

09-2525-cv(L)

09-3615-cv(XAP)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-2525-cv(L); 09-3615-cv(XAP)



VISHRANTHAMMA SWARNA,

Plaintiff-Appellee-Cross-Appellant,

—v.—

BADAR AL-AWADI, HALAL MUHAMMAD AL-SHAITAN,

Defendants-Appellants,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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Defendants-Appellants,

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Defendant-Cross-Appellee.

**BRIEF FOR THE UNITED STATES OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

Preliminary Statement

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and at the invitation of the Court, the United States respectfully submits this brief as *amicus curiae* in support of affirmance of the district court's judgment with respect to defendants-appellants.

Plaintiff-appellee ("Plaintiff"), a former domestic servant, filed suit against Kuwaiti diplomat Badar Al-

Awadi (“Al-Awadi”), his wife Halal Muhammed Al-Shaitan (“Al-Shaitan”), and the State of Kuwait, claiming violations of the Alien Tort Claims Act and New York state labor law based on alleged slavery and slavery-like practices. Defendants-appellants Al-Awadi and Al-Shaitan (collectively, the “Individual Defendants”) appeal the March 20, 2009, order of the United States District Court for the Southern District of New York (Hon. P. Kevin Castel, J.), granting a default judgment against them. The district court rejected the Individual Defendants’ claim that they are immune from suit under Article 39(2) of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (“Vienna Convention” or “VCDR”), based on Al-Awadi’s position as a diplomat formerly posted to the Permanent Mission of Kuwait to the United Nations. Plaintiff also cross-appeals the district court’s dismissal of her claims against the State of Kuwait based on sovereign immunity.

The United States has a significant interest in ensuring the proper interpretation of the Vienna Convention, to which it is a party, because the VCDR affects the treatment of the United States’ own diplomats abroad and, more broadly, the conduct of the foreign relations of the United States. In accordance with the text and purpose of the Vienna Convention, which sets forth the privileges and immunities to be accorded diplomats and their families while posted abroad, the United States’ longstanding position is that a former diplomat enjoys residual diplomatic immunity under Article 39(2) of the VCDR only for those acts performed in the exercise of his diplomatic functions. The Department of State interprets the scope of this immunity as limited to official acts performed as a

diplomat.* The Department of State's interpretation of Article 39(2), which is entitled to deference, is rooted in the customary international law of diplomatic immunities, which was codified by the VCDR.

Because Al-Awadi's employment of Plaintiff as a personal domestic servant was not an official act performed in the exercise of his diplomatic functions for Kuwait, the district court correctly held that Al-Awadi is not entitled to residual diplomatic immunity from Plaintiff's claims. Because Al-Shaitan, as Al-Awadi's spouse, did not hold a position at the Kuwait Mission to the United Nations, her employment of Plaintiff could not be an official act, and the district court correctly held that she is not entitled to residual diplomatic immunity. The United States takes no position on the district court's dismissal of Plaintiff's claims against the State of Kuwait.

* In this brief, the terms "official acts" and "acts of the sending State" refer solely to acts performed by an individual within the official functions of a diplomatic mission, as defined by Article 3(1) of the VCDR. This brief takes no position on the meaning of these terms in other immunity regimes.

ARGUMENT**POINT I****FORMER DIPLOMATS ENJOY RESIDUAL
DIPLOMATIC IMMUNITY UNDER ARTICLE 39(2) OF
THE VCDR ONLY FOR THOSE ACTS PERFORMED
WITHIN THEIR DIPLOMATIC FUNCTIONS**

The Vienna Convention is a multilateral treaty that sets forth, *inter alia*, the privileges and immunities to be accorded to diplomatic agents and their family members while posted abroad. Article 39 of the VCDR addresses the duration of privileges and immunities for diplomats. *See* VCDR art. 39. Specifically, Article 39(2) establishes that a diplomat loses his diplomatic privileges and immunities when he leaves his diplomatic post, except with respect to “acts performed by such a person in the exercise of his functions as a member of the mission.” *Id.* art. 39(2).

The district court correctly held that the residual immunity of former diplomats under Article 39(2) of the VCDR “applies to a former diplomatic agent’s official acts but not private acts.” *Swarna v. Al-Awadi*, 607 F. Supp. 2d. 509, 519 (S.D.N.Y 2009). This interpretation is consistent with the text and purpose of Article 39(2), and comports with the United States’ longstanding interpretation of the provision, which is “entitled to great weight.” *Abbott v. Abbott*, __ U.S. __, No. 08-645, 2010 WL 1946730, at *9 (U.S. May 17, 2010). The district court’s construction is also consistent with customary international law norms that were codified in the VCDR. The Individual Defendants’ argument that Article 39(2) affords broad residual immunity for

unofficial acts incident to diplomatic functions lacks support, would improperly expand the scope of residual diplomatic immunity, and was correctly rejected by the district court.

A. The District Court’s Holding That Residual Diplomatic Immunity Is Limited to Immunity for Official Acts Is Consistent With the Text of the VCDR in Light of Its Purpose

Under established rules of treaty interpretation, courts look first to the “ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty’s] object and purpose.” Vienna Convention on the Law of Treaties (“VCLT”), art. 31(1), May 23, 1969, 1155 U.N.T.S. 331;* *accord Abbott*, 2010 WL 1946730, at *6; *Mora v. New York*, 524 F.3d 183, 194 (2d Cir. 2008). In evaluating the purpose and object of a treaty, the preamble “provides valuable context for understanding the terms of a treaty.” *Mora*, 524 F.3d at 196; VCLT, art. 31(2).

The district court’s construction of Article 39(2) as limited to official acts is consistent with both the plain language of Article 39(2) and the VCDR’s preamble, which provides the context and rationale for residual immunity. This Court therefore should reject the Individual Defendants’ argument that “residual immunity under Article 39(2) is not limited to official

* Although the United States has not ratified the VCLT, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. *See, e.g., Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001).

acts imputable to the sending state.” Response and Reply Brief for Defendants-Appellants and Defendant-Cross-Appellee, dated March 24, 2010 (“Def. Reply Br.”), at 5.

Under the VCDR, while they are serving as members of a diplomatic mission, diplomats enjoy broad personal immunity from civil and criminal jurisdiction. *See* VCDR, art. 31. The purpose of such broad personal immunity is to avoid interference in the receiving State with a diplomat’s service for his government. Article 39(2) of the VCDR recognizes that “[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country.” VCDR, art. 39(2). By extending a limited continuing immunity only for “acts performed by such a person in the exercise of his functions as a member of the mission,” *id.*, the VCDR preserves only those aspects of the former diplomat’s immunity that pertain to the sending State’s official actions. *See Baoanan v. Baja*, 627 F. Supp. 2d 155, 162 (S.D.N.Y. 2009). The more limited immunity that subsists for diplomats after they have departed the country accords with the overarching purpose of the VCDR’s privileges and immunities “not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.” VCDR pmb1, cl. 4; *Baoanan*, 627 F. Supp. 2d at 160-61; *see also 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 300 (2d Cir. 1993) (“[M]odern international law has adopted diplomatic immunity under a theory of functional necessity.”). Accordingly, a former diplomat does not enjoy residual immunity for acts performed while serving as a member of the

mission that pertain to his household or personal life, and are only incidental to the performance of diplomatic functions.

The Individual Defendants' argument that Article 39(2) extends residual immunity to all acts "incident to" a diplomat's functions as a mission member, and thereby covers the employment of Plaintiff in this case, *see* Brief and Special Appendix for Defendants-Appellants, dated December 9, 2009 ("Def. Opening Br."), at 16, 26; Def. Reply Br. at 16, would rewrite Article 39(2) altogether. The plain language of Article 39(2) covers acts performed "in the exercise of" diplomatic functions, VCDR art. 39(2), not acts "incident to . . . diplomatic functions," Def. Reply Br. at 16, or "other acts . . . undertaken while serving as diplomats that are incident to their diplomatic mission," *id.* at 18. To broaden the scope of residual immunity as the Individual Defendants suggest would eliminate the distinction between residual immunity and the more comprehensive immunity enjoyed by diplomats while serving as members of the mission. Indeed, reading the residual immunity language in Article 39(2) to cover acts "incident to" diplomatic functions would negate the earlier provision in Article 39(2) that the broader immunity ceases when diplomatic functions come to end.

Leading diplomatic law experts have confirmed the limited scope of Article 39(2), explaining that acts "in the exercise of . . . official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in respect of such acts since this would be indirectly to implead the sending State." Eileen Denza, *Diplomatic*

Law: Commentary on the Vienna Convention on Diplomatic Relations 439 (3d ed. 2008); *see also* *Satow's Diplomatic Practice* 139 (Sir Ivor Robert, ed., 6th ed. 2009) (“The immunity of a diplomatic agent for his official acts—acts performed in the exercise of his functions as a member of the mission—is on the other hand unlimited in time. Immunity in regard to such acts is not personal immunity of the diplomatic agent but is in reality the immunity of the sending sovereign State.”).

Given this distinction between the expansive personal immunity of a current diplomat and the limited immunity of a former diplomat, the district court correctly rejected the Individual Defendants’ argument based on Article 31(1)(c) of the VCDR, which creates a narrow exception to the immunity of a current diplomat for commercial activity “outside his official function.” *See Swarna*, 607 F. Supp. 2d at 520 n.12. The Individual Defendants contend that those acts that courts have held not to fall within the narrow exception for commercial activity outside a sitting diplomat’s “official functions,” such as the employment of a domestic servant, should inform an analysis of acts performed in the exercise of a former diplomat’s “functions as a member of the mission” under Article 39(2). *See* Def. Opening Br. at 25, 27-32 (citing *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 127-29 (D.D.C. 2009); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192 (D.D.C. 2007); *Tabion v. Mufti*, 73 F.3d 535, 537-39 (4th Cir. 1996); *Portugal v. Conclaves*, 82 I.L.R. 115, 117 (1982) (Belg.)).

But the relevant inquiries under Article 31(1)(c) and Article 39(2) are completely separate, and the text of

each article must be examined in the context of the purpose of the immunities provided in the VCDR. With respect to Article 31(1)(c), the United States has explained that, consistent with both the origins and the purpose of the broad personal immunity of sitting diplomats, “the term ‘commercial activity’ [in Article 31(1)(c)] did not encompass the . . . procurement of goods and services needed in the diplomat’s daily life, but rather focused on activities that were *normally inconsistent with* a diplomat’s position.” Statement of Interest of the United States of America (“*Sabbithi* SOI”) at 11, *submitted in Sabbithi*, No. 07-cv-00115, Docket No. 48 (D.D.C. July 22, 2008). In other words, in the context of the broad personal immunity set forth in Article 31, the limited commercial activity exception to that immunity is narrow in scope. The *Sabbithi* court agreed with the United States’ narrow interpretation of Article 31(1)(c), as well as with the holdings in both *Tabion* and *Gonzalez Paredes*; focusing its analysis on the meaning of the term “commercial activity,” the *Sabbithi* court concluded that “[h]iring household help is incidental to the daily life of a diplomat and therefore not commercial for purposes of the exception to the Vienna Convention.” 605 F. Supp. 2d at 127.

By contrast, the proper analysis of residual immunity for a former diplomat under Article 39(2) is whether the act in question was performed within his function as a member of the mission, *i.e.*, whether, in the context of the limited immunity of former diplomats, it is an act that requires the protections of Article 39(2) because it is an official act. *See Baoanan*,

627 F. Supp. 2d at 164.* There is a wide range of activities that are both not commercial, for purposes of the narrow exception to the broad personal immunity of current diplomats, and simultaneously not official acts entitled to residual immunity under Article 39(2) of the VCDR. Conduct that clearly falls outside the scope of the commercial activity exception in Article 31(1)(c) includes engaging in “[o]rdinary contracts incidental to life in the receiving State, such as the purchase of goods, medical, legal or educational services, or agreements to rent accommodation.” Denza at 305. But it is precisely this type of unofficial conduct—conduct incidental to the life of a diplomat and therefore protected by the broad personal immunity provided under Article 31—that is not “performed . . . in the exercise of [a diplomat’s] function” under Article 39(2). As the district court here noted, to conflate conduct that is not commercial, and thus outside the narrow exception under Article 31(1)(c), with residual immunity under Article 39(2), would provide former diplomats with essentially the same broad immunity enjoyed by sitting diplomats. *See Swarna*, 607 F. Supp. 2d at 521.

* The Individual Defendants cite *dicta* in *Sabbithi* for the proposition that because the hiring of a domestic servant is not a commercial activity within the meaning of Article 31(1)(c), it is also an act performed in the exercise of a former diplomat’s functions as a member of the diplomatic mission. *See* 605 F. Supp. 2d at 130, cited in Def. Opening Br. at 31. That portion of the *Sabbithi* decision, however, subsequently was vacated. *See Sabbithi*, No. 07-cv-00115, Minute Order (D.D.C. Feb. 18, 2010).

