

PRIVILEGES AND IMMUNITIES OF THE DIPLOMATIC FAMILY

By

PATRICK J. O'KEEFE *

DIPLOMATIC relations between States are maintained by men and women many of whom are married and have children, as well as parents still alive and other relatives. A question that confronts officials, and sometimes courts, of the State to which these men and women are accredited is: what privileges and immunities are their wives or husbands, children, parents and other relatives entitled to if they enter that State? What are the obligations of the receiving State in this regard?

APPLICABLE LAW

For 109 States the applicable law regulating their obligations is to be found in Article 37 of the 1961 Vienna Convention on Diplomatic Relations.¹ This reads as follows:

1. 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.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.²

In becoming party to the Convention, these 109 States have indicated their willingness to grant the indicated privileges and immunities to the people specified. They are thus under a general duty to see

* Lecturer in Law, University of Sydney.

¹ Three of these States have indicated that they will apply Art. 37 (Botswana) and Art. 37 (2) (Iraq, Malta) only on the basis of reciprocity. These reservations go no further than is allowed for under Art. 47 (2) (a).

² The full text of the Convention can be found in (1964) 500 U.N.T.S. 96. It entered into force on Apr. 24, 1964.

that their municipal law, whether by direct application of the Convention or by legislative incorporation, is capable of fulfilling this obligation. Failure actually to grant these privileges and immunities will give rise to a breach of international law.³

Three other States—Egypt, the Khmer Republic and Morocco—have acceded to the Convention, but have entered a reservation to the effect that Article 37 (2) should not apply. The reservations of Egypt and the Khmer Republic have been objected to by eight States—Australia, Belgium, Denmark, France, the Federal Republic of Germany, Greece, New Zealand and the United Kingdom. With the exception of Belgium these States have also objected to the reservation of Morocco.⁴ The position is that Egypt, the Khmer Republic and Morocco are bound by Article 37 (1) and quite possibly also by Article 37 (2)—their reservations being invalid as “incompatible with the object and purpose of the treaty”⁵; alternatively, the Convention provision may be regarded as binding either because on this point it is declaratory of customary international law or because it has developed into a rule of customary international law.⁶ Discussion of this alternative is relevant also to those States which have not become party to the Vienna Convention on Diplomatic Relations.

On the first approach, prior to 1961 there was almost universal agreement with the idea that some of the diplomat's family should be granted privileges and immunities; there was less agreement about which members of the family should be so entitled and whether the privileges and immunities should apply to the families of all personnel of an embassy or some personnel only. The wife of an ambassador was certainly entitled to the same immunities as her husband, but it was considered questionable whether the extension of privileges and immunities to wives of other personnel—particularly those labelled by the Vienna Convention “members of the administrative and technical staff”—was as universally accepted.⁷ A similar situa-

³ Brownlie, *Principles of Public International Law* (2nd ed., 1973), p. 38.

⁴ The texts of reservations and objections are reproduced in UN Doc. ST/LEG/SER. D/7, *Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions* (List of Signatures, Ratifications, Accessions, etc. as at Dec. 31, 1973), p. 52.

⁵ The formulation used is that of the Vienna Convention on the Law of Treaties. This Convention is not yet in force, but the rule reflects customary international law as expressed in *Reservations to the Convention on Genocide: Advisory Opinion* (1951) I.C.J.Rep. 15. Note the analysis at p. 24 of the object and purpose of that Convention. Similar examination of the object and purpose of the Vienna Convention on Diplomatic Relations could well result in these reservations being held as incompatible.

⁶ An argument based on “persistent objection” (Brownlie, *op. cit. supra*, n. 3, p. 10) would have little weight here, as the degree of objection would seem to be insufficient to invoke the exception.

⁷ Wilson, “Diplomatic Privileges and Immunities: The Retinue and Families of the Diplomatic Staff” (1965) 14 I.C.L.Q. 1265, 1283.

tion applied with respect to children: children of an ambassador enjoyed at best exemption from civil and criminal jurisdiction, but there was no clear rule regarding the children of other ranks of personnel.⁸ Much of this uncertainty resulted from lack of information on State practice and the paucity of court decisions relevant to the matter. It is for this reason that the agreement of many nations at Vienna on Article 37 can be taken as being declaratory of customary international law on this point. Article 37 introduced a clear rule into what was a confused situation: the personnel whose families were entitled to privileges and immunities were indicated and the range and extent of those privileges and immunities set out. Moreover, a few years after the Conference at Vienna, nations such as Canada were saying that "while the Convention is not yet in force, it is generally regarded as declaratory of international law."⁹

If a contrary view be taken and Article 37 regarded as not declaratory of international law at the time of its formulation, it can still be argued that the article has generated a rule of customary international law. The International Court of Justice has established three criteria for such a happening¹⁰: first, the provision "should, at all events potentially, be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law"¹¹; second, "a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected," and, if possible, "the passage of any considerable period of time"¹²; third, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked . . . and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."¹³

Article 37 seems to satisfy all these criteria. It is "of a fundamentally norm-creating character," and there is nothing in the Convention or elsewhere which would detract from this rule constituting a "general rule of law." Participation in the Convention is widespread (as has been previously stated, 112 States are party to it) and representative of all legal and political systems. The Convention has now been in existence for 14 years and in force for 11. The final requirement, the *opinio juris*, is hardly capable of direct proof in the

⁸ *Ibid.* p. 1287.

