

DIPLOMATIC IMMUNITY: TO HAVE OR NOT TO HAVE, THAT IS THE QUESTION

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The question of whether diplomats should be fully immune from criminal prosecution, no matter what the alleged crime, is one that is neither new nor free from dispute. As a matter of international law and United States domestic law, the source of the immunity and the extent to which it extends is quite clear.¹ But with each new offense or tragedy, far and apart as they may be, the public debate over diplomatic immunity rears its ugly head once again.

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1. The notion of diplomatic immunity is ages old and relates back to the time when the King could do no wrong, and the King's messenger served as an extension of the King and his authority. See Vienna Convention on Diplomatic Relations, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents) [hereinafter *Vienna Convention*]. The Vienna Convention was adopted in 1961 with the belief that an international convention in diplomatic intercourse, privileges, and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. *Id.* Article 29 states that "[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." *Id.* Limited exceptions, however, do exist that effectively waive diplomatic immunity. *Id.* art. 31. In 1790, the United States enacted legislation that provided diplomats with full immunity. These laws remained in effect until repealed almost 200 years later in 1978, when the Diplomatic Relations Act, 22 U.S.C. § 254 (1978) [hereinafter DRA], was passed to implement the Vienna Convention. Although the DRA adopts the provisions of the Vienna Convention, the President retains the authority to extend more or less favorable treatment when appropriate. *Id.* § 254c.

This much is true: diplomatic immunity is a necessary evil, though evil it truly rarely is. However, despite that concession, there are improvements that can be implemented that would serve to possibly prevent future offenses or tragedies from occurring. At the very least, the public perception of diplomatic immunity may become more positive.

This article will briefly address four topics:

- 1) the American public's attitudes towards diplomatic immunity;
- 2) the use/abuse of diplomatic immunity within the United States;
- 3) policy changes that have occurred as a result of specific tragedies; and
- 4) suggestions to prevent future abuses or tragedies by diplomats within the United States.

I. AMERICAN PUBLIC'S ATTITUDE

If the perception of diplomatic immunity in the United States had to be summarized by one word, that word would likely be *misunderstood*. Most instances where the topic of diplomatic immunity arises come from a context unflattering to the diplomatic community: parking violation abuses, apparent escape from criminal offenses, or drunk driving, to name just a few examples.²

As a result of the January 1997 tragic death of a teenage girl, a victim of a car accident caused by a drunk Georgian diplomat in Washington, D.C.,³ and the simultaneously public dispute between officials of the City

2. This perception is not helped by Hollywood's portrayal of diplomats such as in the 1989 film *Lethal Weapon 2* starring Mel Gibson and Danny Glover. In this film a South African diplomat openly hides behind the shield of diplomatic immunity while committing various criminal offenses, including drug smuggling and murder. Obviously, the overwhelming majority of diplomats, usually the best, brightest, and most educated a country has to offer, are law abiding guests residing in the United States.

3. See *infra* notes 21-24 and corresponding text for discussion: subsequent to delivering these remarks, the author was retained by the family of Joviane Waltrick to initiate a civil action against the Republic of Georgia, Gueorgui Makharadze and other responsible parties. An action was filed in the United States Federal District Court for the District of Columbia on december 31, 1997. John A. Knab, as representative of the Estate of Joviane Waltrick v. Republic of Georgia Case No. 1:97CV03118 (D.D.C. Dec. 31, 1997). See Bill Miller, *Crash Victim's Mother Seeks Damages from Georgian Diplomat, Others*, WASH. POST, Jan. 1, 1998, at D4; Gerald Mizejewski & Walden Siew, *Accident Victim's Mom Sues Jailed Diplomat*, WASH. POST, Jan. 1, 1998, at A1. Both diplomatic immunity and sovereign immunity will be issues litigated in the proceedings.

of New York and various diplomatic missions over parking violations,⁴ the American public was consumed with the debate over diplomatic immunity. The opinion polls, while reflecting the dissatisfaction with the results of specific events, demonstrated an ignorance of the greater good obtained through the use of diplomatic immunity worldwide and a recognition that some changes are necessary.

During a survey period of January 28, 1997 to February 4, 1997, Americans were asked whether diplomatic immunity should supersede the laws of United States, federal, state, and local government? Of the respondents, five percent answered *yes*, fifty-three percent said *no* and forty-two percent were *mixed*.⁵ Sample responses included the following retorts:

Yes, diplomatic immunity should be a matter of international law. I suspect that such immunity protects American diplomats abroad as much as it might allow certain diplomats to commit crimes here. Moreover, even it [sic] immunity should not override United States laws. I do not think it is a matter that can be left up to individual municipalities.

