DIPLOMATIC AND CONSULAR LAW IN THE AGE OF EMPIRE

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Abstract: Diplomatic and consular law underwent significant alterations in Europe in the nineteenth century as result of changes in the political and international order. With the expansion of trade, European states came to exchange envoys with states in other continents. Envoys increasingly promoted the commercial interests of their nationals. With the move from monarchical to constitutional rule, envoys came to be seen more as representing a country, rather than a monarch. Their immunity from local jurisdiction, while it continued to be respected, was challenged as they were seen less as surrogates for a monarch. At the same time, the service rendered by envoys became more professionalized. Envoys came to be relied upon to keep tabs on domestic developments in the receiving state, in particular on their military preparations.

Key words: sending state, receiving state, diplomat, consul, immunity

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Diplomatic and consular law were highly developed by the latter years of the nineteenth century. In this chapter, diplomatic law will first be considered, followed by consular law. In regard to both, the period 1870 to 1920 witnessed substantial change relating to developments in the international order. Diplomatic law had been forged over several centuries as states exchanged diplomats to maintain relations with one another. This law built on principles dating back to ancient times whereby sovereignties recognized the utility of emissaries. Rules developed prohibiting their mistreatment. Perceived self-interest allowed rules to develop despite the absence of formal processes whereby redress could be sought. A terminology developed. The state that dispatched an emissary was the "*état accreditant*" in French, the "sending state" in English. The state to which the emissary was sent was the "*état accreditaire*," or the "receiving" state.

The prevailing monarchical system of domestic governance in Europe established the identity of the participants in diplomatic relations. Emissaries were conduits between monarchs. Any injury to an emissary was regarded as an injury to the monarch. In the course of the nineteenth century, however, monarchies were slowly changing, in some countries faster than in others. Representative assemblies were constraining the role of monarchs. Emissaries came to be regarded more as representatives of a state, than of a monarch.

Changes in the domestic orders affected the style of diplomacy. A French scholar could write in 1898 that the diplomacy of the *fin de siècle* was qualitatively different from the diplomacy of a century earlier. "Public opinion," wrote Paul Pradier-Fodéré, "determines the direction of

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events." "Diplomatic law," he said, "is based on the idea of the sovereignty of the people," rather than, as before, "on "the mistake of divine right." The perception at least of diplomats had been less than flattering. Whereas a diplomatic agent formerly was "the instrument of the ambition of his sovereign," Pradier-Fodéré wrote, by the turn of the twentieth century "he represents the general interests of his country." The public image of diplomats had changed, said Pradier-Fodéré, from that of agents who told lies and kept secrets to that of one who worked for the common good.

"Formerly, a diplomatic agent was a courtesan, and a servant; today he is a citizen entrusted with the most noble, the most brilliant, and the most enviable function to which an enlightened spirit might aspire." That function, Pradier-Fodéré wrote, was "to represent abroad the dignity, the moral culture, and the understood interests and legitimate rights of his country."[1]

One other political change impacted the style of diplomacy in the second half of the nineteenth century. The identity of some of the major participants in Europe's political order was changing. A pan-Italian state was formed out of the multiple sovereignties on the Italian peninsula. Farther north, Prussia led the formation of German-populated areas into a German state. Austria combined with Hungary to form the Austro-Hungarian Empire. These combinations strengthened some sovereigns while at the same time reducing the number of entities involved in European diplomacy.

At the same era, Europe's relations expanded in other regions of the world, leading to diplomatic relations with additional sovereign actors.[2] Europe's diplomats interacted with Latin America and Asia to an extent not seen in prior eras. Relationships with sovereigns not part of Europe altered the tenor of diplomatic relations. In Europe, many of the sovereigns enjoyed familial relations with their counterparts elsewhere. In extra-Europe relations, that element of commonality was absent.

The scramble for colonies in the later years of the nineteenth century also impacted the scope of diplomacy. European powers claimed sovereignty over territory in Africa. The view towards Africa was reflected in the title of the Russian scholar Fedor Martens' treatise on international law. Martens entitled his tome *Contemporary International Law of Civilized Peoples*.[3] The colonization of Africa, had some impact on the style of diplomacy, as will be seen below, but did not change it in any fundamental way. African political entities were not regarded as sovereigns once they were absorbed into European states. One historian of Europe's diplomacy wrote, "the desire for colonial expansion had a profound effect on foreign policy: its effect on diplomatic method was not so great."[4]

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[1] Paul Pradier-Fodéré, *Cours de droit diplomatique à l'usage des agents politiques du Ministère des Affaires Étrangères des états européens et américains* (Paris: Pedone, 1899), at vii-viii.
[2] Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration* (London: Routledge 1995), at 110.
[3] Fedor Martens, Современное международное право цивилизованных народов (Санкт Петербург: Типография министерства путей сообщения 1887-1888).
[4] Harold Nicolson, *The Evolution of Diplomacy: Being the Chichele Lectures delivered at the University of Oxford in November 1953*, at 107-108 (New York: Collier 1962).

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Already in the seventeenth and eighteenth centuries, practices had been followed, and rules based on those practices came to be observed in regard to modes of appointing and receiving ambassadors and other embassy staff. Those modalities underwent modification after the Napoleonic wars. Prior to that time, strict rules had prevailed in European capitals on the order of precedence of the various foreign ambassadors. The major powers topped the list, and protocol required observance of their preeminence. An 1815 accord among Europe's major powers buried this procedure.[5] Instead, ambassadors would take rank by their longevity in the particular capital city.[6] The longest serving representative would be the *doyen* of the corps of diplomats.

Professionalization of diplomacy

Increasing international commerce brought a new emphasis in diplomatic functions. Diplomats increasingly viewed it as their role to promote trade for private firms. To some, such activity seemed undignified for a diplomat, but as companies competed for markets, governments through diplomats came to their aid. Embassies came to house diplomats specializing in commercial matters, termed commercial or trade attachés.[7]

A revolution in international communications also impacted diplomacy in the latter decades of the nineteenth century. The telegraph came into use. For the first time, a foreign ministry could communicate with a far-flung ambassador in real time.[8] By late nineteenth century, the telegram was the primary means of communication between a foreign office and an ambassador. To a significant extent, foreign offices replaced ambassadors as decision-makers.[9] Pradier-Fodéré wrote that this "the electric telegraph and the rapidity of communication" brought a change in decision-making at embassies. They have "taken the initiative away from public ministers. . . . When the centers of negotiations were separated from each other by long distances," the negotiators worked from instructions. "Today the diplomatic agent . . . hangs on the telegraph wire," allowing the home ministry to act directly.[10]

Diplomats were no longer left to their own devices to operate based on vague written instructions. They could be controlled by their ministry. One result was that the diplomatic service became increasingly professionalized. In 1860, the British Parliament appointed a committee to study Britain's diplomatic service. The committee gathered information on the diplomatic service for other European countries. For Britain, it bemoaned the fact that at the existing levels of remuneration many British diplomats were hard pressed to survive in European capitals. It recommended improvements not only in remuneration but in other material conditions of life. It also recommended improving the existing examinations required of

[5] Règlement du 19 mars 1815 sur le rang entre les agents diplomatiaues, art. 4.
[6] Raoul Genet, *Traité de Diplomatie et de Droit Diplomatique* (Paris: Pedone 1931), vol. 1, at 403.
[7] Nicolson, *The Evolution of* Diplomacy, at 109-110.
[8] Nicolson, *The Evolution of Diplomacy*, at 110.
[9] Hamilton and Langhorne, *The Practice of Diplomacy*, at 132.
[10] Pradier-Fodéré, *Cours de droit diplomatique*, at v-vi.