⁹ Letter of Feb. 11, 1964, by Canadian Under-Secretary of State for External Affairs; reported in (1965) 3 *Canadian Yearbook of International Law* 318.

¹⁰ *North Sea Continental Shelf Judgment* (1969) I.C.J.Rep. 3.

¹¹ *Ibid.* p. 42.

¹² *Ibid.*

¹³ *Ibid.* p. 43.

absence of a specific situation; none of the usual evidence on which this element of custom is assessed being available in this instance. On the other hand, there is no evidence to suggest that State practice in regard to Article 37 lacks this element. Moreover:

The essential problem is surely one of proof, and especially the incidence of the burden of proof. . . . The proponent of a custom has to establish a general practice and, having done this in a field which is governed by legal categories, the tribunal can be expected to presume the existence of an *opinio juris*.¹⁴

For these reasons Article 37 will be used as the basis of this examination of the entitlement to privileges and immunities of the diplomatic family.

However, before commencing our examination of this problem, it is necessary to point out that Article 37 represents the least that a State is obliged to grant the diplomatic family by way of privileges and immunities. States can by agreement between themselves exceed this standard if they so wish. Bilateral agreements of this nature are undesirable in that they detract from the standard of uniformity established by the Vienna Convention; but the Convention does not prohibit them. Article 47 prohibits discrimination between States in applying the Convention. However, it goes on to say that discrimination shall not be regarded as taking place "where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention."

WHOSE FAMILIES?

Article 37 is specific on this point: only the families of the diplomatic agents and the members of the administrative and technical staff are entitled to privileges and immunities. These ranks are defined in Article 1.

A "diplomatic agent" is the "head of the mission or a member of the diplomatic staff" by which is meant "members of the staff of the mission having diplomatic rank." "Members of the administrative and technical staff" are "members of the staff of the mission employed in the administrative and technical service of the mission." In the language of the Convention, both these categories are "members of the staff of the mission."

The basis for extending privileges and immunities to these families is surely the same as that of those extended to the officer himself¹⁵; namely, functional necessity. This, the prevailing explanation of

¹⁴ Brownlie, *op. cit. supra*, n. 3, p. 8.

¹⁵ To the contrary Willson, *loc. cit. supra*, n. 7, p. 1282.

diplomatic immunity,¹⁶ means that "the diplomat should have such privilege as conforms with the purpose for which he is accredited."¹⁷ Pressure brought to bear on his family would undermine that objective as much as direct pressure on the officer concerned.

Persons Belonging to the Household

Receipt of privileges and immunities by members of the family of the diplomatic agent and members of the administrative and technical staff is contingent on two conditions: membership of the "family" and inclusion in the "household."

The history of Article 37 illustrates the problems of giving content and meaning to these concepts. In the International Law Commission, the matter was first dealt with by Mr. Sandstrom, special rapporteur, in Article 24 (3) of his 1950 report:

*Les privilèges et immunités des bénéficiaires reviennent aussi aux membres de leurs familles et à leurs domestiques privés étrangers pourvu qu'ils habitent sous le même toit.*¹⁸

This report was considered by the International Law Commission at its 9th session in 1957. Mr. Francois of the Netherlands proposed the following substitution:

1. The members of the staff of the mission, including administrative and service staff, shall, if they are not nationals of the receiving State, enjoy the diplomatic privileges and immunities set forth in the preceding articles.
2. The privileges and immunities of persons entitled in their own right shall also apply to:
 - (a) their wives;
 - (b) their children under 18 years of age; and
 - (c) their private servants who are not nationals of the receiving State and live under the same roof.¹⁹

Discussion by members of the Commission revealed general disagreement with this proposal. It was felt to be too restrictive and not in accordance with the practice of the majority of States in limiting the categories of entitled relatives to wives and children, and in particular to children under 18 years of age only. It was argued that a general formula would be more suitable. Furthermore, some members expressed a preference for the phrase "belonging to his household" rather than "living under the same roof."²⁰

¹⁶ Historical explanations have been that diplomats were deemed not to be within the territory of the State to which they were accredited (extraterritoriality) or that the diplomat partook of the immunity of the sovereign whose person he represented.

¹⁷ O'Connell, *International Law* (2nd ed., 1970) II, p. 889.

¹⁸ *Yearbook of the International Law Commission* (1955) II, pp. 9, 12.

¹⁹ *Yearbook of the International Law Commission* (1957) I, p. 123.

²⁰ *Ibid.* pp. 134 *et seq.*

The principle was adopted that diplomatic privileges and immunities should be enjoyed by all members of the families of diplomatic agents who were also members of their household, on the understanding that it be stipulated in the commentary that the term "family" covered at least the wife and any children not yet of age. Further, there was general acceptance of the principle that the members of a diplomatic agent's family should enjoy the same immunities as the agent himself.²¹

The Commission adopted a provisional draft set of articles together with commentaries and transmitted these through the Secretary-General to member governments for their observations. Article 28 of the draft read:

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in Articles 22 to 27.²²

In the commentary on this proposed provision, the Commission said:

In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals of the receiving State. The Commission did not feel it desirable to lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse and children under age at least, are universally recognised as members of the family, but cases may arise where other relatives too come into the matter. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties and special circumstances are necessary qualifications.²³

In the light of critical comments by a small number of governments the special *rapporteur* introduced a new version of Article 28 at the 10th session of the Commission in 1958:

1. Apart from the diplomatic agent, the members of his family who form part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in Articles 22 to 27. Even if they are nationals of the receiving State, they shall be entitled to the benefit of these privileges and immunities if they are also nationals of the sending State.²⁴

In this new version, members of the administrative and technical

²¹ *Ibid.* p. 136.

