THE REGIME OF DIPLOMACY AND THE TEHRAN HOSTAGES

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I

THE Tehran hostages case, with its legal implications, provides an important occasion for probing into the effectiveness of the protection of the privileges and immunities of diplomats, the most important channel of communications between the members of the international community. It has its specific political and social characteristics, which mark it as a sign of our times and link it to another problem in the area of diplomacy, the Soviet practice which may also be seen in the same perspective. Both are linked to the political phenomenon affecting the world arena: the East-West confrontation in the process of social and economic change and the transformation of the international community.[1]

Any student of the legal order in action is familiar with the fact that its practical enforcement is subject to local and regional deviations. Under the general umbrella of the universal law of diplomacy, each capital treats its diplomats with variations, depending on local conditions and traditions. The Vienna Convention on Diplomatic Relations[2] itself recognises this fact. However, even at the first sight it is clear that Soviet practice is not of merely local significance. The Soviet Union imposes the consequences of its approach to the role of diplomacy on the international community at large, thus influencing the regime of diplomacy in global proportions.

The objective of the present article is to test the formal source of the law of diplomacy against the practice of States. As Charles de Visscher has put it:

> Every rule of positive international law . . . presents two essential aspects for critical examination on different planes: the degree in which its content corresponds to social needs, and the accuracy of its formal expression compared with the practice of States. The rule of international law retains its full force in application, and consequently its positiveness, only insofar as it satisfies this double requirement. This is a fact of experience particularly well illustrated in treaty regulation. A normative [law-making]

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1. Certainly, the authority of the Vienna Convention on Diplomatic Relations is affected by the atmosphere of tension evident in various countries of Africa and Asia. Burning of embassies and of diplomatic missions, murders of ambassadors and diplomatic agents (Sudan, Afghanistan, Cyprus, Lebanon, Egypt and Pakistan), though not directly due to official government action, is frequently the result of revolutionary conditions induced by the regimes of the host countries. At the peak of Soviet-Chinese tensions, reciprocal treatment of diplomats of the two countries left a good deal to be desired. While outside the scope of the present inquiry, these events have a bearing on it.

2. 500 UNTS 95. Ratified on April 18, 1961.

> treaty the content of which is too far in advance of development in international relations is stillborn, just as a treaty that ceases to be exactly observed in the practice of governments is no longer valid in its formal expression.
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> Any study of the action of power on international law therefore demands knowledge of all the social realities that determined this action as well as knowledge of the processes of formal elaboration by which it takes effect.[3]

In the area of international law, upon which this article is focused, the international community lives under the Vienna Convention. The Convention is a codification of practice followed for centuries, and provides for a minimum standard of conduct. Immunities and privileges can be extended either unilaterally or bilaterally. Article 47 provides:

> 1. In the application of the provisions of the present Convention receiving State shall not discriminate as between States.
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> 2. However, discrimination shall not be regarded as taking place: (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of the provision to its mission in the sending State; (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

In case of discriminatory treatment of accredited diplomats in a given capital, reciprocity is the only remedy open to the State, which considers itself injured.

The institution of reciprocity in its limited form as it was defined in the Convention is combined with a safety valve in the case of conflict between the receiving and the sending States regarding the conduct of a diplomat. The presence of the individual diplomat is always a question of consent; should an accredited diplomat therefore overstep the boundaries of diplomatic propriety, a simple declaration by the receiving State that he is no longer acceptable (*persona non grata*, Article 9 of the Convention) resolves the conflict. This procedure has the advantage that it avoids a formalised conflict. Article 9 must be read in the context of two other provisions of the Convention. Article 32 provides for the waiver of the diplomatic immunity, and is directly related to Article 41, which lays down in general terms the duty of the accredited diplomat to respect strictly the legal order of the receiving country:

> 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They have a duty not to interfere in the internal affairs of that State. . . .
>
> 3. The premises of the mission must not be used in any manner incompatible with the function of the mission as laid down in the present Convention or by other rules of general international law or by any special agreement in force between the sending and the receiving State.

Historically, the international law of diplomacy is the product of practice in the fairly homogeneous international community of the eighteenth and nineteenth centuries, which shared its main opinions as to the role of the

3. Charles de Visscher, *Theory and Reality in Public International Law*, pp. 137-8.

State in the international legal order. This is not true today. The emergence of a great number of States has strained the framework of the international legal system and produced great diversity in the diplomatic practice of States. It is important to realise that cultural diversity in the contemporary international community must affect opinions as to what is the proper application of legal rules. It is not surprising that though the rule of law is uniform for the entire international community, it may produce different results in individual cases. Law, as the eminent sociologist Gurvich stated, consists of frameworks born of the needs and functions of what he calls real collective units. Through these frameworks are introduced specific rules for various environments in a social structure.[4] Adapting Gurvich's theory to the conditions that exist in the international community, uniform rules result in different outcomes.

