MODERN DIPLOMATIC LAW

by

MICHAEL HARDY

M.A., LL.M., Barrister-at-Law

MODERN DIPLOMATIC LAW

by

MICHAEL HARDY

M.A., LL.M., Barrister-at-Law

MANCHESTER UNIVERSITY PRESS

U.S.A.: OCEANA PUBLICATIONS INC.

Published by the University of Manchester at
THE UNIVERSITY PRESS
316-324 Oxford Road, Manchester, 13

U.S.A.
OCEANA PUBLICATIONS INC.
75 Main Street, Dobbs Ferry, N.Y. 10522

distributed in India by
N. M. TRIPATHI Private LIMITED
Princess Street, Bombay-2

Library of Congress Catalog Card No. 68–17737

G.B. SBN: 7190 0309 1

Oceana Book No. 23–8

Printed in Great Britain by Butler & Tanner Ltd., Frome and London

FOREWORD

By her Will, the late Miss Olive Schill of Prestbury, Cheshire, an old friend of the University, whose portrait is painted in Lady Katharine Chorley's *Manchester Made Them*, left the sum of £10,000 to the University in memory of her brother, Melland Schill, who died in the 1914–18 war. The annual income from this sum is to be used to promote and publish a series of public lectures of the highest possible standard dealing with International Law.

These lectures by Mr. Michael Hardy on 'Modern Diplomatic Law' have a particular interest, since the entry into force on 24 April 1964 of the Vienna Convention on Diplomatic Relations. For English lawyers in particular, the subject is a practical one, as the Diplomatic Privileges Act, 1964, incorporates Article 1 and Articles 22 to 24 and 27 to 40 of the Convention *expressis verbis* into English law.

Mr. Hardy is a distinguished graduate of the Law Faculties of Oxford and of Cambridge. He has practised at the Bar, taught in the Universities of Manchester and London, and is now a responsible international civil servant on the staff of the Office of Legal Affairs of the United Nations in New York. I hasten to add, however, that the author is merely expressing his own personal views and in no sense intends to commit the United Nations or any other body with which he may be associated to his expression of those views.

B. A. Wortley

Faculty of Law,
University of Manchester

CONTENTS

CONTENTS

Chapter I

ESTABLISHMENT AND FUNCTIONS OF DIPLOMATIC MISSIONS

INTRODUCTION

IT is my aim in these lectures to describe the legal framework of the means by which States pursue their external policies towards one another. I shall not attempt to examine every feature of diplomatic practice or to summarize the pros and cons of all the problems which may arise in the day-to-day life of a diplomatic mission. Nor, even less, will I try to specify what particular policies individual countries have followed and the tactics which should be observed to ensure success. My inquiry goes to the rules and pieces of the game and not to the players and their contests. Accordingly, we shall not be concerned with the widest sense of the word 'diplomacy', where it becomes synonymous with the execution of foreign policy, but with the narrower and more technical use of the word to refer to the means by which a country's foreign relations are maintained. Diplomacy, or diplomatic relations, may be defined for present purposes as being the conduct, through representative organs and by peaceful means, of the external relations of a given subject of international law with any other such subject or subjects. The term 'diplomatic law' therefore comprises the body of legal rules which govern the conduct and status of the organs concerned. The phrase 'through representative organs' refers at once to the delegated and symbolic quality of these organs—to the fact that they are, in short, *agents* whose acts constitute acts on behalf of the parent entity, and to the fact that it is the entity itself which chooses the organ to represent it and the task it shall perform, according to its own internal procedures. 'By peaceful means' excludes war and warlike activities from the sphere of activity of diplomatic agents; in this sense the exercise of diplomatic functions is based on a J. S. Mill-like distinction between the persuasion of others (in which opinion is free) and invasion of their rights (which is entirely forbidden). It is certain, however, that the initiation of direct military measures—for all that diplomacy may have led up to them—excludes the continuance of normal diplomatic relations: *inter arma*

silent legates. The clumsy term 'subject of international law' covers the possibility that entities other than States may also engage in diplomatic activities; it includes, therefore, besides the Holy See (in so far as the external relations of that body are insufficiently explained by assimilating it to a national State), the ever-increasing number of inter-governmental organizations with major functions, namely the United Nations, the specialized agencies, the European Communities and the principal regional associations. Each of these, no less than an accepted sovereign State, now acts as a centre of diplomatic representation and is the cause of further diplomatic efforts elsewhere.