B. The District Court’s Construction of Residual Diplomatic Immunity Is Consistent With the United States’ Longstanding Interpretation of Article 39(2) of the VCDR, Which is Entitled to Deference

The longstanding and consistent practice of the United States is to interpret the scope of immunity under Article 39(2) as a limited immunity for official acts only.

As explained by the State Department’s Legal Adviser in 1988, “[t]he United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities, except for acts performed in the exercise of the functions as a member of the mission.” Declaration of Abraham D. Sofaer, dated July 5, 1988 (“Sofaer Decl.”), ¶ 5 at 3, *submitted in United States v. Guinand*, 688 F. Supp. 774 (D.D.C. 1988).^{*} Those acts for which a former diplomat retains immunity are “acts committed in the course of official functions.” *Id.* ¶ 5, at 6.

Consistent with this view, the Department of State’s standing guidance to foreign diplomatic missions, issued in the form of a communication to the chiefs of all diplomatic missions in the United States, states:

^{*} For the convenience of the Court and the parties, the Sofaer Declaration is reproduced in the Addendum to this brief.

[t]he Department wishes to remind the missions that in any case involving criminal activity no immunity exists against the arrest and prosecution of a person formerly entitled to privileges and immunities who returns to the United States following the termination of his or her official duties, unless it can be proved that the crime *related to the exercise of official functions*.

Circular Diplomatic Note, Nov. 15, 1989, 2 FAM § 231, Ex. 233.4 (emphasis added), *available at* <http://www.state.gov/documents/organization/84395.pdf>. Additional Department of State guidance advises that, “[w]ith the exception of immunity for official acts (which exists indefinitely), criminal immunity expires upon termination of the diplomatic or consular tour of the individual enjoying such immunity.” Department of State, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities* 15 (1998).^{*} Although these communications focus on criminal immunity, as the district court correctly recognized, Article 39(2) does not distinguish between the residual immunity of former diplomats for criminal and civil acts. *Swarna*, 607 F. Supp. 2d at 521.

This Court should afford “great weight” to the Government’s longstanding interpretation of Article 39(2) of the VCDR. *Abbott*, 2010 WL 1946730, at *9; *accord Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S.

* For the convenience of the Court and the parties, this publication is reproduced in the Addendum to this brief.

176, 184-85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Mora*, 524 F.3d at 188.

The limited body of case law that has developed interpreting Article 39(2) is consistent with the district court's and the United States' interpretation, which limits residual immunity to official acts. Compare *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (finding residual immunity for former UN officials for acts related to employment of plaintiff at official diplomatic mission itself); *Osman v. Annan*, No. 07-837-CV-W (NKL), 2008 WL 2477535, at *1-2 (W.D. Mo. June 16, 2008) (same); *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005) (same); *Knab v. Georgia*, No. 97CV3118, 1998 WL 34067108, at *1 (D.D.C. May 29, 1998) (finding residual immunity for former diplomat because plaintiff's complaint conceded defendant "was acting in his official capacity"); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (finding residual immunity for former UN officials for acts related to disbursement of plaintiff's employment benefits at UN), *with Baoanan*, 627 F. Supp. 2d at 170 (finding no residual immunity for former UN diplomat and his wife for acts related to employment of domestic servant in their home); *In re Noboa*, No. M19-111, 1995 WL 581713, at *3-4 (S.D.N.Y. Oct. 4, 1995) (finding no residual immunity from service of subpoena requiring testimony in estate litigation in which former diplomat was participating as heir or legatee); *Guinand*, 688 F. Supp. at 774 (finding no residual immunity for former diplomat for distributing illegal narcotics).

Moreover, "[t]he United States Government's interpretation of the termination of immunity under

the VCDR is . . . consistent with [the] practice of other sovereign states, including [those] which are party to the Vienna Convention.” Sofaer Decl. ¶ 8; *see also* Denza at 439-44.* While the views of the United States are entitled to great weight in interpreting a treaty, the practice of other States Parties to the VCDR is also instructive. *See Abbott*, 2010 WL 1946730, at *9 (“In interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight.”) (internal quotation marks omitted). The views of other States Parties are also reflected in foreign case law confirming the accepted distinction between the continuing immunity of former diplomats for official acts and the termination of immunity for unofficial acts. *See, e.g., Propend Finance Pty Ltd. v. Sing*, [1997] EWCA (Civ), 111 I.L.R. 611 (U.K.) (finding official police work on behalf of Australian government to be “in the exercise of [Australian police liaison’s] functions as a member of the mission”); *Zoernsch v. Waldock*, [1964] EWCA (Civ), 2 All E.R. 256 (U.K.) (“The English cases show that in English law an envoy’s immunity from suit and legal process in respect of acts done in his private capacity endures only so long as he is *en poste* Quite different considerations, however, apply to acts done by him in his official capacity.”).

* Although Kuwait’s brief to this Court takes, in the context of this litigation, an expansive view of the scope of residual immunity, its view is out of the mainstream and inconsistent with the views of the United States.

C. The District Court’s Construction of Residual Diplomatic Immunity Is Consistent With the Customary International Law That Was Codified in Article 39(2) of the VCDR

The district court’s interpretation of Article 39(2) as affording a limited scope of residual diplomatic immunity is also consistent with the customary international law that preceded the VCDR and formed the basis for the drafting of Article 39(2).

One of the primary tasks of the drafters of the VCDR was to survey and reflect in a treaty existing customary international law relating to diplomatic intercourse and immunities. This task fell initially to the International Law Commission (“ILC”), which prepared a draft document that eventually formed the basis for negotiation of the VCDR by the States themselves.* Specifically, the ILC was to “undertake the codification of the topic ‘[d]iplomatic intercourse and immunities,’” in light of “existing principles and rules and recognized practice.” G.A. Res. 685 (VII), ¶¶ 2, 5 (Dec. 5, 1952), *available at* <http://www.un.org/documents/ga/res/7/ares7.htm>; *see also* 767 *Third Ave.*

* The ILC is a group of international law experts operating under the auspices of the United Nations; in 1957 and 1958, before the eventual negotiation of the VCDR, the ILC undertook a review of the law of diplomatic intercourse and immunities. *See Summary Records of the Ninth Session, 23 April—28 June 1957*, [1957] 1 Y.B. Int’l L. Comm’n, U.N. Doc. A/CN.4/SER.A/1957 (“1957 Summary Records”); *Summary Records of the Tenth Session, 28 April—4 July 1958*, [1958] 1 Y.B. Int’l L. Comm’n, U.N. Doc. A/CN.4/SER.A/1958.

Assocs., 988 F.2d at 300 (the VCDR “codified longstanding principles of customary international law with respect to diplomatic relations”); *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986) (“[T]he 1961 Vienna Conference examined the articles in the light of modern conditions, surveying the body of law and practice which had developed over the years regarding the rights, duties, and privileges of diplomatic missions’ . . .”) (quoting Leonard Meeker, Legal Adviser to the State Department, *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess., at 2 (1965)).

The customary international law rule on residual diplomatic immunity, which was “clearly established” at the time the VCDR was drafted, provided that even when the act “on which the proceedings were based had taken place during the subsistence of immunity[,] [it] was no bar to subsequent proceedings so long as it was of a private nature and not performed in the exercise of diplomatic functions.” Denza at 434-35. As long ago as 1858, the Law Officers of the United Kingdom confirmed that former diplomats enjoyed only a limited residual immunity when it advised that a former diplomat could not assert immunity except for those acts done by him “within the scope of his duty, and more especially if they were previously commanded or subsequently sanctioned and approved by the Government by which he was accredited.” 1 Lord McNair, *International Law Opinions* 197 (1956). This doctrine is also reflected in an 1895 Resolution of the Institute of International Law, which stated that “[i]mmunity continues after retirement from office insofar as acts connected with the exercise of said

duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office.” 1895 Resolution, art. 14, *reprinted in* 26 *Am. J. Int’l L.* 162, 164 (1932).*

The doctrine also appears in the 1932 Harvard Research on Privileges and Immunities in a provision that is remarkably similar to Article 39(2) of the VCDR:

Article 18—Non-Liability for Official Acts

A receiving state shall not impose liability on a person for an act done by him in the performance of his functions as a member of the mission or as a member of the administrative personnel.

* The non-governmental Institute of International Law was founded in Belgium in 1873 by eleven international lawyers and was created to contribute to the development and promotion of international law. See http://nobelprize.org/nobel_prizes/peace/laureates/1904/international-law-history.html; http://www.idi-iiil.org/idiF/navig_historique.html.

26 Am. J. Int'l L. 97 (1932 Supp).^{*} In this provision, the “performance of [a diplomat’s] functions as a member of the mission” is summarized in the article’s title as “Official Acts.” The commentary to the Harvard Research further explains this provision, noting that “[d]uring the period of their official functions the members of a mission are exempt from the jurisdiction of the receiving state, both with respect to official and private acts. . . . For acts performed in a private capacity, however, they are subject to the law of the receiving state, their immunity being merely from the exercise of jurisdiction.” *Id.* at 98.

Case law regarding residual diplomatic immunity predating the VCDR similarly supports an interpretation of Article 39(2) that limits residual diplomatic immunity to official acts. *See, e.g., Arcaya v. Paez*, 145 F. Supp. 464, 472 (S.D.N.Y. 1956) (finding that the former Consul General and current Alternate Representative of Venezuela to the United Nations had not committed alleged acts within the scope of his

^{*} The Harvard Research in International Law was initiated in 1929 to assist the League of Nations in its efforts to codify international law. The Harvard Research continued its work until 1940, with advisory groups of leading American international law experts producing several draft conventions on various international law topics. John P. Grant & J. Craig Barker, *The Harvard Research: Genesis to Exodus and Beyond*, in *The Harvard Research in International Law: Contemporary Analysis and Appraisal* 1, 7 (John P. Grant & J. Craig Barker, eds., 2007).

official authority such that “[i]f and when defendant loses his status and the immunity that goes with it, plaintiff ought to be allowed to proceed with his action” for libel).

This view of residual diplomatic immunity was thus well established in customary international law before it was codified in the VCDR, and has been so described by several respected international law scholars and practitioners. *See, e.g.*, Denza at 434, 439; Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 Int’l Comp. L.Q. 76, 78 (1966); Joan E. Donoghue, *Perpetual Immunity for Former Diplomats? A Response to “The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity?”*, 27 Colum. J. Transnat’l L. 615, 662 (1988-89).

D. The Individual Defendants’ Position That Article 39(2) Encompasses Acts Other Than Official Acts Lacks Support

The Individual Defendants’ principal argument in support of their position that “residual immunity under Article 39(2) is not limited to official acts imputable to the sending state,” Def. Reply Br. at 5, is based on an interpretation of the ILC’s discussions regarding the provision that became Article 38 of the VCDR, not Article 39. *See 1957 Summary Records*, 1 Y.B. Int’l L. Comm’n at 98-103, 124-26. The Individual Defendants argue that because the ILC used the phrase “official acts” in Article 38 to describe the scope of immunity enjoyed by diplomats who are citizens or nationals of the receiving State, but used a different phrase, “acts performed in the exercise of functions as a member of the mission,” in Article 39(2) to describe the scope of

immunity enjoyed by former diplomats, the immunity described in Article 39(2) cannot also be limited to official acts. *See* Def. Reply Br. at 8-13.

The Court should reject this argument. As explained above, the text, context, and subsequent practice of the United States and other States Parties, as well as customary international law, make clear that residual immunity under Article 39(2) is limited to official acts.

Furthermore, the drafting history of Article 38 does not bear the interpretation urged by the Individual Defendants. The initial ILC draft of the precursor to Article 38 contained language similar to that in Article 39(2). *See 1957 Summary Records*, 1 Y.B. Int'l L. Comm'n at 98. One member of the drafting committee suggested using the phrase "public acts" to make clear that the immunity would not cover the criminal negligence of a diplomat who is also a national of the receiving State, when that national is driving in his own country (*i.e.*, the receiving State). *Id.* at 99-100. The suggested "public acts" language, however, was not adopted. *Id.* at 110. Rather, in the next round, the drafter without explanation changed the language of Article 38 to "official acts legitimately performed in the exercise of his functions." *Id.* Later, that text was further changed to "official acts performed in the exercise of his functions." *Report of the Int'l Law Comm'n Covering the Work of Its Tenth Session*, [1958] 2 Y.B. Int'l L. Comm'n 102, U.N. Doc. A/CN.4/117. Thus, there is little clarity garnered from the drafting history of Article 38 with respect to the significance of the inclusion of the phrase "official acts."

