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## **Persona Non Grata**

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## **(p. 61) *Persona Non Grata***

### **Article 9**

**1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.**

**2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.**

### **Historical background**

The fundamental principle that the receiving State need not continue to suffer in a diplomatic capacity an individual who had become unacceptable to it existed from the earliest period of diplomatic practice. In virtually all the early instances the conduct complained of consisted in political intrigue against the sending State. The authorities were agreed that the receiving State was fully entitled to 'expel' the offending diplomat at short notice and the debate concerned only whether it had competence to try him for a criminal offence.<sup>1</sup>

An early and celebrated case was that of Don Bernardino de Mendoza, Spanish Ambassador to Queen Elizabeth I of England, who was ordered to leave within fifteen days when investigations disclosed his involvement in a plot aimed at deposing the Queen and replacing her with Mary Queen of Scots. Queen Elizabeth sent an emissary to Spain to try to show that her quarrel was with Mendoza personally and not with the sending State—from whom another ambassador would be welcome. Although this attempt to continue friendly relations was unsuccessful, the practice of expelling a diplomat whose misdemeanour was deemed to be personal and not attributable to his sending State, became general.<sup>2</sup> Other celebrated cases where the facts became known were Bruneau, Secretary to the Spanish Ambassador, who was expelled by Henri IV of France, and Cellamare, a later Spanish Ambassador escorted to the frontier when his part in a conspiracy against the French Regent was discovered. Vattel, writing in 1750 when immunity from criminal jurisdiction had become a settled rule, emphasized that the receiving State should expel a diplomat only after appealing to the sending sovereign for justice or for recall of the offender.<sup>3</sup>

(p. 62) The practice advocated by Vattel became general during the more placid political climate of the nineteenth century. 'Expulsion' cases disappeared and requests for recall were complied with discreetly and without public demands for reasons, although the facts often became known and appeared in diplomatic handbooks. The United States complied with this practice by recalling their chargé d'affaires at Lima in 1846 after he had described a decree officially communicated to him by the Peruvian Ministry of Foreign Affairs as 'a compound of legal and moral deformities presenting to the vision no commendable lineament, but only gross and perverse obliquities'. The Secretary of State commented in his dispatch to Mr Jewett that:

if diplomatic agents render themselves so unacceptable as to produce a request for their recall from the government to which they are accredited, the instances must be rare indeed in which such a request ought not to be granted. To refuse it would be to defeat the very purpose for which they are sent abroad, that of cultivating friendly relations between independent nations.<sup>4</sup>

Britain, however, as in the similar case of *agrégation* discussed under Article 4, was unwilling to observe this new discretion—it expected reasons to be given for a request for recall and reserved the right to examine these reasons. Lord Palmerston, on the occasion of the dismissal of Sir Henry Bulwer, British Ambassador in Madrid, formulated British practice in these words:

The Duke of Sotomayor, in treating of that matter, seems to argue as if every government was entitled to obtain the recall of any foreign minister whenever, for reasons of its own, it might wish that he should be removed; but this is a doctrine to which I can by no means assent ... it must rest with the British government in such a case to determine whether there is or is not any just cause of complaint against the British diplomatic agent, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him, or by maintaining him at his post.<sup>5</sup>

These different views of the law came into direct conflict in 1888 when Lord Sackville, British Minister in Washington, became *persona non grata* with the US Government on the publication during an election campaign of a letter in which he had advised a former British subject how he should vote. The Marquis of Salisbury set out the British position thus:

It is of course open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.<sup>6</sup>

The United States had in fact furnished its reasons for requesting recall, but it maintained that Britain was under a duty to comply with its request and quoted Calvo as the true international rule:

When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offence committed by the (p. 63) agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not, at its pleasure, communicate the reasons on which it bases its request; but such an explanation cannot be required.<sup>7</sup>

In 1917 Satow concluded that it was impossible to reconcile these conflicting positions and wrote: 'The conclusion to be drawn is that any government has the right of asking for the recall of a foreign diplomatic agent on the ground that his continuance at his post is not desired, and the Government which has appointed him has an equal right of declining to withdraw him.'<sup>8</sup>

The Harvard Research in 1932 set out similar principles, but added the important proviso that: 'If a sending State refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as a member of a mission to have been terminated.'<sup>9</sup> Strictly, the receiving State can only refuse to receive or accept a member of a foreign

mission—it cannot with any effect ‘dismiss’ him or ‘declare his functions to be terminated’. The effect of the Harvard Research formulation was, however, in line with the general practice whereby the receiving State’s wish for recall prevailed over any resistance from the sending State.

