HOSTAGE-TAKING AND DIPLOMATIC IMMUNITY

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A diplomat, is has been said, is someone sent abroad to lie for his country. Today it might be said with at least as much accuracy that a diplomat is someone sent abroad to die, perhaps, for his country — or at any rate to face the risk of death or violence, almost like a soldier leaving for war. Diplomatic immunity can now be guaranteed only in terms of duty-free Scotch, and even that solace is being denied in some parts of the world.

During the year ending March 31, 1980, at least 65 ideologically-motivated attacks involving violence were mounted against diplomats or on their premises. The most notorious of these, of course, was the seizure of the U.S. Embassy in Tehran in November 1979. Almost a year later, 48 U.S. diplomatic hostages are still being held by the Iranian militants and three others are confined at the Iranian Foreign Ministry, in defiance of two orders of the International Court of Justice and in spite of innumerable pleas, resolutions, declarations, special missions and even sanctions directed to securing their release.

Canada, through Ken Taylor and his staff, was able to help six members of the U.S. Embassy leave Iran. The steps Canada took to bring about their departure were unusal and unorthodox. Were they lawful? That is the basic question I have been asked to address here today.

I should make clear at the outset that Canada has not involved itself in the substance of the broader dispute between the United States and Iran. Nor do I intend to touch upon that issue now, except for such passing reference as may be required for the consideration of legal factors.

Canada acted essentially from humanitarian motives first in giving refuge to the six members of the U.S. Embassy and then in facilitating their departure (if I may put it that way). But this humanitarian action was also founded upon, and intended to ensure respect for, one of the most ancient and fundamental principles of international law. I refer of course to the concept of diplomatic immunity. I shall elaborate upon that concept in attempting to make my case for the lawfulness of Canada's actions. While I shall also address other relevant legal factors, it is the doctrine of diplomatic immunity which is central to the issue.

Diplomatic immunity is as old as diplomacy, which is as old as conflict, which is as old as man. The related concepts of diplomatic and consular immunity find their modern expression in the 1961 Vienna Convention on Diplomatic Relations[1] and the 1963 Vienna Convention on Consular Relations[2], both of which represent largely a codification of customary international law. It is noteworthy, I think, that while the Iranian authorities have

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1. Vienna Convention on Diplomatic Relations (1961), 55 Am. J. Int'l L. 1064, U.N. Doc. A/Conf. 20/13, April 16, 1961.

2. Vienna Convention on Consular Relations (1963), 57 Am. J. Int'l L. 995, U.N. Doc. A/Conf. 25/12, April 23, 1963.

not respected their obligations to the United States under these conventions (to which Iran, the United States and Canada are all parties), they have never to my knowledge denied the obligations themselves. Indeed these obligations form part of the great body of Islamic law, as was emphasized by Judge S. Tarazi of Syria in his dissenting opinion in the judgment of the International Court of Justice of May 24, 1980 on the merits of the *Case Concerning United States Diplomatic and Consular Staff in Tehran.*[3] (The dissent, I should note, related only to the grounds for the jurisdiction of the Court and the question of the responsibility of the Government of Iran in the matter of reparations). Judge Tarazi cited a 1957 lecture by Professor Ahmed Rechid of the Istanbul law faculty, as follows:

> In Arabia, the person of the Ambassador has always been regarded as sacred. Muhammad consecrated this inviolability. Never were Ambassadors to Muhammad or to his successors molested. One day, the envoy of a foreign nation, at an audience granted to him by the Prophet, was so bold as to use insulting language. Muhammad said to him: 'If you were not an envoy I would have you put to death'.[4]

Why is this sacrosanct character everywhere conferred upon diplomats? The International Court of Justice, in its order of 15 December 1979 indicating provisional measures in the case between the United States and Iran, answered this question in the following terms:

> [T]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for what purpose; . . .
>
> [T]he institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective cooperation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.[5]

In sum, states cannot conduct their relations without diplomats and diplomats cannot exercise their functions without the protection of diplomatic immunity.