While there is less discussion in the drafting history of the precursor to Article 39, at the conclusion of the

ILC's discussion regarding the scope of residual diplomatic immunity, the ILC Chairman "confirmed that the Commission's intention with regard to the second sentence in paragraph 2 of the [residual immunity] article was that immunity should subsist indefinitely, since the acts concerned were not really private acts at all but acts of the sending State." *1957 Summary Records*, 1 Y.B. Int'l L. Comm'n at 217. In both articles, therefore, the history reflects an intent to exclude private acts.

Accordingly, whatever the scope of immunity set forth in Article 38—and it is not necessary for the Court to determine the nuances of any possible differences in the scope of immunities set forth in Articles 38 and 39—the use of the phrase "official acts" in Article 38 does not provide a legitimate basis for expanding the scope of residual immunity in Article 39(2). The district court's construction of Article 39(2) as providing a limited immunity that does not extend to private acts comports with the text and context of the treaty, is supported by the subsequent practice of the United States and other States Parties, and is consistent with the understanding of residual immunity under customary international law predating and codified in the VCDR.

POINT II**THE INDIVIDUAL DEFENDANTS DO NOT ENJOY
RESIDUAL DIPLOMATIC IMMUNITY FROM
PLAINTIFF'S CLAIMS IN THIS CASE****A. The District Court Correctly Held That Al-Awadi Is Not Entitled To Residual Diplomatic Immunity From Plaintiff's Claims Under Article 39(2)**

The district court correctly held that Al-Awadi is not entitled to residual diplomatic immunity from Plaintiff's claims under Article 39(2) of the VCDR, as his employment of Plaintiff as a personal domestic servant was a private act, and not one performed in the exercise of his diplomatic functions.* The district court, accepting the facts as alleged in the complaint as true, reasonably determined that Plaintiff's predominant function was to provide personal services for the

* The privileges and immunities set forth in the VCDR are applicable to the Individual Defendants by virtue of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("UN Headquarters Agreement"), which provides that certain resident members of diplomatic missions to the United Nations are entitled to the same privileges and immunities in the United States as are accorded diplomatic envoys to the United States. *See* UN Headquarters Agreement, art. V, § 15(2), 12 Bevan 956, T.I.A.S. 1676; *Ahmed v. Hoque*, No. 01 Civ. 7224 (DLC), 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002).

Individual Defendants: cooking, cleaning, and taking care of their children—tasks that are unrelated to a diplomat’s official functions—for an average of seventeen hours a day, seven days a week. *See Swarna*, 607 F. Supp. 2d at 513, 520.

Because she was hired as a live-in domestic employee, Plaintiff’s situation was markedly different from that of the plaintiffs in *Brzak*, who were employed at the United Nations itself by the office of the United Nations High Commissioner for Refugees, and were subordinates of the defendants. *Compare id.* at 512-13, *with Brzak*, 597 F.3d at 110. In *Brzak*, this Court held that the defendants were entitled to residual immunity because the allegations in that case involved “management of the office in which the plaintiffs worked” and “personnel management decisions falling within the ambit of the defendants’ professional responsibilities.” *Brzak*, 597 F.3d at 113. By contrast, as the district court reasonably concluded, the allegations here concern the employment of a domestic servant, whose functions were principally to provide personal services to the Individual Defendants. *See Swarna*, 607 F. Supp. 2d at 520 (noting Plaintiff was Al-Awadi’s “domestic servant, hired to work in his private home, tending to his family’s personal affair[s]”). As such, Al-Awadi’s employment of Plaintiff did not fall within his professional responsibilities as a Kuwaiti diplomat.

The Individual Defendants focus on Plaintiff’s allegations that she cooked for official and semi-official functions of the Kuwaiti Mission, *see* Complaint ¶ 50, and assert that the diplomatic receptions in their home for which Plaintiff provided assistance were held in the

course of “promoting friendly relations,” which is one of the functions of a diplomatic mission as established in Article 3 of the VCDR. *See* Def. Opening Br. at 26; VCDR art. 3(1)(e).^{*} The district court reasonably concluded, however, that Plaintiff’s services on these occasions were a “tangential benefit” that “did not make her an employee of the mission, and did not make Al-Awadi’s act of employing her in law the act of the sending State.” *Swarna*, 607 F. Supp. 2d at 520 (internal quotation marks omitted).

The district court’s reasoning was adopted by another district court in this Circuit in a similar case, *Baoanan v. Baja*, also brought by a former domestic servant against the former diplomats who had employed her. The *Baoanan* court noted that the plaintiff’s allegation that she, similar to Plaintiff in this case, “prepared for and cleaned up after [the defendants’] weekly parties at the Philippine Mission” did not “transform her employment into an official act.” 627 F. Supp. 2d at 168. Quoting *Swarna*, the *Baoanan* court agreed that any “tangential benefit to the [Philippine] Mission did not make [the plaintiff] an employee of the mission” because there was “no indication that [the defendants’] assignment of a private domestic worker to clean up after those parties [was] demanded by his diplomatic function.” *Id.*

^{*} Article 3 sets forth examples of the “functions of a diplomatic mission,” including “(e) [p]romoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.” VCDR art. 3(1)(e).

The district court's conclusion also is supported by a similar case in the Ninth Circuit, in which the court held that the Consul General of the Republic of Korea and his wife were not entitled to immunity from labor law claims in connection with their employment of a domestic servant, even though the servant also spent some time cooking and serving at official events held at the Consul General's home. *See Park v. Shin*, 313 F.3d 1138, 1143 (9th Cir. 2002). Like the residual immunity of former diplomats, consular officers and employees are entitled to immunity for acts "performed in the exercise of consular functions." Vienna Convention on Consular Relations ("VCCR"), art. 43(1), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. Courts have interpreted this provision as affording immunity for official consular acts only. *See, e.g., Ford v. Clement*, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) ("[A] consular officer . . . must . . . plead and prove immunity on the ground that the act or omission underlying the process was in the performance of his official functions.") (quoting *Koeppe & Koeppe v. Federal Republic of Nigeria*, 704 F. Supp. 521, 522 (S.D.N.Y. 1989)).

In *Park v. Shin*, the court rejected arguments virtually identical to those advanced here by the Individual Defendants. The plaintiff in *Park* worked in the defendants' home "cooking, cleaning, performing other household duties, and taking care of Defendants' three children." 313 F.3d at 1141. In addition, as alleged in this case, the "[p]laintiff's duties . . . included preparing and serving food when [the defendants] entertained guests on behalf of the Korean Consulate at the [defendants'] home." *Id.* The plaintiff alleged that "it was customary for the Shins to entertain at their home" because "[t]he Korean Consulate . . . does not

have an area in which to entertain guests.” *Id.* The defendants argued that their employment of the plaintiff was a consular function both because the plaintiff provided services at official consular events in the defendants’ home, and because the Consul General “could not fulfill his other functions as a consular officer effectively if he were required to cook, clean, take care of his children, and perform the other services that Plaintiff provided for [his] family.” *Id.* at 1142.

The Ninth Circuit rejected this argument noting that the plaintiff’s salary was paid by the defendants and that “the bulk of Plaintiff’s time” was spent not on consular events but on cooking, cleaning, and caring for the defendants’ children. *Id.* at 1143. The court concluded that any services the plaintiff provided to the Consulate were “incidental to her regular employment as [the defendants’] personal domestic servant,” *id.*, and “insufficient to make the hiring and supervision of Plaintiff a consular function,” *id.* at 1142. The court therefore held that the defendants were not entitled to immunity. *Id.* at 1143.

Similarly here, the district court reasonably determined that Plaintiff was a personal employee of the Individual Defendants who was hired to tend to the Individual Defendants’ personal affairs, rather than to assist with diplomatic events. *Swarna*, 607 F. Supp. 2d at 520. As in *Park*, any incidental responsibilities that Plaintiff may have had in connection with official functions of the Kuwaiti Mission to the United Nations did not transform the Individual Defendants’ act of employing Plaintiff into one that was “in law the act of the sending State.” *Id.*

Plaintiff's allegations regarding her visa status confirm the district's court conclusion that the Individual Defendants' employment of Plaintiff as a personal employee was a private act. Plaintiff alleges that she was issued a G-5 visa to work for the Individual Defendants in the United States. Complaint ¶ 22. Under the Immigration and Nationality Act and Department of State regulations, G-5 visas are issued only to the attendant, servant or personal employee of representatives to or officers and employees of international organizations such as the United Nations. *See* 8 U.S.C. § 1101(a)(15)(G); *id.* § 1201(a)(1)(B); 22 C.F.R. §§ 41.21(a)(4), 41.27(c)(xiii). Department of State regulations require evidence of an employer-employee relationship between the individual diplomat and the domestic servant, in which the domestic servant is paid from the private funds of the diplomat, to establish eligibility for such a visa. *See* 22 C.F.R. § 41.21(a)(4); 9 FAM § 41.21 N6.1, "Aliens Entitled to A-3, G-5 or NATO-7 Classification" (CT:VISA-1389; 01-07-2010), *available at* <http://www.state.gov/documents/organization/87174.pdf>.^{*} The issuance of a G-5 visa to an individual based on the employer's representation that the individual will be employed as a personal domestic servant and paid out of a diplomat's private funds thus indicates that employment of the visa holder is in fact a private act. *Baoanan*, 627 F. Supp. 2d at 167-68; *see also Park*, 313 F.3d at 1142-43 (A-3 visas, analogous to G-5 visas, "are issued only for personal employees of consular officers").

^{*} Employees of a diplomatic mission itself are issued a different category of visa. *See* 22 C.F.R. § 41.22(a)(1).

The district court's determination that the hiring of a domestic servant is a private act not entitled to residual diplomatic immunity also is consistent with United States' practice with respect to its own diplomats. The Department of State generally would not assert residual diplomatic immunity on behalf of an American diplomat sued by a former household servant who had been brought into the receiving State by virtue of a personal employment relationship, nor would the Department of Justice provide representation to a United States diplomat under such circumstances. *See* 2 FAM § 512, "Legal Representation of Departmental Employees by the Department of Justice," *available at* <http://www.state.gov/documents/organization/84420.pdf>. This would be true even if the servant occasionally worked at diplomatic functions in the diplomat's home. The Department of State regards such individuals to be personal employees engaged in domestic duties to support the diplomat and his or her family, and the employment of such individuals generally is not "an act performed by such a person in the exercise of his functions as a member of the mission." VCDR art. 39(2).

B. The District Court Correctly Held That Al-Shaitan Is Not Entitled To Residual Diplomatic Immunity From Plaintiff's Claims Under Article 39(2)

The district court correctly held that Al-Shaitan, as the spouse of a former diplomat, is not entitled to residual diplomatic immunity from Plaintiff's claims under Article 39(2) of the VCDR. During the period when Al-Shaitan was accredited by the State of Kuwait to the United Nations as Al-Awadi's spouse, she enjoyed

the same broad privileges and immunities as Al-Awadi. *See id.* art. 37(1) (providing same personal immunity to family members of diplomats as to diplomats themselves during period of accreditation). Unlike Al-Awadi, however, Al-Shaitan was never a member of the Kuwait Mission. Accordingly, Al-Shaitan could not have conducted any acts under Article 39(2) “as a member of the mission,” and her immunity does not continue to subsist. Thus, Al-Shaitan enjoys no residual immunity from the civil jurisdiction of the United States. *See* VCDR, art. 39(2); *Baoanan*, 627 F. Supp. 2d at 170-71.

CONCLUSION

The Court should affirm the judgment of the district court that the Individual Defendants are not entitled to residual diplomatic immunity from Plaintiff’s claims.

Dated: New York, New York
June 2, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6988 words in this brief.

PREET BHARARA,
*United States Attorney for the
Southern District of New York*

By: EMILY E. DAUGHTRY,
Assistant United States Attorney

ADDENDUM

Add. 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
v. : Criminal No. 88-201 (OG)
JULIO J. GUINARD :

DECLARATION OF ABRAHAM D. SOFAER

I, Abraham D. Sofaer, hereby declare pursuant to 28 U.S.C.
Section 1746 as follows:

1. I am the Legal Adviser of the Department of State. I
have served in this capacity since June 10, 1985. I submit
this declaration to advise the court of the interpretation of
the United States Government of the Vienna Convention on
Diplomatic Relations, particularly with reference to the
termination of privileges and immunities enjoyed by members of
diplomatic missions. My declaration is based on my personal
knowledge and on information provided to me in my official
capacity.