RC of Brooklyn, NY on 1/28/97⁶

I believe for the protection of our diplomats we should keep diplomatic immunity, but if a local law is violated they should be immediately deported to their country.

JR of Union City, TN on 1/29/97⁷

Diplomatic immunity shouldn't mean squat when it concerns the US laws.

EP of Cuyahoga Falls, OH on 1/29/97⁸

Yes. But in all categories except Murder, Manslaughter, Child Molesting and Rape! If any diplomat in any country did any of the offenses in the categories listed above, they should be deem [sic] a criminal and dealt with accordingly.

RP of New York, NY on 1/30/97⁹

4. See *infra* notes 23-27 and corresponding text for discussion.

5. *The Official New York City Website* (visited Oct. 25, 1997) <<http://www-ci.nyc.ny.us/html/misc/html/qdipimm.html>>.

6. *Id.*

7. *Id.*

8. *Id.*

This is a question that must be addressed between the countries involves. Although it seems good on the face of it would we want another countries [sic] strange laws to affect our countries [sic] visitors there?

LF of Jamaica, NY on 2/2/97¹⁰

Diplomatic immunity should only be extended to Ambassadors, Consul General. Only the top three echelons of a diplomatic missions [sic] have any need for immunity. All other employees are simply civil service types and should not be entitled to immunity.

JM of New York, NY on 2/3/97¹¹

Misconceptions over the notion of diplomatic immunity do not stop with the average American on the street, but dangerously extend to local law enforcement personnel. One commentator reported that:

State Department training sessions for local law enforcement personnel begin by breaking down the misconceptions and stereotypes about dealing with persons who have diplomatic immunity. On a written test given before the training, one question proposed:

Q. The U.S. Department of State (circle one)

A. Works with law enforcement and the court system to protect U.S. interests.

B. Fix traffic and parking tickets for diplomats.¹²

It was the objective of the State Department that anyone who initially chose B would change his answer to A by the end of the training course.

II. USE/ABUSE OF DIPLOMATIC IMMUNITY

One thing must be made clear. Diplomatic immunity protects Americans more than it may cause harm to Americans. The fact is that the United States has one of, if not the, highest number of diplomats stationed

9. *Id.*

10. *Id.*

11. *See supra* note 5.

12. *Id.*

around the world. Several countries, particularly during the Cold War, would not hesitate to arrange for an *accident* or *crime* to occur in order to harass western diplomatic personnel. This was particularly so when the diplomat was suspected to be a covert intelligence officer. Charging the diplomat with a *crime* served as a convenient manner in which to force a diplomat to leave the country. Given that many foreign legal systems fall far short of our notion of providing adequate due process, it is far preferable to know that members of our foreign service, or intelligence agencies, will not be subject to fraudulent prosecution or interrogations.¹³

In exchange for protecting our personnel, foreign diplomats are necessarily afforded the same courtesy. But is it a fair exchange? The answer is yes when one considers the statistics. There are over 18,000 individuals in the United States area who hold some form of diplomatic immunity.¹⁴ Rarely do any of these individuals commit a crime. For example, from March 1986 to February 1988, out of 80,000 serious crimes reported in the District of Columbia, only five were committed by diplomats.¹⁵

The State Department has attempted to aggressively react to diplomatic incidents, particularly those involving alcohol offenses. Between 1993 and 1996, the licenses of thirty-seven diplomats were suspended.¹⁶ Local law enforcement is supposed to report offenses to the State Department. Unfortunately, this does not always occur.¹⁷

13. In 1992, Uganda's ambassador to Washington, Stephen Kapimpina Katenta-Apuli, was implicated in an arms-purchasing and smuggling scheme to buy 400 anti-tank missiles. He was detained in Florida after a sting operation by customs agents, but not indicted because of his immunity [T]he State Department asked Uganda to lift his immunity, but the envoy was recalled home. Espionage cases tend to be different, even when suspected foreign spies do not have official immunity. In general, officials said, foreign spies are simply expelled, to insure that American spies, when caught, are treated equally. Steven Erlanger, *U.S. Will Ask Former Soviet Republic to Lift Diplomat's Immunity*, NEW YORK TIMES, Jan. 6, 1997, A15.

14. George Gedda, ASSOCIATED PRESS, Jan. 10, 1997.

15. According to State Department officials, serious cases involving diplomats are relatively rare . . . with about 10 to 15 cases a year that are nearly all questions of shoplifting or drunken driving, and usually involve the dependents of diplomats. In about half of those cases, immunity is waived and fines are paid. Steven Erlanger, *Officials Defend Diplomatic Immunity; New York Case Is Politically Charged*, NEW YORK TIMES, Jan. 7, 1997, at B3. Seventeen felonies were committed by foreign diplomats in the United States in 1995, and 19 were committed the previous year, according to the State Department. ASSOCIATED PRESS, Jan. 7, 1997.