The Vienna Convention on Diplomatic Relations spells out in detail what is meant by diplomatic immunity. The Convention's major provisions are as follows:

- The premises of a diplomatic mission are inviolable and the receiving state is under a special duty to take all appropriate steps to protect them.
- The person of a diplomatic agent is inviolable and he or she enjoys unqualified immunity from any form of arrest or detention and from the criminal jurisdiction of the receiving state, which is obliged to prevent any attack upon his or her person, freedom or dignity.
- Finally, diplomatic agents and staff have the right to depart from the receiving state at any time they wish.[6]

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3. (1980), 19 I.L.M. 553. (I.C.J.).
4. *Id.*, at 581.
5. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Provisional Measures, Order of 15 December 1979, (1980), 19 I.L.M. 139 at 145 (I.C.J.).
6. *Supra* n. 1, Articles 22, 26, 29, 44 at 1069-70, 1076.

The Vienna Convention on Consular Relations[7] provides for a somewhat less absolute immunity in respect of consular officers. Of course, when personnel of a diplomatic mission are providing consular services, they are entitled to the full protection afforded by the Convention on Diplomatic Relations.

There can be no doubt that the Government of Iran violated its international obligations and international law in not protecting the U.S. Embassy personnel from being attacked and taken hostage by the militants. The Iranian authorities carried unlawfulness still further when they put the seal of official approval on this situation by the decree issued on 17 November 1970 by the Ayatollah Khommeini. Later, in violation of their obligations under the U.N. Charter, they defied the unanimous order of the International Court of Justice of 15 December 1979 requiring them to restore the U.S. Embassy to the U.S. authorities, to release the hostages, and to afford them the full protection, privileges and immunities to which they are entitled, including freedom and facilities to leave Iran.[8] That order was confirmed by the Court in its judgment of 24 May 1980[9] on the merits of the case, which declared Iran's actions to be in violation of its obligations under international conventions and long-established rules of general international law, and which also decided that the Government of Iran is under an obligation to make reparation to the Government of United States.[10] Iran, however, has defied this judgement as well.

Establishing the unlawfulness of Iran's actions does not of itself automatically establish the lawfulness of Canada's own actions with regard to the six members of the U.S. Embassy who were given refuge from the militants and later helped to leave Iran. I hope, however, to demonstrate that Canada's actions were indeed lawful. This was also the conclusion reached by Professor Leslie Green in his monograph on the subject of "The Tehran Embassy Incident and International Law"[11]. Professor Edward McWhinney, however, appears to have reached a rather different conclusion. In a *Vancouver Sun* article[12] he is quoted as having said that Canada violated the ordinary norms of international law but that these Canadian violations, by a sort of hierarchy of wrongs, in accordance with the principle of *jus cogens,* were justified in light of the greater violations committed by Iran. To my way of thinking, Professor McWhinney's views comes too close to saying that the end justifies the means or that two wrongs make a right, and I can see no wrong whatever in what Canada did.

The Government of Iran, however, claims to see something wrong. In a note of 14 February 1980 to the U.N. Secretary General, which was circulated to all members of the United Nations and filed with the International Court of Justice, the Iranian Ministry of Foreign Affairs declared that it viewed Canada's actions "as a serious breach of trust, a grave abuse

7. *Supra* n. 2.
8. Supra n. 5 at 146.
9. *Supra* n. 3.
10. *Id.*, at 574.
11. (March, 1980), The Canadian Institute of International Affairs.
12. January 31, 1981.

of diplomatic privileges . . ., an infrngement upon the sovereignty and a gross interference in the internal affairs of the host country . . ."

Let us look at Canada's actions to see if they truly represent all these sins.

As to granting refuge to the six members of the U.S. Embassy, Canada has never adhered to the rather sweeping Latin American view of diplomatic asylum. In the Canadian Government's view, international law at this time does not recognize any general right of diplomatic asylum — that is, asylum granted on an embassy's premises. International law, however, does recognize that such asylum may be granted in certain extraordinary circumstances, and particularly for exceptional humanitarian reasons. Perhaps it would be preferable, however, to speak of the temporary safe haven or temporary refuge that an embassy may provide to a person in imminent danger to his or her life or safety, for instance during political disturbances or riots against which the local authorities are unable to offer protection or which they themselves incite or tolerate. This was plainly the case in Tehran when Ken Taylor took in the six members of the U.S. Embassy. Moreover, in Tehran of course refuge was granted to persons who in their own right enjoyed unqualified immunity and were entitled to special protection by the host government. There can be no question that this action in any way constituted a breach of trust, an abuse of diplomatic privileges, an infringement of Iranian sovereignty or an intereference in Iran's internal affairs. Rather it was a lawful form of protection against unlawful acts by a group which itself challenged Iranian sovereignty and the Iranian Government by attempting to act as its own government and usurping powers which even the lawful authorities could not claim. For it must be recalled that when refuge was granted to the six Americans, it was to protect them from militants who were not yet acting with the official, albeit unlawful, sanction which the Iranian Government ultimately accorded them. Indeed one of the strangest quirks of the unhappy situation in Tehran is reflected in the same note of 14 February from the Iranian Foreign Ministry to the U.N. Secretary General, which alleged that no danger threatened any of the U.S. hostages and which offered for proof of this statement the fact that the Foreign Ministry itself had provided "asylum" for three members of the U.S. Embassy.

