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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER II

IMMUNITIES

In making a determination of a jurisdictional problem, it is not enough to weigh a state's claim to assert jurisdiction in terms of the accepted bases of jurisdiction. Claims for immunity, predicated either on the status of the accused as an agent of a state or the official character of the acts constituting the offense must also be taken into account. A member of an armed force is an agent of the state which he serves, and many of his acts are done in the performance of his official duties. A common assertion is that, as an agent of the state, he is immune from the jurisdiction of any other state, and that in any event his acts done in the performance of duty cannot be the basis of prosecution by any other state. Before discussing the validity of these claims directly, a review of the situation with respect to the immunities accorded other agents of a state is desirable. In any inquiry in this area, however, it should be borne in mind that jurisdiction is the norm, immunity the exception, and the existence of an immunity must be affirmatively demonstrated. There is, moreover, a discernible tendency to restrict the scope of even the immunities recognized.

The immunity of states is still widely accepted [1] but application of the doctrine has been limited—in particular in the commercial transaction field. The basis of state immunity has been attacked on the ground that neither the equality and independence of states nor their dignity requires they be exempt from normal judicial processes with respect to their activities in foreign states, especially if in areas of similar activities the state submits to the jurisdiction of its own courts in respect to claims brought against it.[2]

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[1] See the Comment to Article VII of the Draft Convention on the Competence of Courts in Regard to Foreign States, Harvard Research in International Law, 26 A.J.I.L. (Supp.) 727 (1932).

[2] "Thus no legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts

PERSONAL IMMUNITY

Certain agents of a foreign state, notably those with diplomatic status, enjoy personal immunity from the jurisdiction of the territorial state. The fiction of extraterritoriality at one time contributed to shaping diplomatic immunities. It seems unnecessary to point out at this juncture the many facets of the law of diplomatic immunities which are inconsistent with such a premise.[3] This is not to say either that there are no rules with respect to diplomatic immunities which do not owe their origin at least in part to the extraterritorial concept or that it is now entirely without influence. Again, respect for the sending state has been and continues to be a factor.[4] Emphasis has, however, shifted to the need for protection of diplomats in the performance of their functions. This is not, of course, a rule of law, but a policy consideration

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concluded or torts committed in the territory of the state assuming jurisdiction. On the contrary, the sovereignty, the independence, and the equality of the latter are denied if the foreign state claims as a matter of right—as a matter of international law—to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that State." Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 1951 Brit. Yb. Int'l. L. 220, 229. See also 1 Lauterpacht-Oppenheim, *International Law*, 272, 273 (8th ed., 1957).

[3] "The Committee does not consider that the conception of exterritoriality, whether regarded as a fiction or given a literal interpretation, furnishes a satisfactory basis for practical conclusions. In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic functions and of maintaining the dignity of the diplomatic representative and the State which he represents as the respect properly due to secular traditions." "League of Nations, Committee of Experts for the Progressive Codification of International Law," Questionnaire No. 3, January 1926, 20 A.J.I.L., (Spec. Supp.) 148, 149 (1926).

[4] "The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolize something to which deference and respect are due, and they are consequently treated with deference and respect themselves." Hall, *International Law*, 218–19 (8th ed., Higgins, 1924). See also Pruess, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunity," 10 N.Y.U.L. Rev. 170, 182 (1932).

which is shaping the law not only with respect to diplomats but with respect to other officials of a state.[5]

There is less than complete agreement regarding which agents of foreign states are entitled to personal immunity. The immunity of heads of state,[6] foreign ministers,[7] ambassadors and others with diplomatic status and their families is universally recognized, but that of the administrative and service staff of a diplomatic mission is at best doubtful.[8] Again, a consul has no general im-

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[5] Comment a to Article 76 of the Restatement, *Foreign Relations Law*, p. 252, reads: "The most widely accepted rationale for diplomatic immunity is that it assures governments that they will not be hampered in their foreign relations by harassment of, or interference with, their diplomatic representatives. Protection of the performance of diplomatic functions requires that those charged with such performance not be subject to intimidation by persons in the receiving state. Furthermore, states recognize that immunity of their diplomatic personnel in other states may be conditioned upon a reciprocal grant of immunity to such personnel of the other states." See also Comment b to Article 77 at p. 257; Ogdon, "The Growth of Purpose in the Law of Diplomatic Immunity," 31 A.J.I.L. 449 (1937).