²² *Yearbook of the International Law Commission* (1957) II, p. 140.

²³ *Ibid.* p. 141.

²⁴ *Yearbook of the International Law Commission* (1958) II, pp. 16, 18.

staff were included, with members of the service staff. Their families were not mentioned.

This proposal was strongly criticised by many members of the Commission and paragraphs 1 and 2 of Article 28, as drafted at the 9th session, were adopted subject to drafting change.²⁵ Much of the criticism was based on the fact that only a small number of governments objected to the previous draft. The view seemed to prevail that it was the Commission's duty to frame whatever provisions it considered to be in the best interests of the international community. Many members maintained that the administrative and technical staff were more likely to be aware of confidential information than junior attachés. Consequently, they needed the same protection as diplomatic agents, and their families should be placed in the same position as those of such agents themselves. In the words of Sir Gerald Fitzmaurice:

Much of the staff was making a more important and more essential contribution to the functioning of the mission than, say, some junior attaché. Lastly, unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear on the diplomatic agent through his family. The same argument was equally applicable to the families of the technical and administrative staff, for such staff had access to the secrets of the mission.²⁶

The 10th session saw the Commission adopt a final set of draft articles together with a commentary thereon. The Commission decided to recommend to the General Assembly that the draft should be recommended to member States with a view to the conclusion of a convention.²⁷

In relation to members of the families of diplomatic agents and administrative and technical staff the new Article 36 recommended by the Commission was almost identical with the previous Article 28. The commentary on Article 36 was similar to that on Article 28 with the addition of the words:

Such special circumstances might exist where a relative kept house for an ambassador, although she was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect, to become a part of it.²⁸

The discussion on Article 36 during the Vienna Conference concentrated almost entirely on the entitlement to privileges and immunities of the administrative and technical staff, *vis-à-vis* the diplomatic staff. No comment was offered as to who was included in the concept "member of the family forming part of the household."

²⁵ *Yearbook of the International Law Commission* (1958) I, p. 166.

²⁶ *Ibid.* p. 162.

²⁷ *Ibid.* p. 200.

²⁸ *Yearbook of the International Law Commission* (1958) II, p. 102.

Debate on this point occurred in relation to Article 1, dealing with definitions. The United States of America proposed the addition of a new paragraph reading:

A member of the family is the spouse of a member of the mission, any minor child or any other unmarried child who is a full-time student and such other members of the immediate family of a member of the mission residing with him as may be agreed upon between the receiving and the sending States.²⁹

This proposal was criticised by a number of States. The Indian delegate said that "the Commission had been wise in refraining from laying down an explicit criterion for determining who should be regarded as a member of the family and what should be the age limit for children. The composition of the household varied from country to country, depending on the family system. In India, there was a legal obligation to support aged parents and unmarried sisters, and the same might be true elsewhere."³⁰

Ceylon submitted that Article 1 be amended by the addition of the words:

By the family of a member of a mission is meant his spouse, if any, unmarried children and such other immediate relatives of himself and his spouse, who are part of his household.³¹

A further proposal by Argentina, Ghana, Guatemala, India, Federation of Malaya, Mexico, Spain and the United Arab Republic read:

The family of a member of a mission consists of the spouse and his dependants, who form part of his household.³²

In the event none of these formulations was adopted by the Committee of the Whole. The amendment of the United States was further amended to read:

A member of the family is the spouse of a member of the mission, any minor child, and in addition such other members of the family of a member of the mission as may be agreed upon.³³

but this was withdrawn because it was felt that the Committee was not likely to reach agreement on the definition.³⁴ The eight-power amendment was also withdrawn. The amendment proposed by Ceylon, having been withdrawn by Ceylon, was resubmitted by Tunisia but rejected by 34 votes to 3 with 26 abstentions.³⁵ Thus, Article 1 as it went to the fourth plenary meeting contained no

²⁹ Doc. A/CONF. 20/C. 1/L.17. in *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records*, Vol. 11, p. 9.

³⁰ Krishna Rao (India) speaking in Committee of the Whole: *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records*, Vol. 1, p. 74.

³¹ *Op. cit.*, Vol. 11, p. 16.

³² *Ibid.* p. 47.

³⁴ *Op. cit.*, Vol. 1, p. 226.

³³ *Ibid.* p. 44.

³⁵ *Ibid.*

reference to the concept of the family. The Article was adopted unanimously by the plenary meeting.

The history of Article 37, the commentaries of the International Law Commission and the debates over Article 1 at the Vienna Conference thus provide some guidelines as to how Article 37 should be interpreted; but this is by no means an easy task.

