign cases as applying a contrary construction of Article 31(1)(c). See Brief of Break the Chain et al. as Amici Curiae (in support of Plaintiffs) at 21-22, nn. 99-103, & Exs. B-C. Neither case is persuasive.

According to the certified English translation that amici provided to the Court, in the first case, Fonseca v. Larren, Boletim do Ministério da Justiça 403 (1991), Portugal's Supreme Court of Justice concluded that, taken together, the exceptions to immunity contained in Article 31 "were intended to exclude all activities outside of the diplomat's diplomatic functions," including "the contracting of a domestic maid to perform services in the diplomat's private residence" (emphasis added). However, the court did not address the Vienna Convention's negotiating history, which flatly

**D. The characterization of Defendants' alleged conduct as constituting human trafficking does not change the analysis in this case**

In this case, the characterization of Defendants' alleged conduct as constituting human trafficking does not change the analysis. For present purposes, the proper inquiry is not whether Defendants have engaged in human trafficking, or the extent to which human trafficking affects the global economy, but whether Defendants have engaged in "commercial activity" as that term is intended in the Vienna Convention. As explained above, the Vienna Convention's drafting history makes clear that the "commercial activity" exception refers to the ongoing conduct of a commercial business for profit, and does not include a diplomat's employment of a domestic servant, even though such employment may have incidental economic effects. See Tabion, 73 F.3d at 538.

Legal characterizations aside, the core factual allegations here — namely, that Plaintiffs were mistreated during their tenure as domestic servants to a diplomat and his wife — are remarkably similar to those held not to constitute "commercial activity" in Tabion and Gonzalez Paredes. In both

---

contradicts this expansive reading of Article 31's exceptions. Indeed, the Portuguese court's opinion does not specifically construe the "commercial activity" exception at all. Moreover, in reaching its conclusion, the court incorrectly described the scope of diplomatic immunity as not extending to the acts of a diplomat that "are not practiced in the name of the state that represents them or for the purposes of the mission." On the contrary, subject to the exceptions set forth in Article 31, "immunity from jurisdiction applies to all acts of diplomats, private as well as official." Cahier & Lee, Vienna Conventions on Diplomatic and Consular Relations 29 (1989). Thus, the Fonseca court's reasoning runs counter to both the Vienna Convention's negotiating history and widely accepted principles of diplomatic law, and should not be followed.

The second case, from a Belgian labor court, falls even further from the mark. Although amici have provided the Court with only a translated summary of the case, rather than the text of the case itself, the summary indicates that the Belgian court based its decision not on Article 31, but on Article 39, and the court appears to have made no attempt to construe the meaning of "commercial activity" as used in Article 31(1)(c). Moreover, in that case, the American defendants enjoyed diplomatic immunity when service was attempted, and, accordingly, the United States asserted that jurisdiction over them was never properly established. The United States appealed the trial court's decision to the contrary, and continues to view the case as wrongly decided.

of those cases, as in this one, the plaintiffs alleged that the defendant diplomats hired them outside of the United States; that they accompanied the defendants to the United States to perform domestic services; and that they were ultimately underpaid and mistreated. See Tabion, 877 F. Supp. at 286; Gonzalez Paredes, 479 F. Supp. 2d at 189. In Gonzales Paredes, as in this case, in securing A-3 visas for the plaintiffs, the defendants allegedly misled U.S. officials about the proposed terms of employment. See Gonzalez Paredes, 479 F. Supp. 2d at 190. And in Tabion, as here, the defendants allegedly confiscated the plaintiffs' passports and prevented the plaintiffs from leaving their home. See Tabion, 877 F. Supp. at 286.

The meaning of "commercial activity" in Article 31(1)(c) of the Vienna Convention, as understood by the international community and consistently interpreted by the Executive Branch, should be unaffected by the application of a different label to these substantially similar facts. A contrary construction would revise the United States's understanding of its treaty obligations, effectively curtailing the protections historically granted to foreign diplomats residing in the United States and threatening to undermine the protections reciprocally afforded to U.S. diplomats living overseas.

**II. Diplomatic Immunity Extends to Constitutional Claims**

Plaintiffs next argue that diplomatic immunity cannot deprive the Court of jurisdiction to hear constitutional claims. Because application of the Vienna Convention's diplomatic immunity provisions would leave them without a judicial remedy for their alleged Thirteenth Amendment violations, they argue, those treaty provisions must yield.

In the view of the United States, respecting Defendants' diplomatic immunities does not raise a constitutional concern. To begin, although Plaintiffs correctly note that treaty provisions are subject to constitutional limitations, see, e.g., Reid v. Covert, 354 U.S. 1, 17-18 (1957), there is no

conflict between the Vienna Convention and the Thirteenth Amendment. Nothing in the Vienna Convention authorizes involuntary servitude or any other practice forbidden by the Constitution; in fact, Article 41 of the Vienna Convention provides that, despite their immunities, diplomats are obligated to respect the laws of the receiving State. See Tabion, 877 F. Supp. at 293 (citing VCDR art. 41).

Moreover, courts commonly apply immunity doctrines to preclude jurisdiction over even constitutional claims. See, e.g., FDIC v. Meyer, 510 U.S. 471, 474-75 (1994) (sovereign immunity bars constitutional claims against the United States absent waiver); Pierson v. Ray, 386 U.S. 547, 554-55 (1967) (absolute judicial immunity from constitutional claims); Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976) (absolute prosecutorial immunity from constitutional claims); Harlow v. Fitzgerald, 457 U.S. 800, 815-18 & n.24 (1982) (qualified immunity from constitutional claims for government officials). Suits against foreign sovereigns and their representatives are no exception to this principle. See Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 710 (2d Cir. 1930) (constitutional grant of jurisdiction to the federal courts is necessarily limited by the right of a foreign sovereign to plead immunity); Lafontant v. Aristide, 844 F. Supp. 128, 130, 140 (E.D.N.Y. 1994) (dismissing claims arising under the Constitution, federal statutes, and customary international law on the ground of head-of-state immunity). Cf. Tuck v. Pan Am. Health Org., 668 F.2d 547, 549-50 (D.C. Cir. 1981) (dismissing constitutional and common law claims against an international health organization as barred by the International Organizations Immunities Act). In fact, at least one court has rejected the precise argument Plaintiffs advance here, finding, in the context of a Thirteenth Amendment claim brought against a diplomat by his former domestic servant, that there is "no authority to suggest that a constitutional claim trumps the applicability of diplomatic immunity." Ahmed v. Hoque, No. 01-7224, 2002 WL 1964806, at *7 (S.D.N.Y. 2002).

## III. There Is No Jus Cogens Exception to Diplomatic Immunity

In a similar vein, Plaintiffs next argue that diplomatic immunity cannot bar their claims because Defendants' alleged conduct violates jus cogens norms prohibiting slavery and similar practices.[13] Plaintiffs submit that the prohibition of slavery is a jus cogens norm; that the Vienna Convention conflicts with that norm because it immunizes slaveholders from suit; and, therefore, that the Vienna Convention's diplomatic immunity provisions are void under these circumstances.

In the view of the United States, there is no jus cogens exception to diplomatic immunity. Assuming treaty provisions must comply with jus cogens norms, just as they must adhere to constitutional limitations, there is no conflict between the Vienna Convention and jus cogens norms, as nothing in the Vienna Convention authorizes any practice that violates any such norm. Cf. Hazel Fox, The Law of State Immunity 525 (2002) ("State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement."). Further, diplomatic immunity is itself a fundamental principle of international law, see supra Part I.A, and there is no evidence that the international community has come to recognize a jus cogens exception to diplomatic immunity. See Jones v. Ministry of Interior, [2006] UKHL 26, ¶ 27

---

[13] The concept of a jus cogens norm, also known as a peremptory norm of international law, was formalized in the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, done May 23, 1969, 1155 U.N.T.S. 331. Under the Vienna Convention on the Law of Treaties — to which the United States is not a party — a "treaty is void if . . . it conflicts with a peremptory norm of general international law." Id. But as the Ninth Circuit has noted, this category of norms "is of relatively recent origin in international law, and 'although the concept of jus cogens is now accepted, its content is not agreed.'" Alvarez-Machain v. United States, 331 F.3d 604, 614 (9th Cir. 2003) (citing Restatement (Third) of Foreign Relations Law of the United States § 102 n.6 (1987)), rev'd on other grounds sub nom. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

(U.K. House of Lords 2006) (finding "no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms").[14] Indeed, we not aware of any United States court that has recognized a jus cogens exception to a diplomat's immunity from its civil jurisdiction. A deviation from this international consensus would create an acute risk of reciprocation by other States, potentially subjecting U.S. diplomats to controversial litigation in foreign jurisdictions. See id. ¶ 63 ("[I]nternational law . . . is based on the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable,

---

[14] Plaintiffs' reliance on the decisions of international criminal tribunals, or the international agreements establishing the authority of such tribunals, is misplaced. Those decisions and agreements are not to the contrary, as international law recognizes that criminal proceedings are "categorically different" from civil suits with respect to the immunity of foreign sovereigns and their representatives. Jones, [2006] UKHL 26, ¶ 19; see id. ¶ 21; Aidi v. Yaron, 672 F. Supp. 516, 518-19 & n.4 (D.D.C. 1987) (declining to extend to the civil context decisions of international criminal tribunals abrogating the immunity of defendants charged with the commission of international crimes).

Moreover, in circumstances where an international criminal tribunal asserts jurisdiction over government officials pursuant to a multilateral treaty, such as the Rome Statute, which established the International Criminal Court ("ICC"), the treaty expressly sets forth, for example, that the "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Statute of the ICC, art. 27(2), done July 17, 1998, U.N. Doc. A/CONF.183/9. Similarly, the statute creating the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which was adopted by resolution of the United Nations Security Council, provides: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Statute of the ICTY, art. 7(2), U.N. Doc. S/25704, adopted May 25, 1993, U.N. Doc. S/RES/827. The statute establishing the International Criminal Tribunal for Rwanda ("ICTR"), which was also adopted by U.N. Security Counsel resolution, is to the same effect. Statute of the ICTR, art. 6(2), adopted Nov. 8, 1994, U.N. Doc. S/RES/955. Thus, each of these statutes speaks directly to the question of official immunity, and each provides for the abrogation of that immunity for limited purposes.

As explained in the text, in this case, by contrast, there is no binding international decision or agreement to abrogate the immunity of a diplomat from the civil jurisdiction of the receiving State where jus cogens violations are alleged.

forward-looking and reflective of values it may be, is simply not accepted by other states.").

Moreover, U.S. courts have declined to find a jus cogens exception to the application of other, related immunities. For example, in considering the immunity of foreign heads of state, courts have deferred to the Executive's conclusion that customary international law does not recognize a jus cogens exception. See Wei Ye v. Jiang Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (court is bound by the Executive's determination, established through a suggestion of immunity, "that a foreign leader should be immune from suit even when the leader is accused of acts that violate jus cogens norms"). Such deference is appropriate here, too, in view of the Supreme Court's admonition that "serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (U.S. 1964); see also id. at 432-33 ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."). Likewise, in the context of the Foreign Sovereign Immunities Act, courts have consistently declined to recognize an implied exception to the immunity of foreign States or their agencies for jus cogens violations. See, e.g., Belhas v. Moshe Ya'Alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008); Wei Ye, 383 F.3d at 627 & n.10; Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996). This Court should decline to chart a different course in the diplomatic immunity context.[15]

---

[15] We are aware of one foreign court that has recognized a jus cogens exception in the state immunity context, but that decision has not been followed by other jurisdictions and, in fact, has been forcefully criticized. In Ferrini v. Federal Republic of Germany, Cass Sez Un 5044/04 (2004), Italy's Supreme Court of Cassation entertained a civil claim against Germany based on war crimes

## IV. The Trafficking Victims Protection Act Does Not Override Diplomatic Immunity

Plaintiffs finally argue that diplomatic immunity cannot bar their claims under the Trafficking Victims Protection Act ("TVPA"), Pub. L. No. 106-386, 114 Stat. 1466 (2000). Specifically, they contend that the application of diplomatic immunity would irreconcilably conflict with the TVPA's civil remedy provision, 18 U.S.C. § 1595(a), and, therefore, that the Vienna Convention's diplomatic immunity provisions are void under the last-in-time rule, which generally holds that a later statute nullifies an earlier treaty to the extent the two conflict.