[6] Traditionally, the immunity is referred to as that of foreign sovereigns, but it seems clear that it is equally available to any head of state. 1 Hyde, *International Law*, 817 (2d ed. rev. 1945). See, with respect to the immunity of a sovereign, Hall, *op. cit. supra*, note 4, at 220; see generally, Article 69, Restatement, *Foreign Relations Law*, p. 219.

[7] "No precedents have been found dealing with the immunity of the head of a government or that of a foreign minister, but in view of the extensive immunity granted to diplomatic officials * * * it is to be presumed that a foreign minister while on an official visit to the government of the territorial state has an equal immunity, both as to official and as to private acts." Reporters' Notes 1 to Article 69, Restatement, *Foreign Relations Law*, p. 222.

[8] Article 37 of the Vienna Convention on Diplomatic Relations, signed April 18, 1961, accords immunity to members of the administrative and technical staff of a mission and their families, if they are not nationals of or permanently resident in the receiving state; members of the service staff who are not nationals of or permanently resident in the receiving state are accorded immunity in respect of acts performed in the course of their duties. See also The Report of the Sub-Committee (Diena), League of Nation's Committee of Experts for the Progressive Codification of International Law, 20 A.J.I.L. (Spec. Supp.) 163 (1926); and Gutteridge, "Immunities of the Subordinate Diplomatic Staff," 1947 Brit. Yb. Int'l. L. 148. Administrative and service personnel are accorded immunity in the United States by statute (Title 22 U.S.C., Secs, 252–54) subject to certain reservations, but in according such immunity the United States seemingly goes beyond its obligation under international law. Articles 76 and 77 of the Restatement, *Foreign Relations Law*, p. 252, 255, and Comment c to Article 76 and Comments (e) through (g) to Article 77, p. 253 and 259–61.

munity, but immunity only with respect to his official acts [9] or perhaps such immunity as is necessary for the proper performance of his functions.[10] The great majority of the civilian employees of the United States do not enjoy personal immunity when abroad.[11]

Personal immunity for one agent of a foreign state clearly cannot be inferred from the existence of such immunity with respect to another agent in a different category. There are abundant reasons why this should be so. In so far as personal immunity derives from respect for the sending state, it is relevant that the dignity of that state is much more significantly engaged where the agent is the Head of State, the Foreign Minister or an Ambassador than where he is a minor employee of a mission.

Diplomatic immunities in particular have a long history, which accounts for the present scope of these immunities perhaps more than does any theory or combination of theories, which have something of the quality of rationalization after the fact. Further, and of more importance, the nature of a diplomat's functions [12] make

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[9] Article 21, Draft Convention on the Legal Position and Functions of Consuls, Harvard Research, *op. cit. supra*, note 1, at 338; Beckett, "Consular Immunities," 1944 Brit. Yb. Int'l. L. 34. See Lee, *Consular Law and Practice* (1961) for a comprehensive treatment of the status of Consuls.

[10] Article 85, Restatement, *Foreign Relations Law*, p. 287.

[11] "Questions have been raised before this committee about the diplomatic status of State Department and other civilian officials. In the first place, it should be made clear that the great majority of State Department personnel overseas do not have immunity from local criminal jurisdiction. On the contrary, most United States civilian officers and employees abroad, including those of other governmental agencies, as well as the State Department, have neither immunity nor the special guarantees provided United States servicemen by the Status of Forces Agreement. They are completely subject to local criminal jurisdiction, whether on duty or off duty." Deputy Under Secretary Murphy, Hearings on H.J. Res. 309 Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 167 (1955). See, however, the Vienna Convention on Diplomatic Relations, *supra*, note 8.

[12] Article 3 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, defines the functions of a diplomatic mission as consisting *inter alia* in:

"(a) representing the sending State in the receiving State;

(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) negotiating with the Government of the receiving State;