As to Canada's actions in helpinng these six members of the Embassy to leave Iran, again there is nothing to support Iran's charges of breach of trust, abuse of diplomatic privileges, infringement of sovereignty or interference in internal affairs. The departure of the six, with or without outside assistance, was not itself an unlawful act but rather an exercise of their right to leave Iran in accordance with undisputed principles of international law which have been twice confirmed by the principal judicial organ of the United Nations. Nor was it a breach of trust for Canada to assist in this departure, unless it can be said to be a breach of trust to refuse to condone a flagrant violation of a fundamental tenet of international law. Nor was Canada's assistance an infringement of Iranian sovereignty, since that sovereignty did not and could not extend to detaining embassy personnel and preventing them from leaving the country. Nor, finally, was that

assistance an interference in the internal affairs of Iran, unless the very concept of *international* affairs has been totally swallowed up by the jealous god of the nation state — a proposition which the International Court of Justice has firmly rejected in this case.

Canada acted in accordance with its own national law and with international law in granting Canadian passports to these six U.S. diplomats. The relevant internal procedures in Canada were properly followed. As Professor D.C. Turack points out in his book on *The Passport in International Law*, ". . . a state is able to issue a passport to anyone it wishes according to its own municipal law".[13] While states normally issue passports only to their own nationals, a passport is not conclusive proof of nationality. As Professor Turack further points out: "It is known that certain states not only issue passports to their own nationals but also to foreigners. The kind of passport issued to foreigners may, but need not differ from that issued to the states [sic] nationals".[14] Professor Turack cites the examples of Spain, France and Italy when, after the Arab-Israeli conflict in 1967, all three countries gave a very flexible interpretation to their nationality laws in order to issue passports to certain Jews in the United Arab Republic. The essential purpose of a passport, it should be stressed, is to certify that the bearer has a right to protection while abroad and a right to return to the country of his citizenship or the country issuing the passport. There is no doubt that the six members of the U.S. Embassy issued with Canadian passports had such rights, as they also had the inalienable right to leave Iran, freely and unhindered, at any time.

Not only do I consider that Canada acted lawfully throughout the Tehran affair, I would also suggest that Canada perhaps was under a duty to assist as it did. Canada, like Iran and the United States, is a party to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons,[15] including Diplomats. That Convention obliges party states to cooperate in the prevention of certain crimes against such persons, which is precisely what Canada did in Iran. Professor Green comes close to this view of Canada's action. In the monograph I have already referred to, he writes: "The Vienna Conventions and the 1973 convention on terrorism against diplomats confirm that the rights and protection of international law extend to diplomats as a whole, so that an offence against one is in fact afflicted upon all".[16] Therefore, concludes Professor Green, "since the rights of diplomats were attacked by the seizure of the United States embassy and the detention of the hostages", it would be open to any embassy to facilitate the escape of any hostage if it were able to do so. Professor Green says this would be "open to" any embassy, but I rather wonder whether one might not say "incumbent upon". This latter approach appears to be reflected in a declaration adopted at the recent Venice Summit by the Heads of Government of Britain, Canada, France, the Federal Republic of Germany, Italy, Japan and the United States. In that

13. D.C. Turak, The Passport in Interntional Law, (1972) 225.
14. *Id.*, at 18.
15. (1973), 13 I.L.M. 41; A/RES/3166 (XXVIII), February 5, 1974.
16. *Supra* n. 11.

declaration the Heads of Government expressed their resolve to "provide to one another's diplomatic and consular mission support and assistance in situations involving the seizure of diplomatic and consular premises or personnel".