In the view of the United States, the TVPA does not override diplomatic immunity. First, the TVPA is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States's treaty obligations in the absence of a clear statement from Congress. See Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("Legislative silence is not sufficient to abrogate a treaty."). Cf. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 232, 238 (D.C. Cir. 2003) (Algiers Accords not abrogated by subsequent statute absent a "clear statement" from Congress). Second, where a remedy-creating statute is silent on the question of immunity, it should be read in harmony with existing immunity rules. See Malley v. Briggs, 475 U.S. 335, 339 (1986) ("Although [42 U.S.C. § 1983] on its face admits of no immunities, we have read 'it in harmony with general principles of tort immunities and defenses rather than in derogation of

---

that took place during World War II, finding that "the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes." The U.K. House of Lords recently rejected Ferrini, stating that the Italian court's approach "is simply not accepted by other states," Jones, [2006] UKHL 26, ¶ 63, and "cannot . . . be treated as an accurate statement of international law as generally understood," id. ¶ 22.

them.'") (quoting Pachtman, 424 U.S. at 418); see also The Schooner Exchange, 11 U.S. (7 Cranch) at 146 (courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood").

At bottom, there is no reason to believe that Congress, in enacting the TVPA, meant to alter existing immunity practices. Accordingly, Plaintiffs' last-in-time argument should be rejected.

## V. Failure of the United States to Respect Diplomatic Immunities Could Have Serious Consequences in the International Community

It bears repeating that the Vienna Convention provides in no uncertain terms that, despite their immunities, diplomats are obligated to respect the laws of the receiving State. See Tabion, 877 F. Supp. at 293 (citing VCDR art. 41). Although this obligation cannot be judicially enforced, the Executive Branch takes allegations of the abuse of diplomatic privileges very seriously, and has various formal and informal means of obtaining compliance through the diplomatic process. For example, as a formal matter, the Department of State can request that the sending State waive the diplomat's immunity, see VCDR art. 32(1), or it can formally declare a diplomat persona non grata and expel him from the country, see Tabion, 877 F. Supp. at 293 (citing VCDR art. 9(1)). Short of formal measures, which are not always appropriate, the Department of State can attempt to informally mediate disputes with the diplomat's mission. Indeed, in some instances, bringing a matter to the mission's attention will induce voluntary compliance. See, e.g., 767 Third Ave. Assocs. v. Perm. Mission of Zaire to United Nations, 988 F.2d 295, 303 (2d Cir. 1993) (noting that "diplomatic efforts and pressure" had proven "extraordinarily successful" in getting Zaire to pay back rent owed by its mission).

The privileges and immunities accorded to diplomats under the Vienna Convention are vital to the conduct of peaceful international relations and must be respected. If the United States is

prevented from carrying out its international obligations to protect the immunities of foreign diplomats, adverse consequences may well obtain. At a minimum, the United States may hear objections for failing to honor its obligations not only from the Kuwait Mission, but also from the missions of other States with immunities guaranteed by the Vienna Convention. Moreover, a ruling by this Court that accepts Plaintiffs' arguments to limit the immunities traditionally accorded to diplomatic agents would inevitably lead to erosion of these essential safeguards, and potentially put our diplomats at increased risk abroad. As the Second Circuit has observed, "Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern." 767 Third Avenue, 988 F.2d at 301.

**CONCLUSION**

For the foregoing reasons, the Court should conclude that a diplomat's employment of a domestic worker is not a "commercial activity" under Article 31(1)(c) of the Vienna Convention but, rather, an activity incidental to the diplomatic assignment, to which immunity attaches notwithstanding the characterization of Defendants' alleged conduct as constituting human trafficking. The Court should further conclude that diplomatic immunity bars its jurisdiction over constitutional claims, including those that may arise under the Thirteenth Amendment, as well as over alleged violations of jus cogens norms and the TVPA.

Dated: July 22, 2008

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

VINCENT M. GARVEY
Deputy Director, Federal Programs Branch

*/s/ Eric B. Beckenhauer*
ERIC B. BECKENHAUER
Cal. Bar No. 237526
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Telephone: (202) 514-3338
Facsimile: (202) 616-8470
E-mail: eric.beckenhauer@usdoj.gov

*Counsel for the United States of America*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of July 2008, I caused the foregoing document to be served on all counsel of record electronically by means of the Court's CM/ECF system.

*/s/ Eric Beckenhauer*
ERIC B. BECKENHAUER

# Exhibit D

VOLUME 29, NUMBER 2, SPRING 1988

# Recent Developments

## DIPLOMATIC IMMUNITY: APPLICATION OF THE RESTRICTIVE THEORY OF DIPLOMATIC IMMUNITY — *The Abisinito Affair*

A recent automobile accident involving a foreign diplomat has provided the United States Department of State with the first test of the "restrictive theory" of diplomatic immunity it first announced in 1984. Under the restrictive theory, diplomatic immunity from prosecution remains absolute with regard to official acts, but immunity for all other acts ceases as soon as a diplomat's official functions come to an end and he leaves the United States. Thus the restrictive theory permits the preparation of a criminal case to be brought against an offending diplomat should he later reenter the country. In the present case, although the State Department urged the District of Columbia authorities to conduct a complete investigation of the automobile accident, charges have not yet been brought, suggesting that the restrictive theory may be intended more as a deterrent to wrongdoing by diplomats, or as a means of exacting adequate compensation for United States citizen-victims, than as a hard-and-fast rule for bringing foreign diplomats to justice.

In the early morning hours of February 13, 1987 in Washington, D.C., two United States citizens were injured, one seriously, when Papua New Guinean Ambassador Kiatro Abisinito drove his car into their parked car and two others, veered across the street, and hit a fourth car before careening to a halt against a brick wall.[1] The Ambassador was charged with "failing to pay full time and attention to driving," an offense carrying a possible $100 fine.[2] He was taken to the hospital, treated for a mild head injury, and released.[3] A preliminary investigation revealed that alcohol had been a factor in the

1. Lynton, *Envoy's Car Slams Into 4 Vehicles*, Wash. Post, Feb. 14, 1987, at B1, col. 2.

2. *Id.* Stopping a diplomatic or consular official to issue a traffic citation does not constitute arrest or detention in violation of diplomatic immunity, although such an official cannot be required to sign the citation. OFFICE OF PROTOCOL AND OFFICE OF FOREIGN MISSIONS, U.S. DEP'T OF STATE, PUB. NO. 9533, GUIDANCE FOR LAW ENFORCEMENT OFFICERS: PERSONAL RIGHTS AND IMMUNITIES OF FOREIGN DIPLOMATIC AND CONSULAR PERSONNEL 16 (1988) [hereinafter GUIDANCE].

3. Caplan, *Crash of Envoy's Car Focuses Attention on International Law*, Legal Times, May 4, 1987, at 20, col. 1.

accident.[4] The government of Papua New Guinea recalled Abisinito on February 17 and withdrew his diplomatic accreditation one week later.[5]

Shortly after the accident, the Department of State's Office of Foreign Missions brought the matter to the attention of the United States Attorney for the District of Columbia for investigation and possible criminal prosecution. The charges could include second-degree murder if the man seriously injured in the accident were not to survive.[6]

United States law on diplomatic immunity is embodied in the Diplomatic Relations Act of 1978,[7] which brought the United States into conformity with the 1961 Vienna Convention on Diplomatic Relations.[8] Traditionally, the United States supported the absolute view of diplomatic immunity.[9] At the 1961 Vienna Conference, the United States criticized one proposal to limit immunity from civil jurisdiction as an attempt to "lay down a new rule of international law."[10] Notwithstanding the United States' objection, several excep-

---

4. A police report indicated that the Ambassador "had been drinking" and was "obviously drunk." Lynton, *supra* note 1.

5. Larschan, *The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?*, 26 COLUM. J. TRANSNAT'L L. 301, 307 (forthcoming 1988); *see also* Oberdorfer, *Papua New Guinea Recalls Diplomat*, Wash. Post, Feb. 21, 1987, at B1, col. 1.

6. Harris, *Diplomatic Issue Still Not Immune to Controversy*, Wash. Post, Feb. 16, 1987, at C1, col. 3.

The two injured U.S. citizens brought a civil suit against the insurer of the Embassy of Papua New Guinea. Hagan v. State Farm Ins. Co., No. 87-0452 (D.D.C. filed Feb. 24, 1987); Clement v. State Farm Ins. Co., No. 87-0451 (D.D.C. filed Feb. 24, 1987). Suit was brought against the insurance company immediately after the accident in order to comply with Madoo v. Globe Am. Casualty Co., 650 F. Supp. 855 (D. Md. 1986) (direct action against a diplomat's insurer must be filed while the diplomat is still accredited). Larschan, *supra* note 5, at 302. *See also infra* note 28. A motion was granted on June 2, 1987 to join former Ambassador Abisinito and the government of Papua New Guinea as defendants. Larschan, *supra* note 5, at 302. The less seriously injured plaintiff settled her case out of court. The other case is still pending, but no date has been set for trial. Telephone interview with Clerk, U.S. District Court, District of Columbia (Apr. 8, 1988).

7. Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified as amended at 22 U.S.C. § 254(a)–(e) (1982 & Supp. IV 1986)).

8. Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

9. In 1790, the U.S. passed legislation providing absolute immunity from civil and criminal prosecution for diplomatic agents, their families, and servants, as well as for lower-ranking mission personnel. Act of Apr. 30, 1790, ch. 9, §§ 25–27, 1 Stat. 117 (1845) (codified at 22 U.S.C. §§ 252–254 (1976)). The Act of 1790 remained in force until 1978, when it was replaced by the Diplomatic Relations Act. *See* GUIDANCE, *supra* note 2, at 2.

10. *Report of the International Law Commission*, 13 U.N. GAOR Supp. (No. 9) at 58, U.N. Doc. A/3859 (1958). The U.S. maintained that the Convention should restate existing principles of international law on the subject, which, it submitted, "require[] complete exemption of persons entitled to diplomatic immunity from criminal and civil process, in the absence of a waiver by the sending State, except with respect to real property owned by such person in his private capacity." *Id.*

tions to immunity from civil jurisdiction were incorporated into the final Convention.[11]

Since the Vienna Conference, pressure has mounted within the United States for further restrictions on diplomatic immunity as the number of criminal and tortious acts committed by diplomats has increased.[12] The Diplomatic Relations Act of 1978 reduced the number of people in the United States with diplomatic immunity from about 18,800 to less than 8,000.[13] It also required that all diplomats purchase automobile liability insurance[14] and, in its "direct action" provision, allowed plaintiffs injured by diplomatic agents to sue the tortfeasor's insurance company directly.[15]

The restrictive theory of diplomatic immunity, which rests principally on the idea of post-immunity prosecution of lawbreakers, was first raised by the State Department in a Circular Note to the Chiefs of Mission in Washington in 1984.[16] In its Circular Note, the Department announced its position that the privileges and immunities of diplomats suspected of committing crimes would terminate upon

---

11. The exceptions relate to civil actions involving private immovable property, succession, and professional or commercial activities outside the diplomat's official functions. Vienna Convention, *supra* note 8, art. 31(1)(a)–(c).

12. *See generally* Wright, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177 (1987).

A catalytic event occurred on April 20, 1974, when a cultural attaché at the Panamanian Embassy ran a red light and broadsided the car of Dr. Halla Brown, a clinical professor of medicine at George Washington University. Dr. Brown was left a quadriplegic and spent the next 19 months in various hospitals. *Diplomatic Immunity: Hearings Before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 126–27 (1978). Because diplomatic immunity precluded suit against the attaché, Dr. Brown absorbed medical costs of almost $300,000. Only three years later, under enormous pressure from the U.S. government, did the Panamanian government make an *ex gratia* payment of $10,000 to Dr. Brown. *Id.* at 2 (statement of Sen. Howard M. Metzenbaum).

13. SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, 1978, at 32 (Comm. Print 1979) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Unit, Civil Division, U.S. Dep't of Justice) [hereinafter LEGISLATIVE HISTORY].

14. The Act requires diplomats and embassies to carry a minimum of $300,000 in insurance for property damage or personal injuries caused by diplomats in automobile accidents. 22 U.S.C. § 254(e) (1982 & Supp. IV 1986).

15. *Id.*

16. Circular Note to Chiefs of Mission at Washington (Mar. 21, 1984), *excerpted in* Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 655, 658 (1984) [hereinafter Circular Note].

The Circular Note was issued in response to an apparent increase in violations of the law by diplomats and their families in the preceding two years. In the most notorious incident, the grandson of the Brazilian ambassador shot a U.S. citizen outside a Washington, D.C. nightclub in December 1982. The victim, who later died, brought suit against both the ambassador and the Brazilian government. The claim against the government was dismissed on grounds of sovereign immunity, while that against the diplomat was dismissed on grounds of diplomatic immunity. *See* Recent Development, *Sovereign Immunity: Liability for a Violent Tort Committed by a Diplomat*, 25 HARV. INT'L L.J. 506 (1984).

their expulsion from the United States.[17] No bar would exist to arresting and prosecuting an offender who later returned to the United States, unless the crime related to the exercise of his or her official functions or the statute of limitations had run.[18]

Following newspaper reports that the State Department had ordered a full investigation of the Abisinito incident,[19] the government of Papua New Guinea requested assurances that any criminal investigation or indictment of its former ambassador under United States law would be suppressed.[20] Papua New Guinea based its request on article 31 of the 1961 Vienna Convention, which states that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state."[21] In reply, the State Department argued that the privileges and immunities of diplomats cease when they leave the country to which they are accredited, except with regard to acts performed in the exercise of their functions as members of the diplomatic mission.[22] The Department maintained that Ambassador Abi-

---

17. Circular Note, *supra* note 16, at 658.

18. *Id.*

19. *See, e.g.*, Caplan, *supra* note 3; Oberdorfer, *supra* note 5.

20. Note from the Embassy of Papau New Guinea to U.S. Dep't of State, *discussed in* Leich, *Contemporary Practice of the United States Relating to International Law*, 81 AM. J. INT'L L. 935, 937 (1987).

21. Vienna Convention, *supra* note 8, art. 31(1). Papua New Guinea further contended that the decision of the International Court of Justice (ICJ) in *Case Concerning United States Diplomatic and Consular Staff in Tehran* affirmed the principle of absolute immunity from criminal prosecution. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). In that case, the ICJ emphasized that any attempt by Iran to subject U.S. hostages to criminal proceedings would constitute a breach of its obligations under article 31(1) of the Vienna Convention. *Id.* at 37.

22. Note from U.S. Dep't of State to Embassy of Papua New Guinea (June 22, 1987), *excerpted in* Leich, *supra* note 20, at 938–39 (1987) [hereinafter U.S. Note]. In support of this view, the State Department cited article 39(2) of the Vienna Convention, which provides:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time . . . . However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Vienna Convention, *supra* note 8, art. 39(2).

Underlying this interpretation of article 39(2) is the "functional necessity" theory of diplomatic immunity: diplomats need to be shielded from the enforcement jurisdiction of the receiving state in order to function effectively. As a consequence, however, they enjoy immunity only for those activities that are essential to the diplomatic process. The functional necessity theory is embodied in the preamble to the Vienna Convention:

> The States parties to the present Convention . . . [r]ealiz[e] that the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States . . . .

Vienna Convention, *supra* note 8, preamble. In its commentary on the draft articles of the Convention, the International Law Commission wrote that it had been guided by the functional necessity theory "in solving problems on which practice gave no clear pointers," while also bearing in mind the "representative character" theory, which bases the privileges and immunities of diplomats on the notion that the diplomatic mission personifies the sending state. [1957] 1

sinito's actions at the time of the accident could not be characterized as "performed in the exercise of his functions as a member of the mission,"[23] and therefore rejected Papua New Guinea's contention that international law would preclude his subsequent prosecution.[24]

For the moment, the Department of State has declined to ask for an indictment of Ambassador Abisinito.[25] In reaching its decision, the Department may have been influenced by Papua New Guinea's compliance with the insurance provisions of the Diplomatic Relations Act of 1978[26] and its assurances that Papua New Guinea would compensate the man seriously injured in the accident.[27]

As a result, the Department's restrictive theory of diplomatic immunity has yet to be tested in court.[28] However, the legislative history of the Vienna Convention shows strong support for limitations on immunity, both civil and criminal, extending well beyond those finally incorporated into the Convention.[29] The restrictive theory has prece-

---

Y.B. INT'L L. COMM'N 92, *reprinted in* E. DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 9 (1976).

23. U.S. Note, *supra* note 22, at 939.

24. *Id.* The State Department's reply went on to distinguish the ICJ's decision in *Case Concerning United States Diplomatic and Consular Staff* on the grounds that any criminal proceedings against Ambassador Abisinito would be initiated only after his repatriation. By contrast, the U.S. hostages in Tehran had neither been expelled nor withdrawn at the time the ICJ handed down its decision, and were therefore still entitled to full diplomatic privileges and immunities. *Id.*

25. Telephone interview with Meg Pickering, Attorney-Adviser, Office of the Legal Adviser, U.S. Dep't of State (Apr. 22, 1988).

26. *See supra* note 14.

27. Larschan, *supra* note 5, at 302.

28. The pending civil suit, *supra* note 6, may provide an analogous test. An indirect interpretation was suggested in Madoo v. Globe Am. Casualty Co., 650 F. Supp. 855 (D. Md. 1986), in which an injured plaintiff attempted to bring suit against the liability insurer of an automobile owner and driver, both Nicaraguan diplomats, under the direct action provisions of the Diplomatic Relations Act of 1978. *See supra* text accompanying note 15. The court dismissed the complaint, finding that under the language of the statute the insured diplomat must be entitled to immunity at the time the direct action is filed, and that because both diplomats' assignments had terminated by the date of filing, they were no longer entitled to immunity. *Id.* at 857. The court's assumption that immunity expires upon termination of the diplomatic assignment concurs with the Department of State's restrictive theory.

29. The Conference considered, but ultimately rejected, a proposal by the Netherlands for a specific exception to immunity from civil jurisdiction for vehicular torts. *Netherlands: Amendment to Article 29*, U.N. Doc. A/CONF. 20/C.1/L.186/Rev.1 (1961), *reprinted in* 2 *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records* 59–60, U.N. Doc. A/CONF. 20/14/Add.1 (1962). The proposal would have given courts in the receiving state jurisdiction over claims for damages arising from motor vehicle accidents unless a direct right of action lay against an insurance company in the receiving state. This proposal was similar to the direct action provision adopted by Congress as part of the Diplomatic Relations Act of 1978. *See supra* text accompanying note 15. Though many delegations, primarily from Third World countries, felt that such limiting proposals were undesirable, *see* LEGISLATIVE HISTORY, *supra* note 13, at 107, there were more abstentions than negative votes, implying that the majority of participating states agreed at least in principle with some further restrictions on diplomatic immunity. U.S. DEP'T OF STATE, UNITED NATIONS CONFERENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES, REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA WITH RELATED DOCUMENTS 49 (1961).

dents in customary international law as well. There are several cases, dating back to the nineteenth century, in which members of diplomatic missions have been subjected to civil or criminal proceedings after their appointments had ended and they had had a reasonable period in which to wind up their affairs and leave the country.[30]

A public safety exception to diplomatic immunity, which serves to curb the most egregious forms of conduct by diplomats when such conduct might pose a danger to citizens of the receiving state, has likewise been recognized in customary international law. In its commentary on the draft Vienna Convention, the International Law Commission noted that inviolability of the person of diplomats "does not exclude in respect of the diplomatic agent either measures of self-defense or, in exceptional circumstances, measures to prevent him from committing crimes or offences."[31] The United States has asserted the public safety exception as a separate basis for its restrictive interpretation of diplomatic immunity.[32]

Similar sentiments, but more militant in tone, are reflected in recent legislation introduced in the United States Congress. A bill currently before the Senate Judiciary Committee would make it a crime punishable by a fine, ten years' imprisonment, or both for any member of a foreign diplomatic mission to use a firearm or to commit any felony.[33] An accompanying Senate resolution would urge the President to seek renegotiation of the Vienna Convention to incorporate the proposed limitations on immunity.[34]

In comparison with legislation of this sort, the State Department's restrictive theory has the advantage of responding to the same perceived need—to clamp down on the most flagrant abuses of immunity by diplomatic agents—without requiring revision of the Vienna Con-

---

30. The fact that the acts in respect of which proceedings were brought had taken place during the subsistence of immunity was no bar to subsequent proceedings so long as they were of a private nature and not performed in the exercise of diplomatic functions. In Empson v. Smith, [1965] 2 All E.R. 881, a panel of three judges unanimously held that loss of immunity from whatever cause, be it waiver, change in the law (in that case, the enactment of the Diplomatic Privileges Act of 1964), or termination of the diplomatic appointment, permitted the reinstatement of proceedings that had been stayed on grounds of immunity. *See also In re* Suarez, 1 Ch. 176 (1918) (the Diplomatic Privileges Act of 1708 could not be invoked as a defense against an order for sequestration of assets of foreign minister who had been removed from the diplomatic list at the time of the order, after a reasonable time had elapsed for him to wind up the legation's affairs and transfer them to his successor); E. DENZA, *supra* note 22, at 248.

31. *Report of the International Law Commission*, 13 U.N. GAOR Supp. (No. 9) at 97, U.N. Doc. A/3859 (1958).

32. GUIDANCE, *supra* note 2, at 16.

33. S. 339, 100th Cong., 1st Sess. (1987). *See also* S. 1437, 100th Cong., 1st Sess. (1987) (eliminating immunity for crimes of violence, reckless driving, drug trafficking, and driving under the influence of alcohol or drugs).

34. S. Res. 74, 100th Cong., 1st Sess. (1987).

vention.[35] A 1984 report of the Foreign Affairs Committee of the British House of Commons, investigating the takeover of the Libyan People's Bureau in London,[36] concluded that although the incident "exposed a number of defects in the Convention where the balance of interest between the receiving and the sending State had not been achieved," the Convention is "in general terms working fairly well most of the time" for most of the states adhering to it; and it would not be "desirable or practicable" to attempt to renegotiate it in order to limit privileges and immunities.[37]

If the State Department's cautious implementation of the restrictive theory in the Abisinito case is any indication, it may view the theory more as a deterrent to irresponsible behavior by foreign agents, or as a form of leverage to secure adequate compensation for injured United States victims, than as a way of subjecting foreign diplomats to United States criminal jurisdiction. The State Department may fear that strict application of its restrictive theory will call forth retaliatory actions against United States diplomats abroad.[38]

---

35. As part of its policy of narrowly interpreting and applying the Vienna Convention, the State Department has recently begun (1) barring serious diplomat-offenders from reentering the U.S., using a "worldwide automated visa lookout system"; (2) publishing comprehensive written guidance for law enforcement officers on the handling of incidents involving foreign diplomatic and consular personnel (*see* GUIDANCE, *supra* note 2); and (3) in particularly egregious cases involving juvenile offenders, expelling the entire family from the U.S. As the Vienna Convention does not define which members of diplomats' families are entitled to immunity, the Department has reduced the number of people in this category by setting a cutoff for dependent children at age 21, unless the child is a full-time student, in which case the age limit is 23. Finally, because the Convention does not provide for the extension of full immunity to aliens permanently resident in the receiving state, the Department has proposed that privileges and immunities be terminated for locally hired members of embassy staffs who have lived in the U.S. for ten years or longer. BUREAU OF PUB. AFF., U.S. DEP'T OF STATE, CURRENT POLICY NO. 993, DIPLOMATIC IMMUNITY AND U.S. INTERESTS 3–4 (1987) [hereinafter DIPLOMATIC IMMUNITY].