(d) ascertaining by all lawful means conditions and developments in

a peculiarly compelling case for personal immunity. He is not simply physically in the country, but intimately involved with its government. Basically, his functions are to acquire information and to do all he legitimately can to shape attitudes and events most favorably to his own state. To do this, he must inquire, suggest, persuade, negotiate, and bargain; all of which involve direct relations with the foreign government. The subtleties of his functions make subtle pressures upon him possible, and hence call for a maximum of protection from those pressures, even those exerted indirectly, through his family or, perhaps, his domestic servants. Also, the protection must be adequate to the situation in the unfriendliest foreign country,[13] and it is obviously impractical to vary its scope depending on the prevailing climate of particular bilateral relationships. All this suggests that protection of the diplomatic function, without more, justifies complete personal immunity for diplomats and their associates. The process of accreditation and particularly the right to declare a diplomat *persona non grata* not only reflect and emphasize the nature of the diplomat's relationship with the state to which he is accredited, but provide something of a substitute sanction for those supplied by the criminal law. This is not to say that there is no functional basis for according immunity to other agents of a foreign state than diplomats, but that the status of each class must be separately judged in the light of the particular circumstances.

The importance of these considerations, and the present disposition to restrict the immunities of those in comparable categories but the scope of whose immunities is not firmly established, is revealed in the history of such international organizations as the League of Nations and the United Nations. Two classes of individuals are involved, representatives of member states and officials of the organizations, and their status differs. Representatives of members who have diplomatic rank, even though not accredited to a sovereign state, have been said to enjoy diplomatic

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the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

[13] "[O]ur diplomatic personnel are often required to live and work in hostile lands where immunity is essential to their work and to their safety." Deputy Under Secretary Murphy, Hearings, *supra*, note 11, at 167.

privileges and immunities under international law.[14] This is not unchallenged,[15] however, and in any case there is doubt regarding the officials to be included in this class. Officials of international organizations, which lack the capacity for legation, appear not to be entitled to diplomatic privileges and immunities in the absence of treaty,[16] and the United States is said to have been particularly adamant in its adherence to this view.[17]

The Covenant of the League provided in Article 7 that "Representatives of the Members of the League and officials of the League shall enjoy diplomatic privileges and immunities." [18] The Covenant, in according full diplomatic privileges and immunities to representatives of members and officials of the League, followed a pattern established in many prior treaties. The shift to the functional approach to the problem of immunities, with a resulting limitation in their scope, is reflected in the corresponding provision of the Charter of the United Nations. Art. 105, paragraph 2, provides: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." The General Convention on Privileges and Immunities of the United Nations,[19] suggests that in the view of the General Assembly the necessary immunities from criminal jurisdiction of both representatives of members and officials are limited.[20]

The United States has not ratified the General Convention, and

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[14] Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 A.J.I.L. 694, 699 (1931); Kunz, "Privileges and Immunities of International Organizations," 41 A.J.I.L. 828, 843 (1947).

[15] Article 89, Restatement, *Foreign Relations Law* and Comment b thereto, p. 311.

[16] Preuss, *op. cit. supra*, note 14, at 695.

[17] Preuss, "The International Organizations Immunities Act," 40 A.J.I.L. 332, 333 (1946), citing the opinion given by the Department of State to the British Embassy, 1 *Foreign Rel. U.S.* 414 (1929). See also Reporters' Note 1 to the Introductory Note to Topic 4 of Chapter 4 of the Restatement, *Foreign Relations Law*, p. 292.

[18] For the manner in which this was implemented, see Preuss, *op. cit. supra*, note 14, at 699; and Kunz, *op. cit. supra*, note 15, at 844.

[19] 1 U.N. Treaty Series 15 (1950).

[20] See Articles V, VI and X. Members are placed under a duty to waive the immunities accorded where they would impede the course of justice and can be waived without prejudice to Members interests.

in the host state the immunities of representatives of members and officials of the United Nations depend primarily on the Headquarters Agreement [21] and the International Organizations Immunities Act.[22] The Headquarters Agreement goes beyond the requirements of the Charter and grants to resident representatives and certain members of their staffs "the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it." [23] On the other hand, the Headquarters Agreement makes no reference to officials of the United Nations, and their immunity from criminal jurisdiction. Under the International Organizations Immunities Act it is strictly limited to that for official acts.[24] Moreover, not only are the benefits accorded by the Act subject to the requirement that the President prescribe the organization, and to the President's power to withdraw, condition or limit such benefits,[25] but the Secretary of State is given power to declare any individual *persona non grata.*[26]

The limited immunity of United Nations officials under the Act was further restricted in the *Ranollo Case,* a prosecution against the chauffeur of the Secretary-General for speeding while driving the Secretary-General to a conference with officials of the City of New York on United Nations business.[27] The court indicated it would have accepted as conclusive a suggestion of the Department

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[21] 61 Stat. 760 (1947), TIAS No. 1676.