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2. My responsibilities as Legal Adviser include the formulation and implementation of the interpretation of international law and treaties by the United States Government, including those that grant or relate to privileges and immunities enjoyed by foreign government officials in the United States.

3. The privileges and immunities of members of diplomatic missions in the United States are established in the Vienna Convention on Diplomatic Relations, April 18, 1961, T.I.A.S. No. 7502, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("VCDR"). This treaty entered into force for the United States on December 13, 1972. In 1978, Congress passed the Diplomatic Relations Act, 22 U.S.C. sections 254a-254e, which repealed all prior U.S. statutes on diplomatic privileges and immunities, establishing the Vienna Convention on Diplomatic Relations as the sole law of the United States on the subject of diplomatic privileges and immunities.

4. Article 39 of the VCDR describes the beginning and termination of diplomatic privileges and immunities. Diplomatic immunities commence "from the moment [the diplomat] enters the territory of the receiving state ... or ... from the moment when his appointment is notified to the Ministry of Foreign Affairs." Privileges and immunities terminate "when

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the functions of a person enjoying privileges and immunities have come to an end ... at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

5. The United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities, except for acts performed in the exercise of the functions as a member of the mission. (Article 3 of the VCDR lists the permissible functions of a diplomatic mission.) The Department of State has publicly stated this interpretation to U.S. law enforcement authorities, to Congress, and to members of foreign diplomatic missions in the United States.

Thus, an official State Department publication, intended to provide guidance to law enforcement authorities on the various categories of foreign mission personnel and the privileges and immunities to which they are entitled, states:

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Criminal immunity, to the extent that it is enjoyed by a particular individual and to the extent that it is not waived by the sending State concerned, precludes the exercise by courts of the United States of jurisdiction over alleged criminal activity by such persons, whether such activity occurred during or prior to the period during which such person enjoys criminal immunity in the United States. The jurisdictional bar, however, is not a perpetual benefit for such person. With the exception of immunity for official acts (which subsists indefinitely), criminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying such immunity, including a reasonable period of time for such person to depart the U.S. territory. Thereafter, if the law enforcement authorities of the United States can obtain personal jurisdiction over a person alleged to have committed criminal acts in the United States, normal prosecution may go forward.

United States Department of State, Guidance for Law Enforcement Officers: Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, Department of State Publication 9533 at 18 (1987). A copy of this publication is attached hereto as Exhibit A.

The Chief of Protocol of the United States, in testimony to Congress, described this publication and stated: "we have pointed out the necessity for careful and complete police work at the time of the incident in order to lay the basis for possible future prosecution when immunity ceases to exist. ... After the offender leaves the United States, the existence of an outstanding arrest warrant may be entered into the records of the immigration authorities." United States Department of

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State, "Diplomatic Immunity and U.S. interests," Current Policy No. 993, at 3. A copy of this statement is attached hereto as Exhibit B.

The Department of State has also stated its interpretation to the diplomatic community in the United States through two diplomatic notes circulated to all diplomatic missions. (Diplomatic notes are formal communications from the Department of State to diplomatic missions.) On March 21, 1984, the Secretary of State declared:

On the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to the exercise of official functions, or the statute of limitations for that crime had not imposed a permanent bar to prosecution."

Circular Diplomatic Note, March 21, 1984, at 2-3. A copy of this diplomatic note is attached hereto as Exhibit C. This interpretation was restated in another circular note in 1987 by the Chief of Protocol: "The Department wishes to remind the missions that in any case involving criminal activity no ban exists on the arrest and prosecution of a person formerly entitled to privileges and immunities who returns to the United States, unless it can be proved that the crime related to the

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exercise of official functions." Circular Diplomatic Note, September 21, 1957, at 2. A copy of this diplomatic note is attached hereto as Exhibit D.

These examples discuss the rules regarding termination of immunity and the ability of the receiving State to prosecute former diplomats in terms of departure from the United States because almost all persons in these circumstances would rather leave than face criminal prosecution in the U.S. Nonetheless, the rules on termination of immunity are exactly the same whether the person involved leaves or remains in the United States following the termination of his or her diplomatic status: that person is subject to prosecution for criminal acts committed while in diplomatic status, except for acts committed in the course of official functions.

Finally, the United States Government has not, and, I believe, would not assert immunity from criminal prosecution for one of its diplomatic personnel in another State, once that person's tour of duty had ended and a reasonable time for that person to depart had elapsed, unless that criminal prosecution was for acts committed in the course of that person's official functions. Moreover, I believe such an assertion would not be accepted by the courts of another State, because of the international interpretation and practice of other States regarding the termination of diplomatic immunity.

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6. The United States' Government's interpretation of Article 39(2) of the VCDR is consistent with the underlying purposes of the treaty. As stated in its preamble, "the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." The primary basis is that foreign representatives may carry out their duties effectively only if they are accorded a certain degree of insulation from the application of the laws of the host country. Thus, these representatives need protection while they are serving in their positions so that they may fully carry out their functions, without fear of interference or harassment by the receiving State. Once their tour of duty has ended, however, they no longer require this protection because they are no longer exercising important functions which must be protected in order to maintain the orderly conduct of foreign relations between their State and the receiving State. Thus, the purpose of immunity is not violated by permitting a prosecution to go forward when the former diplomat is no longer employed at the mission, except where a prosecution involves that former diplomat's official functions.

7. In addition, Article 41 of the VCDR specifically imposes a duty to respect the laws and regulations of the receiving State on all personnel of a diplomatic mission who

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enjoy privileges and immunities. Thus, as spelled out in the Department of State's guidance for law enforcement officers: "frequently (and erroneously), immunity is understood to mean pardon, total exoneration, or total release from the responsibility to comply with the law. In actuality, immunity is simply a legal barrier which precludes U.S. courts from exercising jurisdiction over cases against persons who enjoy it and in no way releases such persons from the duty, embodied in international law, to respect the law and regulations of the United States." Department of State, Guidance for Law Enforcement Officers, at 17 (Exhibit A).

8. The United States Government's interpretation of the termination of immunity under the VDCR is, to the best of my knowledge, consistent with practice of other sovereign states, including the almost 150 states which are party to the Vienna Convention. United States Department of State, Treaties in Force, Department of State Publication 9433, at 240 (1987). See E. Denza, Diplomatic Law at 247-49 (1976).

9. I have been advised that a one count indictment was returned in this case on June 2, 1988, charging Julio J. Guinand with violating 21 U.S.C. section 841(a), which prohibits the distribution of controlled substances. The certification of Mr. Guinand's status prepared by the Office of

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Protocol of the Department of State certifies that Mr. Guinand was notified to the Department of State by the Embassy of Peru as a member of its administrative and technical staff on January 1, 1981, and was terminated by the Embassy of Peru on December 31, 1987. He was accorded 30 days as a reasonable time in which to leave the United States. Upon Mr. Guinand's failure to depart the United States by that date, he was indicted. Mr. Guinand no longer has diplomatic status and is no longer entitled to immunity for any act committed during the period he held diplomatic status, except for acts taken in the exercise of his functions. It is clear that the act of distributing controlled substances is not an official diplomatic function.

9. It is my view, in my official capacity as Legal Adviser of the Department of State, that finding that the defendant in this case continues to enjoy diplomatic immunity for acts charged in the indictment would have significant and adverse consequences. The VCDR (Article 9) provides that the host State, here the U.S., can declare a diplomat persona non grata. The sending State must then either remove the diplomat or terminate his functions. Thus, the U.S. public is protected from further harm. Either the diplomat may be removed from the U.S. or the diplomat may be prosecuted. Permitting a former diplomat to remain in the U.S. after he or she has committed

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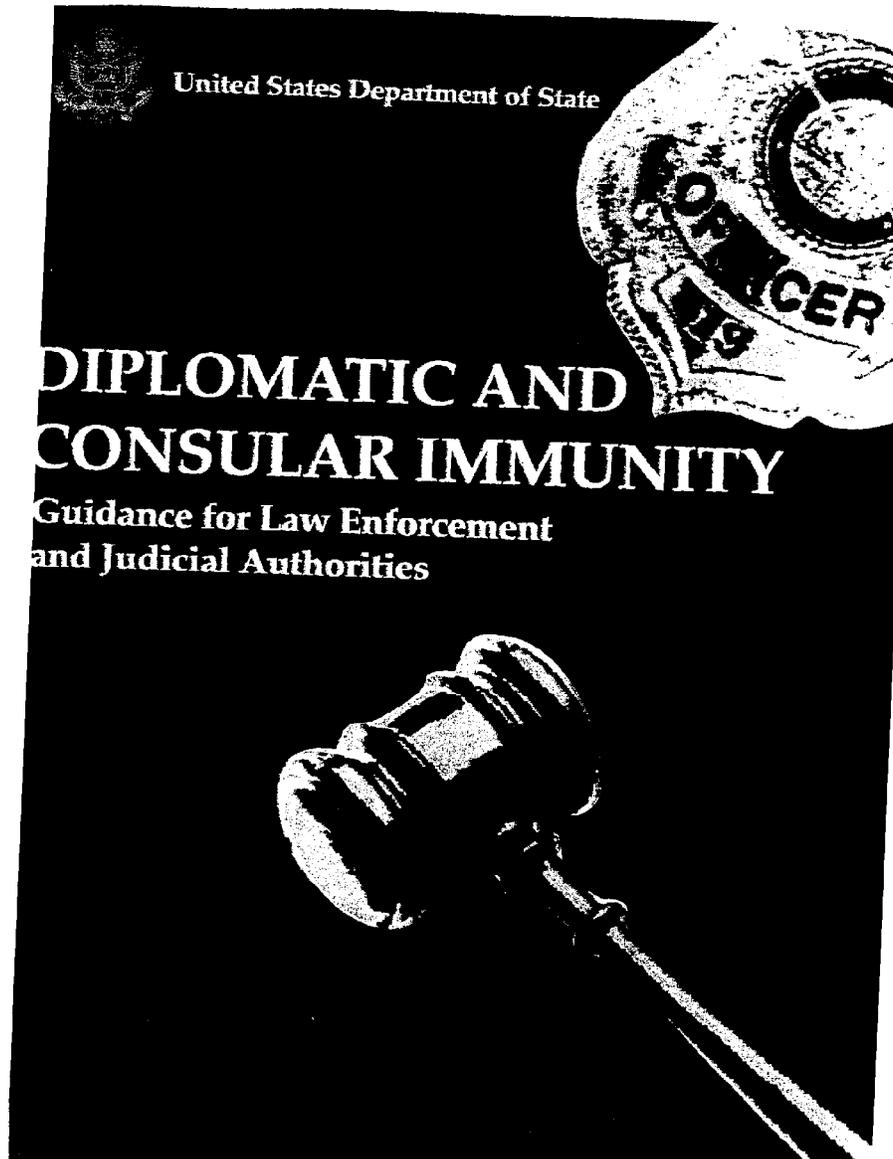
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criminal acts unrelated to official functions, while continuing to bar prosecution of that person, would remove the ability of a State to protect itself from further harm, without serving any interests of the sending State for the benefit of which immunity is accorded.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on July 6, 1988


Abraham D. Sofaer



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This booklet provides a guide to the categories of foreign mission personnel and the privileges and immunities to which each is entitled.

For information on the arrest and detention of foreign nationals not possessing any form of diplomatic or consular immunity, please refer to Department of State Publication 10518, *“Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.”*

Additional information on this subject can be obtained by writing or calling the Office of the Assistant Legal Advisor for Consular Affairs, L/CA, Room 5527A, U.S. Department of State, Washington, D.C. 20520, telephone (202) 647-4415 or fax (202) 736-7559.

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Add. 13



United States Department of State

**DIPLOMATIC AND
CONSULAR IMMUNITY
Guidance for Law Enforcement
and Judicial Authorities**

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Preface

INTERNATIONAL LAW, TO WHICH THE UNITED STATES is firmly committed, requires that law enforcement authorities of the United States extend certain privileges and immunities to members of foreign diplomatic missions and consular posts. Most of these privileges and immunities are not absolute and law enforcement officers retain their fundamental responsibility to protect and police the orderly

conduct of persons in the United States. This booklet provides a guide to the categories of foreign mission personnel and the privileges and immunities to which each is entitled. It explains how to identify (and verify the identity of) such persons and furnishes guidance to assist law enforcement officers in the handling of incidents involving foreign diplomatic and consular personnel.

I

Introduction

WHAT IS DIPLOMATIC IMMUNITY?

Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities.

The principle of diplomatic immunity is one of the oldest elements of foreign relations. Ancient Greek and Roman governments, for example, accorded special status to envoys, and the basic concept has evolved and endured until the present. As a matter of international law, diplomatic immunity was primarily based on custom and international practice until quite recently. In the period since World War II, a number of international conventions (most noteworthy, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations) have been concluded. These conventions have formalized the customary rules and made their application more uniform.