36. On April 17, 1984, a woman police officer was killed and ten other persons injured when a gunman inside the Libyan People's Bureau in London fired on a peaceable group of protestors demonstrating against the regime of Libyan leader Colonel Muammar el-Qaddafi. When British police surrounded the People's Bureau to prevent entry and exit, Libya retaliated by besieging the British Embassy in Tripoli. An 11-day stalemate ensued, with each government holding officials of the other as hostages. Diplomatic relations between the two countries were severed, but Britain finally granted de facto diplomatic immunity and safe passage home to all Libyans in the People's Bureau, presumably to avoid endangering the 8,000 British nationals in Libya and the diplomats inside the British Embassy in Tripoli. Wright, *supra* note 12, at 179–82.

37. FOREIGN AFFAIRS COMM. OF THE HOUSE OF COMMONS, FIRST REPORT, H.C. PAPER 127 (1984), *reprinted in* 34 INT'L & COMP. L.Q. 610, 619–20 (1985).

38. Testifying against S. 1437, *supra* note 33, U.S. Chief of Protocol Selwa Roosevelt pointed out that any unilateral alteration of the U.S. government's obligations under the Vienna Convention might lead other countries to take retaliatory countermeasures. DIPLOMATIC IMMUNITY, *supra* note 35, at 1–2. Roosevelt reported that only two incidents in a recent 12-month period would have been addressed by the proposed legislation, which nevertheless could have adversely affected thousands of U.S. diplomats, administrative and technical staff, and their dependents living abroad. *Id.*

However, the reciprocal adoption of the restrictive theory would not in any way jeopardize United States diplomats. The ability of diplomats to represent their countries "without fear of interference or reprisal"[39] would not be compromised, since the restrictive theory applies only to crimes committed in the course of nonofficial acts. Exemption from legal process in even the most egregious circumstances creates a privileged class incompatible with the democratic climate of the modern state, as well as a symbolic irritant that breeds ill will and resentment antithetical to the ends of diplomacy.

Thomas W. Pecoraro

39. Larschan, *supra* note 5, at 304.

# Exhibit E

# Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations

## I. INTRODUCTION

A fundamental principle of international law is that members of diplomatic missions are shielded from legal process.[1] This "shield"—diplomatic immunity—is broadly defined as "the freedom from local jurisdiction accorded under international law by the receiving state to [foreign diplomats and to] the families and servants of such officers."[2] A common misconception is that diplomatic privileges and immunities confer a license to commit wrongs.[3] This Comment will demonstrate that diplomatic immunity from criminal and police jurisdiction, although subject to abuse, does not entitle diplomats to violate domestic laws, but is, instead, an essential element of effective international relations.

Specifically, this Comment will trace the doctrine of diplomatic immunity from its incorporation into United States statutory law in 1790,[4] to its uniform international treatment in the Vienna Convention on Diplomatic Relations in 1961,[5] and finally to its recent codi-

---

1. Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978,* 54 TUL. L. REV. 661, 662 (1980) [hereinafter cited as *New Regime*].

2. LIBRARY OF CONGRESS, HISTORY OF THE CONCEPT OF DIPLOMATIC IMMUNITY, *reprinted in* Report on Legislative History of the Diplomatic Relations, 96th Cong., 1st Sess. 12 (1979).

3. William Macomber, United States ambassador to Turkey, observed that "[d]iplomatic immunity is not license [to commit a wrong] and those who use it as such abuse the hospitality which has been extended to them (and) strain rather than improve relations." Turan, *The Devilish Demands of Diplomatic Immunity,* Wash. Post, Jan. 11, 1976, at 20 (Potomac Section), col. 1; Turan continues: "[t]he hard facts remain that abuse of the privilege is an all-too-common fact of life." *Id. See also* Gupte, *Privileges for Diplomats in U.S. Stir Resentment and May Be Curbed,* N.Y. Times, July 18, 1978, § II, at B8, col. 4.

4. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18 (amended by 22 U.S.C. §§ 252-254 (1976) (repealed 1978)).

5. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. As of December 31, 1977, 127 states had deposited instruments of ratification of or accession to the Vienna Convention with the United Nations Secretary General. United Nations Multilateral Treaties: List of Signatures, Ratifications, Accessions as of 31 Dec. 1977, U.N. Doc. ST/LEG/SER. D/11 51 (1977). The United States ratified the Vienna Convention on September 14, 1965; the ratification was deposited on November 13, 1972; and the Vienna Convention was entered into force in the United

fication in the Diplomatic Relations Act of 1978.[6] Special emphasis will be placed upon the scope of immunity from criminal prosecution and the class of diplomats who are entitled to receive it. Finally, the changing nature of diplomatic immunity and the sanctions which constrain diplomatic representatives to abide by local laws will be analyzed.

## II. The Theories Underlying Diplomatic Immunity

Any comprehensive analysis of diplomatic immunity must include a discussion of its underlying theories. Diplomatic immunity is among the most ancient doctrines of international law.[7] Extending specific rights to representatives of other countries in periods of peace and war has long been essential to facilitate international relations.[8] Legal scholars have offered several theories to justify diplomatic privileges and immunities. Most prominent are the following theories: (1) personal representation; (2) extraterritoriality; and (3) functional necessity.[9]

### *A. Personal Representation*

The personal representation theory enjoyed its greatest popularity during the eighteenth and nineteenth centuries.[10] Under the personal representation theory, the diplomat assumes the role of the head of the sending state or of the sovereign power of that state.[11] Because the diplomat is the "alter ego" of his ruler,[12] he enjoys the

States on December 13, 1972. The United States Senate's ratification appears at 111 Cong. Rec. 23, 773 (1965).

6. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254, 28 U.S.C. § 1364). The Act became effective on December 29, 1978, 90 days after its enactment on September 30, 1978. For a brief presidential statement on the signing, see 14 Weekly Com. Pres. Doc. 1694 (Oct. 2, 1978).

7. Preface to C. Wilson, Diplomatic Privileges and Immunities at vii (1967).

8. *Id.* at 1.

9. *Id. See also* M. Ogdon, Juridical Bases of Diplomatic Immunity 63-194 (1936) (discusses and analyzes in detail the development and status of these three theories).

10. Note, *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 Va. J. Int'l L. 131, 132 (1978) [hereinafter cited as *Consequences*].

11. G. Schwarzenberger & E. Brown, A Manual of International Law 79 (6th ed. 1976).

12. Bergman v. De Sieyes, 71 F. Supp. 334, 341 (S.D.N.Y. 1946), *aff'd*, 170 F. 2d 360 (2d Cir. 1948). In *Bergman*, a French diplomat on his way to his position in Bolivia was served process while in New York. The court held that the diplomat was entitled to the same privileges while en route to the country in which he was accredited, as he would have if he were a diplomatic resident of the United States. The court stated:

[A] foreign minister is immune from the jurisdiction, both criminal and civil, of the

rights and privileges which would be accorded his master by the receiving state.[13] The rationale for the personal representation theory was best expressed by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon:* "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad."[14]

Personal representation has been criticized, however, as being "altogether too wide and too fallacious for the business of conducting international business."[15] The two major criticisms of this theory are: (1) placing a diplomat entirely beyond the law of a host state merely because he personifies his sovereign defines too broadly the scope of that diplomat's rights;[16] and (2) the concept of "personal representation" is difficult to apply to modern systems of government.[17] In a monarchy, for example, a diplomat would assume the role of his king. In a democratic form of government such as the United States, where sovereign power is divided among executive, legislative and judicial branches, however, it is difficult to ascertain exactly whose authority the diplomat represents.[18]

---

courts in the country to which he is accredited, on the grounds that he is the representative, the alter ego, of his sovereign who is, of course, entitled to such immunity, and that subjection to the jurisdiction of the courts would interfere with the performance of his duties as such minister. . . .

13. In Holbrook v. Henderson, 4 Sand. Ch. 619, 628 (1839) the court stated that "[t]he respect rendered the minister is not personal, merely, but is in truth, the respect due from one sovereign to another . . . ."

14. 11 U.S. (7 Cranch) 116, 138 (1812) (a French warship was not subject to admiralty jurisdiction in the United States, even though the vessel was in United States territorial waters).

15. RIEFF, DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES, AND PRACTICE 26 (1954).

16. Note, *Terrorist Kidnapping of Diplomatic Personnel,* 5 CORNELL INT'L L.J. 189, 198 (1972) [hereinafter cited as *Diplomatic Personnel*]. Commentators tend to agree that the primary purpose of diplomatic immunity is to facilitate international discourse. Therefore, the scope of such immunity should be narrowly drawn to govern activities promoting this specific purpose rather than extended in blanket fashion to cover all of the diplomat's activities in the receiving state. In applying "blanket" immunity to personal representatives of the sovereign state, however, the personal representation theory fails to limit the scope of diplomatic immunity adequately.

17. *Id.* C. WILSON, *supra* note 7, at 4.

18. *Id.* The personal representation theory assumes that the diplomat personifies the supreme authority of the sending state. In a democratic state, however, supreme authority is not vested in one individual or a small group, but rather in separate and distinct branches. Therefore, this would result in individuals representing various groups of only limited authority in direct contradiction to the theory's premise of the diplomat personifying the

### *B. Extraterritoriality*

Extraterritoriality is another theory employed during the eighteenth and nineteenth centuries to justify diplomatic immunity.[19] Under this theory, a diplomat is treated as if he were still living in the sending state,[20] and the premises of the diplomat's mission are treated as an extension of that state's territory.[21] Thus, extraterritoriality suggests that a host state may neither enter, nor subject to legal process, real property held by another state.[22] Moreover, a host state lacks personal jurisdiction over the diplomat and therefore cannot compel him to appear in its courts.[23] A judicial interpretation of this theory appeared in *Wilson v. Blanco*,[24] an 1889 New York Supreme Court case. There, the court stated that the rule of international law "derives support from the *legal fiction* that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides."[25]

The theory of extraterritoriality has been widely criticized.[26]

---

supreme authority. "It might now be asked: the ambassador is the personification of whom?" *Id.*

19. *Consequences*, *supra* note 10, at 132.

20. *See* D. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES 47 (1971).

21. Z.H. GROTIUS, 2 DE JURE BELLI ET PACIS 202 (W. Whewell trans. 1853). *See also* G. SCHWARZENBERGER & E. BROWN, *supra* note 11, at 81.

22. *See* G. SCHWARZENBERGER & E. BROWN, *supra* note 11 at 80-81. Consider the situation of Jozsef Cardinal Mindszenty, the Catholic Primate of Hungary, a fervent anti-communist, who, to escape imprisonment, resided safely for many years in the United States embassy in Budapest. *Mindszenty Leaves Hungary, Goes to Rome*, N.Y. Times, Sept. 29, 1971, at 1, col. 6.

23. Z.H. GROTIUS, *supra* note 21; *see also* Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice*, 43 DEP'T ST. BULL. 173, 175 (1960).

24. 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 714 (1889).

25. *Id.* at 582, 4 N.Y.S. at 714 (emphasis added). Similar judicial interpretations of the theory are found in The King v. Guerchy, 1 Black. W. 545, 96 Eng. Rep. 315 (1765) (an ambassador is not subject to the courts of the country to which he is sent but is believed, by legal fiction, to still be a resident of his own country); Taylor v. Best, 14 C.B. 487, 517, 139 Eng. Rep. 201, 213 (1854) ("The foundation of the privilege[—exemption from the jurisdiction of the English courts—]is, that the ambassador is supposed to be in the country of his master"); Attorney General v. Kent, 1 H. & C. 12, 23, 158 Eng. Rep. 782, 786 (1862) (diplomatic immutuity is based upon the principle that "an ambassador is deemed to be resident in the country by which he is accredited").