On the question of who comprises the members of the family, both the history of Article 37 and general policy considerations lead to rejection of an approach restricting this concept to wives only or wives plus children below the age of majority. Such an approach would be out of harmony with world opinion on who constitutes a member of the family and how this may be deduced. Such a fact is evident from many sources.

Reference has already been made to the opinion of the International Law Commission suggesting the existence of special circumstances where a relative keeps house for an ambassador, although not closely related to him, or where a distant relative has lived with the family for many years. Another commentator states that while "the spouse and minor children are universally regarded as members of the family if they are part of the household of the diplomat"; beyond that "it is difficult to define precisely the expression 'members of the family' because circumstances may vary in each case." Thus "a dependent parent or a relation who keeps house for the diplomat may well be regarded as a member of the family."³⁶

The view of the United States of America is that—

All governments are in general agreement that the wife of a diplomatic agent, his minor children, and perhaps his children who 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 receiving State.³⁷

An expression of the British view is in similar terms:

. . . in our administrative practice . . . it (*viz.* the concept of members of the family who form part of the household) is regarded as including the spouse and minor children resident with the entitled children, but may also include other persons in special circumstances—for example, a dependent parent or a sister managing the household for an unmarried officer.³⁸

On the Australian attitude there is little guidance to be had from official pronouncements. Senator Spicer, then Attorney-General³⁹ of

³⁶ Sen, *A Diplomat's Handbook of International Law and Practice* (1965), p. 154.

³⁷ Whiteman, *Digest of International Law* (1970), VII, p. 260.

³⁸ The Earl of Bessborough, *Parliamentary Debates, House of Lords* (1968), Vol. 292, col. 199.

the Commonwealth, in answer to a parliamentary question, said in 1952:

I am not prepared, offhand, to state the definition which a court might attach to the word "family." I should think, however, that in our statutes it will be understood to have the Australian meaning and not that which might be attached to it in another country. In my opinion, it would at least include the wife and the children of the ambassador. I am not prepared to say that it would not go a little further and extend also to some other near relatives.³⁹

On the basis of this survey, the phrase "members of the family" would include at least the wife and minor children. This interpretation appears to be now a rule of customary law. Outside that, it is very much a matter of State discretion as to whether a particular person is classed as a "member of the family." Older children still dependent on the parents for some specific reason, as well as more distant relatives having a particular relationship with the officer, might well be included in his family by the receiving State. In this extended family each case has to be considered on its merits within a general framework of policy considerations, case law, commentators' opinions and community *mores*. Matters to be taken into account would include local age of majority, degree of dependency, special relationships, etc. Tests of age and economic dependence cannot be adopted as sole criteria in this area. These are highly relevant but must be considered within the overall situation.

A wife may have a source of income sufficient to give her independence but, on the basic principles of entitlement to privileges and immunities, should still be granted them as a member of the family. A son over 21 years may also be covered in certain circumstances:

In 1959 the 22-year-old son of the French Minister in Washington was served with a summons and civil complaint arising out of an automobile accident in New York in which his car allegedly damaged that of the complainant. The French Embassy in Washington returned the summons and complaint to the Department of State by note and expressed its wish to invoke diplomatic immunity for the Minister's son. In a subsequent discussion with a representative of the Office of Protocol in the Department of State, the Minister's wife explained that her son, while over 21, had been attending college in the United States, was recuperating from an operation, and was dependent on and residing with his father. In view of the French Embassy's refusal to waive immunity and the United States practice of according diplomatic immunity to dependents of diplomatic officers residing with them, the Chief of Protocol of the Department of State requested the United States Attorney-General to appear and advise the New York Court (through the United States Attorney) that the defendant was entitled to immunity.⁴⁰

The position may be summed up from a comment made during debate in the International Law Commission:

³⁹ *Hansard, Senate*, Oct. 21, 1952, p. 3382.

⁴⁰ *Whiteman, op. cit. supra*, n. 37, p. 265.

The criterion of dependency should be taken in a social rather than a strictly financial sense, children or wives being still regarded as part of the household although they might enjoy a private income.⁴¹

Attempts to define the family in an exclusive sense (*i.e.* in terms of the conditions in which a person ceases to be a member of the family) also give rise to problems. If the words of the Convention, "members of the family," were given their plain and ordinary meaning, there could be a case for holding that once a person is recognised as being a member of the family, he would continue as such in spite of the fact that he may no longer be dependent and is past the age of childhood. On the other hand, and this is the better view, these matters should be considered within the framework of the purposes for which such privileges and immunities are granted, and their scope regulated accordingly. Support for such an interpretation can be gained from Article 10 (1) (b) of the Vienna Convention on Diplomatic Relations which indicates acceptance of the fact that a person may cease to be a member of the family:

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of: ...

(b) . . . the fact that a person becomes or ceases to be a member of the family of a member of the mission;

Once again, each case would have to be considered on its merits, taking into account the factors outlined above.

The second condition on which entitlement to privileges and immunities is contingent is inclusion in the "household." This would also require individual assessment:

One cannot categorically lay down how the phrase "forming part of his household" will be interpreted by the courts, but it would appear to be open to a wider interpretation than "members of the family living with him." because a member of the family can form part of the household while many miles away.⁴²

Could it thus encompass a wife living apart from her husband but still maintained by him? Could it cover the facts of *In Re C.*⁴³ where an English Court held that a child was still a member of the father's family, although he had seldom lived under the same roof as the father?