What both de Visscher and Gurvitch are concerned with is the relationship between a formal legal rule and real power. Power in support of the legal rule may come from the State or social groups interested in the protection of its interests. Hence the frequent coexistence of legal institutions, which assume different functions within various legal branches corresponding to conflicting interests of different social groups (e.g., contract, property, and labour law). The Vienna Convention on Diplomatic Relations is not "too far in advance of development of international relations . . ." in the industrial West. At the same time, in a different social environment, it may be a less adequate formulation of the regime of diplomats. In a different set of international relations, the Convention may be abused for purposes which have little in common with its spirit and intended role.

II

The conviction that envoys of friendly or unfriendly powers require protection was well founded in antiquity, and it became a part of the civilised tradition of the Middle Ages, when the principle of the personal inviolability of envoys became a principle of law. Until that time, the protection of an envoy on a mission to a foreign country was assured by religious commands. Transition from religious to legal guarantees occurred gradually, although, for a time, writers and law-makers saw little difference between the two. Already in the seventh century, Byzantium and its Slavic neighbours observed strictly the principle of diplomatic inviolability as a principle of international law. Byzantine tradition was directly derived from the principle of Roman law: "Si quis legatum hostium pulsasses, contra jus

4. Gurvich, *Sociology of Law* (1942) 198-203.

gentium id commissum estimatus, quia sancti habentur legati."[5]

In the West, the principle of the inviolability of envoys was sanctioned by heavy penalties. *Leges barbarorum* (inspired by Roman law) provided for the payment of heavy fines (blood money) for the killing of an envoy.[6] It is important to realise, however, that in Middle Ages foreign missions and embassies were frequently the business ecclesiastics, who were under the special protection of the law wherever they went.[7] Kijevian treaties with Byzantium of the early medieval period frequently included provisions on the status and treatment of envoys.[8]

In contrast, the Arabs in the same period followed a different approach. Protection of foreign envoys in Baghdad depended upon the assurances of the Khaliff. Should he die, his assurances lapsed, and foreign envoys were liable, as infidels, to be imprisoned,[9] though the Koran obligated Muslims to assure proper treatment to foreign envoys.[19]

In the course of time, provisions for the protection of foreign envoys began to appear in legislative form. The *decretum Gratiani* of 1145 (a systematic collection of papal legislation, *discordantium canonum concordia*) stated that violators of the immunity of envoys were to be excommunicated.[11] *Las Siete Partidas* issued by King Alphons X in twelfth century Spain guaranteed to foreign envoys, not only personal inviolability, but also immunity from suit in court.[12]

In broad historical perspective, public opinion (including legal opinion), international customary law, treaty law and internal legislation have followed the same line of development, towards the universal protection of the diplomats, including their immunity from the jurisdiction of the courts (criminal and civil), and protection of the person.

The idea that a diplomat, representing a foreign sovereign is not subject to local jurisdiction was formally stated in the case of the Spanish ambassador, Bernardino de Mendoza (1584), who was a participant in a conspiracy to depose Queen Elizabeth of England. The Privy Council

5. M. Taube, "Études sur le développement historique du droit internationale dans l'Europe Orientale", RCADI, 1926, I, vol. 11, p. 376; "L'apport de Byzance au développement du droit international occidental", RCADI, II, vol. 67, p. 264).

6. Redslob, R., *L'Histoire des grandes principes du droit des gens* 145 (1923).

7. Behrens, "Treatises on the Ambassador written in the fifteenth and early sixteenth centuries" (1936) LI *English Historical Review*, 204, 623.

8. D. B. Levin, *Diplomaticheskii immunitet* (1949) p. 30.

9. Antokoletz, *Tratado teoretico y pratico de derecho diplomatico y consular* (1948), vol. I, p. 308. See also E. Nys, "Les Commencements de la diplomatie et le droit d'ambassade juqu'a Grotius" (1884) XVI, *Revue de droit international et de droit comparé*, 169.

10. Redslob, *op. cit. supra* n. 6., p. 145.

11. E. Nys, *Les origines du droit international* (1894) p. 339.

12. *Las Siete Partidas* (trans. S. P. Scott, 1931) p. 144; M. Ogden, *Juridical Bases of Diplomatic Immunity* (1936) p. 46.

consulted Albericus Gentile as to whether Mendoza should be tried before the English courts. Gentile's reply was that he should be expelled from England to be punished by his sovereign.[13] But doubts persisted. Some time later, in the case of another Spanish ambassador, Inojosa, who insulted the Duke of Buckingham, Dr. Wellwood – a civilist – was of the opinion that Inojosa was not protected by his diplomatic status, while Sir Richard Cotton, who was also consulted, followed Gentile's advice.[14] New notions took root with some difficulty. However, once they did, they were codified in modern treaties on diplomatic relations: the general Act of the Congress of Vienna (1815), modified three years later at the conference at Aix la Chapelle (1818); the Havana Convention (1928); the Vienna Convention on Diplomatic Relations (1961), and, finally, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomats (1968).