16. ASSOCIATED PRESS, Jan. 13, 1997. Additionally, eight diplomats were expelled from the United States in 1996 for repeated drunk driving. Ruben Castaneda *Diplomat Got 3 Tickets Before Fatal Crash*, WASH. POST Jan. 19, 1997.

17. Following the accident it was discovered that Makharadze had previously been stopped for traffic violations, including drunk driving and speeding, in Virginia and Washington, D.C., but local law enforcement officials never notified the U.S. Department of State. Had they done so, it is very likely that Makharadze would have lost his driving privileges and the accident might not have

On January 3, 1997, in Washington, D.C., a car driven by Gueorgui Makharadze, the second highest ranking diplomat for the Republic of Georgia in the United States, was involved in a tragic automobile accident that resulted in the death of sixteen-year-old Joviane Waltrick, a Brazilian national residing in Maryland. Makharadze, who was said to have been driving at eighty miles per hour, was intoxicated at the time.¹⁸ However, due to his diplomatic status, Makharadze was not given a breathalyzer or blood test. The incident caused a public uproar, particularly when it appeared Makharadze would be recalled back to Georgia and would escape prosecution.¹⁹ As a moral gesture, but in part due to intense public pressure, Georgian President Eduard Shevardnadze agreed to voluntarily waive Makharadze's immunity.²⁰ Makharadze subsequently pled guilty.²¹

Most likely the biggest abuse of local laws by diplomats, and certainly one that has caused much consternation among the American public, has involved parking violations. This year witnessed an extraordinary dispute between the diplomatic community and the City of New York, with harsh words exchanged on both sides.²² Again, however, this is not a new problem. In fact, former New York City Mayor John Lindsay implemented an innovative and effective solution to the problems caused by illegal diplomatic parking during his administration in the 1960s. Although diplomatic immunity protected the representatives of foreign governments from having to pay their tickets or the impounding of their vehicles, police could tow an illegally parked diplomat's car to another legal parking place, however. So New York police hooked up diplomats' cars and hauled them to an undesirable part of New York. It took about two weeks for illegal parking by diplomats to decline in mid-town

occurred. *Id.* The Washington Post determined that the system in place to report infractions was not very systematic. A survey of local police officials found that they do notify the State Department about serious violations, but how they define serious varies. Many police officers won't even write up a traffic infraction such as running a red light, if it doesn't cause an accident, because they figure with a diplomat there's no point. Editorial, *Diplomats and Immunity*, WASH. POST, Jan. 19, 1997, at A.

18. ASSOCIATED PRESS, Jan. 4, 1997; Bill Miller, *Diplomat Pleads Guilty*, WASH. POST, Oct. 19, 1997, at A1.

19. Ruben Castaneda & Karl Vicks, *Diplomat Unlikely to be Prosecuted in Crash, Officials Say*, WASH. POST, Jan. 7, 1997, at B1.

20. Donna Abu-Nasr, *Associated Press* (visited October 25, 1997)

<<http://lubockonline.com/news/021697/georgian.htm>> .

21. Vicks, *supra* note 19. Makharadze was subsequently sentenced to 7-21 years on Dec. 19, 1997.

22. See David Stout, *Diplomats' Tussle with Police Becomes an International Issue*, NEW YORK TIMES Jan. 1, 1997; John M. Goshko, *In New York, Another Undiplomatic Dispute*, WASHINGTON POST, Jan. 7, 1997, at B7.

Manhattan.²³ City officials today have sought to implement a less obtrusive remedy.²⁴

III. SERIOUS DIPLOMATIC ABUSES INVARIABLY LEAD TO POLICY CHANGES

In 1974, a respected Washington, D.C. physician was left a quadriplegic after being involved in an automobile accident with a diplomat.²⁵ The D.C. police declared the attache was responsible for the crash but immune from prosecution because of his diplomatic status. Public outrage about this case led Congress to change diplomatic immunity laws to require diplomats to carry automobile insurance. Diplomats are now required to maintain at least \$400,000 in liability insurance, a sum greater than most Americans are required to maintain.²⁶

The answer to resolving diplomatic incidences, however, is not to overreact. Sadly, this is too often the case. Responses to diplomatic abuses must be rational, and implementation should be consistent. The development of international law from which diplomatic immunity extends finds much of its roots in the notion of reciprocity.²⁷ Thus, the action of Senator Judd Gregg (R-NH) to threaten to revoke foreign aid payments to the Republic of Georgia if it did not waive Makharadze's immunity is ill-advised, despite the fact that the United States, due to its international status, finds itself in a position to make such demands.²⁸ The Republic of

23. Henrik Liljegren, the Swedish Ambassador to the United States, "remembered a case in Stockholm when a drunken diplomat refused to leave his car after the police asked him to do so, so they could drive him home. Instead, they towed him home in his car." *NEW YORK TIMES*, *supra* note 15.