## Negotiating history

There was general agreement in the International Law Commission and at the Vienna Conference that the preferable rules were that a request for recall must be granted and that reasons for such a request need not be given. There was debate only on whether the absence of obligation to give reasons should be expressly stated as in the Rapporteur’s original draft and in the final text of Article 9. A revised text submitted to the Commission in 1958 by Mr Tunkin and accepted by them was silent on the need to give reasons, although the Commission in its Commentary said that this was to be interpreted as meaning that the question was left to the discretion of the receiving State. At the Vienna Conference the French representative argued that once Article 4 had stated expressly that reasons need not be given for refusal of *agrément* there was risk of uncertainty unless similar provision was made in Article 9.<sup>10</sup>

Another amendment introduced by Belgium at the Conference spelt out the generally agreed principle that a person could be declared *persona non grata* prior to entry into the territory of the receiving State.<sup>11</sup> In such a case he could be denied leave to enter and would not acquire under the terms of Article 39(1) any entitlement to privileges or immunities.

Article 9 followed Article 13 of the Harvard Draft in providing for subordinate embassy staff a procedure analogous to that of *persona non grata* notification, but not involving the (p. 64) same formalities of diplomatic communication. The term used—‘not acceptable’—is an improvement on the expression used in the Harvard Draft—‘Objectionable Personnel’.<sup>12</sup>

## Subsequent practice

Article 9 has proved in practice to be a key provision which enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere in the Convention. During the last twenty years it has been used in response to conduct by members of diplomatic missions which was barely contemplated when the Convention was drawn up.

In the *Case concerning United States Diplomatic and Consular Staff in Tehran (Hostages Case)*,<sup>13</sup> the International Court of Justice (ICJ) considered the suggestion by Iran’s Minister of Foreign Affairs that the seizure of the US Embassy and detention of its diplomatic and consular staff as hostages should be examined in the context of ‘continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms’. The ICJ held that even if established, these alleged criminal activities could not justify Iran’s conduct ‘because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions’. They stressed that Article 9 provided a remedy for abuse of diplomatic functions and, because it imposed no obligation to give reasons, took account:

of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3(1)(d) of the 1961 Convention, of ‘ascertaining by

all lawful means conditions and developments in the receiving State' may be considered as involving such acts as 'espionage' or 'interference in internal affairs'.

Article 9 formed part of a 'self-contained regime' which foresaw possible abuse by members of missions and specified the means to counter such abuse. Iran had at no time declared any member of the diplomatic staff in Tehran *persona non grata*, and did not therefore 'employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains'.<sup>14</sup>

## Espionage

In the early years of the operation of the Vienna Convention, suspicion of spying was the most common reason for declaring a diplomatic agent *persona non grata* or 'requesting his recall'—the euphemistic expression standard in diplomatic usage. The most sensational example occurred in 1971 when, following repeated warnings to the Soviet Union to reduce the numbers of their KGB agents in diplomatic and trade establishments in London, the British Government requested the withdrawal of 105 Soviet officials. The (p. 65) Aide-Mémoire handed to the Soviet chargé d'affaires set out how the growth of intelligence gathering activities by Soviet officials in Britain constituted a direct threat to the security of the country, and stated that the recurring need to request withdrawals had imposed strains on Anglo-Soviet relations. It concluded:

The Soviet Embassy is therefore requested to arrange for the persons named on the attached list, all of whom have been concerned in intelligence activities, to leave Britain within two weeks from the date of this aide-mémoire. Henceforth:

- (a) the number of officials in (i) the Soviet Embassy (ii) the Soviet trade delegation and (iii) in all other Soviet organizations in Great Britain will not be permitted to rise above the levels at which they will stand after the withdrawal of the persons named in the attached list;
- (b) if a Soviet official is required to leave the country as a result of his having been detected in intelligence activities, the permitted level in that category will be reduced by one.