The formalisation of the rules of international law was matched by ever more elaborate provisions of municipal law providing for legal liability for crimes against diplomats, and also providing for the strict delimitation of the civil law situations in which members of the diplomatic corps could be sued in the courts of the host country.[15]

III

By the end of the Middle Ages, diplomatic missions had changed their character, as they became permanent institutions. Their purpose was to maintain continuous contact with the receiving country. By the end of the seventeenth century, this practice, which had been started by the Italian cities in their mutual relations, and was generally followed by the Holy See, became quited widespread. Nearly all major European powers have since converted to permanent diplomatic missions.

In Europe of the sixteenth and seventeenth centuries, which was a period of intensive dynastic rivalries, a permanent ambassador was frequently a source of and encouragement to subversion and espionage, so much so that espionage and intelligence gathering were deemed to be within the traditional duties and occupations of diplomats. England (Henry VII) and France (Francis I) of that time tried to control access to foreign envoys, in order to restrict unauthorised contacts. In 1617, a law was passed in France which prohibited the French from communicating with foreign envoys,

13. A. Gentile, *De legationibus libri tres*, vol. II, p. 80.

14. E. R. Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929) p. 25.

15. A. H. Feller and M. O. Hudson, Diplomatic and Consular Law and Regulations of Various Countries (1933). *Cf.* also U.N. Legislative Series, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, (1958) S.T.L.E.G./Ser.B/7.

except papal nuncios. In Venice, it was prohibited by law, under penalty of death, to maintain relations with foreign envoys except by permission of the *Direttoria.*[16] During the Cromwellian Revolution, no member of Parliament or the government had the right to negotiate with foreign envoys without special authorisation, under the penalty of losing his position.[17] Nevertheless, the opinion was widespread that espionage was one of the most important functions of a foreign diplomat,[18] and Frederick II, king of Prussia, considered the organisation of espionage services by accredited foreign ministers a function authorised under international law.[19]

The fear of espionage caused the State of Muscovy in the sixteenth century to adopt measures which practically sealed off foreign missions from unofficial contact with Muscovite citizens. Envoys and their suites were lodged in premises outside the city of Moscow, surrounded by high stockades and guarded by troops. No person could enter or leave the premises. In order to restrict diplomats' contacts with the outside world, food and other necessities were supplied by the local authorities. Even during travel through the Tsar's dominions, foreign missions were under constant supervision. Arrests of an entire mission, where something suspicious occurred, were quite frequent.[20]

The Russian obsession with diplomatic espionage (which survives in the present day) is best illustrated by the case of Charles Taillerand, a Frenchman in the service of the Transylvanian prince, Bethlen Gabor. In 1632, he arrived in Moscow and was immediately arrested and deported to Siberia. The reason for this treatment of the unfortunate diplomat was his denunciation by a member of his suite, who told the Orthodox Patriarch Filaret that the ambassador's real mission was to spy for the Polish King. He was finally released at the request of Luis XIII of France, who assured the Tsar of his innocence. Professor Levin explains that at that time diplomatic status did not guarantee personal inviolability, if the interests of State security were involved.[21]

IV

Espionage laws were not the only expression of the conviction that in the case of conflict between State interests and the rights and privileges of diplomats, vital State interests must be protected. History offers numerous

16. M. Redlich, *The Law of Nations* (2nd ed., 1937) pp. 18-19, 255.
17. Krauske, *Die Ent-wicklung der standigen Diplomatie vom funfzehnten Jahrhundert bis zu den Beschlussen von 1815 und 1818* (1883) p. 19.
18. Redlich, *op. cit. supra* n. 16, p. 19.
19. Krauske, *op. cit. supra* n. 17, p. 20.
20. Levin, *op. cit. supra* n. 8, pp. 90-1.
21. d. p. 94.

examples of this outlook.

Three groups of cases are selected to illustrate the practice of States in such situations. To the first group belong three incidents which took place in the eighteenth century: the affair of Ghillemberg (1716), the arrest of Prince Cellamare (1718), and the imprisonment of Monti, the French ambassador to Poland (1735).