Forms of diplomacy

As regards the institutional forms which modern diplomacy may take, States now have at their disposal an unparalleled array of devices for the conduct of their foreign affairs. There is, firstly and primarily, the exchange of permanent diplomatic missions and agents. This institution, which, like so much of the machinery of the modern state system, had its origins in fifteenth-century Italy,[1] has become the commonest form of diplomatic representation; by agreement, two States may exchange envoys and establish an embassy or legation in each other's country. The element of permanence necessarily brings about, by contrast with temporary missions, greater contacts with the law of the receiving State so as to raise the question, in a variety of contexts, of the extent to which the authorities of that State may exercise control over the activities of the foreign envoy and the degree to which they are obliged to respect his immunity from their jurisdiction. The second form of diplomacy consists of missions which may most accurately be described as non-permanent but which are normally referred to as special missions, or *ad hoc* diplomacy. This medium may be divided according to the particular person chosen to conduct the mission or according to the purpose for which the mission is sent, the two matters being usually closely linked. One category consists of visits made or meetings attended by leading political figures, whether heads of State or Government attempting to resolve major political difference, or foreign ministers representing their countries at regular sessions of international organizations.[2] Besides

[1] It may be noted that the dispatch of diplomatic envoys was not an exclusively Western invention: see Sen, *A Diplomat's Handbook of International Law and Practice* (1965), p. 3.

[2] As one former holder of that office has written, 'Today a foreign minister has

this class of special missions, conducted by persons having direct political responsibility, there are what may be termed special missions proper. These are composed of persons designated for the particular task or given special rank for the occasion. Besides the traditional example of the appointment of a representative to attend a ceremonial function, such as a coronation or a presidential installation, temporary missions may also be employed for more immediate political or technical purposes. Thus a special mission may be sent to explain a matter of particular delicacy and importance involving a shift in government policy or, since such missions may be used (unlike the case of permanent representation) when the two Governments do not recognize one another, in order to explore the possibility of establishing, or re-establishing, diplomatic relations. The discussion of financial problems, postal arrangements, the exchange of civil aviation facilities, the sharing of hydroelectric power, and a host of kindred matters may also require the dispatch, often for considerable periods, of expert groups possessed, at least within their field of competence, of power to represent their country and, often, to enter into binding agreements.

Special missions are to be distinguished from the official representation of a State at an *ad hoc* conference convened by a particular Government and from state representation in an international organization. The problems relating to the conduct of international conferences summoned by individual States cannot be covered here, except to note that the privileges and immunities accorded by the host State are often the same as those which would be given to members of a special mission dealing with a similar topic. In the case of the major international organizations on the other hand, the possession of an independent legal personality, the establishment of permanent offices at which States may institute missions similar to those accredited to States, the regular nature of the meetings held and the scope of the matters considered, combine to render the forms of diplomatic activity involved sufficiently distinctive and important as to require separate discussion. As in the exchange of permanent missions between States, the element of duration brings with it an increase in the range of possible contacts with the local jurisdiction and a correspondingly greater need for precise regulation of the position of the various parties concerned.

---

on his agenda, at least once or twice a month, a meeting of an international body which he must attend in person.' Beyen, 'Diplomacy by Conference', *Diplomatie unserer Zeit* (ed. Braunas and Stourzh, 1959), p. 63.