Notwithstanding the antiquity of the concept of diplomatic immunity, its purpose is often misunderstood by the citizens of this and other countries. Occasional abuses of diplomatic immunity, which are brought to public attention, have also served to prejudice public attitudes toward this practice. Dealing with the concept of immunity poses particular problems for law enforcement officers who, by virtue of their oath and training, are unaccustomed to granting special privileges or concessions to individuals who break the law. On the other hand, police officers who understand the importance

of diplomatic immunity may be inclined to be overly generous in its application if they do not have a full understanding of its parameters. It is the purpose of this booklet to familiarize police officers with the general rules of diplomatic and consular immunity and to provide them with specific guidance regarding the handling of difficult situations.

The term diplomatic immunity is popularly, and erroneously, understood to refer to special protections afforded all employees of foreign governments who are present in the United States as official representatives of their home governments. Law enforcement officials, however, must have a more sophisticated understanding of the concept. There are over 100,000 representatives of foreign governments, including dependents, in the United States. Many of these persons may be entitled to some degree of immunity under international law. Some of these persons are members of diplomatic missions, others are assigned to consular posts, and still others are employees of international organizations or members of national missions to such international organizations. For each of these categories of persons, particular rules apply and, even within these categories, different levels of immunity may be accorded to different classes of persons. Most of these persons are assigned to Washington, D.C., and New York City, but large numbers are assigned in other major cities around the country. Moreover, nearly all of these persons are free to travel around the country either on official business or for pleasure.

II

Legal and Practical Basis of Immunity

THE SPECIAL PRIVILEGES AND IMMUNITIES accorded foreign diplomatic and consular representatives assigned to the United States reflect rules developed among the nations of the world regarding the manner in which civilized international relations must be conducted. The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country. The United States benefits greatly from the concept as it protects U.S. diplomats assigned to countries with judicial systems far different than our own.

The various categories of immunity are explained below (and a table is provided to summarize elements of paramount concern to law enforcement officials (*see* Page 26)), but all have a common legal foundation. While customary international law continues to refine the concepts of diplomatic and consular immunity, the basic rules are currently embodied in international treaties. These treaties have been formally adopted by the United States and are, therefore, pursuant to the U.S. Constitution, "the supreme law of the land." The U.S. Government is legally bound to ensure that such privileges and immunities are respected by its states and municipalities.

U.S. law regarding diplomatic immunity has its roots in England. In 1708 the British Parliament formally recognized diplomatic immunity and banned the arrest of foreign envoys. In 1790 the United States passed similar legislation which provided absolute immunity for diplo-

mats, their families and servants, as well as for lower ranking diplomatic mission personnel. This 1790 law remained in force until 1978, when the present Diplomatic Relations Act (22 U.S.C. 254) was enacted to replace it. The principal purpose of the 1978 Act was to bring U.S. law into line with the 1961 Vienna Convention on Diplomatic Relations (which entered into force for the United States in 1972). The 1978 Act imposed a more precise regime and reduced the degree of immunity enjoyed by many persons at diplomatic missions.

On a practical level, failure of the authorities of the United States to respect fully the immunities of foreign diplomatic and consular personnel may complicate diplomatic relations between the United States and the other country concerned. It may also lead to harsher treatment of U.S. personnel abroad, since the principle of reciprocity has, from the most ancient times, been integral to diplomatic and consular relations.

It should be emphasized that even at its highest level, diplomatic immunity does not exempt diplomatic officers from the obligation of conforming with national and local laws and regulations. Diplomatic immunity is not intended to serve as a license for persons to flout the law and purposely avoid liability for their actions. **The purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient and effective performance of their official missions on behalf of their governments.** This is a crucial point for law enforcement officers to understand in their dealings with foreign diplomatic and consular

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personnel. While police officers are obliged, under international customary and treaty law, to recognize the immunity of the envoy, they must not ignore or condone the commission of crimes. As is explained in greater detail below,

adherence to police procedures in such cases is often essential in order for the United States to formulate appropriate measures through diplomatic channels to deal with such offenders.

III

Categories of Persons Entitled to Privileges and Immunities

Members of Diplomatic Missions

Diplomatic missions are traditionally the principal communication link between the country that sends them and the host country. Accordingly, the staffs of diplomatic missions (embassies) are afforded the highest level of privileges and immunities in the host country in order that they may effectively perform their important duties. Under modern international law (reflected in the Vienna Convention on Diplomatic Relations), however, there are different categories of persons within each diplomatic mission, some of whom enjoy greater immunities than others.

The categories of diplomatic mission personnel are defined primarily with reference to the functions performed.¹ Diplomatic agent is the term for ambassadors and the other diplomatic officers who generally have the function of dealing directly with host country officials. This category enjoys the highest degree of immunity. The next category is "members of the administrative and technical staff" of the mission, which includes those persons who support the activities of diplomatic agents. This category includes secretaries, certain clerical personnel, office managers, and certain professional security personnel. Members of the administrative and technical staff enjoy privileges and immunities which in some respects are less than diplomatic agents. Finally, there are the

"members of the service staff" of the diplomatic mission who perform tasks such as driving, cleaning, and building and grounds maintenance. These persons are afforded significantly less in the way of privileges and immunities. The privileges and immunities of each of these groups is explained in more detail below, and a table is provided to summarize the privileges and immunities of greatest interest to law enforcement personnel.² Also provided is an explanation of important exceptions to the general rules. (A discussion of tax and customs duty exemptions and other privileges not of immediate concern to law enforcement and judicial authorities is not included in this booklet.)

Diplomatic Agents. Diplomatic agents enjoy the highest degree of privileges and immunities. They enjoy complete personal inviolability, which means that they may not be handcuffed (except in extraordinary circumstances), arrested, or detained; and neither their property (including vehicles) nor residences may be entered or searched. Diplomatic agents also enjoy complete immunity from the criminal jurisdiction of the host country's courts and thus cannot be prosecuted no matter how serious the offense unless their immunity is waived by the sending state (see discussion below). While it is not ordinarily of concern to police authorities, they also have immunity from civil suit except in four very limited circumstances: (a)

¹The definition of these categories is general since the category into which specific individuals fall may differ depending on reciprocal practices with the countries concerned. Law enforcement personnel, however, do not need to worry about these distinctions in operational situations. Their responsibility is to assure that the appropriate degree of immunity is afforded once the person concerned has been precisely identified.

²The private servants of diplomatic personnel enjoy no jurisdictional immunity or inviolability in the United States.

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in connection with real property transactions not conducted on behalf of the mission; (b) in connection with any role they may play as executor for or heir to an estate being distributed in the host country; (c) in connection with the performance of professional or commercial activities outside the scope of their official duties; or (d) in respect of counterclaims on the same subject matter when they have been the initiating party in a suit. Finally, they enjoy complete immunity from the obligation to provide evidence as witnesses and cannot be required to testify even, for example, if they have been the victim of a crime.

Family members forming part of the household of diplomatic agents enjoy precisely the same privileges and immunities as do the sponsoring diplomatic agents.³

Members of Administrative and Technical Staff. Members of the administrative and technical staff of a diplomatic mission perform tasks critical to the inner workings of the embassy. Accordingly, they enjoy privileges and immunities identical to those of diplomatic agents in respect of personal inviolability, immunity from criminal jurisdiction, and immunity from the obligation to provide evidence as witnesses. Their immunity from civil jurisdiction, however, is quite different. Members of the administrative and technical staff enjoy immunity from civil jurisdiction only in connection with the performance of their official duties. This is commonly known as official acts or functional immunity and is explained in more detail in the section below addressing consular privileges and immunities.

Like those of diplomatic agents, the recognized family members of administrative and technical staff enjoy the same privileges and

immunities from the host country's criminal jurisdiction as their sponsors. Since these family members have no official duties to perform, they enjoy no immunity from civil jurisdiction.

Members of Service Staff. Members of the service staff of diplomatic missions perform less critical support tasks for the missions and are accorded much less in the way of privileges and immunities than are those in the other categories. Service staff members have official acts immunity only (see further explanation below) and they enjoy no personal inviolability, no inviolability of property, and no immunity from the obligation to provide evidence as witnesses. The families of service staff members enjoy no privileges or immunities.

Nationals or Permanent Residents of the United States. The general rules set forth above assume that the staff members of the diplomatic mission are nationals of the sending country or some third country. The United States, as a matter of policy, does not normally accept as diplomatic agents its own nationals, legal permanent residents of the United States or others who are "permanently resident in" the United States.⁴ The family members of diplomatic agents enjoy no privileges or immunities if they are nationals of the United States. Members of the administrative and technical staff (including their families) and members of the service staff enjoy no privileges and immunities if they are U.S. nationals, legal permanent residents, or foreign nationals "permanently resident in" the United States.

Police officers should not have to deal with this distinction since the U.S. Department of State issues identification cards (see further discussion below) with the nationality principle in mind. However, it is important for law enforce-

³The United States defines members of the household to include: spouses, children until the age of 21 (until the age of 23 if they are full-time students at an institution of higher learning), and such other persons expressly agreed to by the U.S. Department of State in extraordinary circumstances.

⁴A member of a mission, other than a diplomatic agent, "permanently resident in" the United States for purposes of Article 38(2) of the VCDR and Article 71(2) of the VCCR enjoys no privileges and immunities pursuant to the Vienna Conventions.

ment officials to understand these principles generally, because they could confront a situation wherein a U.S. citizen spouse of a foreign national diplomatic agent (who lacks the correct identity documents) attempts to establish his or her immunity solely on the basis of proving a relationship with the diplomatic agent.

Special Bilateral Agreements. There are some countries with which the United States has concluded bilateral agreements which grant to all members of the staff of their respective embassies (provided that they are nationals of the sending country) the privileges and immunities to which only diplomatic agents are normally entitled. Identification cards will reflect this status but police officers should be aware of this distinction because they may have to confront situations where a chauffeur or mechanic from the embassy of one of these countries asserts a right to full diplomatic privileges and immunities.

Temporary Duty. Persons sent to the United States on short-term official duty with diplomatic missions ordinarily do not enjoy any privileges and immunities (law enforcement authorities should nonetheless always seek prompt verification from the U.S. Department of State in particular cases involving such individuals).

Waiver. Always keep in mind that privileges and immunities are extended from one country to another in order to permit their respective representatives to perform their duties effectively; in a sense, it may be said the sending countries "own" these privileges and immunities. Therefore, while the individual enjoying such immunities may not waive them, the sending States can, and do. Police authorities should never address the alleged commission of a crime by a person enjoying full criminal immunity with the belief that there is no possibility that a prosecution could result. **The U.S. Department of State requests waivers of immunity in every case where the prosecutor advises that, but for the immunity, charges would be pursued.** In serious cases,

if a waiver is refused, the offender will be expelled from the United States and the U.S. Department of State will request that a warrant be issued and appropriate entries to the National Crime Information Center (NCIC) database be made by the responsible jurisdiction. The seeking of waiver of immunity is handled entirely via diplomatic channels, but effective and informed police work becomes the basis of the prosecutor's decision and the foundation for the U.S. Department of State's waiver requests and any subsequent prosecutions or expulsions.

Members of Consular Posts (Normal and Special Bilateral)

Consulate personnel perform a variety of functions of principal interest to their respective sending countries (e.g., issuance of travel documents, attending to the difficulties of their own countrymen who are in the host country, and generally promoting the commerce of the sending country). Countries have long recognized the importance of consular functions to their overall relations, but consular personnel generally do not have the principal role of providing communication between the two countries—that function is performed by diplomatic agents at embassies in capitals. The 1963 Vienna Convention on Consular Relations grants a very limited level of privileges and immunities to consular personnel assigned to consulates that are located outside capitals. There is a common misunderstanding that consular personnel have diplomatic status and are entitled to diplomatic immunity.

Consular Officers. Consular officers are those members of consular posts who are recognized by both the sending and the host country as fully authorized to perform the broad array of formal consular functions. They have only official acts or functional immunity in respect of both criminal and civil matters and their personal inviolability is quite limited. Consular officers may be arrested pending trial only

if the offense is a felony and that the arrest is made pursuant to a decision by a competent judicial authority (e.g., a warrant issued by an appropriate court).³ They can be prosecuted for misdemeanors, but remain at liberty pending trial or other disposition of charges. Property of consular officers is not inviolable. Consular officers are not obliged to provide evidence as witnesses in connection with matters involving their official duties, to produce official documents, or to provide expert witness testimony on the laws of the sending country. Absent a bilateral agreement, the family members of consular officers enjoy no personal inviolability and no jurisdictional immunity of any kind.