24. New York City Mayor Rudy Giuliani hoped to implement a plan used with success in Washington, D.C., where "diplomats with tickets that have gone unpaid for more than a year are denied registration for their diplomatic license plates, preventing them from driving until they pay up." Randy Kennedy, *Giuliani Asks U.S. Help On Deadbeat Diplomats*, *NEW YORK TIMES* Jan. 9, 1997, at B3.

25. Vicks, *supra* note 19.

26. *Id.* See also 22 U.S.C. Section 254 (e) ("Liability Insurance For Members Of Mission"); Castaneda & Vicks, *supra* note 19 ("As a result of previous car accidents involving immunity, diplomats are required to carry insurance coverage of at least \$400,000, and State Department officials said yesterday that that is usually the extent of reparations available to victims.").

27. Reciprocity, of course, works both ways. Georgian President Eduard Shevardnadze set a commendable example by waiving the diplomatic immunity of Makharadze. However the hard-line approach taken by New York City officials resulted in Russian traffic police launching a crackdown on foreigners driving in Moscow. They issued more than 200 citations, the majority to Americans. Lynn Berry, *ASSOCIATED PRESS*, Jan. 7, 1997. Whether President Shevardnadze's example will be followed is yet to be seen.

28. *REUTERS*, Jan. 8, 1997; see also Abu-Nasr, *WASHINGTON POST*, *supra* note 20 (stating that Senator Gregg urged President Clinton to withhold \$30 million in aid to the Republic of Georgia until it waives immunity).

Georgia's decision to ultimately waive Makharadze's immunity should be applauded, and, hopefully, a worthwhile example has been set.²⁹ One wonders, however, whether it is an example the United States will follow, as it has not in the past.

As a result of the furor raised in the wake of the Makharadze incident, it was discovered that in "a similar case in Moscow in 1993, the United States refused to waive diplomatic immunity when an American envoy struck and killed a Russian pedestrian on a dark street after midnight" ³⁰ The Russians accused the American diplomat of driving while under the influence of alcohol. "But the United States determined he had not been drinking and decided it would be best to recall him home. . . . The diplomat . . . left Moscow within thirty six hours of the accident. No disciplinary action was taken against the man, who remains in the foreign service."³¹

Indeed, United States officials could only recall one instance in recent years where the United States agreed to waive a diplomat's immunity to allow prosecution. However, in that case, which occurred in Bolivia in 1995, the United States itself was the aggrieved party. The accused individual was a contractor working for the United States Drug Enforcement Agency and allegedly embezzled funds from the United States.³²

IV. DIPLOMATIC IMMUNITY, WHILE A NECESSARY POLICY, CAN BE MODIFIED TO BETTER PROTECT THE HOST STATE COMMUNITY

While diplomatic immunity must and should be maintained, there are several policy modifications that can be taken to ensure fewer violations of domestic law occur. As Congressman David Dreier recently stated,

29. Examples of states waiving diplomatic immunity are far and few in between. In 1989, Belgium waived immunity after a sergeant posted at its embassy in Washington was charged with and later convicted of two murders in Florida. Steven Lee Myers, *Georgia Diplomat Told To Remain In U.S. For Inquiry*, NEW YORK TIMES, Jan. 11, 1997, at 1. Apparently, however, the defendant was judged mentally ill, Erlanger, *supra* note 15, at B3, and the waiver was conditional on the United States not seeking the death penalty. ASSOCIATED PRESS, *supra* note 15. More often than not, immunity is not waived. For example, in 1981, the teen-aged son of a Ghanaian diplomat was held on rape charges. After being declared persona non grata, he was expelled. A North Korean diplomat, in 1982, was charged with sexual abuse and was allowed to leave the United States after pleading guilty. However, he did not possess full immunity. Steven Erlanger, *U.S. Wants Immunity of Car-Crash Diplomat Lifted*, NEW YORK TIMES Jan. 6, 1997, at A15.