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candidates, in particular to ensure solid knowledge of French, but also of history and international law.[11]

Nonetheless, through to the Great War aspirant British diplomats were required to have a substantial annual private income, a requirement that kept the diplomatic service populated predominantly by the upper classes of British society. The same obtained in Germany, in whose diplomatic service members of the aristocracy dominated despite a requirement of passing a rigorous examination. In the Europe of the late nineteenth century, a capacity to be accepted in the upper echelons of society remained a valuable qualification for a diplomat.[12]

The British committee found increasing professionalization in the diplomatic services of other European countries. It reported that in Russia, by an 1859 regulation, an examination was required of applicants for diplomatic positions. The examination covered languages, international law, and economics. Candidates were required to write a memorandum in both Russian and French on an assigned topic in diplomacy. Candidates were required to study the works of specific authors, including Vattel and John Stuart Mill.[13]

In 1877, France's foreign ministry required entrants to sit for an examination and brought diplomats into closer interaction with the functionaries at ministry headquarters on the Quai d'Orsay. Entrants chosen for merit gradually replaced persons of upper class lineage in France's foreign service. Earning a diploma from the *Ecole libre des sciences politiques* came to be regarded as a significant qualification.[14] Change in the identity of diplomats was not uniform through the continent. By the time of the Great War, France's ambassadors were largely drawn from the bourgeoisie, whereas Germany's remained largely members of the nobility.[15]

Another tendency in European diplomacy was the naming of women as diplomats. Whereas in times past the appointment of a woman to represent her country was not deemed appropriate, by the turn of the twentieth century women began to be appointed, albeit in small numbers, to the diplomatic ranks, and their appointments were accepted by receiving states.[16]

Among the qualifications the various governments of Europe began to require for entry into the diplomatic service, a knowledge of French was included.[17] While France under Napoleon was defeated on the battlefield, its language continued to dominate diplomacy. Not only were treaties written in French, but French was required in written communications diplomats made to

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[11] Report from the Select Committee on Diplomatic Service, July 23, 1861, House of Commons Parliamentary Papers (1861), at ix-x.
[12] Hamilton and Langhorne, *The Practice of Diplomacy*, at 103-104.
[13] Minute of Prince Gortchakoff, December 10, 1859, quoted in Report from the Select Committee on Diplomatic Service, July 23, 1861, House of Commons Parliamentary Papers (1861), at 412-414.
[14] Hamilton and Langhorne, *The Practice of Diplomacy*, at 99-101.
[15] Hamilton and Langhorne, *The Practice of Diplomacy*, at 104.
[16] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 1, at 176.
[17] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 2, at 613.

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officials of a receiving state. Contention over this issue increased around the turn of the twentieth century, in particular from efforts by diplomats of the United States to employ English.[18]

Diplomatic law remained in the realm of customary law through the 1870 to 1920 period. No multilateral conventions were attempted. A smattering of bilateral treaties were concluded containing clauses requiring each state to afford whatever immunities it afforded to representatives of other states. This concept was termed "most favored nation," meaning that if a state afforded a certain level of immunity to the diplomats of any other state, it must afford it to diplomats of the treaty partner.[19]

Appointment of an ambassador required acceptance by the receiving state. The same was not true for lower-ranking members of a diplomatic mission. It remained, however, within the discretion of a receiving state whether a particular diplomat might serve in that capacity in the receiving state.[20] A receiving state that did not want a diplomat could communicate a declaration of *persona non grata*, meaning that the person did not have the consent of the receiving state and, if already in the receiving state, could be required to depart.[21]

In 1891 the United States proposed to send Henry W. Blair as Minister in Peking. While Blair was en route to China to assume the post, the Chinese Government informed the United States that it objected to the appointment and found him *non grata*. Blair had been a member of the US Senate when it adopted the Chinese Exclusion Act of 1888, which forbad the migration of Chinese to the United States. The Chinese Government complained that Blair had supported the legislation and that during floor discussion of it he made derogatory comments about the Chinese. The United States objected to China's objection to Blair, but it acknowledged China's right to consider him *persona non grata*. Blair resigned the appointment without taking it up.[22]

Diplomatic immunity

Once diplomatic representatives were exchanged, a range of legal obligations arose. A receiving state had to allow diplomats to find appropriate premises from which to work. It had to protect diplomats from harm, even harm caused by private parties.[23] It had to afford them certain immunities from local jurisdiction.

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[18] Hamilton and Langhorne, *The Practice of Diplomacy*, at 105-107.
[19] Research in International Law: Diplomatic Privileges and Immunities, *American Journal of International Law*, vol. 26 (Special Supplement), at 27 (1932).
[20] Martens, Современное международное право цивилизованных народов, vol. 2, at 25-26.
[21] Research in International Law: Diplomatic Privileges and Immunities, at 77-79.
[22] G. Fr. de Martens; *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, 2d series, vol. 22, at 271-291 (Leipzig: Dieterich 1897). Briefly recounted in William Edward Hall, *A Treatise on International Law*, 6th ed. (Oxford: Clarendon Press 1909), at 294.
[23] Cecil Hurst, Les immunités diplomatiques, Hague Academy of International Law, *Recueil des cours* 1926 vol. 2, 115, at 128. Research in International Law: Diplomatic Privileges and Immunities, at 90.

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Immunity for diplomats was well established in the law.[24] States typically afforded a range of immunities to diplomats. Two different terms – "privileges" and "immunities" – were applied in this context. When scholars made an attempt in 1932 to codify the law on diplomacy they were unable to distinguish between the two terms. They put them together and said simply that the phrase "privileges and immunities" was "consecrated by usage."[25]

Practice had developed, in any event, to exempt diplomats broadly from regulation by the receiving state. Diplomats were exempted from local taxes.[26] They could not be called into military service. They could not be prosecuted for crime. Importantly, these "privileges" or "immunities" attached to the sending state, meaning that it remained within the prerogatives of the sending state to forego them when an issue arose.

As for the purpose of diplomatic immunity, it was sometimes said to flow from the "reciprocal independence" of the sending and receiving state, and to the respect of each for the sovereignty of the other.[27] The Austrian scholar Leo Strisower thought that this rationale did not suffice. The "essential reason," he said, is the need to be able to exercise diplomatic functions.[28] Diplomats could not carry out their functions, said the British international lawyer Cecil Hurst, if local officials in the receiving state could interfere in their activities in the way that can be done with other persons.[29]

With the move away from absolute monarchy in the nineteenth century, the granting of immunities was questioned. The exemption from taxation, for example, was challenged in the legal literature as not being necessary to allow diplomats to carry out their duties. Nonetheless, few inroads were made on that exemption, or indeed on others.[30] Even the immunity from criminal prosecution was challenged by what came to be called the Italian school. Its adherents, as explained by Ernest Lehr, who chaired the Committee on Diplomatic and Consular Immunities for the Institute of International Law, thought that the procedural guarantees that were in place by the late nineteenth century sufficed to protect diplomats from unfairness. Lehr's Committee rejected this thinking.[31] Immunity from criminal prosecution remained firm in state practice for diplomats.