In these days of equality of the sexes, it is important to note that the Convention, although it consistently uses the male gender, should be interpreted as referring to both male and female. The

⁴¹ Bartos, *Yearbook of the International Law Commission* (1957) I, p. 134.

⁴² Buckley, "The Effect of the Diplomatic Privileges Act 1964 in English Law" (1965-66) *British Yearbook of International Law* 320, 349.

⁴³ [1958] 3 W.L.R. 309.

husband of a female diplomatic agent should also be entitled to privileges and immunities under Article 37. This interpretation would be in accord with the practice of States as evidenced, for example, by the United States of America:

. . . the husband of a female diplomatic officer would enjoy, in the United States, the privileges and immunities granted by law to members of the family of a diplomatic officer.⁴⁴

THE IMPACT OF NATIONALITY

Members of the family of a diplomatic agent forming part of his household are not to enjoy privileges and immunities, if they are nationals of the receiving State. The same exclusion applies to the families of administrative and technical staff, with the addition that they are also excluded if they are "permanently resident in the receiving State." The meaning of "permanently resident" poses difficult problems of practical application and is susceptible to different interpretations in different jurisdictions. The United Kingdom has indicated that, for administrative purposes, it regards this phrase as "referring to a person who, at the relevant date, was ordinarily resident in the United Kingdom and had not, at that time, the intention to cease so to reside."⁴⁵

The exception of nationality will be of greatest practical importance when a male diplomatic agent marries a female national of the receiving State. The resulting situation will depend on the nationality laws of that State. It is far more complex than at least one commentator assumes:

Article 37 does not accord privileges and immunities to members of the diplomat's family who are nationals of the receiving State. According to the Vienna Convention, an ambassador or minister's wife will continue [to be] subject to the local courts and may even be arrested if she is a national of the receiving State.⁴⁶

There is no international law "as to whether nationality is conferred on the married woman on the principle of family unity, or is refused on principles of sex equality."⁴⁷ It is a matter for the municipal law of individual States, although it is said that "the modern tendency is to favour sexual equality."⁴⁸ Nevertheless, if, under the nationality laws of the receiving State, the woman automatically acquires the nationality of her husband, the diplomatic agent, she should then be

⁴⁴ Whiteman, *op. cit. supra*, n. 37, p. 260.

⁴⁵ "Memorandum on Diplomatic Privileges and Immunities in the United Kingdom," *British Practice in International Law* (1966), p. 127.

⁴⁶ Nascimento e Silva, *Diplomacy in International Law* (1972), p. 144.

⁴⁷ O'Connell, *op. cit. supra*, n. 17, p. 682.

⁴⁸ Brownlie, *op. cit. supra*, n. 3, p. 376.

entitled to the privileges and immunities specified in Articles 29 to 36, as a non-national of the receiving State. Contrarywise, if the local nationality laws state that she retains her nationality or give her a choice of acquiring her husband's nationality which she does not exercise.

The position is still more complicated where the husband is a member of the administrative and technical staff. Here the wife, even though she may be regarded as a non-national by the local law, is not entitled to privileges and immunities if she is "permanently resident in the receiving State." The determination of this question could pose considerable difficulties, particularly if a subjective approach, such as that of the United Kingdom quoted above, is adopted. On the other hand, could it be assumed that a woman who marries a member of the administrative and technical staff who is a national of the sending State, and subject to a change of posting at the will of that State, has evinced *an intention* to cease to reside in the receiving State?

Attached to the Vienna Convention on Diplomatic Relations there is an Optional Protocol Concerning Acquisition of Nationality. The operative part of this is Article II which reads:

Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.⁴⁹

The Protocol is of immediate importance for a member of the family of a diplomatic agent forming part of his household born in the receiving State. In States for which the Protocol is operative, it prevents the child acquiring local nationality on the *jus soli* principle and thus losing his entitlement to privileges and immunities.

Moreover, application of the Protocol would prevent the situation where a female diplomatic agent loses her entitlement to the full range of privileges and immunities, as set out in the Convention, through marriage to a national of the receiving State. This situation could arise where the law of the receiving State stipulates that the wife automatically acquires the nationality of her husband. The Protocol would prevent this occurring. However, for those States where the Protocol does not apply and the local law renders the wife a national, the female diplomatic agent would be entitled only to "immunity from jurisdiction, and inviolability, in respect of official

⁴⁹ There are 31 States party to the Optional Protocol, which can be found at (1964) 500 U.N.T.S. 224.

acts performed in the exercise of his functions," as set out in Article 38 (1).

Article 38 deals with the entitlement to privileges and immunities of a diplomatic agent "who is a national of or permanently resident" in the receiving State. As already stated, this person is entitled only to "immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." There is no mention of the members of the family of such a person. Logically these people, if they are nationals of the receiving State, should not enjoy any privileges and immunities. Those to which the agent himself is entitled are limited in scope and relate only to his "official acts performed in the exercise of his functions." Any grant to members of the family would thus exceed those the agent himself enjoys, as they could not be confined to "official acts":

It would, therefore, be reasonable to state that the members of the families are not entitled to any immunity or privileges. It is, of course, open to the receiving State to allow such immunities and privileges as it may like in its absolute discretion.⁵⁰

However, if the receiving State is going to grant those people privileges and immunities it would, on equitable grounds, also have to increase the range and scope of those granted the agent himself.