[22] 59 Stat. 671 (1945), 22 U.S.C. Sec. 288d (1958). On the issue of whether the Act implements completely the obligations of the United States under the Charter, see Preuss, *op. cit. supra,* note 14, at 341.

[23] Section 15.

[24] Section 288 (d) (b) reads: "Representatives of foreign governments in or to international organizations 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 and falling within their functions as such representatives, officers or employees except insofar as such immunity may be waived by the foreign government or international organization concerned." Section 288 e (c) adds that "No person shall, by reason of the provisions of said sections, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein."

[25] Section 288.

[26] Section 288 (e). For a criticism of this grant of power to the Secretary of State, see Preuss, *op. cit. supra,* note 14, at 339.

[27] *Westchester County* v *Ranollo,* 187 Misc. 777, 67 N.Y. Supp. 2d 31, 41 A.J.I.L. 690 (1947), City Ct., New Rochelle, (1946).

of State that the chauffeur was immune [28] but in the absence of such advice undertook to decide the jurisdictional issue, and held the chauffeur not immune. The case is interesting not so much for its result as for the reasons given, particularly the emphasis placed upon the "equal administration of justice" and the objection voiced to the creation of a "large preferred class within our borders."

In summary, the history of the immunities accorded representatives to and officials of the League of Nations and the United Nations highlights the degree to which the personal immunity of diplomats accredited to the territorial state is *sui generis*. It also suggests that with respect to other agents of foreign governments whose immunity is not firmly established, states are prepared to accord only that immunity which is essential to the performance of their specific functions. There is little disposition to group all officials of a foreign government in the same class, and accord all the same immunity, regardless of function.

OFFICIAL ACTS

A second major issue is whether an agent of a foreign government who does not enjoy personal immunity may nevertheless claim immunity with respect to acts done in the performance of his official duties. It has been asserted that there is a general rule of international law according such immunity [29] but there is much reason to challenge that assertion.

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[28] The chauffeur's appointment had been duly notified to and accepted by the Secretary of State, and the Legal Adviser had advised the Secretary-General that in his opinion the chauffeur was entitled to the immunity. Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranollo Case," 41 A.J.I.L. 555, 556–57 (1947). On the issue of the conclusiveness of a State Department certificate, see pp. 559–65, and on the appropriateness of the jurisdictional issue being decided by the court, see p. 573.

[29] The Comment to Article 18 of the Draft Convention on Diplomatic Privileges and Immunities, Harvard Research in International Law, 26 A.J.I.L. Supp. 15, 99 (1932) states that: "International law imposes upon the courts of the receiving state an incompetence *ratione materiae* in the case of public acts. * * *. Immunity for official acts, as the application of a general principle of international law, and attaching to the intrinsic nature of the acts themselves, does not constitute a part of 'exterritoriality' or diplomatic immunity in the strict sense, which imposes upon the court an incompetence *ratione personae*. It applies to all public acts, by whomsoever performed, and to all state agents, whether diplomatic or otherwise." See to

There is no such general principle of municipal law. The immunity of the state from suits by its citizens or subjects, if it exists, does not imply, as a corollary, immunity for its agents.[30] This rule of law is subject to qualification in the United Kingdom "in the case of acts committed abroad against a foreigner." [31] This qualification is, however, concerned only with the jurisdiction of the British courts with respect to Acts of State of agents of the British Crown. It embodies a principle of British constitutional law stemming from certain concepts regarding the separation of powers, rather than a rule of international law.[32]

Whether an agent of a foreign state is immune from the jurisdiction of the territorial sovereign is a quite different question. The immunity, if it exists, is an extended application of the doctrine that "every sovereign State is bound to respect the in-

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the same effect Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunity," 10 N.Y.U.L. Rev. 170, 178–80 (1932).

The Restatement, *Foreign Relations Law*, asserts, however, in Comment C to Article 69, p. 221 that: "Public ministers, officials or agents of a state do not have immunity from personal liability, even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state or unless they have one of the specialized immunities * * *."

[30] In *Johnstone* v. *Pedlar* [1921], 2 A.C. 262, an action by a United States citizen to recover money taken from him when he was arrested for illegal drilling, the House of Lords rejected the defense of Act of State, Viscount Finlay saying, at 271: "It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person, the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be." See also Dicey, *Conflict of Laws* 163 (7th ed. 1958). Cf., *Barr* v. *Matteo*, 360 U.S. 564 (1959), *Howard* v. *Lyons*, 360 U.S. 593 (1959).