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[24] Hans Frisch, *Der völkerrechtliche Begriff der Exterritorialität* (Vienna: Alfred Holder 1917), at 25.
[25] Research in International Law: Diplomatic Privileges and Immunities, at 26.
[26] Research in International Law: Diplomatic Privileges and Immunities, at 57-61.
[27] Maurice Leven, De l'immunité de jurisdiction des agents diplomatiques, *Revue de droit international privé et de droit pénal international*, vol. 4, 580, at 583-584 (1908).
[28] Leo Strisower, L'extraterritorialité et ses principales applications, Hague Academy of International Law, *Recueil des cours* 1923, vol. 1, at 239.
[29] Hurst, Les immunités diplomatiques, at 122.
[30] Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press 1999), at 347.
[31] *Annuaire de l'Institut de droit international*, vol. 14 (1895-1896), at 205.

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Immunity from criminal prosecution applied even if the act imputed to the diplomat had no connection to official duties. At the turn of the twentieth century, the operation of automobiles opened a realm in which diplomatic immunity had not previously figured. In 1904 a secretary of the British embassy was taken before a court in the US state of Massachusetts for driving at an unlawful speed. The secretary apologized for the violation but plead diplomatic immunity. Rejecting the plea, the judge convicted the secretary and imposed a monetary fine. The British embassy in Washington complained to the US Department of State, insisting on immunity. As result of that intervention, the Governor of Massachusetts approached the judge, who remitted the penalty.

A similar situation arose the same year involving a counselor of the French embassy charged with speeding in his automobile in Washington DC. When he plead immunity, city officials complained to the US Secretary of State, who contacted the French ambassador. The ambassador said that the counselor denied speeding but apologized in any event. The ambassador asked that the matter be dropped, and the city government relented.[32]

Immunity from criminal prosecution remained strict, however. The Institute of International Law explained in 1895 that diplomats were exempt from criminal prosecution in the receiving state. Instead, diplomats who committed crimes in the receiving state were "subject to their national penal law, as if they had committed them in their own country.[33]

Immunity also protected a diplomat from civil suits, but with some exceptions. A diplomat who purchased land in the receiving state might be sued for matters relating to that ownership. A diplomat who engaged in commercial activity in the receiving state might be sued for matters relating thereto.[34]

Diplomatic immunity came under attack in some quarters, as a relic of the age in which monarchy predominated. The rationale was that the monarch ruled by divine right and was above the law. A diplomatic emissary, as the monarch's representative, must similarly be above the law.[35] This view was challenged as a relic of a former age.[36] Critics argued that immunity protected malefactors. Justice, it was said, counted for more than did the protection of a foreign sovereign.[37] Despite these challenges, immunity from criminal prosecution retained its vitality.

Diplomatic immunity was "a right belonging to a state," rather than to the individual diplomat. Hence the sending state could waive the immunity if it saw fit. Only the government, not the

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[32] John W. Foster, *The Practice of Diplomacy As Illustrated in the Foreign Relations of the United States* (Boston: Houghton, Mifflin 1906), at 163-164.
[33] Résolution: Règlement sur les immunités diplomatiques, arts. 12-13, 13 August 1895, *Annuaire de l'Institut de Droit International* (Paris: Pedone 1895), vol. 14, at 243.
[34] Charles Dupuis, Les relations internationales: les représentants des états et la diplomatie, Hague Academy of International Law, *Recueil des cours*, vol. 2, at 303 (1924).
[35] François Laurent, *Droit civil international* (Paris: Marescq 1880), vol. 3, at 135.
[36] Laurent, *Droit civil international*, vol. 3, at 27.
[37] Frey and Frey, *The History of Diplomatic Immunity*, at 344.

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individual, was capable of foregoing immunity in a particular situation.[38] There were nonetheless instances in which a diplomat personally renounced immunity, and various courts accepted such renunciations.[39]

Diplomats were also protected from being summoned to a court in the receiving state to give testimony.[40] In Spain, however, a statute required magistrates to compel diplomats to testify when their testimony was needed.[41] The statute evoked protest from the organized diplomatic corps in Madrid in an 1877 episode. As a result, the Spanish Government intervened to prevent implementation of the statute.[42]

The prohibition on requiring testimony applied even if the particular case had nothing to do with diplomatic activity. The rationale for the prohibition was that a diplomat appearing as a witness would be subject to the l laws of the receiving state regarding the behavior of witnesses. A practice developed that a court that found a diplomat's testimony necessary could approach the government, which could ask the sending state to arrange for the diplomat to give a statement in writing. This procedure did not suffice, however, in a criminal case if the law of the receiving state gave the accused a right to cross-examine witnesses.[43]

Extraterritoriality and asylum

Immunities applied not only to the person, but to premises. The issue in regard to both was discussed under the rubric of "extraterritoriality" in the literature of the nineteenth century. The person of a diplomat, as well as the premises used for diplomatic purposes, were said to be "extraterritorial," that is, for all intents and purposes, outside the territory of the state in which they were in fact located. At the Institute's 1895 session of the Institute of International Law in Cambridge, the Alsatian lawyer Ernest Lehr expressed the view "que l'agent diplomatique est encore aujourd'hui considéré comme étant *extra territorium* en tant qu'il s'agit d'actes où, nonobstant sa residence de fait à l'étranger, il est reputé d'avoir pas quitté le territoire de son proper pays."[44]

This view was broadly challenged, however, in the waning years of the nineteenth century, by scholars and judges who saw it as the fiction that it obviously was. They advocated for what they considered a more realistic mode of analysis of the situation of diplomatic personnel and

[38] Research in International Law: Diplomatic Privileges and Immunities, at 125-131. Leven, De l'immunité de jurisdiction des agents diplomatiques, at 587-588.
[39] Strisower, L'extraterritorialité et ses principales applications, at 243.
[40] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 1, at 528.
[41] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 1, at 528-529.
[42] Mr. Cushing (U.S. Legation in Madrid) to Mr. Fish (Secretary of State), 13 January 1877, *Foreign Relations of the United States 1877*, at 492.
[43] Ernest Satow, *A Guide to Diplomatic Practice* (London: Longmans 1917), at 272. Charles Calvo, *Le droit international théorique et pratique*, 4th ed. (Paris: Guillaumin 1888), vol. 3, at 318.
[44] *Annuaire de l'Institut de droit international*, vol. 14 (1895-1896), at 207.

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premises. They preferred to speak of particular privileges and immunities. “This fiction [of extraterritoriality] is not useful,” declared the French writer Paul Fauchille, but is “vague, fausse et partant dangereuse.”[45]

Fauchille recounted a French case from 1865, involving a Russian who tried to kill someone inside Russia’s embassy in Paris. A French court found it had jurisdiction to try the man, on the rationale that the site of the embassy was in the territory of French.[46] Charles Dupuis, another French scholar of the era, affirmed as a general rule that persons committing crimes within an embassy, at least those not entitled to immunity, could be prosecuted in the courts of the receiving state. An ambassador who declined to allow the police to enter to make the arrest, said Dupuis, would have to deliver the suspect to police. This would not be considered extradition.[47] The view taken by the French court in the 1865 case reflected the predominant approach, despite talk about extraterritoriality.