I said at the outset that I would not deal here with the wider dispute between the United States and Iran except to the extent that it might be relevant to the legal questions at issue. In two letters to the International Court of Justice, Iran's Foreign Minister referred to the case before the Court as "only a marginal and secondary aspect of an overall problem".[17] This problem, he asserted, "involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms".[18] It was on this basis that the Government of Iran sought to deny the jurisdiction of the Court and apparently seeks to justify its actions. At least one American voice has been raised in seeming support of this position. In an editorial comment in the *American Journal of International Law,* Richard Falk writes in the following terms:

> Because law is clear on the books does not prove that it deserves approval or that it is adequate. The events in Iran show us that some clear rules of international law have been broken, but they also suggest that the content and impact of this law are arbitrary and one-sided. Given the historical shifts in the world, including the upsurge of power in the Third World, it is not clear why the old law should be kept as is. But it is also not assured by any means that governments will create a more balanced law surrounding the issues of embassy use and abuse, as well as whether someone accused of serious state crimes should be entitled to asylum rather than, say, to 'a fair trial under impartial auspices'.[19]

Writing from a totally different perspective in the *International Lawyer,* another U.S. writer, Nathaniel P. Ward, came to the following conclusions on the subject of "Espionage and the Forfeiture of Diplomatic Immunity":

> When the sending State commits espionage, it is conducting an activity which the United States does not recognize as a proper function of diplomacy and therefore should not be protected. Such abuse of privileges and immunities is in conflict with treaty provisions as well as domestic immunity statutes, and is detrimental to national security. Accordingly, the United States would seem to be warranted in abolishing immunity for the criminal act by initiating remedial measures. By excising privileges and immunities for espionage, the United States would be adopting an effective sanction against the sending State by subjecting its diplomats to criminal penalties. Such unilateral domestic action would revoke the exclusive diplomatic license for espionage, force the diplomatic and consular community out of clandestine collection and restore diplomacy to the role for which it was intended.[20]

With all due respect for the views of these learned authors, I consider that a better view was expressed by the International Court of Justice when it declared that even if the alleged crimes of the United States were to be established, they could not be regarded as constituting a justification of

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17. *Supra* n. 3 at 556. Letter dated March 16, 1980 quoted by the International Court of Justice.
18. *Ibid.*
19. Richard Falk, "The Iran Hostage Crisis: Easy Answers and Hard Questions" (1980), 74 Am.J. Int'l L. 441 at 416.
20. Nathaniel P. Ward, "Espionage and the Forfeiture of Diplomatic Immunity" (1977), 11 Int'l Lawyer 657 at 671.

Iran's actions and a defence in the case before the Court. As the Court pointed out, diplomatic law itself provides the necessary means of defence against, and sanctions for, illicit activities by members of diplomatic missions. The receiving state may at any time, and without having to explain its decision, notify the sending state that any particular member of its diplomatic mission is *persona non grata* and must leave the country. The receiving state also has the power, at its own discretion, to break off diplomatic relations with the sending state and to call for the immediate closure of the offending mission.

In conclusion, Canada's actions in Tehran were a unique and lawful response to a unique and unlawful situation. They were not directed against the Government of Iran or the people of Iran. The Canadian Government and the Canadian public have had very considerable sympathy with those objectives of the Iranian revolution relating to the creation of a more just society in Iran. Such objectives, however, cannot be advanced by unlawful measures against foreign diplomats. Neither can any legitimate grievances of Iran be resolved in this way. Private or state acts of terrorism represent a growing evil which works against the very causes it purports to serve. International law is one of the pillars in the world's defence against such terrorism. But the limitations of international law alone are sadly reflected in the fact that the U.N. General Assembly, at the very height of the Iranian hostage crisis, was engaged in approving a new International Convention against the Taking of Hostages, with the full participation of the delegation of Iran. Now the Nordic countries have asked that the forthcoming session of the General Assembly include on its agenda the consideration of effective measures to enhance the protection, security and safety of diplomats and consular missions and representatives. One wonders how effective these "effective measures" will be. One wonders too if some of the limitations of international law might be overcome by a greater measure of international justice. Meanwhile, diplomats will continue to carry out their indispensable functions despite the risks involved — and despite the tired old jokes about striped pants, cocktails and caviar. I hope too that among themselves, they will, like Ken Taylor, go on giving real meaning to the notion of *esprit de corps* — Canadians, Americans and Iranians alike, colleagues all.