[31] Viscount Finlay in *Johnstone* v. *Pedlar*, *id.*, at 271. This dictum was based on *Buron* v. *Denman*, [1848] L.R. 2 Ex. 167, 189, in which Commander Denman, who had burned the Spanish plaintiff's slave ships and freed a large number of slaves in territory on the West Coast of Africa, where slavery was lawful, was sued in trespass in an English court. Baron Parke, in leaving to the jury the issue of ratification of Denman's acts by the British government, stated that ratification would give the plaintiff "a remedy against the Crown only (such as it is) and actually exempts from all liability the person who commits the trespass." See also 26 *Halsbury's Laws of England* 251 (2d ed., 1937).

[32] Mann, "The Sacrosanctity of the Foreign Act of State," 59 L.Q. Rev. 42, 45 (1943).

dependence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." [33] The doctrine, so broadly stated, has been increasingly attacked but has been reaffirmed by the Supreme Court.[34] To a substantial yet indefinable degree it stems from notions regarding the separation of powers and is hence to that degree a rule of municipal rather than of international law.[35] Usual application of the doctrine is in cases in which the act of the foreign state is only indirectly involved, as in litigation involving private rights alleged to have been created by act of the foreign state. Critics have urged that, at least as to Acts of State other than legislation or judgments, the doctrine should be applied only where the Act of State "is done subject to or is recognized by that legal system which governs the legal relationship concerned," [36] in keeping with the approach of private international law. The confiscation cases are hence

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[33] *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); see also 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 2, at 267.

[34] *Banco Nacional de Cuba* v. *Sabbatino*, 32 U.S.L. Week 4229 (Mar. 23, 1964). For criticism of the doctrine, see Mann, *op. cit. supra*, note 32, at 155; Zander, "The Act of State Doctrine," 53 A.J.I.L. 826 (1947); "Act of State Immunity," 57 Yale L.J. 108 (1947); "A Reconsideration of the Act of State Doctrine in United States Courts," a report of the Committee on International Law of the Association of the Bar of the City of New York, May, 1959. See also Kingsberry, "The Act of State Doctrine," 4 A.J.I.L. 359 (1910); W. Harrison Moore, *Act of State in English Law* (1906). But see Falk, *Toward a Theory of Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 26 Rutgers L. Rev. 1 (1961).

[35] "The Act of State Doctrine is not of itself a rule of public international law. In the United States the doctrine would appear to be largely a consequence of judicial deference to the executive branch imposed by the separation of powers in our constitutional system. Public international law does not prohibit the courts of one State from reviewing the validity of the acts of a foreign government under international law." A Reconsideration of the Act of State Doctrine in United States Courts, *op. cit. supra*, note 34, at 3. This seems an overstatement; there would appear to be an obligation to recognize a foreign act of state which is unexceptionable on any of the usual grounds, e.g. is not contrary to the public policy of the forum, does not relate to property or persons not within the foreign state. See Falk, *op. cit. supra*, note 34, at 31. But see Comment g to Article 41, Restatement, *Foreign Relations Law*, p. 134 and *Banco Nacional de Cuba* v. *Sabbatino*, 32 U.S.L. Week 4229, 4235 (Mar. 23, 1964).

[36] Mann, *op. cit. supra*, note 32, at 55. See also Comment b to Article 41, Restatement, *Foreign Relations Law*, p. 129.

explicable in terms of "the generally accepted principle of private international law that the transfer of tangible property is subject to the *lex rei sitae* * * *." [37] Private international law furnishes no rule where criminal jurisdiction is involved, but the general recognition in international law of the primacy of territorial jurisdiction suggests a parallel approach.[38]

Where the criminal or tort liability of the agent of a foreign state is involved, the application of the doctrine is again in a sense indirect. *Underhill* v. *Hernandez* [39] is said, however, to have established that in the American view the agent of a foreign state does enjoy immunity—in that case from tort liability—for acts done in the performance of his official duty,[40] since the defendant at the time of suit was no longer an agent of the foreign state, Venezuela. The English view is said to be to the contrary.[41] But even if the decision in *Underhill* v. *Hernandez* is read as predicating immunity on the official character of the defendant's act, the question remains whether this does not depend on the fact the act was done in Venezuela, not the United States, since the court's rationale for its decision was "the immunity of individuals from

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[37] Mann, *op. cit. supra*, note 32, at 56.