The term “extraterritorial” appeared, nonetheless, in analyses of a receiving state’s obligation to safeguard diplomatic premises. Such premises were to be protected by the receiving state, for example, in case of forced intrusion by outsiders. The confidentiality of archives of an embassy was to be protected as well from intrusion.[48] The premises were deemed to be under the control of the sending state, though not outside the sovereignty of the receiving state. A German court gave the following analysis of what “extraterritorial” meant in regard to diplomatic premises.

> The concept "exterritoriality" contains a fiction that is not to be taken literally. By virtue of exterritoriality, the lands enjoying these rights are, in many respects, treated legally as though they lay within the state of their occupants; their attachment to the state in whose boundaries they lie is not thereby denied.[49]

Whatever the view on extraterritoriality, the concept was not pressed to the point of allowing diplomatic representatives to give asylum to persons sought for arrest by the police of the receiving state.[50] Diplomatic asylum in the period 1870 to 1920 was widely accepted in Latin American. There if individuals on the losing side in a civil conflict asked to be kept in an embassy to protect them from treason or other criminal charges, embassy staff could shelter them. Police of the receiving state would not be allowed to enter the embassy to make an arrest. That practice grew out of a history of domestic political conflict in Latin America. In Europe in earlier times ambassadors had at times afforded asylum.[51] But by the late nineteenth century the

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[45] Paul Fauchille, *Traité de droit international public* (Paris: Rousseau 1926), vol. 1, part 3, at 64.
[46] Sirey, *Recueil périodique 1865*, vol. 1, at 33 (Cour de Cassation, 13 October 1865).
[47] Dupuis, Les relations internationales, at 300.
[48] Research in International Law: Diplomatic Privileges and Immunities, at 61-62.
[49] Kammergericht Berlin, Urteil 16.6.1902, XIII. Civ.-Senat, in Theodor Niemeyer, *Zeitschrift fur Internationales Privat- und Öffentliches Recht*, vol. 12, 464, at 465 (1903). As translated in Research in International Law: Diplomatic Privileges and Immunities, at 51.
[50] Research in International Law: Diplomatic Privileges and Immunities, at 62-63.
[51] John Bassett Moore, Asylum in legations and consulates and in vessels, *Political Science Quarterly*, vol. 7, 1, at 5-8 (1892).

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practice had largely died out in Europe.[52] The sole major exception was to be found in the actions of ambassadors accredited to Spain, where in a number of instances of civil strife they gave shelter to persons on the non-prevailing side.[53]

In 1901, a writer in the *Harvard Law Review* said that while asylum had on occasion been claimed in the past, "to-day it is doubtful if in one of the greater nations of the world its existence would be either claimed or conceded."[54] Dupuis, with apparent reference to the practice in Europe, explained that if a person was in an embassy who had committed a crime elsewhere in the receiving state, the ambassador would have to turn that person over to police. If the person were a "political refugee at risk of vengeance," according to Dupuis, the ambassador might lawfully offer temporary shelter to ensure safe exit but would have to avoid appearing to take a partisan stance in a political conflict.[55]

Protection of dignity

One of the obligations of a receiving state is show respect for the sending state. In 1892 a French citizen living in the US state of Pennsylvania displayed a French flag on his house on Decoration Day, a US holiday on which US flags were traditionally displayed as a sign of patriotism. A local police officer tore the French flag down and threw it into mud on the street, apparently considering it inappropriate to display the flag of a foreign power on this holiday. When the French ambassador complained, the US Secretary of State approached the Governor of Pennsylvania, leading to disciplinary action against the officer. The French ambassador expressed appreciation for this outcome.[56]

The dignity of diplomatic representatives was also to be protected, not only from actions by governmental personnel, but by private parties as well, particularly by the local press. "It is the strict, absolute duty of any government worthy of its name," wrote a leading scholar, "never to allow the press to defame or injure members of the diplomatic corps; sacred and inviolable in their person and in their residence, so are they in their reputation."[57] Libel laws might be invoked. In the United States in 1898, the US Secretary of State referred a situation of libel against a British diplomat to the Attorney-General for prosecution.[58]

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[52] Frey and Frey, *The History of Diplomatic Immunity*, at 388-389.
[53] US Secretary of State Hamilton Fish to Minister in Spain Caleb Cushing, 5 October 1875, quoted in Francis Wharton, *International Law Digest of the United States*, vol. 1, at-686 (1887). Moore, Asylum in legations and consulates and in vessels, at 19-20.
[54] Barry Gilbert, The Right of Asylum in Legations of the United States in Central and South America, *Harvard Law Review*, vol. 15, at 118 (1901).
[55] Dupuis, Les relations internationales, at 301.
[56] Foster, *The Practice of Diplomacy*, at 163-164.
[57] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 1, at 513.
[58] Mr. Day, Secretary of State, to the Attorney-General, June 8, 1898, in John Bassett Moore, *A Digest of International Law*, vol. 4, at 630.

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Penal laws might refer specifically to diplomats. Under Austria's penal law, it was an aggravating circumstance to an offense titled "insult to honor" if the object of the insult was a diplomat accredited to Austria.[59] The Russian penal code made it a crime to "outrage an ambassador or a chargé d'affaires." The same code provision made it a crime to "outrage any diplomatic agent," meaning one of lower rank, but only "if this outrage has been committed with the intention of manifesting a lack of respect to the government of this agent."[60] In either case the penalty could be incarceration up to six months.

In France a Press Law of 1881 also mandated a criminal penalty for "outrage" against a diplomat:

> Article 37. L'outrage commis publiquement envers les ambassadeurs et ministres plénipotentiaires, envoyés, chargés d'affaires ou autres agents diplomatiques accrédités près du gouvernement de la République, sera puni d'un emprisonnement de trois mois à un an et d'une amende de cinquante francs à deux mille francs, ou de l'une de ces deux peines seulement. [61]

This provision, which repeated a similar French provision of 17 May 1819, did not further define "outrage." Although the title of the 1881 law related to "the press," it applied broadly to statements by anyone.

France experienced difficulty in implementing the 1881 law. By its provisions, charges for committing "outrage" against a diplomat fell to the jurisdiction of a *cour d'assises*, where juries were used. The 1881 law did not sit well with French juries, which tended to sympathize more with the accused persons than with the diplomats. Acquittals were entered by juries in a number of instances, engendering protest from sending states. As a result, jurisdiction was changed by a law of 16 May 1893, to move these cases to a *tribunal correctional*, where no juries were used.[62]

Part of the reason for protecting diplomats from insult was that they represented the monarch of the sending state. By the turn of the twentieth century, as diplomats came to be regarded more as representatives of a state rather than of a monarch, the rationale for laws like France's "outrage" provision was gradually undermined. Working in the same direction was better protection for press freedom at that era.[63] "Foreign governmental agents now acknowledge," wrote Cecil Hurst shortly after the Great War, "that the government [of the receiving state] must respect freedom of the press and is not responsible for articles published in newspapers that attack foreign governments or their representatives."[64]

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[59] Austria, General Penal Law of May 27, 1852, Reichsgesetzblatt 1852, No. 117, in A.H. Feller and Manley O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington: Carnegie Endowment for International Peace 1933), at 51.
[60] Russia, Penal Code of 22 March1903, art. 535, Feller and Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, at 755.
[61] Parliament of France, *Loi sur la liberté de la presse*, fait à Paris, le 29 juillet 1881.
[62] Dupuis, Les relations internationales, at 300.
[63] Robert J. Goldstein, Freedom of the Press in Europe, 1815-1914, *Journalism Monographs*, No. 80, at 9 (February 1983).
[64] Cecil Hurst, Les immunités diplomatiques, at 132-133.