Count Ghillemberg, the Swedish minister to the Court of St. James, was implicated in a vast diplomatic intrigue directed against English possessions on the European continent and the person of King George I, including the engineering of an insurrection in Scotland with the assistance of a Swedish military force. The broader aspects of this diplomatic charade involved a number of European powers. A letter which contained a report by Count Ghillemberg was intercepted by the Danes, who informed London of the conspiracy. Acting on this information the British government detained Ghillemberg and seized his archives. The arrest of Ghillemberg caused a mixed reaction in the diplomatic corps in London. The Marquis de Montelon, the ambassador of Spain, lodged a formal protest with Lord Stanhope, the British foreign secretary, finding it unfortunate that the government had violated the personal inviolability of a foreign diplomat and the archives of the Swedish mission. In reaction to the detention of Ghillemberg, the Swedish government ordered the arrest of Jackson, the British Minister resident in Stockholm. Eventually the affair was solved through the good offices of France, and the exchange of Ghillemberg and Jackson was duly arranged.[22]

The case of Cellamare (1718), the Spanish ambassador in France, was again an example of political intrigue, in this instance designed to disrupt the system of European alliances directed against Spain, and to isolate the protestant powers, England and Holland, by assuring the supremacy of the Spanish faction headed by the Duc d'Orleans in France. Here again, intercepted correspondence revealed the conspiracy against the government of France. The Spanish Embassy was surrounded by troops and Cellamare was arrested. Following the successful escape of the French ambassador in Spain, Cellamare was deported to the Spanish frontier and set at liberty there.[23]

The last case in this series was the arrest of Monti, the French Ambassador to the Polish Court. After the death of the Polish King, two candidates for the Polish throne competed in the process of elections, and one of them, Leszczynski, was supported by France, but opposed by

22. Martens, C. *Causes célèbres du droit des gens*, vol. I, pp. 97-147.
23. *Ibid.* pp. 149-177.

Russia. Russia intervened militarily, and Monti was arrested by the commander of the corps which besieged Danzig, where Monti had sought refuge. The arrest of Monti was the subject of an extensive diplomatic correspondence between the courts of France and Russia, the Russian side advancing the view that since August 11, the King of Poland had died, Monti's diplomatic status had lapsed. He was not accredited to the newly elected king, and, by his intervention into the internal affairs of Poland, he had violated the legal and political order of that country. In addition, Russia contended that, although there was no declaration of war between France and Russia, hostilities involving the armed forces of the two countries had taken place, and Monti was a diplomatic representative of an enemy, not entitled to privileges, immunities and courtesies in Russia. Monti was released by the Russians only after 18 months in prison.[24]

It is worth noting that in the case of Ghillemberg the conduct of the British government caused some criticism, while the case of Cellamare was passed over in silence, as his intrigues in France were generally recognised as a serious departure from the code of diplomatic etiquette. In contrast, Russian treatment of Monti caused a joint intervention by the ministers of Holland and England in St. Petersburg on his behalf.[25]

V

A series of incidents involving arrests of diplomats took place in the stormy days which followed the October 1917 Revolution in Russia. The new government dropped out of World War I, and sued for peace. There were additional grounds for the unhappiness of the powers of the Entente. Following the Revolution, the new regime initiated a systematic revolutionary propaganda campaign addressed to the West, which was combined with high-handed measures against individual western diplomats who for one reason or another displeased the new regime. Although Russia had quit fighting, the Romanians, who at that time occupied Besarabia, continued fighting on the side of the Allies. In December 1917 the Soviet government arrested the Romanian minister in Russia, Diamandi, and released him on January 1, 1918, only after protests by the diplomatic corps.[26]

In the same period, the Soviet government adopted a practice of appointing "Representatives of the People's Commisariat for Foreign Affairs", without asking for formal accreditation. In England, the "Representative" of the Bolshevik government was Maxim Litvinov who

24. *Ibid.* pp. 211-245.
25. *Ibid.* pp. 220
26. *Ministerstvo Innostrannykh Diel: Dokumenty Vneshnei Politiki*, vol. I, pp. 82 and 89.

was appointed in November 1917. One of his first acts was to protest at the drafting of Russian nationals into British Army service, in accordance with an agreement with the Imperial regime. Litvinov contended, that since Russia had concluded a peace treaty with the Central Powers, the agreement was no longer in force.[27] In August 1918 the British government issued a deportation order against Litvinov and his staff. In response, the Soviet government promptly discovered an anti-Soviet plot organised by British and French diplomats and arrested them. As Litvinov was detained, the Soviet government proposed the exchange of Litvinov for the arrested diplomats, insisting upon guarantees of inviolability of his person and luggage by the governments of Britain, Holland, Norway and Sweden.[28]

The next series of Soviet diplomatic events is directly connected with the beginning and aftermath of World War II. Under the terms of the 1924 Consular Convention with Poland,[28a] the Polish consul in Kiev enjoyed diplomatic status. According to a report by the Polish ambassador to the Soviet Union on September 30, 1939, a few days after the Soviet Union invaded Poland, Mr. Matusinski, the acting consul in Kiev, was summoned by the plenipotentiary of the Soviet Foreign Office in Kiev at 2 o'clock in the morning, ostensibly to discuss the final details of his departure from the Soviet Union. He went at once, with two chaffeurs, and vanished without trace. The Italian ambassador Rossi, deputy dean of the diplomatic corps in Moscow, intervened with Potemkin, Soviet Deputy Commissar for Foreign Affairs, and received the reply that he had no information from the local authorities. Potemkin pointed out that the Polish consul had already lost his diplomatic status and could be arrested by the Soviet authorities if it appeared that he had committed a crime against the Soviet Union. Ambassador Rossi replied that he saw no possibility of that; although on September 18, 1930 the Polish consul still enjoyed full diplomatic immunity, he had on that date been interned. Rossi's intervention with Molotov produced no results. He was told that the Soviet authorities had no information concerning the Polish consul.[29]