This summary of the major forms through which States conduc their external relations shows how varied those means now are; it i: a complicated instrument upon which States are allowed to play— now sending a special mission, now exchanging envoys with anothe: State, now preparing for a coming session of one of the principa international bodies. Before describing in more detail the legal issue: raised, in particular as regards permanent diplomatic missions and state representation in international organizations, it is necessary tc examine the sources and theoretical bases of the legal rules involved.

Sources of diplomatic law

Diplomatic relations are regulated by law for the same reason as many other branches of human activity, namely from a general recognition that only by so doing can affairs be conducted smoothly. The foundation of diplomatic law lies accordingly in the desire of States that their diplomatic relations should function on a stable and orderly basis. Granted the existence of independent, potentially antagonistic, sovereign States, legal regulation provides a feeling of security: it implies, as Bentham said, 'a given extension of future time in respect to all that good which it embraces'.[1] Nevertheless we must remember that we are referring primarily to international law, a system of law unique in the discretion which it leaves to its subjects in the choice and application of given legal rules. Thus, in the particular context of diplomatic law, it must be emphasized that this body of law normally only comes into operation after a State has agreed to accept the representative of another.[2] The position may be summarized by saying that whereas some of the international rules involved in this body of law directly affect States in their relations as executives, others acquire their main relevance within the confines of national law, the major example being, of course, the sphere of diplomatic privileges and immunities. A State is, however, allowed to determine for itself how to give effect to its international obligations. The various national measures taken, including judicial decisions, relating to diplomats, although not sources of law for other States, are accordingly indicative of the understanding of particular States

[1] *The Theory of Legislation* (ed. Ogden, 1931), p. 97.

[2] Thus it may be noted that the Diplomatic Privileges Act 1964, c. 81, adopted to give effect within the United Kingdom to the Vienna Convention on Diplomatic Relations, reproduces less than half the provisions of the Convention (Articles 1, 22-4 and 27-40), those omitted (apart from the final clauses) being directed solely to the executive.

as to the extent of their obligations in international law, and as such evidence of the content of that law.

On the international plane, the sources of diplomatic law are largely to be found (or were, at least, until recently largely to be found) in the customary rules of international law. No general treaty has hitherto existed to which States could adhere, nor have States been required by any formal act to acknowledge their acceptance of the body of rules comprised under the term 'diplomatic law'. In this sphere, if in no other, a 'constant and uniform usage, accepted as law',[1] has emerged, recognized by all States, albeit with some divergence as to the details of its application. To this statement two exceptions exist. Firstly, in a limited number of cases provision has been made by bilateral treaty for the grant of privileges and immunities to the respective envoys of the two States. These treaties,[2] mostly dating from the late nineteenth century, between Latin American and Middle and Far Eastern States on the one hand, and European nations or the United States on the other, are of relatively minor significance; apart from the agreement expressed that the two countries should enter into diplomatic relations and exchange official envoys, the privileges and immunities to be awarded were usually left to be determined according to general international law. The other exception, which is very much more important, concerns the adoption in 1961 of the Vienna Convention on Diplomatic Relations, which regulates in detail the status of permanent diplomatic missions and agents exchanged between States.[3] Although there had been previous attempts to give general regulation to this topic, these had been incomplete either in their results or in the scope of the matters covered. In 1815 the Regulation adopted at the Congress of Vienna settled the previously highly disputed question of rank and precedence among envoys; the League of Nations examined the matter between 1924 and 1928 but, apart from collecting material regarding state practice, did not pursue its inquiries beyond the level of an expert committee;[4] and, in 1928, the Sixth International American Conference which met at Havana adopted a Convention

[1] *Asylum Case, I.C.J. Reports, 1950*, p. 277.

[2] These treaties are described and listed in Harvard Law School, *Research in International Law, I: Diplomatic Privileges and Immunities* (1932), p. 26.

[3] The status of special missions may also shortly be regulated by a Convention. See p. 91 below.