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Espionage

While in earlier times persons with a military background might serve in an embassy, it was only in the latter part of the nineteenth century that it became common practice. The term "military attaché" entered the lexicon of diplomacy. This development resulted from a weakening of the concert of Europe in keeping countries out of warfare. Military attachés helped keep their governments abreast of military preparations abroad. In times of crisis they could liaise with the receiving state's military command. Their role was delicate, however, because while formally subordinate to the ambassador, they remained in a military rank and thus under the command of higher military authority. Furthermore, military attachés were prone to overstepping in the gathering of information, with or without the encouragement of the sending state, and thereby generating conflict with the receiving state. [65]

Espionage was not restricted to military attachés. Snatching letters from the postal services had been common practice in the early nineteenth century for the governments of major powers like Austria, Britain, and France, seeking communications between diplomats and their home governments. In the later years of the nineteenth century, when telegraph messages became a regular means of diplomatic communication, governments intercepted telegrams. Messages were typically sent in code,[66] but governments intent on gaining secret information used cryptographers to decipher them.[67]

Conference diplomacy

One feature of European diplomacy that had been seen only rarely in former times was the convoking of conferences to deal with issues of concern. Conference diplomacy was not entirely novel. The Congress of Vienna of 1815 had, indeed, been just such an undertaking. But the issues that arose in Europe in the latter half of the nineteenth century brought this approach to the fore. The warfare that the concert of Europe failed to prevent brought the European powers together in this way. One issue was humanitarian matters related to warfare. A conference was called in Brussels in 1874 to develop a set of practices in that regard. The result was the Brussels Declaration, which required combatants to minimize harm to civilians in military operations. The aim of the Brussels Declaration can be debated. One interpretation is that protection of civilians out of humanitarian considerations was the aim. But the Declaration allowed a certain scope for armies in taking action that would harm civilians, hence a competing interpretation is that the intent was to protect armies more than civilians.[68] Whatever the true aim of the Brussels Declaration, the mechanism used to achieve it was a conference at which rules aiming at general applicability were devised.

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[65] Hamilton and Langhorne, *The Practice of Diplomacy*, at 120-122.
[66] Research in International Law: Diplomatic Privileges and Immunities, at 79-80.
[67] Hamilton and Langhorne, *The Practice of Diplomacy*, at 122-124.
[68] Eyal Benvenisti and Doreen Lustig, Taming Democracy: Codifying the Law of War to Restore the European Order: 1956-1874, University of Cambridge, *Legal Studies Research Paper Series*, Paper No. 28/2017, June 2017.

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The effort of European powers to consolidate their territorial claims in Africa also led the European states to regard conferences as useful mechanisms. When a number of states found themselves in contention over claims in Africa, they saw a conference as preferable to traditional bilateral contacts. They met in Berlin in 1885 and concluded an agreement to resolve the contention among them in the area of the Congo Basin.[69]

Efforts to suppress the slave trade also figured as an issue of general concern that could be addressed by conference diplomacy. European powers met at Brussels in 1890 and concluded a treaty calling for an end to the slave trade and for measures to suppress it.[70]

Preservation of the peace was also addressed in conferences. In 1898 Tsar Nicholas II of Russia called a conference to deal with peace and a reduction in armaments. The conference was held in The Hague in 1899, with a follow-up conference at the same location in 1907.[71] Important treaties relating to the means of warfare were drafted that shaped the law on that topic well into the future.[72] As well, a treaty was concluded to establish a quasi-judicial forum for states to resolve their differences, called the Permanent Court of Arbitration.[73]

Conferences also were held to respond to crisis situations. When Germany objected for the establishment by France of a protectorate over Morocco in 1906, and Germany seemed to be threatening war over the issue, a conference was convoked at Algeciras, Spain. The conference arrived at a disposition for Morocco that protected Germany's interests in some measure but did not avert France's establishment of a protectorate.[74]

When the Great War ended in 1918, again it was a conference, called at Paris, that set terms for the postwar international order. The League of Nations, created in 1919 at Paris, was an institution designed to deal with a range of problems, prominently with warfare.[75]

Immunity in international regimes

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[69] General Act of the Conference of the Plenipotentiaries of Austria=Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo, Berlin, 26 February 1885, Clive Parry, *Consolidated Treaty Series*, vol. 165, at 485.
[70] General Act of the Brussels Conference: Slave Trade and Importation into Africa of Firearms, Ammunition and Spiritous Liquors, Brussels, July 2, 1890: US Congress, *Statutes at Large*, vol 27, at 886; also Clive Parry, *Consolidated Treaty Series*, vol. 173, at 293.
[71] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 3, at 13.
[72] See, e.g., Convention respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
[73] Convention for the Pacific Settlement of International Disputes, The Hague, 29 July 1899.
[74] Genet, *Traité de Diplomatie et de Droit Diplomatique*, vol. 3, at 103.
[75] Covenant, League of Nations, arts. 10-11.

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The General Act of the Berlin Conference concerning the Congo of February 20, 1885, provided for unimpeded transit on the Congo River. An Act of Navigation for the Congo was included in the Act of Berlin. To administer this incipient regime, an "International Commission" was created.

> Article 17
> There is instituted an International Commission, charged with the execution of the provisions of the present Act of Navigation.
> The Signatory Powers of this Act, as well as those who may subsequently adhere to it, may always be represented on the said Commission, each by one delegate. But no delegate shall have more than one vote at his disposal, even in the case of his representing several Governments.
> This delegate will be directly paid by his Government. As for the various agents and employees of the International Commission, their remuneration shall be charged to the amount of the dues collected in conformity with paragraphs 2 and 3 of Article 14.
> The particulars of the said remuneration, as well as the number, grade and powers of the agents and employees, shall be entered in the returns to be sent yearly to the Governments represented on the International Commission.[76]

Members of the International Commission were given "inviolability" while performing their functions. The records of the International Commission likewise were to enjoy "inviolability."

> Article 18
> The members of the International Commission, as well as its appointed agents, are invested with the privilege of inviolability in the exercise of their functions. The same guarantee shall apply to the offices and archives of the Commission.

The Act of Berlin did not define "inviolability," either as applied to the "agents" or to "the offices and archives," Presumably the rules that had developed for diplomatic immunity in the state-to-state context were envisaged.[77]

Boldly, the Act of Berlin appeared to make this "inviolability" binding not only on the states adhering to the Act of Berlin, but to all states. This would seem to be the intent, because Article 13, which provided for the regime of free passage on the Congo River, further stipulated:

> Article 13: These provisions are recognized by the Signatory Powers as becoming henceforth a part of international law.

Strisower notes these provisions as a precursor to similar clauses in the Covenant of the League of Nations.[78] Article 7 of the Covenant likewise uses the term "inviolable" for League premises:

> The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

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[76] General Act of the Berlin Conference concerning the Congo, Berlin, 26 February 1885.
[77] And see Strisower, L'extraterritorialité et ses principales applications, at 238.
[78] Strisower, L'extraterritorialité et ses principales applications, at 238.