In the post-World War II era, several incidents involved the travel of foreign diplomats in the Soviet Union. In October 1960, the British Embassy protested against the detention and interrogation by the Odessa police of two British diplomats who took photographs of a crowd in an Odessa store. The Soviet government's explanation was that the photographs were taken without the consent of the persons concerned and

27. *Ibid.* p. 103.
28. *Ibid.* p. 468.
28a. SDD. 2 pp. 38 *et seq.*
29. *Documents on Soviet-Polish Relations 1939-1945* (1961) p. 89.

that the British diplomats continued their activities in spite of that fact that they were warned not to do so.[30]

In September 1964, the American and British Embassies protested against the arrest and detention of three diplomats who travelled from Moscow to Vladivostok and the confiscation of notes and other materials on their persons or in their possession. In reply, the Soviet note of October 6, 1964 alleged that the three diplomats had gathered information on "railway junctions, bridges, tunnels, radar installations, airports, locations of troop units, and other objects of defense significance," from the window of a train on which they were travelling, using "special optical apparatus and other technical intelligence devices".[31]

VI

The last group of incidents comes from the Middle East. One, of course, is the case of American hostages in Iran; the other is the Iraqui-South Yemen confrontation.

At the time when the American Embassy in Teheran was invaded by Iranian militants, the Iraqui-South Yemen (Aden) confrontation had ended. The event which precipitated this confrontation was the murder on June 3, 1979, of Dr. Tawfiq Rushdi, an Iraqui refugee, who sought asylum in Aden and became a professor at Aden University. According to a report read over the Aden local radio on June 4, 1979, a group of Iraqui Embassy security guards followed Rushdi in a car bearing diplomatic licence plates and shot him near his home in the Mansurah district of Aden. Yemen's reaction was to surround the Iraqui Embassy with troops. The Iraqui ambassador was summoned to the foreign ministry, and presented with a demand to surrender the suspects.[32]

Upon the ambassador's refusal the next day, Yemenite troops stormed the Embassy and arrested the suspects. In retaliation the Iraqui government recalled the ambassador and arrested Yemen's *chargé d'affaires* and the entire diplomatic staff in Baghdad.[33] Intervention on behalf of the Yemen diplomats was in vain. Charges were brought against three of the arrested security guards. On September 17, the Supreme Court of South Yemen found all three of the defendants guilty of Rushdi's murder. It declared itself incompetent, however, as regards two defendants, because of their diplomatic status and refused to impose a penalty. It sentenced the third

30. "Chronique des fait internationaux" (1961) 65 *Revue General du Droit International Public*, 620.
31. *Pravda, Izvestia*, Oct. 7, 1964.
32. Foreign Broadcast Information Service, June 7, 1979.
33. *Al Nahar* (Beirut) June 10, 1979; see also *Middle East*, July, 1979, 10.

defendant, who was not a diplomat, to ten years' imprisonment.[34] Eventually, the incident ended with the release of the detainees.[35]

In the background of the Aden incident was a change of course in foreign policy by Iraq. After a period of close alliance with the Soviet Union, Iraq tried to put some distance between itself and its Soviet protector and to improve its relations with the more conservative of its Arab neighbours. The Baghdad regime sought to adopt a policy of greater openness towards the West, seeking arms from France, as well as industrial equipment and managerial skills. The new course, a typical example of the policy pattern for small and weak countries in the Middle East, affected relations between Iraq and the radical regimes of the Arab world, particularly Yemen, which at that time had become an ally of the Soviet Union. As one commentator stated:

> Observers believe that Aden reacted so strongly to the [Rushdi] assassination because of Iraq's repression of the pro-Soviet Communist Party during the past year. A large number of Iraqui communists have sought refuge in Soviet backed Aden and others went to Lebanon, Eastern Europe and the Soviet Union. Aden obviously did not want a spate of assassinations that could undermine not only its relations with the Soviet Union and other Arab communist allies but also threaten its internal security. Moreover, the Soviet Union has long wanted to criticise Iraq's anti-Communist purge but could not do so directly and encouraged South Yemen to make an issue of Rushdi's assassination.[36]

A broadcast over the domestic radio service in Aden reported a statement adopted by –