[4] The consideration of the topic by the League of Nations is summarized in the Secretariat memorandum, 'Diplomatic Intercourse and Immunities', *Yearbook of the International Law Commission, 1956*, vol. II, pp. 136–46.

regarding Diplomatic Officers, to which a dozen or more Lati American States adhered.[1] Only in the case of the 1961 Convention however, was the matter carried to a successful conclusion so as t produce a codified version of the existing rules acceptable to th generality of States.[2] To the extent to which the Convention is a exercise in 'pure' codification, namely the consolidation of an alread accepted body of customary law, the rules which it embodies ar binding *erga omnes*, except in the cases where a State has consistentl maintained a contrary practice. It should, however, be noted that th Vienna Convention is not exhaustive in the sense of containing al relevant customary rules, even though it certainly contains most o them. The Preamble to the Convention affirms expressly that 'th rules of customary international law should continue to gover questions not expressly regulated by the provisions of the presen Convention'.[3] To the extent to which, on the other hand, the Con vention is more than an authoritative statement of existing rules (th

[1] United Nations Legislative Series, *Laws and Regulations regarding Diplomati and Consular Privileges and Immunities* (1958), vol. VII, p. 419. In so far as th International Law Commission was guided by previous attempts at codification the Havana Convention and the Draft Convention on Diplomatic Privileges anc Immunities, prepared under the auspices of the Harvard Law School, were th most influential. The latter is contained in Harvard Law School, op. cit., p. 19

[2] The Convention, which was adopted following the United Nations Conference on Diplomatic Intercourse and Immunities held at Vienna between 2 March anc 14 April 1961, entered into force on 24 April 1964. The text of the Convention anc list of States parties is given in Appendix II, p. 129 below.

The Conference had before it as the basic proposal for its consideration the revised draft articles which the International Law Commission had prepared on the topic in 1958. The Special Rapporteur (Mr. A. E. F. Sandström (Sweden)), who was appointed by the International Law Commission in 1954, submitted a report in 1955 (*Yearbook of the International Law Commission, 1955*, vol. II, p. 9), which was considered by the Commission at its ninth session in 1957. The International Law Commission adopted a provisional set of draft articles with a commentary (*Yearbook of the International Law Commission, 1957*, vol. II, p. 132). This draft was sent to Governments for their comments and discussed in the Sixth Committee during the twelfth session of the General Assembly. In 1958 the International Law Commission examined the text of the provisional draft in the light of the observations made and submitted a revised set of draft articles, and commentary, to the General Assembly (*Yearbook of the International Law Commission, 1958*, vol. II, p. 89). After consideration of the revised draft by the Sixth Committee, the General Assembly decided by resolution 1450(XIV) of 7 December 1959, that a plenipotentiary conference should be convened in order to adopt an international convention on the topic, based on the revised draft articles.

[3] This clause, not contained in the draft prepared by the International Law Commission (which did not include a Preamble) was inserted at the Vienna Conference at the instigation of the Swiss delegation. It constitutes a kind of reservation, or preservation, of the previous law, rather as an English statute might declare that all matters not expressly regulated continue to be governed by common law.

'best evidence' as it were) and introduces new law, a different position obtains, at least in theory, and only those States are bound which have become parties to the instrument without reservation on the point in question. But the distinction between 'pure' codification and 'new' codification is unreal; though it adorns our legal texts it fails to provide a decisive guide. The distinction cannot be drawn with certainty as regards any, or scarcely any, of the provisions; they nearly all partake of old and new, the new consisting, for the most part, not of innovations as such but of resolution of long-standing points of difference in which, to a large degree, it was less important which rule was adopted provided one rule was clearly chosen and followed by all. The question of ratification is also, to a considerable extent, a false issue when presented in overly clear-cut terms. Provided the codification conference has been adequately prepared—and the process whereby the International Law Commission, the Sixth Committee of the United Nations and individual Member States engage in a triangular dialogue has proved, on the whole, remarkably effective for the purpose—the generality of States are likely to endorse the results achieved. If they do, it may be expected that the new instrument will carry away the rest of the pre-existing law with it. The burden of proof resting on non-adhering States to show the existence of a contrary rule or practice, and even on those States maintaining reservations based on custom with respect to given issues, will be very great. In effect, though not legislative in the sense of being formally obligatory on all States, conventions such as those on the law of the sea[1] and the two Vienna Conventions on Diplomatic and Consular Relations[2] move the law on to another level; they henceforth constitute the basis from which discussion starts.