As indicated, official acts immunity pertains in numerous different circumstances. No law enforcement officer, State Department officer, or diplomatic mission or consulate is authorized to determine whether a given set of circumstances constitutes an official act. This is an issue which may only be resolved by the court with subject matter jurisdiction over the alleged crime. Thus, a person enjoying official acts immunity from criminal jurisdiction may be charged with a crime and may, in this connection, always be required to appear in court (in person or through counsel). At this point, however, such person may assert as an affirmative defense that the actions complained of arose in connection with the performance of official acts. If, upon examination of the circumstances complained of, the court agrees, then the court is without jurisdiction to proceed and the case must be dismissed.

Consular officers who are full-time practitioners of consular functions are referred to as "career" consular officers. These officers are normally nationals of the sending country who are sent to the United States to perform these

functions for a specific period and then are transferred to a further assignment. Career consular officers are prohibited by international law from engaging in professional or commercial activities outside the scope of their official consular functions.

Consular Employees. Consular employees perform the administrative and technical support services for the consular post. They have no personal inviolability, only official acts immunity, and enjoy immunity from the obligation to provide evidence as witnesses only in respect of official acts. Their family members enjoy no personal inviolability or jurisdictional immunities of any kind.

Consular Service Staff. Consular service staff do not enjoy personal inviolability or jurisdictional immunity of any kind, but they do have immunity from the obligation to provide evidence as witnesses in respect of official acts. Their family members enjoy no personal inviolability or jurisdictional immunity of any kind.

Nationals or Permanent Residents of the United States. Consular employees and consular service staff who are U.S. nationals, legal permanent residents, or who are permanently resident in the United States, enjoy no personal inviolability or jurisdictional immunity in the United States. (See footnote 4 on page 5.)

Honorary Consuls. Honorary consuls are American citizens or permanent resident aliens who perform consular services on a part-time basis. Honorary consuls, unlike career consuls, are permitted to carry on another business. These persons have "official acts" immunity only and immunity from the obligation to provide evidence as witnesses only in respect of official acts. They do not enjoy personal inviolability and may be arrested pending trial if cir-

³Police officers should note this distinction carefully. In connection with other categories discussed in this booklet, either a person is absolutely protected from arrest or, alternatively, he or she has no immunity from arrest whatsoever. In the case of career consular officers, such arrest may be carried out **only** if the police officer is operating under the authority of a warrant or similar judicial authorization. Note, however, the discussion below of the public safety prerogatives of police authorities.

circumstances should otherwise warrant. Family members enjoy no immunity or personal inviolability. Honorary consuls are issued official identification cards by the Department of State.

Special Bilateral Agreements. In some cases, a country and the United States have concluded a bilateral consular agreement that grants to members of the staff of their consulates (provided they are not U.S. nationals, legal permanent residents, or permanently resident in the United States) privileges and immunities approximating those afforded diplomatic agents. Law enforcement officers should be aware that these arrangements are not uniform and the State Department identification cards issued to these persons reflect the appropriate level of immunity.

Temporary Duty. Persons sent to the United States on short-term official duty with diplomatic missions ordinarily do not enjoy any privileges and immunities (law enforcement authorities should nonetheless always seek prompt verification from the U.S. Department of State in particular cases involving such individuals).

Waiver. As is the case with members of the staffs of diplomatic missions, the sending country may always waive the privileges or immunities of members of its consular posts. This is less likely to be an issue for consular personnel, however, since their immunities are so limited.

International Organization Personnel and National Missions to Such Organizations

International organizations, such as the United Nations, are relatively modern entities. The privileges and immunities of the personnel of such organizations and the personnel of national missions to such organizations have a different basis than that of diplomatic and consular representatives. In the case of international organizations, the nations concerned have

agreed that the important purposes of such organizations may be accomplished only if a certain measure of privileges and immunities are afforded to their participants. The nations concerned have concluded treaties embodying such grants of privileges and immunities. Some, including the United States, enacted domestic legislation granting specific privileges and immunities to certain categories of persons not covered by the treaties. In determining the degree of inviolability or immunity, law enforcement officers will be guided primarily by the identity documents that have been issued to such persons. The following, however, provides a general overview of the distribution of privileges and immunities in connection with international organizations.

Personnel of International Organizations. International organizations that have headquarters or other offices in the United States are staffed with administrative and executive employees, as necessary, to carry out their functions. The vast majority of these employees enjoy only official acts immunity as provided for in U.S. domestic legislation (the International Organizations Immunities Act, 22 U.S.C. 2881) and no personal inviolability. In certain cases, however, the most senior executives of such organizations have been accorded privileges and immunities equal to those afforded diplomatic agents. This is the case for the Secretary General of the United Nations and for all Assistant Secretaries-General of the United Nations, Principal Resident Representatives of the International Monetary Fund and the World Bank, as well as some senior officials of the Organization of American States secretariat.

Personnel of National Missions to International Organizations. The United Nations and the Organization of American States are headquartered in the United States, and most of their member States maintain permanent missions to the headquarters in the United States. The permanent representatives staffing these missions are accredited to the international or-

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ganization concerned (not to the United States), but their privileges and immunities are nonetheless often defined by reference to the status of diplomatic personnel who are accredited to the United States.

As is the case with diplomatic missions, the assignment of privileges and immunities is differentiated generally on the basis of the functions performed. The most senior representatives in these missions to international organizations have privileges and immunities equivalent to those afforded diplomatic agents. The remainder of the staffs of these missions have only official acts immunity pursuant to the International Organizations Immunities Act and no personal inviolability.

Short-term official visitors from other States to the United Nations or to international conferences convened by the United Nations may enjoy full diplomatic immunity equivalent to that afforded diplomatic agents. Owing to the temporary nature of their visit, such officials will normally not have the usual official identity documents recognizable in the United States. Law enforcement officials (particularly in New York) should be sensitive to the existence of this situation and always coordinate with the U.S. authorities indicated on page 13 if confronted with an apparent offender appearing to fall into this category.

IV

Identification of Persons Entitled to Privileges and Immunities in the United States

IT IS CRITICAL FOR A LAW ENFORCEMENT OFFICER to identify quickly and accurately the status of any person asserting immunity. Numerous documents are associated with foreign diplomats; only one provides an accurate indication of the status of the holder. This section endeavors to explain the array of documents and clarify for police officers which one may be relied upon.

Identification Cards Issued by the U.S. Department of State

The only authoritative identity document is the identity card issued by the U.S. Department of State, Office of Protocol or by the U.S. Mission to the United Nations, in the case of persons accredited to the United Nations. There are three types of identification cards (see sample cards on page 21—23): Diplomatic (blue border for diplomats), Official (green border for embassy employees), and Consular (red border for consular personnel). The identification cards are 3³/₄" x 2¹/₂" and contain a photograph of the bearer. The bearer's name, title, mission, city and state, date of birth, identification number, expiration date, and a U.S. Department of State seal appear on the front of the card. A brief statement of the bearer's criminal immunity is printed on the reverse side. Space is provided for the bearer's signature. While this form of identification is generally to be relied upon, law enforcement authorities are nonetheless urged to immediately seek verifi-

cation as indicated below in connection with any serious incident or in any case where they have reason to doubt the validity of the card. Police officers should be alert to the fact that newly arrived members of diplomatic and consular staffs may not yet have these official identity documents and should contact the U.S. Department of State, Office of Protocol, for verification if confronted with such situations.

Foreign Diplomatic Passports and U.S. "Diplomatic" Visas: Not Conclusive

Foreign diplomatic passports containing U.S. "A" or "G" visas are issued to a broad range of persons, including those who are not accredited to the United States or to international organizations and who therefore enjoy no privileges and immunities in the United States.⁶ This situation is often not fully understood, even by the bearers of such documents, so police officers must be alert to good faith, but erroneous, assertions of immunity by those not entitled to it.

The possession of these documents is an indication that the bearer **might** be entitled to privileges and immunities in the United States. As mentioned above, temporary duty visitors to the United Nations might have only such documents and might nonetheless be entitled to immunity in the United States. A similar situation could arise in connection with the foreign officer who has just joined a diplomatic mis-

⁶All foreign personnel assigned to official duty at bilateral diplomatic or consular missions in the United States would have A-category visas. G-category visas are issued to foreigners assigned to duty at an international organization in the United States or at a foreign country's mission to such organization.

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sion or consular post and has not yet received the appropriate U.S. identity documents. In cases of doubt, police officers should always coordinate with U.S. authorities (see **Telephonic Information/Verification**, page 13).

Tax Exemption Cards: Not Conclusive

Under international law, many members of diplomatic missions and consular posts and certain people associated with international organizations would normally be entitled to exemption from sales taxation in the United States. However, significant numbers of these individuals do not enjoy this privilege owing to considerations based on reciprocity. The U.S. Department of State issues tax exemption cards to all those entitled to such exemptions, but tax cards do not give a definitive indication of the degree of immunity of the bearer. (See sample tax exemption card on page 24.) Accordingly, tax exemption cards should not be relied upon for immunity purposes and should be considered only as an indication that the bearer may enjoy some degree of immunity.

Automobile Registration, License Plates, Driver Licenses: Not Conclusive

The U.S. Department of State, through its Office of Foreign Missions' Diplomatic Motor Vehicle Office, has jurisdiction over the registration of vehicles, the issuance of distinctive license plates for those vehicles, and the issuance of operators permits for individuals who enjoy privileges and immunities in the United States. (See sample Non-Driver ID and Drivers License cards on page 25.) As is the case with tax exemption cards, these Federal registration documents and drivers licenses do not definitively reflect the degree of privileges and immunities of the bearer. They should be relied upon only as an indication that the bearer may enjoy some degree of immunity.

Vehicle license plates issued by the U.S. Department of State must be understood properly by law enforcement authorities in order to avoid confusion. The plates are coded to reflect the degree of immunity which the registered owner of the vehicle enjoys:

Plates with a "D" prefix or suffix are issued to diplomatic missions and those members who hold diplomatic rank.

Plates with a "C" prefix are issued to consular missions and career consular officers.

Plates with a "S" prefix are issued to the administrative and technical staff at diplomatic missions and consular employees at consular missions.

Plates with an "A" prefix or suffix are issued to official vehicles of the Secretariats of the United Nations and the Organization of American States and the personally owned vehicles of those staff members who have diplomatic status.

The U.S. Department of State's distinctive license plates are designed to assist officers in identifying vehicles that belong to foreign missions and those mission members who may enjoy some degree of immunity. However, those plates alone should not be considered verification of the status of the vehicle's operator. For example, police officers should bear in mind that a diplomatic agent who is visiting a consulate may be driving a car with "C" plates. Or a U.S. citizen who is the spouse of a diplomat may be driving a car with "D" plates even though he or she does not have immunity. (Conversely, a diplomatic agent or consular officer may be driving a rented or borrowed car that does not have any type of U.S. Department of State license plate.) These examples serve to emphasize the point that, whatever kind of license plate is on a vehicle, police officers need to verify with the Depart-

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ment of State's Office of Protocol a driver's claim of diplomatic or consular status.

A vehicle registration card is issued at the time of initial registration and registration renewal. It contains the following information: name and address of the registered owner, license plate number, vehicle identification number, vehicle make, vehicle model, vehicle color, date of initial registration, and expiration date of the current registration. Decals with the month and year reflecting the expiration date of the current registration period are issued with the card and must be displayed on the vehicle's rear license plate.

The U.S. Department of State's vehicle registration and driver license status records are available to law enforcement agencies through the National Law Enforcement Telecommunications System (NLETS). Agencies may access these records using the standard NLETS regis-

tration and driver query formats. NLETS has assigned state code (destination ORI) "US" to this data base. If an agency requires additional motor vehicle information, it can be obtained telephonically (see page 13) or by sending an Administrative Message to "DCDOS015V."

Telephonic Information/Verification

In all cases, including those in which the individual provides a U.S. Department of State-issued identification card, the law enforcement officer should verify the immunity status with the U.S. Department of State.

Department of State representatives are available 24-hours daily to assist in emergency situations and when immediate confirmation of a person's status is required. The following telephone numbers are provided for use in this connection.