> [the] mass organizations of the democratic Yemen . . . that they regarded the heinous crime, the victim of which was Dr. Tawfiq Rushdi, as a manifestation of the activities of the Iraqui Ba'th Party, aimed at torpedoing serious efforts to establish an activist Arab front capable of thwarting the imperialist and reactionary schemes obstructing the Arab nationalist liberation movement. The Iraqui Ba'th Party has performed a service for the enemies of the Arab peoples struggling for liberation, democracy, social progress and Arab unity.[37]

The Aden regime claimed that its action was not directed against the people and the government of Iraq, but at the Ba'th Party which betrayed the Arab cause. Indeed, the action of the Aden government was aimed at preserving good relations with Iraq, which is different from the Ba'th Party. A government declaration stated:

> These criminals wanted to harm and disrupt relations between our two countries and to distract us from the major causes which unite us with Iraq in the joint struggle against a common enemy. It is a secondary incident, when set against the pressing major cause of confronting the Sadat-Zionist imperialist design aimed against our entire Arab nation.[38]

34. Foreign Broadcast Information Service, Sept. 17, 1979.
35. *Ibid.*, Sept. 24, 1979.
36. *Al Nahar*, June 10, 1979, 1; *Middle East*, July, 1979, 10.
37. Foreign Broadcast Information Service, June 7, 1979.
38. *Ibid.*

The South Yemen government believed itself to be within its rights in terms of international law. In a statement broadcast on June 7, 1979[39], it stated:

> We in Democratic Yemen hope that this incident will not prevent us from joint action and from further unity and cohesion to confront the main dangers. Therefore, we again ask the Government of Iraq to remove its forces from our embassy in Baghdad and to lift the siege against the *chargé d'affaires* and embassy staff and give them full freedom of movement and contact in accordance with international charters. We hold that this behaviour towards our mission and embassy in Baghdad is unjustified, especially at the time when the ambassador of Iraq and the staff of the embassy enjoy full freedom and can conduct their normal activities as envoys of their country in Democratic Yemen.

Diplomatic immunity, the Aden government alleged, protected diplomats not in violation of international law. The storming of the Iraqui embassy in Aden was therefore legal, while the retaliatory action in Baghdad was clearly illegal.[40] That doctrine was modified somewhat by the Yemen Supreme Court. In its opinion, the court asserted that Iraqui diplomats were not immune from the jurisdiction of the Yemen courts. They could be tried and declared guilty, but could not be sentenced. By implication, the court accepted as legal the storming of the embassy and the detention of the diplomatic personnel.[41]

The case of the American hostages in Iran brings the discussion of the diplomatic regime to the present time.

At about 10.30 Teheran time, on November 4, 1979, a mob of demonstrators attacked the American Embassy in Iran, and after a two-hour seige obtained control of the building and seized the personnel present in the Embassy offices. According to a statement by the U.S. Government –

> The Iranian government security personnel on duty at the Embassy compound made no effort to deter or discourage the demonstrators from the takeover. Furthermore, during the two hours of attack, no Iranian security forces were sent to relieve the situation, despite repeated calls for help from the Embassy to the Iranian Foreign Ministry, and despite the efforts of the United States *chargé d'affaires*, who made contact with the Prime Minister's office and Foreign Ministry officials at the time of the attack. No attempt was made by the government of Iran to clear the embassy's premises, to rescue the personnel held hostage . . . nor did the government of Iran take any action when, shortly after the Embassy seizure, the United States consulates in Tabriz and Shiraz were also seized.
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> Since the time of the takeover, the Embassy personnel have been held hostage in the compound under threatening and inhumane conditions. They were paraded in front of the crowd of demonstrators, blindfolded, and bound. In the Embassy premises they were kept bound, forced to remain silent, without communication with their government and families.
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> It would be superfluous to give a full account of the atrocities committed by the occupiers of the Embassy, threats to execute them, to put them on trial for espionage,

39. *Ibid.*
40. *Ibid.*
41. *Ibid.*, Sept. 17, 1979.

> restricting access to international observers . . . The most important aspect was that the militants holding the Embassy and the hostages issued demands to the United States government threatening various reprisals against the hostages if these were not met.
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> . . . the Government of Iran, from an early stage of the crisis, has given direct support and encouragement to the group holding the Embassy. Members of that group have been permitted to come and go freely from the compound. The Government of Iran refused or ignored the repeated requests of the Government of the United States to free the hostages and restore the Embassy compound to the possession of the United States. The Government of Iran has supported the demands of those holding the hostages, has endorsed the charges of espionage levelled against Embassy personnel, and has threatened to place the personnel on trial for espionage.[42]

Simultaneously, the United States Government asked the Court of International Justice to order that interim measures of protection to be provided for the release of the hostages, for the premises of the United States Embassy in Teheran to be cleared and for United States diplomatic and consular staff to be assured full freedom in the Embassy and Chancery premises and freedom of movement in Iran necessary to carry out their diplomatic and consular functions. It also asked that the Government of Iran should not place any person attached to the United States Embassy or Consulate in Iran on trial and that it should refrain from any action to implement such a trial, and finally that the Government of Iran should ensure that no action was taken which might prejudice the rights of the United States in respect of the carrying out of any ruling which the Court might render on the merits, and in particular that the government of Iran shall neither take nor permit action that would threaten the lives, safety or well being of the hostages.[43] In due course, the Court assumed jurisdiction and issued an order providing for interim measures in accordance with the American request.