The officials were withdrawn within the two week period laid down and the ceiling imposed was rigorously policed and enforced—though not for some years—by a few further requests for withdrawal.<sup>15</sup> Other Western States also found it necessary to declare *persona non grata* large numbers of Soviet Union diplomats—Bolivia expelled 119 in 1972, Canada thirteen in 1978, France forty-seven in 1983 and a further twenty-five in 1985.<sup>16</sup>

The end of the Cold War diminished the number of diplomats declared *persona non grata* 'for activities incompatible with their status'—the standard euphemism for espionage. But in May 1996 Russia publicly accused Britain of running a spy ring and insisted on the withdrawal of four diplomats.<sup>17</sup> In 1990 the United States asked for the withdrawal of four Russian diplomats following the arrest of Robert Hansen, an FBI agent accused of having spied for Russia. The Russian Foreign Minister first said that Russia would expel exactly the same number of US diplomats, and on the following day four US diplomats were duly required to leave.<sup>18</sup> Poland and Estonia have also in recent years required the withdrawal of Russian diplomats found to be engaged in 'activities incompatible with their status'.<sup>19</sup>

Requests for withdrawal of diplomats from friendly countries on grounds of espionage are extremely rare. In 1988, however, Britain requested the withdrawal of an attaché at the Israel Embassy, suspected of working for the Israeli intelligence agency Mossad. Another

diplomat who had left was told he would not be permitted to return. In this case, however, it was made clear that the embassy could replace the two diplomats.<sup>20</sup>

In 1999 the Democratic Republic of Congo expelled for 'espionage' a British diplomat as well as a number of army and government officials. British Ministers publicly insisted that the team had been on a fact-finding tour as part of contingency planning for evacuation of British citizens in the event of an emergency in Kinshasa.<sup>21</sup>

### **(p. 66) Involvement in terrorist or subversive activities**

Although the earliest cases of expulsion of diplomats were on grounds of involvement in conspiracy against the receiving sovereign, requests for recall for such reasons were very unusual when the Vienna Convention was drawn up. In recent years they have been more frequent, and during the regime of Colonel Gaddafi often involved Libyan representatives. The use of the term 'expulsion' has returned—although this is usually no more than convenient shorthand to denote use of the procedure in Article 9. In June 1976 the Libyan Ambassador to Egypt was declared *persona non grata* after being detected distributing leaflets hostile to the regime of President Sadat and suspected of involvement in a clandestine operation against the Egyptian Government.<sup>22</sup> In April 1980 the US Department of State, following information that kidnappings and assassinations of opponents of the Libyan regime of Colonel Gaddafi might be attempted in the United States, declared two members of the Libyan diplomatic mission in Washington *persona non grata* for having engaged in unacceptable conduct and required them to leave the United States within forty-eight hours. A further four members of the mission were also expelled in the following month. Although the Libyan People's Bureau claimed that it was not a diplomatic mission (a separate issue discussed under Article 7 of the Convention) so that Article 9 of the Convention was not applicable, the individuals were duly withdrawn.<sup>23</sup> In June 1980 the Head of the Libyan People's Bureau in London was declared *persona non grata* following his comments on violent incidents involving Libyan dissidents in the United Kingdom.<sup>24</sup> Following the breach of relations between the United Kingdom and Libya in April 1984, Libyan interests in the United Kingdom were protected by Saudi Arabia. In December 1995 the head of the Libyan Interests Section of the Saudi Arabian Embassy—a Libyan diplomat—was required to leave following concern that he was involved in intimidation and surveillance of those opposed to Colonel Gaddafi's regime.<sup>25</sup>

In 1989 Burundi broke off diplomatic relations with Libya and expelled all Libyan nationals residing in Burundi, stating that this course had been taken because Libyan diplomats in particular, and Libyan nationals in general, 'had been participating in activities of destabilization putting the peace and general security of the Republic of Burundi in danger'. An ad hoc arbitral tribunal in *LAFICO and the Republic of Burundi* confirmed the right of Burundi to expel Libyan diplomats, while saying that the expulsion of other nationals was subject to some judicial control. The tribunal noted that: 'The circumstances in which requests for the recall of diplomatic agents can be made are quite different from the conditions for the expulsion of aliens in general. Paradoxically, the former group are less well protected than the latter group.'<sup>26</sup>

Diplomats from other States have also been required to leave following discovery of their implication in the threat or use of violence. In 1991 Germany required an Iraqi diplomat to depart on forty-eight hours notice following his illegal import of a Kalashnikov rifle used to threaten Kurdish demonstrators outside the Embassy of Iraq.<sup>27</sup> In 1995, the United Kingdom declared *persona non grata* an attaché in the Embassy of Iraq accused of collecting information for the Iraq Directorate-General of Intelligence about dissident students in Britain.<sup>28</sup> Three Syrian diplomats were declared *persona non grata* by the West German Government in 1986 following revelation of their complicity in supply of explosives used in terrorist attacks in Berlin.<sup>29</sup> Iranian diplomats were expelled in 1994 from