List of Useful Telephone Numbers

For Information on Diplomatic and Consular Personnel and Personnel of International Organizations Other Than the United Nations

During Normal Business Hours

Current status of U.S. Department of State Federal license tags, registrations, or other motor vehicle information: (202) 895-3532
Fax—(202) 895-3646

Current status of U.S. Department of State driver licenses and general licensing information: (202) 895-3521

For reporting traffic incidents or accidents, issuance of citations, etc., involving foreign missions personnel: (202) 895-3521

Current status of:

Diplomatic agents and family members (202) 647-1664
Embassy administrative, technical, and service staff and families (202) 647-1405
Consular personnel and families (202) 647-1404
International Organizations (202) 647-1402

Please send copies of incident reports and citations to:

Diplomatic Security Service, Protective Liaison Division Fax—(202) 895-3613

After Normal Business Hours

All inquiries should be made to the Diplomatic Security Watch Officer, Department of State (operates 24-hours daily): (202) 647-7277

For Information on United Nations Personnel

During Normal Business Hours

Current status of:

Diplomatic agents and family members (212) 415-4131
U.N. Mission staff and family member (212) 415-4168
U.N. Secretariat employees (212) 415-4131 or (212) 415-4168
U.S. Department of State license tags, registration, or other motor vehicle information (212) 826-4500

After Normal Business Hours

Information is available from the Communications Section of the U.S. United Nations (operates 24-hours daily): (212) 415-4444

Please send copies of police reports to: USUN Host Country Fax—(212) 415-4162

V

Terms and Procedures

Correct Understanding of Immunity

Frequently (and erroneously), immunity is understood to mean pardon, total exoneration, or total release from the responsibility to comply with the law. In actuality, immunity is simply a legal barrier which precludes U.S. courts from exercising jurisdiction over cases against persons who enjoy it and in no way releases such persons from the duty, embodied in international law, to respect the laws and regulations of the United States. Even those who properly understand the concept of immunity sometimes erroneously believe that it is senseless to waste valuable police time in the investigation and paperwork essential to building a legal case on the assumption that there is no possibility that a conviction will result. However, there are diplomatic remedies available to deal with such persons even when immunity bars prosecution and conviction. As explained below, there are a number of important reasons for police authorities to give careful attention to the documentation of incidents involving persons enjoying privileges and immunities. Such incidents should always be promptly reported to the U.S. Department of State.

Personal Inviolability vs. Public Safety

Personal inviolability is enjoyed to some degree by a majority of foreign diplomatic and consular personnel. This inviolability generally precludes handcuffing, arrest, or detention in any form and forbids U.S. authorities from entering the residences, automobiles, or other property of protected persons. Personal invio-

lability is, however, qualified by the understanding, well established in international practice, that the host country does not give up its right to protect the safety and welfare of its populace and retains the right, in extraordinary circumstances, to prevent the commission of a crime. Thus, in circumstances where public safety is in imminent danger or it is apparent that a grave crime may otherwise be committed, police authorities may intervene to the extent necessary to halt such activity. This naturally includes the power of the police to defend themselves from personal harm.

Waiver of Immunity

Diplomatic and consular immunity are not intended to benefit the individual; they are intended to benefit the mission of the foreign government or international organization. Thus an individual does not "own" his or her immunity and it may be waived, in whole or in part, by the mission member's government. The U.S. Department of State will request a waiver of immunity in every case in which the prosecutor advises that he or she would prosecute but for immunity. The U.S. Department of State's ability to secure such waiver may depend to a large degree on the strength (and documentation) of the case at issue. Similarly, it is of little avail for the U.S. Department of State to secure a waiver of immunity in a particular case, if the case has not been developed with sufficient care and completeness to permit a successful subsequent prosecution. Proper documentation and reporting by law enforcement authorities plays a critical role in both of these respects.

Expulsion Procedure

The criminal immunity that foreign diplomatic and some consular personnel enjoy protects them from the normal jurisdiction of the courts with respect to alleged criminal activity. However, in those instances in which a person with immunity is believed to have committed a serious offense (any felony or crime of violence) and the sending State has not acceded to the U.S. Department of State's request for a waiver of immunity, it is the Department's policy to require the departure of that individual from the United States. Requiring the departure of a person who enjoys immunity is an extreme diplomatic tool and it is only used after the most careful consideration to ensure that the United States is not perceived as having acted in an arbitrary, capricious, or prejudiced manner. A high standard of police investigation, records, and reporting in diplomatic incident cases is therefore essential to permit the Department to make the appropriate decision.

Official Acts Immunity

As explained in Section III, consular officers, official acts immunity is not a *prima facie* bar to the exercise of jurisdiction by U.S. courts. Rather, it is an affirmative defense to be raised before the U.S. court with subject matter jurisdiction over the alleged crime. Only such court, in the full light of all the relevant facts, determines whether the action complained of was an official act. Should the court determine that official acts immunity applies in a certain case, international law precludes the further exercise of jurisdiction by the United States. Judicial determination in a case of this type is very much dependent on the facts surrounding the incident;

therefore, a full and complete police report may be critical in permitting the court to make a just decision.

Termination of Immunity

Criminal immunity precludes the exercise of jurisdiction by the courts over an individual whether the incident occurred prior to or during the period in which such immunity exists. This jurisdictional bar is, however, not a perpetual benefit. With the exception of immunity for official acts (which exists indefinitely), criminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying immunity. Therefore, obtaining an indictment, information, or arrest warrant could lay the basis for a prosecution at a later date, e.g., if the diplomat returns to the United States at a later date in a private capacity. Moreover, the existence of an outstanding arrest warrant may be entered into the records of the National Crime Information Center (NCIC) and thus serve to bar the subsequent issuance of a U.S. visa permitting such person to enter the United States.

Archives

The archives and official documents of a diplomatic or consular post are inviolable at all times and wherever they may be. The consular archives and documents of a consular post headed by an honorary consular officer are inviolable provided they are kept separate from other papers and documents of a private or commercial nature relating to other activities of an honorary consular officer or persons working with that consular officer.

VI Handling Incidents

U.S. Department of State Policy

It is the policy of the U.S. Department of State with respect to alleged criminal violations by persons with immunity from criminal jurisdiction to encourage law enforcement authorities to pursue investigations vigorously, to prepare cases carefully and completely, and to document properly each incident so that charges may be pursued as far as possible in the U.S. judicial system.

The U.S. Department of State will, in all incidents involving persons with immunity from criminal jurisdiction, request a waiver of that immunity from the sending State if the prosecutor advises that but for such immunity he or she would prosecute or otherwise pursue the criminal charge. If the charge is a felony or any crime of violence, and the sending State does not waive immunity, the U.S. Department of State will require that person to depart the United States and not return but to submit to the jurisdiction of the court with subject matter jurisdiction over the offense. Upon departure, the Department will request that law enforcement issue a warrant for the person's arrest so that the name will be entered in NCIC.

General Procedures

The vast majority of persons entitled to privileges and immunities in the United States are judicious in their actions and keenly aware of the significance attached to their actions as representatives of their sending State. On occasion, however, one of them may become involved in criminal misconduct. The more com-

mon violations are traffic (illegal parking, speeding, reckless driving, and DWI), shoplifting, and assault.

Whatever the offense or circumstances of contact, law enforcement officers should keep in mind that such persons are official representatives of foreign governments who are to be accorded the maximum degree of respect possible under the circumstances. It is not an exaggeration to say that police handling of incidents in this country may have a direct effect on the treatment of U.S. diplomatic or consular personnel abroad.

When a law enforcement officer is called to the scene of a criminal incident involving a person who claims diplomatic or consular immunity, the first step should be to verify the status of the suspect. Should the person be unable to produce satisfactory identification and the situation be one that would normally warrant arrest or detention, the officer should inform the individual that he or she will be detained until his or her identity can be confirmed. **In all cases, including those in which the suspect provides a State Department-issued identification card, the law enforcement officer should verify the status with the U.S. Department of State or in the case of the U.N. community, with the U.S. Mission to the United Nations.** Once the status is verified, the officer should prepare his or her report, fully describing the details and circumstances of the incident in accordance with normal police procedures. If the suspect enjoys personal inviolability, he or she may not be handcuffed, except when that individual poses an immediate threat

to safety, and may not be arrested or detained. Once all pertinent information is obtained, that person must be released. A copy of the incident report should be faxed or mailed to the U.S. Department of State in Washington, D.C., or to the U.S. Mission to the U.N. in New York in cases involving the U.N. community, as soon as possible. Detailed documentation of incidents is essential to enable the U.S. Department of State to carry out its policies.

Traffic Enforcement

Stopping a mission member or dependent and issuing a traffic citation for a moving violation does not constitute arrest or detention and is permitted. However, the subject may not be compelled to sign the citation. In all cases, officers should follow their departmental guidelines and document the facts of the case fully. A copy of the citation and any other documentation regarding the incident should be forwarded to the U.S. Department of State as soon as possible. For "must appear" offenses, the Department uses the citation and any report as the basis for requesting an "express waiver of immunity." Individuals cited for prepayable offenses are given the option of paying the fine or obtaining a waiver in order to contest the charge.

In serious cases, e.g., DWI, DUI, personal injury, accidents, telephonic notification to the U.S. Department of State is urged. The officer should follow his or her department's guidelines with respect to the conduct of a field sobriety investigation. If appropriate, standardized field sobriety testing should be offered and the results fully documented. **The taking of these tests may not be compelled.** If the officer judges the individual too impaired to drive safely, the officer should not permit the individual to continue to drive (even in the case of diplomatic agents). Depending on the circumstances, there are several options. The officer may, with the individual's permission, take the

individual to the police station or other location where he or she may recover sufficiently to drive. The officer may summon, or allow the individual to summon, a friend or relative to drive; or the police officer may call a taxi for the individual. If appropriate, the police may choose to provide the individual with transportation.

The U.S. Department of State's Diplomatic Motor Vehicle Office maintains driver histories on all its licensees and assesses points for moving violations. Drivers who demonstrate a pattern of bad driving habits or who commit an egregious offense such as DWI are subject to having their licenses suspended or revoked as appropriate. This policy can be enforced effectively only if all driving infractions (DWI, DUI, reckless driving, etc.) are reported promptly to the U.S. Department of State. It is U.S. Department of State policy to assign "points" for driving infractions and to suspend the operators license of foreign mission personnel who abuse the privilege of driving in the United States by repeatedly committing traffic violations and demonstrating unsafe driving practices.

The property of a person enjoying full criminal immunity, including his or her vehicle, may not be searched or seized. Such vehicles may not be impounded or "booted" but may be towed the distance necessary to remove them from obstructing traffic or endangering public safety. If a vehicle that is owned by a diplomat is suspected of being stolen or used in the commission of a crime, occupants of the vehicle may be required to present vehicle documentation to permit police verification of the vehicle's status through standard access to NLETS (use access code US). Should the vehicle prove to have been stolen or to have been used by unauthorized persons in the commission of a crime, the inviolability to which the vehicle would normally be entitled must be considered temporarily suspended, and normal search of the vehicle and, if appropriate, its detention, are permissible.

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Vehicles registered to consular officials, including those with full criminal immunity, and consulates are **not** inviolable and may be towed, impounded, or booted in accordance with local procedures. The U.S. Department of State should be notified if a consular vehicle has been detained or impounded so that its Office of Foreign Missions can follow up with the proper consular official or mission.

Federal license plates issued by the U.S. Department of State are not the property of the diplomat or of a diplomatic mission and remain the property of the Department at all times. As such, they must be surrendered to the U.S. Department of State when recalled. Similarly, these license plates may not be transferred from the

vehicle to which they were assigned by the U.S. Department of State without the authorization of its Office of Foreign Missions.

In cases where the officer at the scene has determined that the vehicle is being operated without insurance and/or has verified with the U.S. Department of State that the vehicle bearing U.S. Department of State license plates is not the vehicle for which those plates were intended, the Department may request that the local law enforcement agency impound the plates and return them to the Department. Such impoundment should only be upon the request of the U.S. Department of State. Subsequent detention of the vehicle must conform to the guidelines above.

VII Conclusion

IT IS IMPORTANT THAT LAW ENFORCEMENT and judicial authorities of the United States always treat foreign diplomatic and consular personnel with respect and with due regard for the privileges and immunities to which they are entitled under international law. Any failure to do so has the potential of casting doubt on the commitment of the United States to carry out its international obligations or of negatively influencing larger foreign policy interests. As stated above, however, appropriate caution should not become a total "hands off" attitude in connection with criminal law enforcement actions involving diplomats.

Foreign diplomats who violate traffic laws should be cited. Allegations of serious crimes should be fully investigated, promptly reported to the U.S. Department of State, and procedurally developed to the maximum permissible extent. Local law enforcement authorities should never be inhibited in their efforts to protect the public welfare in extreme situations. The U.S. Department of State should be advised promptly of any serious difficulties arising in connection with diplomatic or consular personnel. Law enforcement and judicial authorities should feel free to contact the U.S. Department of State for general advice on any matter concerning diplomatic or consular personnel.