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The same Article 7 provided protection of individuals but used instead the phrase "diplomatic privileges and immunities."

> Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

Other international regimes created at the turn of the twentieth century provided for immunity for personnel working in them. The Permanent Court of Arbitration was to have its seat at The Hague, Netherlands. Arbitrators drawn from various countries would travel to The Hague to hear cases. This opened the question of their status while in the Netherlands, in particular whether their work could be impeded if they were subject to local justice. The treaty establishing the court therefore made provision for this situation, providing immunity. It read, "The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.[79]

The Boundary Waters Treaty 1909 Between Britain and the United States established a Joint International Commission to regulate use of the waters of the Great Lakes.[80] Each side provided for immunity of Commission personnel. The emergence of international regimes during these years, culminating in the League of Nations, took diplomatic immunity into a new realm.

Consular relations

Like diplomatic relations, consular relations underwent changes in the period 1870 to 1920, but again without fundamental transformation. Like diplomats, consuls were appointed by a sending state and were accepted by a receiving state. Their function, however, was not government-to-government relations. Consuls were to assist sending state nationals in the territory of the receiving state. Consular law set the rights of a sending state's consuls in this endeavor, and the concomitant obligations of a receiving state to allow such assistance to be rendered.

The need for a state to provide consular services was a function of the economic activity of its nationals. As commerce became more global in the nineteenth century, the need for consular services grew. Consular relations had developed to the eighteenth century in a less than uniform fashion. In the main consuls were not members of a government service but were typically merchants residing in a foreign city who acted on behalf of the sending state. They were typically not paid a salary by the sending state but collected fees for services they performed.[81] By mid-nineteenth century, one found consuls that could either be members of a career service,

[79] Convention for the Pacific Settlement of International Disputes, The Hague, 29 July 1899, art. 24.
[80] Boundary Waters Treaty (Great Britain-USA), Washington, 11 January 1909.
[81] Foster, *The Practice of Diplomacy*, at 217.

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or local persons.[82] Even in the career service, an individual might accept appointment as a consul less to advance the interests of the sending state than to provide advantage in business dealings.[83]

In terms of their relation to the receiving state, there was great similarity between diplomats and consuls. Like a diplomat, a consul was appointed by the sending state. As with a diplomat, the receiving state was free to reject the person at the outset, or to require the person to leave after taking up the post. Once appointed by the sending state, a consul needed to be issued an acceptance, traditionally called an exequatur," from the receiving state. That document would be communicated to the sending state's ambassador. The *exequatur* could subsequently be withdrawn if the receiving state no longer wished to have the official as a consul, an act equivalent to a declaration of *persona non grata* in the case of a diplomat.[84]

Like the diplomatic service, the consular service of many countries saw increasing professionalization in the nineteenth century. France led the way in regularizing consular work as a career matter and in requiring qualifications for an appointment.[85] In 1895 the United States regularized standards in its consular service by requiring an examination for entry, and by requiring that vacancies be filled through promotion.[86] Career consuls increasingly replaced local merchants as consuls of sending states. By the time of the Great War, as many as half of all consuls were of the former type.[87]

"The tendency," wrote the authors of Research in International Law,

> has been for the services to become more professional, more confined to nationals of the sending state, more completely organized as a hierarchy or "consular establishment " in each receiving state with consular agents and vice consuls subordinate to consuls, consuls subordinate to the consuls general, and with the diplomatic mission exercising a general supervision subject to the Ministry of foreign affairs at home.[88]

A consul's mandate in the receiving state did not necessarily extend to the entirety of its territory. Consuls were appointed to work in a designated territorial sector of the receiving state, termed the "consular district."[89]

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[82] Ernest Lehr, *Manuel théorique et pratique des agents diplomatiques et consulaires* (Paris: L. Larose et Forcel 1888), at 2-3.
[83] Hamilton and Langhorne, *The Practice of Diplomacy*, at 117.
[84] Foster, *The Practice of Diplomacy*, at 220-222. Research in International Law: The Legal Position and Function of Consuls, *American Journal of International Law*, vol. 26 (Special Supplement), at 243 (1932).
[85] Hamilton and Langhorne, *The Practice of Diplomacy*, at 117.
[86] Foster, *The Practice of Diplomacy*, at 240-242.
[87] Research in International Law: The Legal Position and Function of Consuls, at 208-209.
[88] Research in International Law: The Legal Position and Function of Consuls, at 203.
[89] Research in International Law: The Legal Position and Function of Consuls, at 225.

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Many states adopted regulations in their domestic law on their own consular service, to let their consuls understand their obligations and the limits of their powers.[90] They also typically adopted legislation or regulations on the immunities foreign consuls were to enjoy, for the guidance of local police and other local authorities.[91]

Like diplomatic law, consular law developed through custom, but in consular law by the nineteenth century bilateral conventions came to occupy a prominent role in supplementing and solidifying custom. Bilateral consular treaties increased substantially in number in the second half of the nineteenth century.[92]

In some instances provisions on consuls were included in treaties of broader scope. Many states had more general treaties on bilateral relations that required them to afford to each other whatever rights they afforded to third states (most-favored-nation provisions). Such treaties required states to extend the applicability of whatever rights they gave in consular treaties.[93]

In 1899, a vice-consul of Colombia was able to evade being forced to testify in a court proceeding in the US State of New York by invoking a most-favored-nation clause in a US-Colombia treaty. An 1853 US-France treaty afforded immunity to consuls in such a situation, and the most-favored-nation provision with Colombia automatically extended the immunity to Colombian consuls in the United States.[94]

Consular functions

By the late nineteenth century, the scope of duties performed by consuls assumed a level of uniformity. Chief among the duties were actions in furtherance of the commercial activity of sending state nationals, including, prominently, commercial shipping.[95] Consuls bore responsibilities relating to commercial shipping vessels of the sending state while they were docked at a port of the receiving state.[96] In fact, many consular posts were located in port cities.[97] Consuls were to oversee the well-being of officers and crew. They were competent to resolve disputes over pay to the crew. Other disputes that might have arisen during a vessel's transit also came under the authority of a consul. If crew members became incapacitated or stranded in the

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[90] A.H. Feller and Manley O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington: Carnegie Endowment for International Peace 1933).
[91] Research in International Law: The Legal Position and Function of Consuls, at 210.
[92] Research in International Law: The Legal Position and Function of Consuls, at 210-211.
[93] Research in International Law: The Legal Position and Function of Consuls, at 212.
[94] *Baiz v. Malo*, Supreme Court, New York County, New York, *New York Supplement*, vol. 58, at 806 (1899). And excerpted in Ellery Stowell, *Consular Cases and Opinions From the Decisions of the English and American Courts and the Opinions of the Attorneys General* (Washington: John Byrne & Co., 1909), at 51.
[95] Alexandre de Clercq, *Guide pratique des consulats* (Paris: Pedone 1898), at 1.
[96] L. Oppenheim, *International Law: A Treatise* (London: Longmans 1905), vol. 1, at 473.
[97] Hamilton and Langhorne, *The Practice of Diplomacy*, at 116.

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receiving state, consuls were to look after their welfare.[98] World trade grew at a rapid rate in the middle years of the nineteenth century, so that by 1870 the need for consular work in the commercial realm was substantial.