Argentina after an investigating judge found evidence linking them to the bombing of the Argentine–Jewish Mutual Aid Association which had killed nearly a hundred people.<sup>30</sup>

There have been several attempts by members of diplomatic missions to kidnap and repatriate opponents of the government of the sending State. In 1964, following the discovery in an Egyptian diplomatic bag at Rome airport—bound, gagged, and drugged—of an Israeli citizen who had formerly been an interpreter at the Egyptian Embassy in Rome, the Italian Government declared two Egyptian diplomats *persona non grata*.<sup>31</sup> In 1984 the implication of members of the Nigerian High Commission in the kidnapping of Umaru Dikko, a former Nigerian Minister living in London, and the attempt to remove him in a crate bearing labels addressed to the Nigerian Ministry of Foreign Affairs led to the expulsion of two members of the mission. The Nigerian High Commissioner was recalled for consultations in Lagos and it was indicated that his return to the United Kingdom would not be welcome.<sup>32</sup> Four Cuban diplomats attempted in 1985 to kidnap a Cuban refugee—formerly a Cuban Minister—from the streets of Madrid, were expelled by the Spanish Government, and left on the following day.<sup>33</sup> In 1994 the Government of Venezuela expelled four Iranian diplomats for kidnapping an Iranian dissident and holding him prisoner in a hotel with five members of his family. When the Iranian Ambassador protested he was himself also declared *persona non grata*.<sup>34</sup>

In 1989, following discovery by French intelligence services of a plot between South African officials and Ulster Loyalists to exchange arms and surface-to-air missile secrets, three South African diplomats in Paris who were implicated were required to leave by the French Government. The following week the British Government in response required three South African diplomats in London to leave—while making it clear that they were selected at random and were not involved in improper activities. The use of Article 9 in this way by the UK Government, without alleging any personal impropriety by those required to leave, appeared to be without precedent.<sup>35</sup> In 2007, however, the UK Government expelled four diplomats from the Russian Embassy as one of a number of responses to Russia's failure either to extradite Andrey Lugovoy—a Russian national—to stand trial in Britain for the murder of Alexander Litvinov by poisoning with polonium-210 or to co-operate with the United Kingdom in finding a solution. The measure was (p. 68) described to the House of Commons by David Miliband, the Foreign Secretary, as a 'clear and proportionate signal to the Russians', but it was not suggested that the four diplomats selected were themselves involved in the murder.<sup>36</sup> A Declaration by the Presidency of the European Union on the case two days later expressed disappointment at Russia's failure to co-operate constructively, but stopped short of endorsing the UK expulsions of Russian diplomats.<sup>37</sup>

In 1988 the Government of Singapore asked for the recall of a US diplomatic agent on grounds of interference in Singapore's domestic affairs, namely seeking to persuade lawyers opposed to the Government to stand in forthcoming elections.<sup>38</sup> Also in 1988 Nicaragua expelled the US Ambassador and seven other diplomatic agents on grounds that they were destabilizing Nicaragua and inciting revolt. Both these actions were followed by retaliatory expulsions in Washington.<sup>39</sup> In 2008, Serbia expelled the Ambassadors of Macedonia and Montenegro in response to the recognition of Kosovo by the two sending States.<sup>40</sup>

In most of these cases of espionage and involvement in subversion or terrorism, the unacceptable activities would have been authorized or at least condoned by the sending State. It is usual in these circumstances for the sending government whose diplomats are required to leave to plead their innocence, to claim that the requirement to withdraw them was unjustified, and to carry out a reciprocal expulsion. In the case of the large scale expulsions of Soviet Union diplomatic staff described above, however, there were no retaliatory expulsions—either because the numbers of foreign diplomats in Moscow were too small for reciprocal expulsions to be possible or because it was made clear to the Soviet Union that retaliation would lead to further expulsions of their diplomats from Western

capitals. Since the power given under Article 9 is not subject to control by objective assessment of reasons or evidence, retaliation cannot be said to be a contravention of the Convention, and in the case of retaliation there is no practice that the diplomats selected should at least be suspected of improper activities.