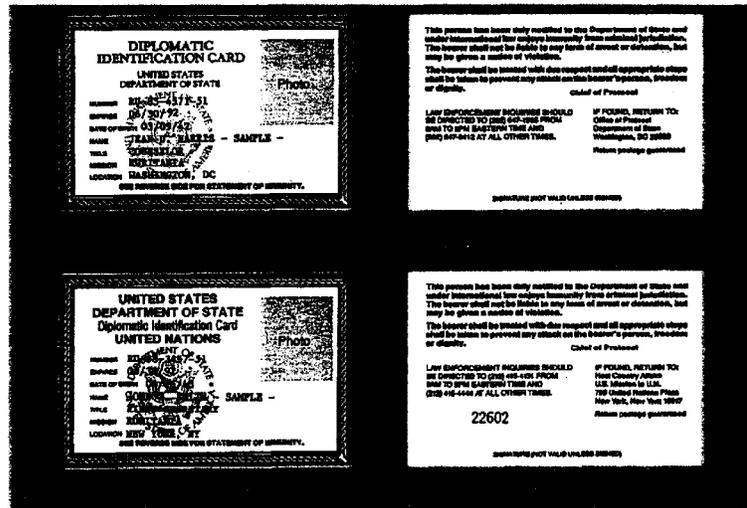
Add. 36

VIII Examples: Identifying Documents

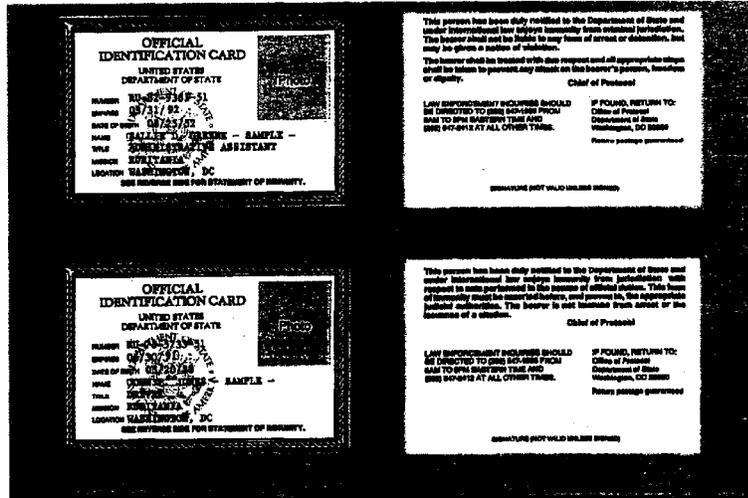
U.S. Department of State Identification Cards

The United States Department of State, Office of Protocol, issues identification documents to foreign government personnel who are entitled to immunity. Samples of the the identification cards are provided here. Because there are different degrees of immunity, law enforcement

officers should read carefully identification cards presented to them. Questions regarding an individual's status or immunity should be referred during working hours to the Office of Protocol, 202 647-1985; after hours to the Bureau of Diplomatic Security, 202 647-7277.



U.S. Department of State Identification Cards—continued



U.S. Department of State Identification Cards—continued

<p>CONSULAR IDENTIFICATION CARD UNITED STATES DEPARTMENT OF STATE</p> <p>NUMBER: BE-68-4781-51 EXPIRES: 04/30/92</p> <p>DATE OF BIRTH: 03/15/48 NAME: JOHN P. BENTY - SAMPLE - TITLE: CONSUL GENERAL RESIDENCE: NEW YORK, NY LOCATION: NEW YORK, NY SEE REVERSE SIDE FOR STATEMENT OF SECURITY.</p>	<p>This person has been duly recognized by the Department of State and under international law shall not be amenable to jurisdiction with respect to acts performed in discharge of consular functions. This form of immunity must be inserted before, and given to, the appropriate judicial authorities. The bearer shall receive the respect or deference pertaining thereto except on a warrant for a felony offense.</p> <p>The bearer shall be treated with this respect and a notice of violation may be issued.</p> <p>Chief of Protocol</p> <p>LAW ENFORCEMENT AGENCIES SHOULD BE CONTACTED TO OBTAIN IDENTIFICATION INFORMATION FROM THE BUREAU OF INVESTIGATION AND FBI AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: Chief of Protocol, Department of State, Washington, DC 20520. Return postage guaranteed.</p> <p>SIGNATURE NOT VALID UNLESS DATED</p>
<p>CONSULAR IDENTIFICATION CARD UNITED STATES DEPARTMENT OF STATE</p> <p>NUMBER: BE-63-4567-51 EXPIRES: 06/30/91</p> <p>DATE OF BIRTH: 03/19/30 NAME: JULIAN L. BRUNER - SAMPLE - TITLE: ADMINISTRATIVE OFFICER RESIDENCE: NEW YORK, NY LOCATION: NEW YORK, NY SEE REVERSE SIDE FOR STATEMENT OF SECURITY.</p>	<p>This person is recognized with the Department of State and under international law shall not be amenable to jurisdiction with respect to acts performed in the exercise of consular functions. This form of immunity must be inserted before, and given to, the appropriate judicial authorities. The bearer is not immune from arrest or the issuance of a citation.</p> <p>Chief of Protocol</p> <p>LAW ENFORCEMENT AGENCIES SHOULD BE CONTACTED TO OBTAIN IDENTIFICATION INFORMATION FROM THE BUREAU OF INVESTIGATION AND FBI AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: Chief of Protocol, Department of State, Washington, DC 20520. Return postage guaranteed.</p> <p>SIGNATURE NOT VALID UNLESS DATED</p>
<p>CONSULAR IDENTIFICATION CARD UNITED STATES DEPARTMENT OF STATE</p> <p>NUMBER: BE-75-1238-51 EXPIRES: 06/30/92</p> <p>DATE OF BIRTH: 04/26/40 NAME: JOHN L. BENTY - SAMPLE - TITLE: VICE CONSUL RESIDENCE: NEW YORK, NY LOCATION: NEW YORK, NY SEE REVERSE SIDE FOR STATEMENT OF SECURITY.</p>	<p>In accordance with a special agreement, this person's immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.</p> <p>The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any insult to the bearer's honor, freedom, or dignity.</p> <p>Chief of Protocol</p> <p>LAW ENFORCEMENT AGENCIES SHOULD BE CONTACTED TO OBTAIN IDENTIFICATION INFORMATION FROM THE BUREAU OF INVESTIGATION AND FBI AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: Chief of Protocol, Department of State, Washington, DC 20520. Return postage guaranteed.</p> <p>SIGNATURE NOT VALID UNLESS DATED</p>
<p>CONSULAR IDENTIFICATION CARD UNITED STATES DEPARTMENT OF STATE</p> <p>NUMBER: BE-63-4789-51 EXPIRES: 06/30/94</p> <p>DATE OF BIRTH: 01/24/40 NAME: JOHN P. BENTY - SAMPLE - TITLE: CONSUL GENERAL RESIDENCE: NEW YORK, NY LOCATION: NEW YORK, NY SEE REVERSE SIDE FOR STATEMENT OF SECURITY.</p>	<p>This person has been duly recognized by the Department of State and under international law shall not be amenable to jurisdiction with respect to acts performed in discharge of consular functions. This form of immunity must be inserted before, and given to, the appropriate judicial authorities. The bearer shall receive the respect or deference pertaining thereto except on a warrant for a felony offense.</p> <p>The bearer shall be treated with this respect and a notice of violation may be issued.</p> <p>Chief of Protocol</p> <p>LAW ENFORCEMENT AGENCIES SHOULD BE CONTACTED TO OBTAIN IDENTIFICATION INFORMATION FROM THE BUREAU OF INVESTIGATION AND FBI AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: Chief of Protocol, Department of State, Washington, DC 20520. Return postage guaranteed.</p> <p>SIGNATURE NOT VALID UNLESS DATED</p>

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U.S. Department of State Tax Exemption Card



NOT TRANSFERABLE

This card authorizes bearer, whose photo appears on reverse, to nationwide exemption from state and local sales taxes, restaurant and similar taxes normally charged to the consumer. Bearer may ask for additional identification.

IF FOUND PLEASE RETURN TO:

Office of Foreign Missions
U.S. Department of State
3607 International Place, N.W.
Washington, D.C. 20008-3034

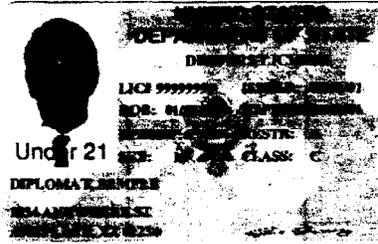
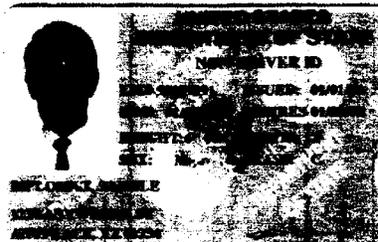
202-895-3563
Monday through Friday
9:00 a.m. - 4:00 p.m. EST

Return Postage Guaranteed
Rev. 08-95

Description: Background is powder blue; the strip at the bottom can be blue, yellow, red, green, or red/green; lettering is dark blue, black, and red; there are holograms of the U.S. Department of State seal and the wording "U.S. Department of State" covering the front of the card.

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U.S. Department of State Non-Driver ID and Drivers License



Any incidents, offenses
or inquiries involving the
license should be directed
to (202) 895-3621 between
8 a.m. - 5 p.m. EST. All other
times, call (202) 947-7277.
For all citations or reports
to (202) 895-3633.

Code:
0- No Restrictions
1- Corrective Lenses
2- Auto Trans/Manual Only
3- All Hand Controls
4- Blind, State Restrictions
5- Single/Driving Only
6- Aerial/Lifts
7- Two vehicle drivers
8- Other

Description: Background is powder blue; lettering is dark blue, black, and red; there are holograms of the U.S. Department of State seal and the wording "U.S. Department of State" covering the front of the card.

IX
Diplomatic and Consular Privileges and Immunities From Criminal Jurisdiction
Summary of Law Enforcement Aspects

Category	May Be Arrested or Detained	Residence May Be Entered Subject to Ordinary Procedures	May Be Issued Traffic Citation	May Be Subpoenaed as Witness	May Be Prosecuted	Recognized Family Members
Diplomatic	Diplomatic Agent	No ¹	No	Yes	No	Same as sponsor (full immunity and inviolability).
	Member of Administrative and Technical Staff	No ¹	No	Yes	No	Same as sponsor (full immunity and inviolability).
	Service Staff	Yes ²	Yes	Yes	Yes	No—for official acts. Otherwise, yes. ²
Consular	Career Consular Officers	Yes, if for a felony and pursuant to a warrant. ²	Yes ⁴	Yes	No—for official acts. Testimony may not be compelled in any case.	No—for official acts. Otherwise, yes. ²
	Honorary Consular Officers	Yes	Yes	Yes	No—for official acts. Yes, in all other cases.	No—for official acts. Otherwise, yes.
	Consular Employees	Yes ²	Yes	Yes	No—for official acts. Yes, in all other cases.	No—for official acts. Otherwise, yes. ²
International Organizations	International Organization Staff ³	Yes ²	Yes ²	Yes	No—for official acts. Yes, in all other cases.	No—for official acts. Otherwise, yes. ²
	Diplomatic-Level Staff of Missions to International Organizations	No ¹	No	Yes	No	Same as sponsor (full immunity and inviolability).
	Support Staff of Missions to International Organizations	Yes	Yes	Yes	No—for official acts. Yes, in all other cases.	No—for official acts. Otherwise, yes.

¹Reasonable constraints, however, may be applied in emergency circumstances involving self-defense, public safety, or the prevention of serious criminal acts.
²This table presents general rules. Particularly in the cases indicated, the employees of certain foreign countries may enjoy higher levels of privileges and immunities on the basis of special bilateral agreements.
³A small number of career officers are entitled to be treated identically to "diplomatic agents."
⁴Note that consular residences are sometimes located within the official consular premises. In such cases, only the official office space is protected from police entry.

ANTI-VIRUS CERTIFICATION

Case Name: Swarna v. Al-Awadi

Docket Number: 09-2525-cv(L)

I, Louis Bracco, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 6/2/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: June 2, 2010

CERTIFICATE OF SERVICE

09-2525-cv(L), 09-3615-cv (XAP) Swarna v. Al-Awadi

I hereby certify that two copies of this Brief for the United States of America as *Amicus Curiae* in Support of Affirmance was sent by Regular First Class Mail to:

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Cross-Appellant*

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Lenora M. Lapidus
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Amicus Curiae

I also certify that the original and five copies were also shipped via Hand delivery to:

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United States Courthouse
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New York, New York 10007
(212) 857-8576

on this 2nd day of June 2010.

Notary Public:

Sworn to me this

June 2, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

SAMANTHA COLLINS

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