[38] That criminal jurisdiction may exist on other bases, e.g., nationality, would seem not to destroy the parallel, since nationality is normally considered a secondary basis for jurisdiction and in any event is not the exclusive basis. The common limitation on the exercise of jurisdiction on this basis that the act must also be a crime where it occurs approaches though it does not quite reach recognition that the law of the territorial state "governs the legal relationship concerned."

[39] 168 U.S. 250 (1897).

[40] "It would appear that in the United States the basis of this immunity is *ratione materiae* rather than *ratione personae* and therefore immunity persists in respect of earlier official acts after an official no longer holds office. See Harvard Research Draft Convention on "Diplomatic Privileges and Immunities," Article 18, A.J.I.L. Supp. 97 (1932); *Hatch* v. *Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876)." A Reconsideration of the Act of State Doctrine in United States Courts, *op. cit. supra*, note 34, at 9, n. 21.

[41] "There cannot be any doubt that in this country, as in most others, the opposite view prevails in practice and theory, and that, accordingly, it is the personal position of the defendant, not the nature of the act the subject-matter of the proceedings, that is of decisive importance. Nevertheless, even in English law there is perhaps a certain inclination in some cases to attribute immunity to the nature of the act." Mann, *op. cit. supra*, note 32 at 47. Mann refers to DiVischer's theory that it is the official act which is entitled to immunity, based on the distinction increasingly drawn between acts of sovereignty and acts done *jure gestionis*.

suits brought in foreign tribunals for acts done *within their own state* in the exercise of governmental authority * * *." [42] This is not the same as saying that a question which should be determined by a careful balancing of the interests of states should turn purely on the matter of territorial sovereignty. Rather the suggestion is that, at least where criminal jurisdiction is concerned, the place where the act occurred is of such significance that only if it occurred outside the state seeking to exercise jurisdiction is there any basis for application of the Act of State doctrine, standing alone.[43] Here, it should be noted that the notion of the sanctity of Acts of State draws its strongest support from what most would now consider an exaggerated view of the significance of territorial sovereignty.[44] In the cases following *Underhill*, the American courts have commonly restated the doctrine in terms which include the element that the act occurred in the foreign state.[45] Of more importance is that "except where constrained by

[42] 168 U.S. 250, 252 (1897). (Emphasis added.)

[43] In the latter case there may still be occasion for balancing the opposing interests of the state concerned, as when the agent of the foreign state, e.g. a member of its armed forces, is a national of another state, and the latter state seeks to exercise jurisdiction on the basis of nationality.

[44] "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. * * * The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law." Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 358 (1909).

[45] *Ricaud* v. *American Metal Company, Ltd.*, 246 U.S. 304 (1918); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *The Claveresk*, 264 Fed. 276 (2d Cir. 1920); *Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F. 2d 438 (2d Cir. 1940); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir. 1947); *United States ex rel Von Heymann* v. *Watkins*, 159 F. 2d 650 (2d Cir. 1947); *United States ex rel Steinworth* v. *Watkins*, 159 F. 2d 50 (2d Cir. 1947); *Pasos* v. *Pan American Airways*, 229 F. 2d 271 (2d Cir. 1956); *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N.Y. 372 (1923); *Salimoff & Co.* v. *Standard Oil Co. of New York*, 262 N.Y. 220 (1933); see also *A. M. Luther* v. *James Sagor and Co.*, [1921] 1 K.B. 456. Cf. *Hewitt* v. *Speyer*, 250 Fed. 367 (2d Cir. 1918), in which the doctrine is stated in terms of "the acts of a foreign nation performed in its sovereign capacity." But the act in question was the

an international agreement requiring them to give extraterritorial effect to a foreign act of State, * * * United States courts have felt free to deny effect, as inconsistent with the public policy of the forum, to foreign acts of State purporting to affect a person or *res* not within the territorial jurisdiction of the acting State at the time of the act in question. The Act of State Doctrine therefore is concerned only with acts of State operating directly on persons or property within the territorial jurisdiction of the acting State." [46] The fighting issue has been whether a court of the forum could deny effect to a foreign Act of State even though it affected a person or *res* within the forum's territorial jurisdiction, on the ground it was inconsistent with the public policy of the forum. The New York Court of Appeals has felt free to do so,[47] and the Second Circuit's decision in *Bernstein* v. *Van Heyghen Freres Societe Anonyme* [48] has been severely criticized be-

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payment in Ecuador into an account in the Bank of Ecuador of moneys claimed to be subject to a prior lien.