26. See M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY 94 (1936), where the author states that the "recent and current trend [as of the 1930's] is conclusively in favor of repudiating the extra-territorial concept in every form." *See also* 2 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1266 (2d rev. ed. 1947) (refers to a "complete abandonment" of the theory); *Ambassadors and Consuls* —

First, because the term "extraterritoriality" is subject to many different meanings,[27] the term itself does not provide adequate guidelines for determining the scope and limits of diplomatic privileges and immunities.[28] Moreover, strict application of this theory could result in dangerous consequences because it presupposes a grant of unlimited privileges and immunities which would transcend those ordinarily extended to diplomats.[29] Finally, extraterritoriality assumes that diplomatic immunity is based upon the absolute *independence* of nations when, in fact, the question of immunity arises only because nations are *interdependent* in the area of international relations.[30]

### *C. Functional Necessity*

Courts and legal theorists recently have begun to temper the theories of personal representation and extraterritoriality because they define the scope of immunities accorded diplomats too broadly.[31] "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,"[32] the current justification for diplomatic immunity is based upon the theory of functional necessity.[33] Under this theory, a diplomat can operate effectively only if given enough liberty to conduct the business with which he is charged.[34] Practical necessity dictates that the diplo-

---

*Privileges, Immunities and Disabilities*, 25 CHI.[-]KENT L. REV. 329, 333 (1947) (suggests that the theory is "outmoded and, logically, no longer applicable.").

27. C. WILSON, *supra* note 7, at 12 (various meanings of the word are listed and analyzed).

28. M. OGDON, *supra* note 26, at 102-03. Because the term "extraterritoriality" does not provide the actual reasons for determining rights and duties, it is of little value as a guideline in determining the scope and limits of diplomatic privileges and immunities.

29. *Id.* Normally, immunities are extended to diplomats based upon their official rank and status. In treating the diplomat as a resident of the sending state, the host state has no jurisdictional authority over him whatsoever. This theory, therefore, has the effect of granting the same immunities to all diplomats regardless of their official positions. D. MICHAELS, *supra* note 20, at 49 n.63.

30. *Diplomatic Personnel*, *supra* note 16, at 198. The major premise for extending privileges and immunities to diplomats is that these privileges and immunities are of vital importance in facilitating relations *between* nations. The theory of extraterritoriality, however, is expressed as an independence from local authority and thus ignores this interdependence between the nations. D. MICHAELS, *supra* note 20, at 49.

31. *See generally* D. MICHAELS, *supra* note 20, at 49.

32. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Preamble, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

33. D. MICHAELS, *supra* note 20, at 49.

34. Note, *The Diplomatic Relations Act: The United States Protects Its Own*, 5 BROOKLYN J. INT'L L. 379, 384 (1979) [hereinafter cited as *U.S. Protects Its Own*].

matic agent be permitted to perform his duties without fear of civil or criminal prosecution in the country to which he is accredited.[35]

The reason for recognizing such a theory is best summarized by Sir Cecil Hurst:

> The writers of textbooks have dealt at great length with the question why immunities are given to diplomatic representatives, and the nature of the obligation upon States to recognise such immunities. In reality the matter is very simple. The privileges and immunities are founded on the necessities of the case. They are essential to the maintenance of international relations. On no other basis than that of exemption from subjection to the local jurisdiction would sovereign States have been willing in times past or today to send their representatives to the headquarters of another State. On no other terms would it have been possible for foreign diplomatic representatives to fulfil the tasks allotted to them.[36]

The functional necessity theory is not without criticism. The theory has been attacked as being too vague because it fails to indicate the limits to which immunities essential to "the accepted practice of diplomacy" are to be extended or, for that matter, what the accepted practice of diplomacy is.[37] Further, to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal.[38] Nevertheless, the functional necessity theory "seems less vague than other theories that have been put forward and, also, more soundly based on reality."[39] For example, the personal representation and extraterritoriality theories extend blanket immunity to the individual diplomat without any regard to the activities he is to perform within the diplomatic mission. The functional necessity theory, on the other hand, moves the emphasis from the individual and focuses instead on the functions of the diplomat. This is a realistic effort to extend only the immunity necessary to perform the diplomatic mission.

---

35. D. MICHAELS, *supra* note 20, at 21.
36. C. HURST, INTERNATIONAL LAW: COLLECTED PAPERS 174 (1950) (lecture delivered at the Academy of International Law in 1926).
37. C. WILSON, *supra* note 7, at 22.
38. *New Regime*, *supra* note 1, at 670.
39. *Diplomatic Personnel*, *supra* note 16, at 199-200 n.50.

## III. Historical Background of Diplomatic Immunity As Applied in the United States

### *A. The 1790 Statute*

At international common law, diplomatic agents enjoyed numerous privileges and substantial immunity from the receiving state's jurisdiction.[40] In the early twentieth century, the doctrine of diplomatic immunity was so widespread that in 1906 United States Secretary of State Elihu Root declared that "the immunities of diplomatic agents exist by virtue of the law of nations . . . [and for such] universally accepted principles no authority need be cited."[41] Nevertheless, in the United States, diplomatic immunity has been codified since 1790.

The United States, recognizing diplomatic immunity as essential to international discourse, codified and expanded upon the existing common law when the First Congress passed the Act of April 30, 1790.[42] From its enactment in 1790 to its repeal in 1978 with the passage of the Diplomatic Relations Act,[43] this statute was the sole basis for diplomatic privileges and immunities in the United States.[44]

The 1790 Statute adopted the rule of *Respublica v. De Longchamps,*[45] which stated that diplomatic immunity is virtually absolute.[46] In *De Longchamps,* the earliest diplomatic immunity

---

40. *See New Regime, supra* note 1, at 662-63.

41. Letter from United States Secretary of State Elihu Root to the Secretary of Commerce and Labor, Mar. 16, 1906, *reprinted in* 4 G. Hackworth, Digest of International Law 513 (1942).

42. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112. Section 25 provides:

> [I]f any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized, or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, construction and purposes whatsoever.

43. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808, 808 (1978).

44. Note, *Diplomatic Privileges and Immunities—The Diplomatic Relations Act of 1978: A Congressional Response to a Vexing Problem,* 22 How. L.J. 119, 121 (1979) [hereinafter cited as *Diplomatic Privileges*].

45. 1 U.S. (1 Dall.) 111 (1784). In *DeLongchamps,* a Pennsylvania resident committed a battery against the Secretary of the French Legation by striking the Secretary's cane. As a result of this battery, the Secretary beat the resident "with great severity" and the resident was prosecuted for violating the law of nations. *Id.* at 111-12.

46. 22 U.S.C. § 252 (1976) (repealed 1978). Section 252 provides that "any ambassador

case in the United States, the Supreme Court held that when a diplomat is attacked in any way, either through legal process or through more direct means, "his freedom of conduct is taken away, [and] the business of his Sovereign cannot be transacted . . . ."[47] Further, the statute made it a crime punishable by fine and imprisonment for up to three years to bring suit against a diplomat.[48]

The absolute immunity guaranteed by the 1790 Statute was repeatedly accepted by the courts as a rational principle of international law. In *The Schooner Exchange v. M'Faddon,*[49] Chief Justice Marshall observed in dicta that a diplomat would be unable to function as the representative of his sending state if he was subject to continued appearances in the receiving state's courts.[50] More recently, two federal district courts have gone so far as to hold that requiring a diplomat to answer to private suits is a form of coercion[51] and an unjustifiable interference with the performance of his functions.[52]

Complete immunity, as guaranteed by the 1790 Statute, required proper registration with the United States Department of State.[53] The State Department further extended the coverage of the 1790 Statute to administrative and technical employees of the diplomatic mission.[54] Although the statute itself did not expressly include such personnel, the State Department considered them implicitly covered by the term "domestic" in the statute.[55] The State Department's extension of immunity was rarely challenged because potential plaintiffs were reluctant to test the proper scope of diplomatic

---

or public minister or any foreign prince of State, authorized and received as such by the President is absolutely immune from arrest, imprisonment, or seizure of his property."

47. *DeLongchamps,* 1 U.S. (1 Dall.) at 117.

48. 22 U.S.C. § 253 (1976) (repealed 1978). For example, in Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965), the Court of Appeals for the District of Columbia upheld the refusal of a United States Marshal to serve a summons on the Tunisian ambassador. Chief Judge Bazelon stated that "although courts will not allow a Marshal to avoid his duty to serve process merely because he notices the availability of a defense to suit, they must protect him if service would violate international law and might subject him to the criminal law of the United States." *Id.* at 979.

49. 11 U.S. (7 Cranch) 111 (1812).

50. *Id.* at 138.

51. *See* Arcaya v. Paez, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956).

52. Bergman v. De Sieyes, 71 F. Supp. 334, 341 (S.D.N.Y. 1942).

53. RESTATEMENT (SECOND) OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 73, comment (i) (1965).

54. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 193, 194 (1976) [hereinafter cited as DEP'T OF STATE (1976)].

55. *Id.*

immunity when the penalty for being wrong was three years of imprisonment.[56]

Under the 1790 Statute, the victim of a diplomat's civil or criminal wrong was unable to obtain legal relief in the United States.[57] This situation was exacerbated by the State Department's extension of blanket immunity to diplomats' families, staff and servants.[58] As the number of diplomatic personnel in the United States increased, diplomatic abuse of local laws, especially in the area of traffic violations,[59] became more prevalent. The increased abuses by diplomats created a tremendous public outcry and forced the State Department to re-evaluate its policy of blanket immunity.[60]

### *B. The 1969 Vienna Convention on Diplomatic Relations*

In addition to the United States' codification of diplomatic immunity in 1790, many other nations had their own laws governing diplomatic immunity.[61] During the eighteenth and nineteenth centuries, however, no formal international codification of diplomatic immunity existed.

As early as 1815, attempts began to formulate a comprehensive policy of diplomatic immunity,[62] but international codification of diplomatic law did not become a reality until the twentieth century.

---

56. *See* Act of April 30, 1790, ch. 9, § 26, 1 Stat. 112, 118 (as amended, 22 U.S.C. § 253 (1976) (repealed 1978)). Section 26 provided:

> [I]n case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court.

*Id.*

57. *Diplomatic Privileges, supra* note 44, at 121.

58. DEP'T OF STATE (1976), *supra* note 54, at 193-94.

59. S. REP. No. 958, 95th Cong., 2d Sess. 3 (1978).

60. *Id.*

61. *See* United Nations Legislative Series, II Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities, U.N. Doc. ST/LEG/Ser.B 7 (1958).

62. Garreton, *The Immunities of Representatives of Foreign States,* 41 N.Y.U. L. REV. 67, 69 (1966).

> The Vienna Convention is the first comprehensive, truly international convention on diplomatic immunities. An earlier convention relating to privileges and immunities was signed at the Sixth International Conference of American States, held in Havana, Cuba in 1928, but only American States were represented. The Congress of Vienna in 1815 formulated international law on diplomatic immunity, but only as it pertained to heads of mission. The document was signed by only eight European powers.

C. WILSON, *supra* note 7, at 273.

In 1952, at the request of the United Nations, the International Law Commission studied the possibility of creating a uniform standard for diplomatic representatives. In 1958, the Commission submitted draft articles to a conference of eighty-one nations meeting in Vienna.[63] The final result was the Vienna Convention on Diplomatic Relations of 1961.[64]

The Convention attempted to clarify and codify the existing international common law and practice of diplomatic relations among nations.[65] Twelve of the fifty-three articles of the Convention dealt directly with personal immunity.[66] These twelve articles established the various categories of diplomats protected as well as the scope of that protection. For example, Article 37 classified members of the diplomatic mission into four categories receiving decreasing degrees of immunity:[67] (1) the diplomat's family; (2) the administrative and technical staff; (3) the service staff;[68] and (4) private servants.[69]

A comparison of the immunities enumerated in the 1790 Statute and those provided by the Convention reveals several differences. First, diplomatic agents under the statute are entitled to full civil and criminal immunity from legal process in the United States.[70] Under the Convention, diplomatic agents have full immunity from criminal prosecution by the host state, but have three ex-

---

63. *Vienna Convention on Diplomatic Relations: Hearing before the Subcomm. of the Senate Comm. on Foreign Relations,* 88th Cong., 1st Sess. 2 (1965) (statement of Leonard C. Mecker).

64. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 T.I.A.S No. 7502, 500 U.N.T.S. 95. As an indication of its acceptance in the international community, 112 nations became parties to the Vienna Convention within ten years after its entry into force. E. DENZA, DIPLOMATIC LAW 1 (1976).

65. *Diplomatic Privileges and Immunities: Hearings and Markup before the Subcomm. on Internal Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 96 (1977) (statement of Burno Ristau, Dep't of Justice).

66. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 29-40, 23 U.S.T. 3229, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

67. *Id.* art. 37.

68. *Id.* art. 1(d), (f), (g). Article 1 of the Convention provides in pertinent part:

> (d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;
>
> . . . .
>
> (f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission . . . .

*Id.* art. 1(d), (f).

69. *Id.* art. 1(h).

70. Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18 (amended by 22 U.S.C. §§ 252-254 (1976) (repealed 1978)).

ceptions to full civil immunity.[71] Second, administrative and technical staffs are granted full civil and criminal immunity under the statute. Under the Convention, they are granted complete criminal immunity, but their civil immunity is limited only to acts performed within the scope of their official duties.[72] Third, members of the service staff enjoy full civil and criminal immunity under the statute, but under the Convention they are entitled to civil and criminal immunity only to the extent of their official acts.[73] Fourth, private servants are granted blanket immunity under the statute, but are denied immunity under the Convention, with the notable exception of receiving those immunities extended by the host state.[74] Finally, family members of both diplomatic agents and administrative staff enjoy the same immunities as do the respective personnel under the Convention.[75]

Inconsistencies between the Vienna Convention and the 1790 Statute delayed the United States' implementation of the Convention's narrower immunity provisions.[76] Although the United States signed the Convention in 1961, it was not ratified by the United States Senate until 1965,[77] and did not enter into force of law until 1972.[78] At that time, the State Department still granted full immunity under the 1790 Statute.[79] The long delay between the signing of the Vienna Convention and its ratification resulted from Congress' attempt to enact new legislation repealing the 1790 Statute before the Convention was ratified.[80] Congress deemed this repeal neces-

71. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. These exceptions are: (1) an action relating to private immovable property in the local jurisdiction; (2) an action relating to succession in which the diplomatic agent is involved as executor or heir; and (3) an action relating to any professional or commercial activity outside the scope of the diplomat's official functions. *Id.*

72. *Id.* art. 37(2).

73. *Id.* art. 37(3).

74. *Id.* art. 37(4).

75. *Id.* art. 37(1). Since service staff enjoyed immunity only as to official acts, family members of these personnel in effect enjoyed no immunities. *See id.*

76. *Consequences, supra* note 10, at 139-40.

77. 111 CONG. REC. 22935 (daily ed. Sept. 14, 1965).

78. 67 DEP'T ST. BULL. 443 (1972).

79. In Senate hearings on the Diplomatic Relations Act, a State Department spokesman explained that "at the time the Vienna Convention was ratified the executive department [sic] determined that the 1790 statute was not superseded." *Diplomatic Immunity Legislation: Hearing on H.R. 7819 before the Senate Comm. on Foreign Relations,* 95th Cong., 2d Sess. 23 (1978) (remarks of Horace Shamwell, Dep't of State).

80. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1964 (1974).

sary to conform the international standards of the Vienna Convention to the domestic standards of diplomatic immunity.[81]

### *C. The Diplomatic Relations Act of 1978*

In 1978, through the Diplomatic Relations Act,[82] Congress repealed the 1790 Statute and implemented relevant provisions of the Vienna Convention as the expression of United States law on diplomatic immunity.[83] The Act was designed to "complement" the Vienna Convention on Diplomatic Relations[84] and does not deal with the full range of diplomatic relations included in the Convention.[85]

The more pertinent provisions of the Act include:

(1) Establishment of the Convention's privileges and immunities as the sole expression of United States law on the subject;[86]

(2) Extension of the Convention's provisions to members of diplomatic missions of sending States which had not ratified the Convention;[87]

(3) Presidential authorization to extend more favorable or less favorable treatment than was provided under the Convention;[88]

(4) Dismissal of actions against individuals entitled to immunity under either the Convention or the Act;[89]

---

81. *Id.*

82. Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254 (1978), 28 U.S.C. § 1364 (1978)).

83. *Id.* at 808-10.

84. *Id.* at 808.

85. *Diplomatic Privileges and Immunities: Hearings on H.R. 1536, H.R. 6133, and H.R. 3841 before the Subcomm. on Internal Operations of the House Comm. on International Relations,* 95th Cong., 1st Sess. 120 (1977) (statement of Virginia Schlundt, subcommittee staff).

86. Diplomatic Relations Act, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

87. *Id.* § 3(b) (codified as amended at 22 U.S.C. § 254(b) (1978)). "Since the Vienna Convention is universally accepted as a codification of binding customary international law on the subject, it is probable to assume that [these] . . . privileges and immunities would be extended to nonsignatory nations." DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 275 (1977) [hereinafter cited as DEP'T OF STATE (1977)].

88. Diplomatic Relations Act § 4 (codified as amended at 22 U.S.C. § 254(c) (1982)):

> The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

*Id.*

89. *Id.* § 5 (codified at 22 U.S.C. § 254(d) (1978)):

> Any action or proceeding brought against an individual who is entitled to immu-

(5) Repeal of the United States Supreme Court's exclusive jurisdiction over suits involving diplomats and establishment of original jurisdiction in federal district courts;[90] and

(6) Implementation of mandatory insurance and direct action provisions.[91]

The most influential and innovative provisions of the Act are the mandatory insurance and direct action provisions which focus on the immunity of the diplomat from vehicular accident liability.[92] Because traffic accidents and resulting injuries constitute the largest number of complaints regarding the misuses of diplomatic immunity,[93] the mandatory insurance and direct action requirements were included to address these abuses. Section 6 of the Act requires diplomats to obtain mandatory liability insurance.[94] This section further provides that "[t]he President shall, by regulation, establish liability insurance requirements."[95] This authority was delegated to the State Department,[96] which has proposed several regulations,[97] including suggested minimum limits on liability coverage.[98] Nevertheless, the

---

nity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254(b) or 254(c) of this Act, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

*Id.*

90. *Id.* § 8 (codified at 28 U.S.C. § 1351 (1978)). The exclusive jurisdiction clause was codified at 28 U.S.C. § 1251(a)(2) (1978), but has never been successfully invoked in its 180 years of existence. Further, there is only one known instance where an attempt was made to bring an original action in the Supreme Court against a foreign ambassador or his servant. Founding Church of Scientology v. Lord Cramer, 404 U.S. 933 (1971) (motion for leave to file bill of complaint denied); DEP'T OF STATE (1977), *supra* note 87, at 267.

91. Diplomatic Relations Act § 6 (codified at 22 U.S.C. § 254(e) (1983)). Compared with other members of the international community, the United States was late in establishing compulsory insurance for diplomats and in creating a right of direct action against insurers. SENATE COMM. ON THE JUDICIARY, DIPLOMATIC RELATIONS ACT, S. REP. NO. 1108, 95th Cong., 2d Sess. 3-4 (1978).

92. Increased media attention to the plight of persons injured in accidents with "immune" foreign diplomats contributed greatly to the passage of the Act. 124 CONG. REC. S13, 695-97 (daily ed. Aug. 17, 1978) (remarks of Senators Mathias, Sarbanes and Thurmond).

93. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, 96th Cong., 1st Sess. 22 (1979).

94. Diplomatic Relations Act § 6 (codified at 22 U.S.C. § 254(e) (1978)).

95. *Id.*

96. Exec. Order No. 12,101, 43 Fed. Reg. 54,195 (1978).

97. 43 Fed. Reg. 57,159 (1978) (codified at 22 C.F.R. § 151 (1978)).

98. *Id.* at 57,160 (codified at 22 C.F.R. § 151.5 (1978)). The regulations propose a minimum liability of $100,000 per person, $300,000 per incident for bodily injury, and $50,000 per incident for property damage, but permit the receiving state to make the final determination. *Id.*

State Department allows the receiving state to make the final determination of minimum coverage.[99] The insurance coverage requirements of most states are less than those recommended by the State Department.[100]

In an attempt to guarantee mandatory insurance recovery, section 7 of the Act creates a federal remedy allowing an injured party to proceed directly against a diplomat's insurer.[101] Under the direct action provision, the insurance company may not offer the diplomatic immunity of its insured as a defense.[102] Absent such a provision, an insurer would receive a windfall since it could collect premiums while being shielded from liability.[103]

---

99. *Id.*

100. Compare the mandatory coverage in New York and the District of Columbia where the limit is $20,000 per incident for bodily injury, and only $5,000 for property damage. N.Y. INS. LAW § 673 (McKinney Supp. 1979); D.C. CODE ANN. § 40-43 (1973 & Supp. 1978).

101. 28 U.S.C. § 1364(a)-(b) (Supp. 1984).

> (a) The district courts shall have original and exclusive jurisdiction, without regard to the amount in controversy, of any civil action commenced by any person against an insurer who by contract has insured an individual, who is a member of a mission [as defined in the Vienna Convention on Diplomatic Relations] or a member of the family of such a member of a mission . . . against liability for personal injury, death, or damage to property.
>
> (b) Any direct action brought against an insurer under subsection (a) shall be tried without a jury, but shall not be subject to the defense that the insured is immune from suit, that the insured is an indispensable party, or in the absence of fraud or collusion, that the insured has violated a term of the contract unless the contract was cancelled before the claim arose.

*Id.*

The constitutionality of a federal direct action statute was raised in congressional hearings. *Claims Against Persons Entitled to Diplomatic Immunity: Hearings on H.R. 7679 before the House Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary,* 95th Cong., 1st Sess. 13 (1977) (remarks of Rep. Thomas Kindness, Ohio). The constitutional objections were overcome when the Supreme Court upheld a state direct action law in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), against equal protection, due process and contract clause challenges.

102. Compare Dickinson v. Del Solar, [1930[ 1 K.B. 376, 380, 142 L.T.R. (n.s.) 66, 67 (1930), an early English case in which an insurance company attempted to shield itself from liability by contending that the diplomatic immunity status of the insured should extend to the insurer. Had the Minister not waived the diplomatic agent's immunity, the court was willing to permit such an extension, thereby making the insurance coverage a fiction. *See also* Windsor v. State Farm Ins. Co., 509 F. Supp. 342, 343 (D.D.C. 1978).

103. *Diplomatic Immunity Legislation: Hearings before the Senate Foreign Relations Comm.,* 95th Cong., 2d Sess. 20 (1980) (statement of Richard Gookin, Deputy Chief of Protocol); *see also Diplomatic Immunity: Hearing on S. 476, S. 477, S. 1256, S. 1257 and H.R. 7819 before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. 42-45 (1978) (exchange between Senator Metzenbaum and Stacy L. Williams, asst. vice-president and associated legislative counsel, Gov't Employees Ins. Co.).

The mandatory insurance and direct action provisions, however, have been criticized for four major reasons. First, the Act is "not retroactive and some of the victims of past accidents remain uncompensated."[104] Second, the prospective minimum liability coverage standards required by the individual states are often inadequate to compensate injured victims fairly.[105] Third, and closely related to the second criticism, the accident victim who sustains injuries greater than the amount of the diplomat's insurance coverage is left without any additional means of recovery,[106] because, unlike most citizens, the diplomat is not subject to a lawsuit beyond the effective insurance coverage.[107] Finally, the direct action provision makes diplomats undesirable policyholders and United States insurance companies reluctant to insure them.[108]

## III. Immunity from Criminal Prosecution

A recurring theme throughout the history of diplomatic immunity is the immunity diplomatic personnel enjoy from criminal prosecution in the host state.[109] This universal rule of immunity is stated in Article 31(1) of the Vienna Convention: "A diplomatic agent shall enjoy [absolute] immunity from the criminal jurisdiction of the receiving State."[110] This became law in the United States with the passage of the Diplomatic Relations Act of 1978.[111]

---

104. Comment, *The Effect of the Diplomatic Relations Act*, 11 Cal. W. Int'l L.J. 354, 368 (1981).

105. *See supra* notes 98-100.