What of the situation where the diplomatic agent is a national of the receiving State, but a member of his family forming part of his household is not? This situation would not be impossible. It could well arise in a country with a large immigration programme and a pool of naturalised citizens from which a foreign country might wish to draw its diplomatic representation. A man might be naturalised, but his wife or children might not. Are they entitled to privileges and immunities, if that man becomes the ambassador, for example, of the State of which he was formerly a national? Logically, they should not, unless the receiving State has specifically made provision for this. The man himself would only have the entitlements set out in Article 38. However, the Vienna Convention on Diplomatic Relations seems to have overlooked this point. It could be argued that a "plain and ordinary" reading of Article 37 (1) would require the receiving State to grant the privileges and immunities specified in Articles 29 to 36. The paragraph is straightforward in requiring such privileges and immunities to be granted to "members of the family of a diplomatic agent forming part of his household . . . if they are not nationals of the receiving State." On the other hand, the relative positioning of the two articles and their subject matter indicates that they are mutually exclusive; the inter-

⁵⁰ Sen, *op. cit. supra*, n. 36, at p. 156.

preter should not, therefore, refer back to Article 37 when dealing with members of the family forming part of the household of a diplomatic agent who is a national of the receiving State, regardless of whether those members are also nationals or not. It may be that a practical way out would be for the receiving State to require the sending State to give a blanket waiver of all rights to privileges and immunities for family members, before consenting to the appointment, as required by Article 8. The sending State has a general power of waiver under Article 32 (1) which states:

The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

However, while a blanket waiver may be effective in relation to customs, tax privileges, etc., it may not operate in relation to immunity from jurisdiction. Under Article 32 (2) "waiver must always be express":

The court must insist on a communication from the head of the mission containing waiver of immunity in respect of the diplomat concerned before it can proceed to hear the suit or the action.⁵¹

Much will depend on relations between the States concerned at that stage.

EXTENT OF PRIVILEGES AND IMMUNITIES

Those entitled under Article 37 (1) enjoy the privileges and immunities set out in Articles 29 to 36. Of these the most significant for practical purposes are personal inviolability and immunity from jurisdiction.

"Inviolability" of the person under Article 29 means that the receiving State is under a special duty to protect the entitled person and keep him free from harm and insult. This is a higher duty than the State owes the ordinary alien. The duty to protect extends not only to action by citizens, but also to steps taken by officials of the State itself. Arrest and detention are specifically mentioned as two forms of interference from which the entitled person is protected.

A number of States have enacted legislation providing severe punishment for those who attack such persons. However, this is not a widespread practice and there is no specific rule that those who injure or offend entitled persons should suffer particularly severe punishment. The situation in Canada has been described in these terms:

⁵¹ *Ibid.* p. 131.

There is no Canadian legislation that establishes an offence specifically in relation to acts done to diplomatic representatives as a particular class of persons or in relation to the denial or the impeding of the exercise of any privilege or immunity that a person in that class may enjoy.

Under ordinary Canadian law an offence could arise in relation to acts done to a diplomatic representative or in relation to the free exercise of his privileges and immunities but such an offence would arise independently of the special status of a diplomatic representative or the incidents of the status.⁵²

The position, then, is that the receiving State is required to offer the entitled person all the protection that is necessary to safeguard him in his life and the pursuit of his occupation. The formulation adopted by the Convention requires the receiving State to take "all appropriate steps to prevent any attack on his person, freedom or dignity." In a practical sense, the determination of "appropriate steps" must rest with the receiving State. This is the only authority capable of assessing accurately the extent of the danger posed by any threat and the response necessary to thwart it.

The precise content of "inviolability" and the duty of the receiving State in relation to the entitled person is thus ill-defined. Much will depend on the circumstances of the case. In one specific area there has been international action to lay down guidelines and provide punishment for those who breach inviolability. This is done in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.⁵³ The Convention is not yet in force. In brief, it relates to the murder, kidnapping or violent attack on an "internationally protected person." States party to the Convention undertake to make such actions crimes under their "internal law," and provision is made for establishing jurisdiction over the offender, including extradition where necessary.

The definition of "internationally protected person" in Article 1 (1) includes:

(b) any representative or official of a State or any official or other agent of an international organisation of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant

⁵² "Interference with Privileges and Immunities of Diplomats" (1967) 5 *Canadian Yearbook of International Law*, p. 258.

⁵³ Reproduced in (1974) 68 *A.J.I.L.* 383. Analysis of this Convention can be found in Przetacznik, "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons" (1974) 52 *Revue de Droit International et des Sciences Diplomatiques et Politiques* 208, and Wood, "The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents" (1974) 23 *I.C.L.Q.* 791.

to international law to special protection from any attack on his person, freedom or dignity, *as well as members of his family forming part of his household* (italics added).