Consuls tended to the needs of sending state nationals in a variety of ways. If a sending state national wished to engage in a profession, like medicine, in the receiving state, a consul's verification of the person's medical degree from the sending state might need to be verified for authenticity. If a sending state national needed to sign documents for use in the sending state, a consul's verification of the signature might be required.[99] If a sending state national died while owning realty in the receiving state, a consul might take action to preserve it for distribution to heirs.[100] When nationals bore children in the receiving state, the birth needed to be recorded to establish the child's nationality.[101] If a sending state national with medical qualifications sought a license to practice medicine in the receiving state, a consular verification of a medical degree might be required.

Consular protection of nationals

A consul did not have jurisdiction over the civil affairs of sending state nationals resident in or sojourning in the receiving state. Sending state nationals were subject to the laws of the receiving state, though the law of the sending state in such matters as personal status might be applied by the courts of the receiving state. If a sending state national were the subject of coercive action by police or other authorities in the receiving state, consuls were to insert themselves to ensure that the sending state national would be accorded the rights to which she or he was entitled.[102] Consuls were enjoined to assist sending state nationals subjected to arrest or imprisonment. Receiving states were obliged to permit visits by consuls to sending state nationals under detention. Controversy sometimes arose in this regard since some receiving states took the position that no one might visit a person arrest on suspicion of crime during the time the supposed criminality was being investigated.[103]

Some sending states were more solicitous than others of the situation of a sending state national in detention on a criminal charge. But a practice developed that a receiving state should honor the request of a consul to visit a sending state national in detention, to consult with her or him about their situation, and to communicate with local officials to ensure that the person's medical or other needs were being met. This activity, not surprisingly, often met with resistance by local officials, especially if the consul was critical of the treatment being afforded. It was often the foreign ministry of the receiving state that needed to impress on local officials the need for consular access, as the foreign ministry might fear exclusion of its own consuls in the other state.

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[98] Foster, *The Practice of Diplomacy*, at 224-226.
[99] Oppenheim, *International Law*, vol. 1, at 474.
[100] Oppenheim, *International Law,* vol. 1, at 473. Research in International Law: The Legal Position and Function of Consuls, at 271-276.
[101] Research in International Law: The Legal Position and Function of Consuls, at 265.
[102] Foster, *The Practice of Diplomacy*, at 227.
[103] Research in International Law: The Legal Position and Function of Consuls, at 270.

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Reciprocity lay at the heart of the consular access obligation, but local police were removed from the comparable situation in other countries.

In 1888, Pradier-Fodéré wrote, "Les consuls ont le devoir de faire respecter en pays étranger les droits de leurs nationaux et de prendre dans ce but toutes les mesures qu'ils jugeront être utiles et nécessaires; c'est par les consuls, a-t-on dit, que l'état étend ses bras protecteurs sur toute la surface du globe."[104] Oppenheim called the work of protecting nationals 'a very important task' of consuls.[105]

Consular protection involved a delicate balance, because a sending state that made significant demands on a receiving state in regard to a sending state national opened itself to similar demands being made against it in the future when the roles might be reversed. Nonetheless, receiving states often risked such consequences by advocating assertively on behalf of their nationals. In 1895 the US consul general in Havana complained to the Spanish governor-general that US nationals under arrest were being held for long periods without trial.[106] The governor-general replied that making such a complaint was the province of diplomats but beyond the accepted powers of consular officials. When the US consul-general reported on the dispute to the Department of State, US Secretary of State Richard Olney backed him up in a note to Spain's ambassador in Washington. Olney wrote that the United States "has persistently directed earnest efforts toward securing for American citizens so detained the immediate enjoyment of all conventional guarantees with respect to process and punishment." Olney based his protest on customary law, "The right of consuls to intervene with the local authority for the protection of their countrymen from unlawful acts violative of treaty or of the elementary principles of justice," he wrote, "is so generally admitted as to form an accepted doctrine of international law."[107]

Consular immunities

While immunities early on attached to diplomats, the same did not obtain for consuls.[108] The distinction in this regard may seem counter-intuitive, since both are appointed by the sovereign authority of the sending state. Yet diplomats were sent to deal with the receiving state as representatives of the sovereign authority. Consuls were sent to tend to the interests of nationals of the sending state. Consuls, it was said, did not represent the sovereign in the same sense as did diplomats.[109]

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[104] Paul Pradier-Fodéré, *Traité de droit international public* européen & américain suivant les progrès de la science et de la pratique contemporaines (Paris: Pedone 1888), vol. 4, at 555 .
[105] Oppenheim, *International Law*, vol. 1, at 473.
[106] Graham Stuart, *American Diplomatic and Consular Practice* (New York: Appleton-Century, 1936), at 375.
[107] Mr. Olney to Mr. Dupuy de Lôme, September 26, 1895, *Foreign Relations of the United States 1895*, Part II, at 1209.
[108] Oppenheim, *International Law*, vol. 1, at 473.
[109] Charles Ozanam, *L'immunité civile de juridiction des agents diplomatiques* (Paris: Pedone 1912), at 71.

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Consuls were "publicly recognized by the admitting State as agents of the appointing State," and on that basis were given certain privileges and immunities.[110] They enjoyed some, but not all of those afforded to diplomats.[111] As with diplomats, taxes could not be imposed on consular premises or on the income a consul received for his consular service.[112]

The extent to which consuls might enjoy any immunities developed in an uncertain fashion. John W. Foster, who had served as US Secretary of State, explained in 1906 that a consul's "privileges" were not "universally recognized," but that "the practice and legislation of different countries vary. The extent of such privileges might be the subject of bilateral treaty, the treaty dealing with arrest for crime, or obligation to appear as a witness in court, or exemption from taxation. Foster noted that many states afforded limited immunities to consuls even absent a bilateral treaty.[113] In the late nineteenth century, French courts in a variety of situations extended immunity to consuls against being subjected to justice where the matter related to their official duties.[114]

The practice that came to be followed more or less generally was that whereas diplomats were immune from local jurisdiction broadly, consuls were immune only in regard to official acts. To take the example above of a diplomat who witnessed a murder, the same result would not apply if it were a consul rather than a diplomat. A consul who witnessed a murder could be required to testify to the same extent as any other person in that circumstance under the law of the receiving state.[115]

As for liability for the commission of criminal acts, [116] consuls did not enjoy the immunity given to diplomats. They could be prosecuted in the normal way. They were generally not subject to being held in pre-trial arrest, however, unless the crime charged was serious.

As for assuring the right to exercise functions as needed, consuls were entitled to much, though not all, of the protection afforded to diplomats. The receiving state was to ensure that the confidentiality of files a consul maintained would be protected. [117] The consular office, however, might be protected less well. An 1885 consular convention between the Netherlands and the United States required inviolability for consular archives, but not for consular offices.[118]

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[110] Oppenheim, *International Law*, vol. 1, at 475.
[111] Research in International Law: The Legal Position and Function of Consuls, at 354-356.
[112] Research in International Law: The Legal Position and Function of Consuls, at 346-351.
[113] Foster, *The Practice of Diplomacy*, at 237-238.
[114] Ozanam, *L'immunité civile de juridiction des agents diplomatiques*, at 75.
[115] Research in International Law: The Legal Position and Function of Consuls, at 338-345.
[116] Research in International Law: The Legal Position and Function of Consuls, at 335-338.
[117] Research in International Law: The Legal Position and Function of Consuls, at 322-326.
[118] Moore, Asylum in legations and consulates and in vessels, at 4.