30. REUTERS, Jan. 7, 1997; Myers, *supra* note 29.

31. *Id.* Former American Ambassador to China and South Korea, James Lilley, remembered a few cases in which accredited Americans or their dependents had injured or killed local residents while driving a car. In general, he said, an indemnity is paid to the family, and the driver is sent back to America before the host country expels the driver. Erlanger, *supra* note 15.

32. REUTERS, Jan. 8, 1997.

“while the concept of diplomatic immunity remains an important underpinning of peaceful diplomacy, it is time, with the exponential growth of the diplomatic corps, that we reexamine the procedures and policies implicit in the doctrine of diplomatic immunity.”³³ Therefore, several suggestions include:

- 1) Bilateral treaties should be implemented with countries which maintain similar legal systems with that of the United States to allow for prosecution of diplomats. For example, there is no reason why an American diplomat accused of a crime in Canada or the United Kingdom should not stand trial. The systems are comparable to those to which we are accustomed and the concerns for a fair trial and prosecution of due process is minimal.³⁴
- 2) Procedures should be established between countries to allow for prosecution of diplomats if the country presents sufficient evidence to the sending State demonstrating that probable cause exists to prove the diplomat may very likely have committed a punishable offense. Rather than the sending State recalling that diplomat immediately upon being accused, the diplomat should then stand trial. Similar to requirements in extradition treaties, the offense should be one recognized by both countries as illegal. Should the nature of the punishment be too foreign (such as the removal of a hand from a convicted thief which is a practice in some Muslim countries but one not recognized by western States), arrangements could be made to have the diplomat serve an appropriate punishment back in his home State.³⁵

33. *Dreier Statement on Reform of Diplomatic Immunity* (last modified May 1, 1997) <<http://www.house.gov/dreier/dipimmst.htm>> (on file with author) [hereinafter *Dreier Statement*].

34. Congressman David Dreier (RCA) introduced legislation that calls upon the “State Department to seriously study the proposal that the United States lead an international effort to encourage every civilized government to hold their own diplomats accountable for their actions abroad by prosecuting them in their own courts.” *Id.*

35. Another alternative is to provide criminal jurisdiction in the sending State for crimes committed by its diplomats in a receiving state. The 1997 State Department and Foreign Assistance Authorization Act included a provision that the Secretary of State should explore, in appropriate fora, whether states should enter into agreements and adopt legislation:

- 1) to provide jurisdiction in the sending state to prosecute crimes committed in the receiving state by persons entitled to immunity from criminal jurisdiction under laws extending diplomatic privileges and immunities; and
- 2) to provide that where there is probable cause to believe that an individual who is entitled to immunity from the criminal jurisdiction of the receiving state under laws extending diplomatic privileges and

3) The United States State Department, before accepting a diplomat's credentials, should require the sending country to provide criminal background histories of that diplomat, as well as any knowledge of alcoholism and explanations for why the diplomat left prior postings. Additionally, those countries where a diplomat had served prior to being sent to the United States should be contacted to inquire as to whether any problems arose involving the diplomat. In the aftermath of the Makharadze case, it was revealed that Makharadze had a history of serious traffic violations in his homeland, including at least three citations for drunken driving.³⁶ Had this been known to the State Department, prior to Makharadze's credentials being accepted additional consideration could have been given to whether Makharadze should be permitted to enter the United States or, at least, question whether he should be allowed to drive a vehicle.³⁷

4) State legislatures should be urged to adopt legislation that would mandate their local law enforcement agencies to notify the United States Department of State when a diplomat is involved in any type of offense, criminal or civil, in order to monitor unacceptable behavior and, if necessary, implement punitive measures.

V. CONCLUSION

The concept of diplomatic immunity traces its roots back to ancient times, and it is a practice that should remain intact. However, it is not a practice to be abused, and appropriate precautions can and should be taken to ensure that diplomats abide by the laws and regulations of the host state. While it unfortunately often takes a tragic event to bring about policy changes in the realm of diplomatic immunity, a balance must be achieved

immunities committed a serious crimes, the sending state will waive such immunity or the sending state will prosecute such individual.

H.R. 1486, § 1706 (b) (1997).

36. Martin Sieff & Walden Siew, *Diplomat Drove Drunk In Homeland*, WASH. TIMES, Jan. 14, 1997 at A1. The information was publicly revealed by Georgian President Eduard Shevardnadze in a radio address. *Id.* Makharadze also been cited on several occasions for traffic violations in the United States. *Id.*

37. According to State Department spokesman Nicholas Burns, "most diplomats, including those from the Republic of Georgia, are only required to pass a vision test and show proof of a valid license from their country to get a State Department-issued license here." *Id.*

that not only protects diplomats from harassment but also those citizens that accord visiting diplomats the hospitality of their nation.