Members of the diplomatic staff and members of the administrative and technical staff clearly come within the definition of "internationally protected person," since they are "entitled pursuant to international law to special protection from any attack" on their person, freedom or dignity. Members of the family of such a person forming part of his household are thus similarly entitled to special protection under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, which thus goes beyond the Vienna Convention on Diplomatic Relations in this respect. The right to special protection is not dependent on the family member's own entitlement to inviolability; rather is it dependent on the diplomat's right. Under the Vienna Convention, the wife of a diplomatic agent may not be entitled to inviolability if she is a national of the receiving State; nevertheless she is an "internationally protected person" under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

Members of the family of a diplomatic agent forming part of his household enjoy immunity from the criminal jurisdiction of the receiving State under Article 31 of the Vienna Convention on Diplomatic Relations. They are also entitled to a slightly more limited exemption from civil and administrative jurisdiction.

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

No reservations have been made to this Article by the 112 States party to the Convention. Moreover, at the time of drafting, it was

generally taken to be declaratory of existing international law. The only element of progressive codification was considered to be Article 31 (1) (b) and (c).⁵⁴

Immunity from criminal jurisdiction is a settled principle of law. The entitled person cannot be prosecuted by the receiving State for any criminal offence that he may commit. Such immunity is a corollary of the right to inviolability. The receiving State has a right, of course, to order the departure of the offender.

With respect to immunity from civil and administrative jurisdiction, probably the most significant aspect for a member of the family of a diplomatic agent forming part of his household is the exception in the case of "professional or commercial activity." The diplomatic agent himself is forbidden under Article 42 to "practise for personal profit any commercial or professional activity," but there is no such prohibition on a member of his family. Had this exception not been inserted, a family member would therefore have had complete immunity in respect of such activities.

In point of fact the employment of family members in the receiving State does cause some problems. As has already been noted, these people enjoy complete immunity from the criminal jurisdiction of the receiving State. Secondly, it is difficult to say what precisely is comprehended by the phrase "professional or commercial activity"; its ambit and the type of activities it covers are unclear. For example, would it cover a civil action arising from an injury caused by the family member on his way to the place where the activity is exercised. Some States avoid this problem by refusing to issue to persons entitled to diplomatic privileges and immunities the work permits without which employment cannot be undertaken. Other States, before allowing the family member to take employment, may require an undertaking by the mission that a waiver will be given, if any legal action arises from that individual's "professional or commercial activity." The value of this has already been doubted.

Waiver must always be express. This is stated in Article 32, which further specifies that immunity can only be waived by the sending State. Waiver by the head of the mission is usually taken as satisfying this requirement. Some active participation in the action by the entitled person is not sufficient. Furthermore, "waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment." A separate waiver is necessary for execution of the judgment to take place, at least where the action

⁵⁴ Sen, *op. cit. supra*, n. 36, pp. 108, 122.

does not fall within the three exceptions to Article 31 (1), in respect of which, it will be remembered, there is no immunity from civil and administrative jurisdiction. Execution may be taken in such a case "provided that the measures concerned can be taken without infringing the inviolability of" the person or his residence. Article 30 (2) dealing with inviolability makes a specific exception with respect to that inviolability for Article 31 (3). Execution can be levied on property, provided it does not violate personal inviolability or that of the residence. Finally, on the question of waiver, if a member of the family of a diplomatic agent forming part of his household himself initiates legal proceedings, he cannot invoke immunity "in respect of any counterclaim directly connected with the principal claim."

How is the right of immunity expressed in practice? This varies from State to State, but a common practice is for the court, once the claim is raised before it, to seek the advice of the executive branch of government. Such advice is tendered in the form of a certificate from the ministry or department concerned with foreign affairs spelling out the status accorded to the entitled person by the Government. This advice may also be sought by counsel for the entitled person, before the case comes on for hearing and then tendered to the court.

The effect of such a certificate varies. In England, section 4 of the Diplomatic Privileges Act 1964 provides that a certificate issued by or under the authority of the Secretary of State shall be "conclusive evidence" of any "fact" which is stated therein, relating to the question "whether or not any person is entitled to any privilege or immunity" under the Act. The Australian Diplomatic Privileges and Immunities Act 1967, however, is less emphatic:

14 (1) The Minister may give a certificate in writing certifying any fact relevant to the question whether a person is, or was at any time or in respect of any period, entitled to any privileges or immunities by virtue of this Act, or an Act repealed by this Act or of the regulations.

(2) In any proceedings, a certificate given under this section is evidence of the facts certified.

On its face the Australian Act allows the court to go behind the Minister's statement, something the English courts are precluded from doing. However, the practical effect of this difference is more apparent than real. As has been said of the English Act:

Although the terms of the executive statement may thus preclude the exercise of any wide discretion, it still remains for the courts, and not for

the executive, to give a final ruling as to the consequences, in terms of local law, of the immunity afforded. Besides considering the substantive content of the immunity—an important issue in view of the various degrees of exemption accorded to the different categories of staff under the Convention—the courts may accordingly need to examine the temporal scope of the immunity, the terms of any waiver made, and the effect of any judgments given elsewhere relating to the diplomatic agent concerned.⁵⁵

The intended operation of the certificate system under the Australian Act was explained in 1967 by the then Minister for External Affairs in these terms:

The sort of certificate that the Minister would give would be to the effect that the person named in the certificate is, say, a chauffeur employed by such and such a diplomatic mission and that his national status is so and so. Then it would be a matter for the court to say, after examining the Convention and the legislation now before us—assuming that it becomes an Act—that a person so certified by the Minister is entitled to this or that degree of immunity.⁵⁶