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Consular premises were not to be used to give asylum to fugitives from justice.[119] But the receiving state was expected to protect both the physical well-being of a consul and consular offices from infringement.[120]

Collective solidarity among diplomats and consuls

Both diplomatic and consular relations developed in customary law as between pairs of states. As diplomatic and consular representatives increased in number, those posted in a particular receiving state developed relationships among themselves. In many capitals, diplomats accredited there formed a grouping, which came to be called the diplomatic corps. From the time of the Congress of Vienna, this practice was formalized, the longest serving among the ambassadors being called the *doyen* of the diplomatic corps who would represent the corps at various ceremonial functions.

Consuls posted in a city might form themselves into a corps. In both cases, members of the corps might consult with each other over matters of mutual interest, in particular if an incident arose in which the receiving state was lax in its obligations towards a particular diplomat or consul. If the rights of one diplomat or consul were disrespected, fellow consuls feared that their own rights might similarly be infringed, as seen in the incidents related above. "The question arises," the authors of the Research in International Law queried, "whether these duties of the receiving state are owed only to the state which has sent the particular consul involved, or whether they are owed to all states who have consuls within its territory. The latter is believed the correct answer."

While the matter rarely received any formal resolution, consuls as a group might come to the defense of one of their number in protesting to officials of the receiving state.[121] "All of the consuls in a state's territory feel less secure and less capable of performing their functions," continued the authors of Research in International Law, "if any one of them is deprived by the receiving state of rights to which he is entitled. All of the sending states, therefore, have an interest in the matter. In the case of diplomatic immunities, this seems clearly the case, as evidenced by the practice under which the diplomatic corps frequently acts collectively through its dean on matters of diplomatic privilege . . . The same practice exists in the consular corps in a particular place. Collective protests have been made in cases of the denial of consular privileges secured by treaties deemed declaratory of general international law.

Line between diplomatic and consular activity

Diplomatic and consular functions were not always neatly separated. Despite the general proposition that consuls were not to have a diplomatic role, the realities on the ground at times

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[119] Research in International Law: The Legal Position and Function of Consuls, at 364-367. Irvin Stewart, *Consular Privileges and Immunities* (New York: Columbia University Press 1926), at 87.
[120] Research in International Law: The Legal Position and Function of Consuls, at 326-330.
[121] Fauchille, *Traité de droit international public*, vol. 1, at 131.

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left consuls in the role of dealing with receiving state officials.[122] By the same token, realities on the ground often thrust diplomats into consular work. During Germany's siege of Paris (1870-71), US Minister Elihu Washburne was the only major power ambassador who remained at his post. Washburne took over consular work for a number of other countries. Washburne organized food distribution to thousands of German civilian residents of Paris during the siege. In the turbulent Paris Commune that followed a few months later, Washburne secured the release of Americans arrested by government forces.[123]

Consuls were not, however, to carry out diplomatic tasks. Consuls were not to communicate with the government of the receiving state on behalf of the sending state. That function was reserved for the diplomats of the sending state. Nonetheless, consuls might communicate with officials of the receiving state in the course of representing the interests of sending state nationals.[124] It was sometimes said that consuls could communicate with local officials of the receiving state, but not with officials of the receiving state's central government.[125] In regulating the activities of sending state-flagged merchant vessels, a consul might interact with a variety of receiving state officials. In providing protective service for a sending state national charged with crime, a consul might interact with police or with judges. Such interaction might lead to contention between the two governments, contention that would need to be resolved at the diplomatic level.

The scope of a consul's right to communicate with officials of the receiving state. In South America, a regional treaty on the functions of consuls was concluded in 1911. It provided that consuls might "address the authorities of the district of their residence . . . in regard to all abuses committed by the authorities against individuals of the country whose interests they protect; they may act in such a way that justice may be rendered such individuals without delay and that they may be judged and condemned by the competent tribunals conformably to the laws of the country."[126] In Europe there were no such treaties delineating the right of a consul to communicate with receiving state officials.

The issue was addressed in an 1880 consular convention between Belgium and the United States. It contemplated representations that a consul might make to receiving state officials on behalf of a national. "Consuls-General, Consuls, Vice-Consuls and Consular Agents," the treaty recited, "shall have the right to address the administrative and judicial authorities, whether in the United States, of the Union, the States or the municipalities, or in Belgium, of the State, the province or the commune, throughout the whole extent of their consular jurisdiction, in order to complain of any infraction of the treaties and conventions between the United States and Belgium, and for the purpose of protecting the rights and interests of their countrymen." Thus, if a Belgian in the

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[122] Hamilton and Langhorne, *The Practice of Diplomacy*, at 116-117.
[123] Dale Walker, *Januarius MacGahan: The Life and Campaigns of an American War Correspondent* (Athens OH: Ohio University Press 1988), at 38.
[124] Research in International Law: The Legal Position and Function of Consuls, at 302-306.
[125] Research in International Law: The Legal Position and Function of Consuls, at 207.
[126] Accord between Bolivia, Colombia, Ecuador, Peru, and Venezuela relative to the functions of the respective consuls in each of the contracting republics, Caracas, July 18, 1911, art. 4 ¶1, *American Journal of International Law*, vol. 26, at 381 (Supplement 1932).

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United States were under arrest, a consul of Belgium was granted access to executive branch officials, or to the courts.[127]

This same provision in the consular treaty with Belgium gave consuls a power to go over the head of an official who did not give satisfaction. “If the complaint should not be satisfactorily redressed,” it recited, “the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the, government of the country where they exercise their functions.”[128]A few years later, Belgium invoked the treaty against the United States over an incident on board a Belgian merchant ship lying in port in Jersey City, New Jersey. Two Belgian seamen got into an altercation on the ship and one stabbed and killed the other. Jersey City police learned of the incident. They boarded the ship, arrested the surviving seaman, and charged murder.

Belgium’s consul said that New Jersey had no jurisdiction, since the incident occurred on a Belgian vessel. A provision in the consular convention on ocean-going vessels recited that the sending state consul "shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception.” And further, “The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb the tranquility and public order on shore, or in the port.”

The Belgian consul filed suit in a US federal court, to free the Belgian seaman. The US Supreme Court, to which the case was appealed, decided against him, saying that an incident as serious as a homicide disturbed tranquility on shore. Though it decided against the consul, the Supreme Court accepted the consul’s authority to approach the courts in order to carry out consular protection.[129]

Conclusion

Although the basics of diplomatic and consular law were not altered in the half-century beginning in 1870, changes in the international situation gave diplomatic and consular practice a significantly new look. The diplomatic and consular services changed with technological developments of the latter nineteenth century. As government bureaucracies became more regularized in general, the same transformation came about in the diplomatic and consular services.

[127] Convention between the United States and Belgium, concerning the rights, privileges and immunities of consular officers, March 9, 1880, art. 9, US Congress, *Statutes at Large*, vol. 21, at 776.
[128] Id., art. 11.
[129] US Supreme Court, *Wildenhus’ Case*, 120 U.S. 1 (1887).

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