As regards the sources of diplomatic law applicable in the case of international organizations, the position differs in that, from the outset, the basis of the pertinent rules has been conventional.[3] Besides the inclusion in the constitutions of the majority of these organizations of an article referring, in broad terms, to the legal status of representatives, it has been customary for member States to adopt a general instrument, such as the Convention on the Privileges and Immunities of the United Nations[4] and the similar convention

[1] See Bowett, *Law of the Sea* (1967).

[2] The Vienna Convention on Consular Relations was adopted in 1963 and came into force on 19 March 1967. The question of consular relations and immunities is not dealt with in the course of the present lectures.

[3] This question is considered more fully on p. 106 ff. below.

[4] Adopted by the General Assembly on 13 February 1946. United Nations

relating to the specialized agencies.[1] In addition agreements ha usually been concluded with the States in whose territories permane offices have been established or where meetings are to be held, settir out the relative entitlements of the host State, of member States, ar of the organization. These agreements, together with the intern regulations of the body concerned, have formed the main sourc of the law relating to state representatives, with custom and practi following behind to eke out the written provisions.

Theoretical bases of privileges and immunities

Having separated the main sources of diplomatic law it is necessa to look further into the manner of operation of that law. A maj portion of diplomatic law is concerned with the action of States i their capacity as executives; the decision to exchange diplomat missions, the choice of individual representatives, or the ruling that given envoy is no longer *persona grata*, for example, are not matte which require national legislation in order to achieve their effects c which may be brought before the courts for review. These aspec depend on the exercise of the political discretion left to the executi of sovereign States, whether the particular action is one taken un laterally or in conjunction with another Government. Even in th case of relations between States and international organizatior where an additional element is introduced, a distinction may b drawn between matters regulated on an inter-governmental plane an those whose main operation is in terms of national law.[2] The rul and topics dealt with primarily between executives are accordingly t be distinguished from those which become applicable within th receiving State after the decision has been made by the Governmer to accept an envoy or, in the case of an international organizatior after a state representative has been dispatched in accordance wit the rules of the organization and any relevant agreements.

The duty which the receiving State owes under international la as regards the inviolability of diplomatic premises and the juri dictional immunity of foreign representatives is definite enough; th

---

Legislative Series, *Legislative Texts and Treaty Provisions concerning the Leg Status, Privileges and Immunities of International Organizations* (1959), vol. I, p. 18.

[1] Approved by the General Assembly on 21 November 1947. United Natior Legislative Series, op. cit. (1961), vol. II, p. 101.

[2] Particular considerations may apply with respect to relations between a Sta and an international organization, but since no organization maintains a munic pal legal system similar to that of a State the distinction drawn in the text remair applicable.

manifestation of that duty, however, is to be found in a municipal context. Although, therefore, in the event of a breach of the duty, the sending State may have recourse through diplomatic channels to an official protest, and even possibly the submission of a claim for reparation, the measures which the receiving State may take beforehand will be internal, directed to its organs and citizens. The receiving State is required to ensure that the standards set by international law are met and may employ for the purpose whatever means or combination of means it chooses, whether administrative, legislative or judicial. This entails, as the case may be, the provision of adequate police protection for diplomatic premises; the furnishing of instructions to officials regarding the treatment to be given to diplomatic agents; the submission by the executive of statements to local courts certifying that diplomatic premises and personnel are not subject to jurisdiction; and, as regards the adoption of legislation, the exemption of the representatives of other Governments from the application of certain laws and the imposition of special penalties on citizens who violate the physical safety of foreign envoys.