106. 22 C.F.R. § 151.9 (1978).

107. *Id.*

108. House Comm. on the Judiciary, Amending Title 28, United States Code, to Provide for Action Against Insurers on Claims Against Persons Entitled to Diplomatic Immunity, J.R.R.N. 1410, 95th Cong., 2d Sess. 4 (1978). The insurance spokesmen contended that:

> [T]he entire issue of providing just compensation to innocent victims of diplomatic negligence is a social and governmental problem. It is not one that should be unilaterally imposed on the private insurance industry. Should both the Diplomatic Relations Act and the direct action legislation become law, it will effectively close the voluntary market on liability insurance to diplomats in the United States.

109. *See U.S. Protects Its Own*, *supra* note 34, at 388.

110. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. The host state, however, may declare a diplomat to be *persona non grata* (a person not warranting immunity) for any reason. *Id.* art. 9; I. Brownlie, Principles of Public International Law 343 (2d ed. 1973). For a definition of *persona non grata*, see *infra* note 174.

111. Diplomatic Relations Act, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

### *A. Criminal and Police Jurisdiction*

Most commentators[112] as well as most courts[113] support absolute immunity from criminal prosecution. Many commentators contend that under both the theory and practice of international law, diplomatic agents may not be tried or punished by local courts for committing a crime.[114] Criminal immunity derives support from the functional necessity theory's goal of maintaining public order and preserving free and uninterrupted relations among nations.[115]

Immunity from the jurisdiction of local police is a traditional right inherent in a diplomat's immunity from criminal prosecution.[116] This right is articulated in a District of Columbia Police Departmental Order which states that "the person entitled to such immunity may not be detained or arrested or subjected to a body search, may not be prosecuted and may not be required to give evidence as a witness . . . ."[117] This statement does not mean, however, that diplomats are exempt from local police regulations. Article 41, paragraph 1, of the Vienna Convention incorporates this idea by declaring that "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."[118]

Nevertheless, abuse by diplomats of local laws and regulations is not uncommon, especially infractions of municipal traffic ordinances. Traffic violations, such as speeding, running stop signs and

---

112. *See* E. SATOW, A GUIDE TO DIPLOMATIC PRACTICE 181 (N. Bland ed. 1957) (immunity extends to any "ordinary crime"); C. FENWICK, INTERNATIONAL LAW 469 (1948) (public ministers are "completely immune" from criminal prosecution).

113. United States v. Enger, 472 F. Supp. 490 (S.D.N.Y. 1978) (no immunity was granted because those charged with espionage were not duly authorized as "diplomats"); *see also* Rex v. A.B., [1941] 1 K.B. 454 (1941) (diplomatic representative of another country, duly authorized by his own government, was granted immunity from criminal jurisdiction of the host state). In a 1978 espionage case, Vietnam's ambassador to the United Nations, Dink Ba Thi, was ordered to leave the United States while his accomplice, a United States citizen, was convicted as a spy and sentenced to five years imprisonment. NEWSWEEK, Feb. 13, 1978, at 25.

114. I. BROWNLIE, *supra* note 110, at 343; I L. OPPENHEIM, INTERNATIONAL LAW, PEACE 790 (Lauterpracht 8th ed. 1955).

115. D. MICHAELS, *supra* note 20, at 50.

116. C. WILSON, *supra* note 7, at 89.

117. Departmental Order, Dist. of Columbia, Metropolitan Police Department, Diplomatic Immunity, Gen. Order 308, No. 12 (Dec. 28, 1979).

118. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 41, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

not paying parking tickets present special enforcement problems.[119] The magnitude of this problem is vividly illustrated in New York and Washington, D.C., the two cities with the largest diplomatic populations. United Nations officials in New York City accounted for 250,000 parking tickets, few of which have been paid.[120] During 1976, fewer than one-fifth of 52,830 parking tickets issued to automobiles bearing diplomatic plates in Washington, D.C., were paid.[121] Because most jurisdictions within the United States classify traffic violations as criminal offenses,[122] diplomats continue to escape prosecution for these violations under the Diplomatic Relations Act, which grants criminal immunity to most categories of diplomatic personnel.[123] The question remaining, therefore, is which categories of diplomats are protected from criminal prosecution?

### *B. Categories of Diplomats Protected under the Diplomatic Relations Act*

Of the four major categories of the "diplomatic mission," only two—diplomatic agents, and administrative and technical staff—are granted complete immunity from criminal prosecution.[124] Family members of these two groups also enjoy these immunities.[125] Functional necessity dictates that those privileges and immunities granted to the diplomatic agent be extended to his family.[126]

---

119. *Diplomatic Privileges and Immunities: Hearings and Markup before the Subcomm. on Internal Operations of the House Comm. on International Relations,* 95th Cong., 1st Sess. 40-41 (1977) (statement of Hon. Walter E. Fauntroy, a Delegate in Congress from the District of Columbia) [hereinafter cited as *Hearings and Markup*].

120. These unpaid tickets amounted to $5 million. N.Y. Times, Oct. 3, 1978, at 50. In Washington, D.C., between March, 1976, and February, 1977, there were a total of 37,905 unpaid diplomatic parking tickets at an unredeemed value of $1,070,730. *Hearings and Markup, supra* note 119, at 49 (statement of Rep. Stephen J. Solarz, New York).

121. *Hearings and Markup, supra* note 119, at 40-41.

122. *See Diplomatic Immunity: Hearings before the Senate Subcomm. of the Comm. of the Judiciary on Citizens and Shareholders' Rights and Remedies,* 95th Cong., 2d Sess. 126-39 (1978). It should be noted that in the District of Columbia, regulations proscribing minor traffic violations have been transferred from the criminal code to the civil code, and more vigorous enforcement against diplomats with limited civil liablity is expected. Effective January 29, 1979, the District of Columbia decriminalized parking violations. Bowman, *Many Embassy Aides To Lose Parking Immunity,* Wash. Post, Jan. 13, 1979, at C-1, col. 1.

123. 22 U.S.C. § 254(d) (1982).

124. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 31(1) & 37(2), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

125. *Id.* art. 37(1). This Comment limits discussion to diplomatic agents and their families.

126. O'Keefe, *Privileges and Immunities of the Diplomatic Family,* 25 INT'L & COMP.

The general rule that diplomatic agents (ambassadors and ministers) are exempt from criminal prosecution in the courts of the country to which they are accredited has not been seriously contested.[127] However, the immunities granted to the diplomat's family, and the rationale for granting such immunities, have both been challenged.

The immunity provisions of the Vienna Convention applicable to a diplomat's family were incorporated into the Diplomatic Relations Act of 1978.[128] Article 37, paragraph 1, of the Vienna Convention states that "[t]he members of the *family* of a diplomatic agent forming part of the household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36."[129] Article 37 immunity is therefore contingent upon membership in the "family" and inclusion as part of the "household." Interpretation of these terms, however, has produced multifarious definitions. The international view is that "family" includes at least spouses, dependent parties and children of different age groups,[130] while "household" includes private servants who are not nationals of the receiving state but who live under the same roof.[131] The United States interpretation of these terms, however, is more specific:

> [T]he wife of a diplomatic agent, his minor children, and perhaps his children that are full-time college students or who are totally dependent on him, are entitled to diplomatic immunity . . . . Other cases, e.g. unmarried adult daughters, dependent parents, and sisters acting as official hostesses, are decided on the basis of the facts in the particular situation and the practice in the receiv-

---

L.Q. 329, 332-33 (1976); I YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 162 (1958) ("Unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear upon the diplomatic agent through his family . . . .").

127. *See* Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp., 472 F. Supp. 77, 78 (S.D.N.Y. 1979) ("[t]he immunity of representatives of foreign nations . . . from criminal . . . jurisdiction has long been a precept of international law").

128. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978).

129. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (emphasis added). Article 37 represents the minimum privileges and immunities a state is obliged to grant to a diplomatic family. The state may exceed these standards by agreement with the sending state if it so desires. Articles 29 through 36 state that a diplomat's family may never be subjected to legal process except in cases involving real property, successions, or professional or commercial activity. *See id.* art. 31(1).

130. DEP'T OF STATE (1977), *supra* note 87, at 272.

131. I YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 123 (1957).

ing state.[132]

Extending immunity to the diplomat's wife is illustrated in two New York cases: *Friedberg v. Santa Cruz*[133] and *People v. Von Otter.*[134] Both cases involved suits for the negligent operation of motor vehicles against the wives of diplomatic agents. The defendant-wives pled the affirmative defense of absolute and unconditional immunity. The courts held for the defendants by extending the husbands' diplomatic immunities, as State Department diplomatic agents, to the wives as a matter of federal law.[135]

Children of foreign ambassadors often abuse the immunities afforded to them as members of a diplomat's family. Such abuses are illustrated by the following incidents involving serious traffic violations. The first incident involved the twenty-one year old son of the Irish ambassador to the United States, John J. Hearne.[136] Young Hearne was charged with homicide when his car struck and killed a domestic worker as she was crossing the street.[137] The charge was dropped when diplomatic immunity was invoked.[138] The other two incidents involved sons of ambassadors to the United States from Paraguay and Pakistan.[139] Both situations involved charges of reckless driving, but neither one resulted in criminal prosecution because diplomatic immunity was invoked. In one instance the police chief threatened to assign a three-man force to arrest the son and bring him before a judge "to show that traffic laws were not to be 'sneezed at.' "[140] The State Department, however, intervened and cancelled the "marching orders" because the ambassador's immunity extended to his son.[141]

The foregoing examples demonstrate that a diplomat's immunity from criminal prosecution extends to the diplomat's immediate family. Further, Article 39(1) of the Convention states that those family members extended such immunities "enjoy them from the

---

132. 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 260 (1963).
133. 193 Misc. 599, 86 N.Y.S.2d 369 (1949).
134. 202 Misc. 901, 114 N.Y.S.2d 295 (1952).
135. *Friedberg*, 193 Misc. at 600, 86 N.Y.S.2d at 370; *Von Otter*, 202 Misc. at 901, 114 N.Y.S.2d at 297. *See* 22 U.S.C. § 1251 (1979) (these cases are rarely adjudicated on their merits).
136. C. WILSON, *supra* note 7, at 187.
137. *Id.*
138. *Id.*
139. *Id.* at 188.
140. *Id.* at 189.
141. *Id.*

moment [the diplomat] enters the territory of the receiving State on proceeding to take up his post."[142] Moreover, these immunities do not immediately cease to exist when the family member is no longer "part of the household."[143] If for some reason the diplomat's immunities cease (e.g., the diplomat dies at his post or is recalled by the sending state), "the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the [expiration] of a reasonable period in which to leave the country."[144]

While extending immunity to family members of diplomatic agents is explicit within both the Vienna Convention and Diplomatic Relations Act, extending such immunity to private servants in the "household" is an entirely different matter. According to the Act, a private servant is prohibited from invoking the immunity of the diplomat for whom he or she works.[145] Article 37(4) states that private servants "may enjoy privileges and immunities only to the extent admitted by the receiving State."[146] Nevertheless, in *United States v. Santizo*[147] and *United States v. Ruiz*,[148] criminal cases decided after the adoption of the Vienna Convention, private servants attempted to shield themselves from criminal liability by asserting the immunity of their diplomatic employer. Both attempts were unsuccessful.