The holding in Banco Nacional de Cuba v. Sabbatino was carefully limited, the court stating that "* * * we decide only that the Judicial Branch will not examine the validity of a taking of property *within its own territory* by a foreign sovereign government, extant and recognized by this government at the time of suit * * *." 32 U.S.L. Week 4229, 4238 (Mar. 23, 1964). (Emphasis added.)

[46] "A Reconsideration of the Act of State Doctrine in United States Courts," *op. cit. supra*, note 34, at 425, citing *U.S.* v. *Moscow Fire Ins. Co.*, 280 N.Y. 286 (1938), *aff'd* 309 U.S. 624 (1940); *Vladikavkazsky Railway Co.*, v. *New York Trust Co.*, 263 N.Y. 369 (1934); *Plesch* v. *Banque Nationale de la Republique d'Haiti*, 273 App. Div. 224, *aff'd per curiam*, 298 N.Y. 573 (1948). *Bollack* v. *Societe Generale*, 263 App. Div. 601 (1942); *Zwack* v. *Kraus Bros. & Co.*, 133 F. Supp. 929 (S.D.N.Y., 1955) *aff'd in part*, 237 F. 2d 255 (2d Cir., 1956).

Mann, *op. cit. supra*, note 32, at 170, 171 states: "If, for one reason or another, an English court were precluded from opposing its principles of justice and morality to foreign acts of State, logic might necessitate the conclusion that foreign confiscatory legislation must also be allowed extraterritorial effect so as to comprise property situate in this country. English Courts have shrunk from arriving at so extraordinary a result." Mann cites also decisions of the Rumanian and Swedish Supreme Courts.

[47] *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533 (1953). See also *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N.Y. 369 (1943); *Sokoloft* v. *National City Bank*, 239 N.Y. 158 (1924); *Second Russian Ins. Co.* v. *Miller*, 297 F. 404 (2d Cir., 1924); *Zwack* v. *Kraus Bros. & Co.*, 237 F. 2d 255 (2d Cir., 1956); cf. *A.M. Luther* v. *James Sagor and Co.* [1921] 1 K.B. 456.

[48] 163 F. 2d 246 (2d Cir., 1947).

cause it did not.[49] There would seem to be no need to argue that an act which is in violation of its criminal law is contrary to the public policy of a state.

The cases involving tort or criminal jurisdiction with respect to acts of agents of a foreign government committed in the receiving state suggest there is no immunity with regard to such acts merely because they were done in the performance of official duty. The leading case, *Regina* v. *Leslie*,[50] concerned the master of an English merchant vessel who, under a contract with the Chilean government, carried certain Chileans, banished by the Chilean government, from Valparaiso to Liverpool. The court drew a sharp distinction between the performance of official acts within and without the territory of the state of which the defendant was an agent,[51] and affirmed a conviction for false imprisonment for detaining the deportees after the vessel left Chilean waters. On virtually identical facts, involving a deportation from Hawaii, by order of President Dole, on a British vessel, the Divisional Court of British Columbia held the captain and owner liable in tort.[52] A

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[49] "'Acts of State' Immunity," 57 *Yale L.J.* 108 (1947). But see *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 859, (2d Cir., 1962). Reversed on other grounds, 32 U.S.L. Week 4229 (Mar. 23, 1964).

[50] Court of Criminal Appeals, 1860, 8 Cox Crim. Cas. 269 (1860); Restatement (Second), *Conflict of Laws*, par. 43 f, Comment f, Illustration 7 (Tent. Draft No. 3, 1956) is expressly to the contrary.

[51] "We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government, and under its authority. * * * The further question remains, can the conviction be sustained for that which was done out of the Chilean territory? and we think that it can. It is clear that an English ship on the high seas, out of any foreign territory, is subject to the laws of England, and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil. * * * [F]or an English ship the laws of Chile out of the state are powerless and the lawfulness of the acts must be tried by English law." *Regina* v. *Leslie*, *supra*, note 50, at 277–78. But see *Rex* v. *Secretary of State for Foreign Affairs* [1947] 2 All E.R. 550, [1947] Ann. Dig. 69 (No. 23). Compare *Dick* v. *United States Lines Co.*, 38 F. Supp. 685 (S.D. N.Y., 1941), holding a seaman could properly be confined by the ship's officers in a foreign port at the direction of officials of the littoral state.