These restrictions, self-imposed or selected in their details, go to make up that body of international and national law known as diplomatic privileges and immunities.[1] Three explanations have been offered as to why this bundle of rules, constituting the particular legal status enjoyed by diplomatic missions and agents in foreign countries, should exist. The first, originally developed by Grotius, is that of the exterritoriality of the diplomat and of embassy premises.[2] As regards diplomatic premises, all acts performed in the building are regarded, or were regarded, as being performed in the country represented, so as to fall within the latter's jurisdiction and not in that of the actual host State. In the case of the diplomat himself, this image or analogy applied less clearly. However, by the use of the maxim *par in parem non habet imperium* and by stressing the notion that the diplomat represented, and indeed stood as a direct substitute for, the sovereign

[1] The word 'privilege' is sometimes used to denote a benefit over and above that ordinarily granted by national law (e.g. in respect of communications) and 'immunity' to describe an exemption from a specific provision of local law (e.g. immunity from taxation), but there is no uniformity of usage and much difficulty in applying the terms consistently with these meanings. Throughout the present lectures the words 'privilege' and 'immunity' are therefore used as synonyms.

[2] See Simmonds, 'Privilèges diplomatiques et naissance de la fiction de l'exterritorialité', *Revue de droit international et droit comparé*, XXXVI (1959), p. 170, showing how Grotius incorporated and superseded the 'representational' theories developed by his predecessors before the notion of territorial jurisdiction had been fully developed.

who sent him, it was possible to extend to the envoy the benefits of being judged solely by his sovereign's law, even as regards acts performed outside the embassy. The limits of this explanation are obvious. The premises of an embassy are situated and the duties of an envoy are actually carried out within the territory of the receiving State. Although for many purposes the authority of the sending State is supreme within the embassy, and the sending State alone determines how its personnel shall be employed, this is not to say that the law of the territorial State is entirely excluded. The very title to the land on which the embassy is situated, or even the claim to occupation of the buildings, must be construed in terms of local law —let alone such questions as whether crimes, possibly unconnected with diplomatic functions, committed by local nationals in embassy premises, are to be judged by the law of the sending State. Furthermore, although the diplomat may have immunity from jurisdiction, it cannot be seriously argued that every act performed by him is to be regarded as *extra territorium*, as though he were the walking embodiment of a system of conflict of laws. If a diplomat buys a newspaper at the corner of the street or orders a meal it may be that he cannot be sued on the contract, but that is not to say that the law governing the transaction is not that of the host State. By its very excesses, the exterritoriality principle is inadequate to explain why certain immunities from local law are accorded. There is a fictional element in this approach which the modern mind finds hard to accept; it is a crutch, helpful to an earlier age, but which we are deemed mentally robust enough to do without. And this is, indeed, the case. There are relatively few modern judgements which base themselves upon this doctrine, or textbooks either. The dismissal by the International Law Commission[1] of this rationale, following a similar rejection by the League of Nations expert committee,[2] may be taken as conclusive.

The remaining explanations, based on the representational qualities of the diplomat and the functional necessities of his office, are not so much opposed as complementary. The original version of the 'representative character' theory identified the envoy with the sovereign so as to exempt him from the jurisdiction of the receiving State by virtue of the status of his master. This interpretation did not accord, however, with the fact that a diplomat's privileges and immunities with regard to local law are not identical, and may indeed be more extensive, than those enjoyed by an individual ruler; nor, even in a

[1] *Yearbook of the International Law Commission, 1958*, vol. II, p. 95.
[2] *American Journal of International Law* (1926), Supplement, p. 149.