Diplomats required to leave one receiving State in such circumstances are not normally dismissed from the service of the sending State and they may be appointed to other States. In May 1984, however, in the wake of the shooting of a British policewoman from the Libyan People's Bureau in London, the UK Secretary of State Sir Leon Brittan urged European Ministers of Justice to agree that diplomats expelled from any European State on grounds of involvement in terrorism should be regarded as unacceptable in any of the others.<sup>41</sup> The Summit Seven States in Tokyo on 5 May 1986 adopted a Statement on International Terrorism directed against States 'clearly involved in sponsoring or supporting international terrorism' which included the following measure: 'denial of entry to all persons, including diplomatic personnel, who have been expelled or excluded from one of (p. 69) our States on suspicion of involvement in international terrorism or who have been convicted of such a terrorist offence'.<sup>42</sup>

## Other breaches of criminal law

The House of Commons Foreign Affairs Committee Report of 1985, drawn up in the wake of the 1984 shooting from the Libyan People's Bureau, concluded that the UK Government had shown itself reluctant to use the very wide powers conferred by Article 9 of the Convention. In the light of evidence of particular incidents, the Committee noted: 'a reluctance to act without watertight evidence and of a reluctance to take strong measures once unacceptable behaviour was identified. These are the sort of cases we would expect to be pursued more strongly in the future.'<sup>43</sup>

Responding to the Committee's recommendation in their 1985 Review of the Vienna Convention, the UK Government set out in detail the more stringent policy they would apply in regard to persons entitled to diplomatic immunity who were alleged to have been involved in serious offences. For this purpose a serious offence was one that would in certain circumstances carry a maximum penalty of six months or more imprisonment. Although the Government agreed with the House of Commons Foreign Affairs Committee that the numbers were small in percentage terms, they stressed that since 1952 it had been practice to ask for a waiver of immunity in such cases on the basis that if immunity were not waived, withdrawal of the individual would be requested. The policy which had been drawn to the attention of heads of mission was:

As a general rule espionage and incitement to or advocacy of violence require an immediate declaration of *persona non grata*. Those involved in violent crime or drug trafficking are also declared *persona non grata* unless a waiver of immunity is granted. In addition the following categories of offence normally lead to a request for withdrawal in the absence of a waiver:

- (a) firearms offences;
- (b) rape, incest, serious cases of indecent assault and other serious sexual offences;
- (c) fraud;
- (d) second drink/driving offence (or first if aggravated by violence or injury to a third party);
- (e) other traffic offences involving death or serious injury;

- (f) driving without third party insurance;
- (g) theft including large scale shoplifting (first case);
- (h) lesser scale shoplifting (second case);
- (i) any other offence normally carrying a prison sentence of more than 12 months.

The criteria for dealing with alleged offences are applied with both firmness and discretion, but not automatically. Full account is taken of the nature and seriousness of the offence and any inadequacies in the evidence.<sup>44</sup>

There are numerous examples of the application of this policy by the United Kingdom. In 1988 a third secretary in the Vietnamese Embassy was required to leave the country on twenty-four hours' notice after he was photographed brandishing a handgun at a crowd of protesters outside his embassy. Renewed warnings were issued to missions that diplomats faced expulsion if found carrying illegal firearms. But only a few days later the Ambassador (p. 70) of Cuba and a commercial attaché were expelled following a shooting incident on the streets of London.<sup>45</sup> British policy is not notably different from that applied in other capitals, but has been applied more publicly since the shooting from the Libyan People's Bureau in 1984 because of the need to be seen to act firmly against abuse of diplomatic immunity. Figures released annually to Parliament show that the firmer policy resulted in some reduction in the number of serious offences drawn to the attention of the Foreign and Commonwealth Office and to the number of diplomats withdrawn at the Government's request. In 2012 there were drawn to the attention of the Government—out of a community of 22,500 people entitled to diplomatic immunity—twelve allegations of serious offences, of which ten were driving-related.<sup>46</sup>

In 2003 a Saudi Arabian diplomat was required to leave following allegations that he had bribed a Metropolitan police officer to provide him with secret information about citizens of Middle Eastern countries living in London. The police officer concerned was charged with misconduct in a public office.<sup>47</sup>

In October 1976 Denmark required the North Korean Ambassador and his entire diplomatic staff to leave on six days' notice on the ground that they had used the embassy for the illegal import and sale of drugs, alcohol, and cigarettes. A few days later the Government of Finland declared *persona non grata* the North Korean chargé d'affaires and three other diplomats following the discovery that Finland had been used as a staging post for drugs destined for other countries in Scandinavia. On the following day the North Korean Ambassador to Norway and Sweden was also declared *persona non grata* for similar reasons.<sup>48</sup> In 1999 the United Kingdom required the withdrawal of a Liberian diplomat found to be smuggling arms in breach of a UN arms embargo on Liberia. The diplomat claimed that the item in question (an armoured car for the Liberian President) had no offensive capacity.<sup>49</sup>