[52] *Cranstoun* v. *Bird*, [1896] 4 B.C. 569. The Court said, at 581–82:

"The admission can mean no more than this, that a lawful order was made in Hawaii to carry the plaintiff in a lawful manner to Vancouver, and in an Hawaiian ship the order might probably have been lawfully carried out. No international law, as it seems to me, has any operation on the

dictum in *Vavasscur* v. *Krupp* is to the same effect, distinguishing a case involving a personal sovereign from one involving his agents.[53]

Across the board, there is too much authority to the contrary to warrant the conclusion that there is a general rule of international law, based on such abstract principles as the equality and independence of States, according immunity to any agent of a foreign government for any act done in the performance of duty. Where the immunity is recognized, it appears to be based primarily—as is personal immunity—on the need to protect the agent in the performance of his functions, and, indirectly, the state he serves in the conduct of its affairs. One factor in that quite flexible concept appears to be the status of the agent, so that personal immunity and immunity for official acts in a sense overlap. A second basic for the immunity may be fairness, i.e., the feeling that it is unfair to place a man in the dilemma of having to choose between conflicting duties.

The Vienna Convention on Diplomatic Relations accords immunity to certain officials not entitled to personal immunity.[54] It is clear, however, that this is not responsive to a view that a general rule of international law requires this result. Rather it

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case. An English captain of an English ship outside Hawaiian jurisdiction commits a trespass, and Hawaiian law or acts of that Government cannot justify the trespass in an English court. No doubt in an Hawaiian court it would or might be otherwise, and this shows that *Buron* v. *Denman*, 2 Ex. 167, has no application."

[53] German shells, said to infringe English patents, were brought into England by the Mikado to be placed on a Japanese warship. The patentee obtained an injunction against the agents of the Mikado restraining them from removing the shells. The Mikado applied to be made and was made a defendant and an order was issued that, notwithstanding the injunction, he could remove the shells. Brett, L. J., in the course of his opinion, said: "If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue." *Vavasseur* v. *Krupp*, [1878] 9 Ch. D. 351, 358.

[54] Article 38 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, provides that:

> "1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that state shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

was motivated by the opinion that there is a functional basis for according the immunity.[55] Moreover, immunity even for acts done in the performance of official duty is expressly negatived in other instances. This is clear recognition that no rule of international law requires according the immunity to all officials of a foreign government.[56]

The foregoing suggests, as guidelines in appraising the claim that a member of an armed force is entitled to personal immunity, these considerations:

(1) There is no general rule according personal immunity to the agents of a foreign state, and the great majority of such agents enjoy no immunity.

(2) There is a discernible tendency to limit immunities of agents of a state to those necessary, in a quite strict sense, to the exercise of their functions, and there is a correlative emphasis on waiver.

(3) The established immunity of diplomats accredited to a state is of limited significance as an analogy because; (a) it has deep historical roots, including the discredited fiction of extra-territoriality of embassies; (b) it depends in part on accreditation and its corollaries, which provide an independent sanction; and (c) it depends largely on the peculiarly close relationship between the diplomat and the state to which he is accredited.

Regarding the claim that an agent of a foreign state is entitled

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[55] Commentary (c) to Article 37 of the Draft Articles on "Diplomatic Intercourse and Immunities," *Report, International Law Commission*, U.N., 10th Session, 28 April-4 July, 1958. G.A., 13th Session, Supp. No. 9 (A/3859), notes that: "The majority * * * considered it essential for a diplomatic agent who is a national of the receiving state to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions * * *."

[56] Article 38 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, provides:

> "2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State."

But those not nationals or residents of the receiving States who are members of the administrative and technical staffs of a mission enjoy personal immunity, and members of the service staff immunity in respect of acts performed in the course of their duties. (See also Article 37 of the Convention.)

to immunity with respect to acts done in the performance of duty, the situation is much less clear. There is some doubt that the Act of State doctrine extends to acts done outside the state of which the accused is an agent, and in any event the reach of the doctrine is likely to be limited strictly in terms of the need for protecting the agent in the performance of his duties.