While these legal steps were being taken, the United States Government pursued negotiations through various channels, including the good offices of friendly governments, and through the Secretary-General of the United Nations. As a result of a gentlemen's agreement between the Secretary-General and the Iranian Government, it was stipulated that the crimes committed by the ousted regime in Iran against the Iranian people should be investigated by an international commission of inquiry, and that the Iranian government should, upon the convening of the Commission, release the hostages into the custody of a third party, and enable the Commission meanwhile to see all the hostages. On March 9, 1980, the Commission, after spending two weeks in Teheran, returned with its mission unaccomplished, while the condition of the hostages and the occupation of the Embassy remained unchanged.

42. *International Legal Materials* (1979), XVIII, 1466-69.
43. *Ibid.* 1482-87.

At the moment of writing, it is useless to expand the account of the case of the hostages beyond these simple facts. The International Court of Justice both in its interim order and final judgment left in no doubt that the Iranian action was in violation of the Convention on Diplomatic Relations.

VII

Soviet diplomatic practice represents another aspect of a State distorting the letter and the spirit of the Convention on Diplomatic Relations.

At the background of the Soviet regime of diplomacy stands the conception of the historic role of the Soviet State as a centre of world revolution. In the realisation of this historic mission, foreign service is a cover for intelligence and espionage activities. Diplomatic immunities serve in the first place to ensure the immunity of Soviet diplomats exposed as spies. The only risk a Soviet diplomat faces is the danger of being declared *persona non grata*, under Article 9 of the Convention. The abuse of the Convention for this purpose is compounded by the practice of retaliating when Soviet diplomats are expelled by expelling the diplomats of the other side. This is, of course, an embarrassment for a country which has resorted to the Article 9 procedure.

The list of countries from which Soviet diplomats have been expelled under a charge of espionage is quite extensive. During the 1970's Soviet diplomats were expelled from Australia and New Zealand. In Europe, Soviet diplomats were declared *personae non grata* in Belgium, Denmark, France, Great Britain, Holland, Norway, Spain, Switzerland and West Germany. In Asia, Soviet diplomatic spies were expelled from China and Japan. In Africa, Soviet diplomats were asked to leave their posts in Equatorial Africa, the Ivory Coast, Kenya, Tunis and Zaire (Congo Kinshassa). In some of the major European industrial countries espionage scandals occurred with considerable regularity. In the United States diplomatic scandals of this sort involved also members of the United Nations staff and of the Soviet embassy to the United Nations. Soviet diplomats were also exposed as spies in Colombia and Mexico.

Some of the Soviet activities were clearly an attack on the security and tranquility of the host countries. In Equatorial Africa, Soviet diplomats were implicated in organising a general strike. In the Ivory Coast, Soviet diplomats were accused of stirring up a revolt among army personnel and university students. In Colombia, Soviet diplomats were said to have organised guerilla activities.

Some of the activities of Soviet diplomats verged on the bizarre. In Switzerland, a Soviet diplomat was apprehended buying counterfeit identity documents. In France, in 1973, a Soviet air attaché was caught stealing

aerial equipment (cameras) shown at the Le Bourget air show. In Britain, a Soviet diplomat was detained in a state of inebriation, after a drinking session with a British air force sergeant whom he had tried to recruit for espionage service. Another Soviet diplomat was caught shoplifting in a London department store. In Norway, a young university student was promised an exit visa for his Muscovite sweetheart in return for joining the Soviet espionage service. He was sentenced to seven years' imprisonment, while the Soviet diplomat involved was expelled.

The Soviet government follows the policy of overstaffing its missions abroad. That these supernumeraries have no duties of a diplomatic character was demonstrated in the case of an espionage scandal in Britain in 1971, as a result of which the British government expelled 105 members of various missions in London in connection with the defection of an important Soviet spy in France. In 1972, the Bolivian government expelled 49 Soviet diplomats. The Soviet mission in that country numbered 62 diplomats, while the Bolivian mission in Moscow was staffed only by three diplomatic agents.