What action can an aggrieved person take if the defendant claims immunity and this claim is upheld by the court? At the outset, it must be made clear that the immunity from jurisdiction which a member of the family of a diplomatic agent forming part of his household enjoys is not a licence for abuse. Article 41 of the Vienna Convention on Diplomatic Relations states that “it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.” In addition, the Preamble to the Convention emphasises that the purpose of privileges and immunities “is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States.” Against this background an approach to the Ministry of Foreign Affairs may bear results. In practice the preferable method of dealing with a claim against a person entitled to immunity is first of all to try to settle the matter between the parties; if this is unsuccessful, the only alternative then is to approach the Ministry. Only after this has been done—or possibly in conjunction with it—should court action be commenced. If this is unsuccessful, the Ministry will be fully aware of the problem, and it will be up to the Ministry to take what action—if any—it considers desirable in the circumstances. As an ultimate lever, the Ministry can ask the entitled person to leave the country. In 1967 the then Australian Minister for External Affairs assured the Commonwealth Parliament that—

... if cases of hardship arise—that is, hardship to an Australian suitor or Australian citizen—resulting from the application of the rules relating

⁵⁵ Hardy, *Modern Diplomatic Law* (1968), p. 54. This gives legislative effect in England to the decision of the House of Lords in *Engelke v. Musmann* [1928] A.C. 433.

⁵⁶ *Hansard, House of Representatives*, Mar. 16, 1967, p. 778.

to diplomatic immunity, the Department of External Affairs is prepared to assist whenever it can to bring about a solution acceptable to both sides—perhaps by bringing the parties together in some way or by seeking agreement that a dispute be referred to arbitration. Again, our experience has been that most governments, in fact all governments, have been prepared to co-operate with us in that.⁵⁷

If all other means of obtaining redress fail, the private claimant can have recourse to the courts of the sending State. Article 31 (4) provides:

The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

The utility of such recourse is doubtful. The courts of the sending State in the great majority of cases will not have jurisdiction. Moreover, service of process on the entitled person will be difficult, if not impossible.⁵⁸

What we have been dealing with is immunity from jurisdiction—not immunity from legal liability. This point was emphasised in the case of *Dickinson v. Del Solar*:⁵⁹

Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction.

This interpretation of the nature of immunity from jurisdiction is incorporated by inference in Article 39 (2) of the Vienna Convention on Diplomatic Relations. Immunity is to cease for the person enjoying privileges and immunities when, his functions having come to an end, he “leaves the country, or on expiry of a reasonable period in which to do so,” except that in the case of “acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.”⁶⁰ The continuance of immunity in respect of official acts has been explained on the basis that “in so far as he [the diplomatic agent] acts in an official capacity, his acts are the acts of the foreign sovereign whom he represents.”⁶¹ Family members do not exercise any functions as members of the mission and thus are liable to action once their right to privileges and immunities ceases. This point could be important in a case where waiver of immunity in respect of execution of judgment has been refused; the judgment itself could ground an action when the defendant loses his immunity.

⁵⁷ *Hansard, House of Representatives*, Mar. 9, 1967, p. 506.

⁵⁸ *Hardy, op. cit. supra*, n. 55, p. 55.

⁵⁹ [1930] 1 K.B. 376, 380.

⁶¹ *Willmer, L.J. in Zoernsch v. Waldock* [1964] 2 All E.R. 256, 261.

⁶⁰ Art. 39 (2).

Apart from inviolability and immunity from jurisdiction, members of the family of a diplomatic agent forming part of his household are exempted from certain social security provisions, taxes, personal services and duties on articles intended for personal use. These are set out in Articles 33 to 36 inclusive of the Vienna Convention. Although they are of practical effect on the daily life of the family member, they do not have the same impact either on the member himself or on inter-State relations as do inviolability and immunity from jurisdiction.

The range of privileges and immunities enjoyed by members of the families forming part of the households of members of the administrative and technical staff of a mission is somewhat less than that enjoyed by similar persons attached to the diplomatic agent. Members of the administrative and technical staff do not have immunity from civil and administrative jurisdiction in respect of acts "performed outside the course of their duties." As family members of this class do not have official duties in relation to the mission, they thus enjoy no immunity from civil and administrative jurisdiction.⁶² Furthermore, the exemption from duties on articles intended for personal use applies only "in respect of articles imported at the time of first installation."

DURATION OF PRIVILEGES AND IMMUNITIES

Article 39 (1) states that "[e]very person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post." Article 10 (1) (b) requires the sending State to notify the Ministry for Foreign Affairs of the receiving State of "the arrival and final departure of a person belonging to the family of a member of the mission." Coupling this with Article 39 (2) already quoted, it is evident that the family members are entitled to privileges and immunities from the time they enter the receiving State until the time they leave it. However, they will cease to be so entitled, if they cease to be members of the family forming part of the household, while still within the receiving State. Finally, if the diplomatic agent or member of the administrative and technical staff himself dies at his post, then "the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country."⁶³

⁶² Hardy, *op. cit. supra*, n. 55, p. 78.

⁶³ Art. 39 (3).