In *Santizo*,[149] one defendant, Ruiz, was a chauffeur to the ambassador of Peru and the husband of the other defendant, Santizo. Santizo was convicted of criminal abortion, while Ruiz was acquitted of being an accessory to the crime. Santizo moved for a new trial contending that she and her husband, as private servants of the ambassador, were entitled to diplomatic immunity from criminal

142. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

143. O'Keefe, *supra* note 126, at 350 (citing arts. 10(1)(b), 39(1) & 39(2)). The question remains as to who exactly is included as "part of the household." *See* M. WHITEMAN, *supra* note 132, at 262.

144. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39(3), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

145. *Id.* art. 37(4).

146. *Id.* Article 37(4) further states that "the receiving State must exercise its jurisidiction over [private servants in the household] in such a manner as not to interfere unduly with the performance of the functions of the mission."

147. No. C-971-63 (D.C. 1963), *as reported in* Harris, *Diplomatic Privileges and Immunities: A New Regime Is Soon To Be Adopted by the United States*, 62 AM. J. INT'L L. 98, 111 (1968).

148. No. 10150-65 (D.C. 1965), *as discussed in id.* at 112-13.

149. *See supra* note 147.

prosecution. The district court denied her motion.[150] A similar immunity claim was raised in *United States v. Ruiz*,[151] where the defendant was charged with larceny. The district court held that the servant would have been entitled to diplomatic immunity if the Peruvian ambassador had asserted it on the servant's behalf. The ambassador did not assert such immunity, however, and the defendant was subsequently convicted.[152] These cases indicate that the courts are reluctant to extend immunity to private servants within the diplomat's "household." Nevertheless, the *Ruiz* court's failure to establish an absolute rule against immunity for servants leaves the door open for future claims. Thus, extending these immunities to the private servants within the household requires case-by-case analysis until an absolute rule is established.

### *C. Sanctions Imposed to Prevent Abuses*

Although the normal procedures and sanctions against those who break local laws cannot be enforced against diplomats, a number of safeguards exist which are designed to deter diplomatic representatives from breaking local laws.[153] The sending state's retention of jurisdiction over its own diplomats serves as one such safeguard.[154] With this safeguard, an injured party is entitled to sue a diplomat in the courts of the sending state where the diplomat does not enjoy immunity.[155] In *Dickinson v. Del Solar*,[156] Lord Hewart stated that "[e]ven if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceased to be a privileged person, and the judgment might also be the foundation of proceedings against him in [his sending state] at any time."[157] Nevertheless, this safeguard is rarely used in practice.[158]

Another safeguard available is the waiver of diplomatic immu-

---

150. *See* Harris, *supra* note 147, at 111-12 (note that Santizo was not a diplomatic employee herself).

151. *See supra* note 148, at 112 (Ruiz was the defendant in both of these suits).

152. *Id.*

153. *See generally* Hill, *Sanctions Constraining Diplomatic Representatives To Abide by the Local Law*, 25 AM. J. INT'L L. 252, 253-68 (1931) [hereinafter cited as *Sanctions Constraining Diplomats*] (discusses the options open to the injured victim or state).

154. C. WILSON, *supra* note 7, at 32.

155. *Sanctions Constraining Diplomats*, *supra* note 153, at 255.

156. [1930] 1 K.B. 376 (1930).

157. *Id.* at 380.

158. *Sanctions Constraining Diplomats*, *supra* note 153, at 268.

nity by the sending state:[159]

> Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.[160]

In *United States v. Arizti,*[161] the defendant-diplomat relied upon diplomatic immunity as a defense to criminal prosecution for conspiracy and violating the federal narcotics law. The diplomat's government chose to waive his immunity, even though the diplomat himself did not consent to the waiver.[162] He was subsequently convicted.[163] The district court held that "the immunity is that of [defendant's] government and is not personal to him. . . . His government's waiver of diplomatic immunity . . . does not require his consent."[164]

Although sending states do not generally waive a diplomat's immunity from criminal prosecution, waiver may be granted when subordinate members of a diplomatic mission are accused of committing a crime. In *Rex v. A.B.,*[165] a United States Embassy clerk in England was convicted of criminal charges when, prior to the criminal proceeding, the clerk was dismissed from his employment and his immunity was waived by the United States.[166] Nevertheless, this situation is the exception to the rule. For example, when a Dutch Embassy vehicle struck and killed a man in Great Britain, the Netherlands ambassador was asked to waive diplomatic immunity of the driver. After consulting with the government, the ambassador refused to waive the driver's immunity.[167]

---

159. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 32(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 ("The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.").

160. Dickinson v. Del Solar, [1930] 1 K.B. 376, 380, 142 L.T.R. (n.s.) 66, 66; *see generally* Taylor v. Best, 14 C.B. 487 (1854).

161. 229 F. Supp. 53 (S.D.N.Y. 1964).

162. Immunity was waived because defendant was not engaged in any diplomatic function within the United States at the time of his offense. *Id.* at 54.

163. *Id.* at 55.

164. *Id.*

165. [1941] 1 K.B. 454 (1941).

166. *Id.* at 456.

167. 54 THE TIMES (London) 13 (May 23, 1958). If this same situation were to happen today in the United States, the driver could be considered a member of the service staff and therefore immune from criminal prosecution as long as the accident occurred while in the

Some commentators recommend that immunity be waived in criminal cases if the crime is punishable by local law and if the courts of the country provide a fair forum.[168] However, a sending state's refusal to waive immunity in these instances may insult the receiving state, especially if the sending state bases refusal on the claimed inability of local courts to provide a fair forum.[169] Therefore, if the sending state will not waive immunity, it is recommended that the state provide a fair forum for criminal prosecution against the offending diplomat.[170]

Additional safeguards against abuses include recall, dismissal or expulsion of the diplomat.[171] Article 9(1) of the Vienna Convention provides:

> The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.[172]

If a diplomat habitually breaks the law, or if the offense with which the individual is charged is serious, sufficient grounds exist for the recall of the diplomat by the sending state.[173] Otherwise, the diplomat runs the risk of being declared *persona non grata.*[174] The normal procedure, however, is to report violations to the head of the diplomatic mission who, in turn, dismisses or transfers those diplomats with numerous violations.[175]

In theory, recall, dismissal and expulsion are effective sanctions

---

course of his official duties. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37(2), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

168. *Sanctions Constraining Diplomats, supra* note 153, at 260-61.

169. *Id.*

170. *Id.*

171. *Id.* at 256.

172. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 9(1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

173. DEP'T OF STATE (1977), *supra* note 87, at 263; *see also Sanctions Constraining Diplomats, supra* note 153, at 256-58, 263.

174. In international law and diplomatic usage, a *persona non grata* is "a person not acceptable [for reasons peculiar to himself] to the court or government to which it is proposed to accredit him in the character of an ambassador, or minister." BLACK'S LAW DICTIONARY 1330 (4th ed. 1968).

175. C. WILSON, *supra* note 7, at 90. A sending state often relocates diplomats who have created adverse public attention because of abuses to receiving states. *Id.*

because they act as specific deterrents to gross infractions of the host state's laws by diplomats, and they prevent repeated violations of these laws by removing the offender from the country.[176] Practice reveals, however, that sending states are reluctant to recall accused diplomats and that receiving states are hesitant to dismiss or expel diplomats unless the charges are serious.[177]

Nevertheless, when a diplomat's actions threaten the safety and security of a receiving state, it is serious enough to justify dismissal or expulsion. State security takes precedence over a diplomat's immunity.[178] Therefore, the rules of immunity from arrest and detention can be circumvented when the diplomat's conduct threatens the national security of the host state.[179]

The importance of national security is not a new development in diplomatic law. It is supported by *Rose v. The King,*[180] a 1947 Canadian case involving an embassy employee who stole documents from the host embassy. The court permitted the diplomatic employee to be prosecuted. One justice concluded:

> Before granting or recognizing a privilege to another State, a State has the right to accord to itself a first privilege, that of its own security. To decide otherwise would be to grant a so-called international rule of authority superior to the strict, rigid, and necessary rule that the State, first and foremost, owes to its own citizens . . . its own security.
>
> The first duty of a diplomatic agent is to respect the security of the state.[181]

In general, these sanctions indicate an overall effort by the receiving state to hold diplomats accountable for their conduct within the state. The effectiveness of these sanctions, however, depends upon proper enforcement by the State Department. The State Department should handle disputes expeditiously by directly resolving them with the respective embassies and their sending states.[182] Fi-

176. *Sanctions Constraining Diplomats, supra* note 153, at 257.

177. DEP'T OF STATE (1977), *supra* note 87, at 263; *see also Sanctions Constraining Diplomats, supra* note 153, at 256.

178. C. WILSON, *supra* note 7, at 83-86.

179. *Id.*

180. 2 Can. C.R. 107, 3 D.L.R. 618 (1947) (Bissonnette, J., translation).

181. *Id.* at 165, 3 D.L.R. at 646.

182. For example, the British Embassy has a policy of always paying their traffic fines. An Embassy spokesman said: "We have a strict rule, no one is to claim diplomatic immunity." Gupte, *Privileges for Diplomats in U.S. Stir Resentment and May be Curbed,* N.Y. Times, July 18, 1978, § II, at B8, col. 4.

nally, assistance by the diplomats themselves is essential if the abuses of diplomatic privileges and immunities are to be curtailed.

## IV. CONCLUSION

The Diplomatic Relations Act of 1978 is the sole embodiment of diplomatic law in the United States. According to the Act, a diplomatic agent is still immune from the criminal jurisdiction of the receiving state. The Act takes major steps, however, to limit the classes of diplomatic personnel accorded immunity. Only those persons integral to the efficient functioning of the diplomatic mission—diplomatic agents, administrative personnel and technical staffs—are granted full immunity from criminal prosecution. In addition, through its mandatory automobile insurance and direct action provisions, the Act provides necessary redress to those most often injured by diplomats.

In general, the Act is a monumental step toward holding diplomats accountable for their activities within the United States. Nevertheless, it is not without criticism. Even though the Act limits those who may claim immunity from criminal prosecution, it still enables eligible diplomats to violate local laws without any fear of legal consequences. The justification for this extension of immunity to criminal conduct is that if a diplomat is forced to defend himself in court he cannot function efficiently. It seems absurd to hold that a diplomat cannot function efficiently unless prohibited from being prosecuted for violating local laws or permitted to engage in activities that harm others. Criminal offenses committed by a diplomat do *not* further the efficient functioning of a diplomatic mission—rarely is it within the legitimate scope of a diplomat's duties to break criminal laws or injure citizens.

The Act attempts to narrow the scope and class of diplomats protected. The Act has failed, however, to narrowly draw these classes and their scope of protection. By further limiting the scope of protection to only those acts performed in the course of a diplomat's official duties, abuses by diplomats can be substantially reduced. Although it may be difficult to define the scope of "official duties," once such a defintion is forged, diplomats will be on notice that certain acts that violate the laws of the receiving state may be actionable. Prosecuting a diplomat for committing serious criminal offenses may interfere with the efficient functioning of that member within the diplomatic mission, but diplomatic immunity is designed

to protect the mission as a whole rather than its individual members. The individual may be replacable without seriously impeding the diplomatic mission. If prosecution is overly extensive and subjects United States diplomats abroad to undue reciprocal hazards, the State Department can, at a minimum, expel an offending foreign diplomat and force the sending state to recall him immediately or waive his immunity.

Over the years, abuse of diplomatic status, especially with regard to traffic violations and traffic accidents, has created severe public resentment. The mandatory insurance and direct action provisions that attempt to subdue this resentment are inadequate. At a minimum, higher mandatory insurance requirements are necessary. In addition, the sending state should take responsibility for paying any amount above and beyond the policy limits of the insurer.

Diplomatic immunity may be necessary, but to extend it without regard to the rights of those injured in the receiving state is unjustified. Abuses must be curtailed; such curtailment must begin with both the diplomat's individual compliance with local laws, and the sending state's efficient policing of its own diplomats abroad. Without these two safeguards, more severe and intrusive steps may be necessary to protect citizens of the receiving state, even if at the expense of the diplomat.

*Robert A. Wilson*