One may surmise that only a small proportion of Soviet espionage activities by diplomats is uncovered. Furthermore, in a number of countries, for example, West Germany, the authorities prefer a quiet rather than publicised liquidation of those involved in espionage incidents. Should an espionage scandal become public almost automatically the Soviet government retaliates by expelling an identical number of the other countrys diplomats. In the 1970's not a single foreign diplomat was expelled from Moscow, except as a retaliation. The only contrary instance was the case of the Venezuelan ambassador in Moscow who befriended dissident artists and writers and was declared *persona non grata.*

Some Soviet espionage agents are well known, and are not, of course, considered desirable in diplomatic posts abroad. In 1976, France refused admission to two Soviet diplomatic spies who had earlier been expelled from Britain. In retaliation the Soviet government refused visas to three French diplomats.[44]

44. Data on the Soviet diplomatic espionage was garnered from the *"Chronique des faits internationaux"* regularly appearing in the *Revue Generale de Droit International Public.* Incidents referred to in this article took place in the period 1969-78: R.G.D.I.P. (1970) 74: Lebanon, 741-2; Switzerland, 755-56; Italy, 493; Kenya, 183; Ivory Coast, 143; (1971) 75: Argentina, 741-42; Great Britain, 1162; United States, 191-92; Zaire, 1175; Holland, 545; (1972) 76: Great Britain, 1174-1179; Japan, 1186; Mexico, 569; Italy, 568; Great Britain, 536; West Germany, 139; Equatorial Africa, 843; (1973) 77: Colombia, 800; Bolivia, 489; Denmark, 507; (1974) 78: France, 676; Tunis, 1193; France, 1160; Norway, 852; France, 262; West Germany, 487; (1975) 79: China, 185; New Zealand, 846; (1976) 80: Holland, 622; West Germany, 1193; Denmark, 1209; (1977) 81: Australia, 497; Spain, 1136; Switzerland, 580; Holland, 311; Great Britain, 299; France, 539; (1979) 83: Spain, 160; United States, 167; France, 172; Venezuela, 201.

VIII

The first conclusion which comes to mind in the light of such confrontation of the Convention with the practice of States is that reciprocity in the regime of diplomacy plays a much larger role than is accorded to it in formal law. The inability to answer in kind exposes the diplomats of countries with stricter standards of conduct in international relations to dangers and humiliations. The treatment of western diplomats in Moscow, in the Matusinski case, and in Tehran, in the Iran hostages case, seems to confirm that conclusion. That the Aden case was finally resolved by concerted action was probably due to the determination of the Iraqi government to ensure the safety of its diplomats by the reciprocal use of violence.

It is also clear that the Convention is not a complete code of law, in the sense that it contains no answer to situations in which the interests of international relations come into conflict with vital national interests of a great power. Certainly, the Soviet Union uses the Convention to serve its interests on a world-wide scale in matters of security, access to raw materials, and the search for prestige and influence. Soviet diplomatic practice also demonstrates a basic attitude to the use of force as a legitimate and legal instrument of policy, which in the mind of Soviet leaders is justified not only by the condition of the international community, but also by the condition of contemporary international law. While the Soviet Union and its lawyers and diplomats participate in the process of developing codes regulating the behaviour of States in international relations, the Soviet government conducts itself in a manner which pays little attention to legal restraints in the use of force. Soviet practice as regards the law of the sea is a case in point.[45]

Early in the nineteenth century, Charles de Martens, who was a member of a distinguished family which provided a number of European countries with diplomats, and who was a professor of international law, published a two-volume collection of materials illustrating the diplomatic practice of States.[46] In the preface he acknowledged that, at the time of the supremacy of the Holy Alliance, one of the principles of contemporary international law was the right of armed intervention, which by that time had already been applied twice, against Piedmont and against the Kingdom of Naples. The basis of that right was the Treaty of Paris of November 20, 1815, which settled the shape of Europe after twenty years of Napoleonic Wars. Martens defines the real regime of diplomacy in the contemporary international

45. Grzybowski, *Soviet Public International Law* (1970) pp. 188 *et seq.*; R.D.G.I.P. (1976) 80, 308; *Ibid.* (1974) 78, 517.

46. Martens, C., *Causes célèbres du droit des gens* (1827).

community at that time. The criterion of legitimacy is a shared conviction in different social environments that the use of force is legitimate in certain circumstances. The same criterion may be applied generally to the world public order as it influences the realities of international relations. The law of diplomacy, and international law in general, is by no means a universal code, although universally adopted agreements certainly suggest the opposite. Instead, one may profitably use the notion of the coexistence of rules and norms formulated at various times which have retained their force to this day. Seen in this perspective, one may wonder whether Iraq's reaction to the storming of its embassy in Aden was contrary to international law. It was certainly an act permissible under the international law of the first decades of the eighteenth century. One may further ask whether diplomatic espionage, as practised by the Soviet Union, although clearly illegal in terms of the present regime of diplomacy, is not a legitimate practice according to the law of diplomacy of Frederic, King of Prussia. By the same token, the Brezhnev doctrine of limited national sovereignty of the countries of the socialist system, and the right of intervention in their internal affairs, is highly reminiscent of international law as it was practiced under the Holy Alliance. However, the comforting thought is that under any concept of international law, the killing of diplomats or taking them as hostages has always been illegal.