The United States has made clear in Guidance for Law Enforcement Officers issued in 1988 that although Article 9 does not require a receiving State to justify a declaration of *persona non grata*, the Government regards itself as subject to inherent constraints:

Even though their immunity may deprive such persons of due process in the formal sense, it is felt that in most cases this remedy should be employed only when there is reasonable certainty that a criminal act has actually been committed. The United States reputation for being a society governed by the rule of law is not served if it may be pointed to as having acted in an arbitrary, capricious or prejudiced manner in invoking the extreme diplomatic tool of declaring a foreign diplomat PNG. Similarly, any PNG action which the U.S. government is not able to defend in appropriate detail may be understood by the other country involved as a political

action and might thus result in the reciprocal PNG of an entirely innocent American diplomat.<sup>50</sup>

(p. 71) It has, however, been confirmed by a Canadian court in the case of *Copello v Canada (Minister of Foreign Affairs)*<sup>51</sup> that the individual has no right to judicial review of the decision to expel him. Article 9 did not form part of Canadian domestic law and the Government of Canada was under no duty to act fairly. A similar position was taken by the Belgian Conseil d'Etat in the case of *T v Belgium* where the court, dismissing the application of a diplomat of the Democratic Republic of Congo for review of the request for his recall under Article 9, maintained:

Such a request is a matter for the relations between States. By reason of its nature, the act by which the receiving State informs the sending State that a member of its diplomatic staff is *persona non grata* is not subject to review by the *Conseil d'Etat* for *ultra vires*.<sup>52</sup>

The United States has taken steps to bar the re-entry into the United States of persons expelled for serious offences. Their names are entered into a worldwide automated visa lookout system, any diplomatic visa is cancelled, and, if the person has left before this is done, the mission is informed that he cannot be replaced until the visa is renewed. Like the United Kingdom, the United States regard failure to comply with applicable law on the possession or carrying of firearms as a serious crime, and if a waiver is not forthcoming when a person entitled to immunity is found carrying unauthorized weapons they require his departure unless there are 'extraordinary circumstances'.<sup>53</sup>

Where withdrawal is requested on grounds of involvement in criminal activity other than espionage, subversion, or terrorism, the likelihood of retaliatory action is substantially smaller. Generally the sending State has not authorized the conduct, and diplomats recalled may face discipline or dismissal.<sup>54</sup>

## **Parking offences**

The UK Government's 1985 Review of the Vienna Convention emphasized the concern of the Government at the high level of illegal parking by diplomatic vehicles and their determination to reduce it substantially. Heads of mission had been notified 'that persistent and deliberate failure by individual diplomats to respect parking regulations and to pay fixed penalty notices will henceforth call into question their acceptability as members of diplomatic missions in London'. Records of unpaid parking tickets would be kept and cases would be drawn to the personal attention of heads of mission with warnings about possible consequences. 'Further unpaid parking tickets incurred by individual cars will lead to a request for the transfer or the withdrawal of the offender.'<sup>55</sup> The UK Government did demand the recall of a few persistent offenders. The demands brought about payment of the outstanding fines and were then withdrawn. Although the (p. 72) use of the *persona non grata* procedure in this context was without precedent, it was reluctantly accepted by the diplomatic corps in London that it was within the powers of the receiving State under Article 9. The effect on systematic abuse by diplomats of their immunity from enforcement of parking restrictions was dramatic. The number of parking tickets cancelled on grounds of diplomatic immunity fell from 108,845 in 1984 to 60,000 in 1985, to 6,551 in 1990, and to 2,328 in 1993.<sup>56</sup>

## Procedure

The effectiveness of Article 9 may be deduced from the fact that there appear to be virtually no cases where a receiving State has found it necessary to resort to its power under paragraph 2 of the Article to refuse to recognize the person concerned as a member of the mission.<sup>57</sup> One such exceptional case was that of a Cuban diplomat, Mr Imperatori, who maintained his innocence of the charges made against him by the United States and publicly expressed his wish to defend himself in a US court. Following the expiry of the period given to him to leave, he was, however, deported by the US authorities to Canada.<sup>58</sup> In most cases—particularly where a diplomat has been detected in some personal misconduct—he leaves or is withdrawn without the receiving State making any formal notification withdrawing his recognition as a member of the mission.<sup>59</sup> Whether the request for withdrawal becomes public at all, and the formality of the language in which it is described, owe more to the circumstances and to the political pressures on the sending and the receiving State than to the nature of the conduct which has caused offence.

It is not possible to come to a firm conclusion on what is a 'reasonable period' for the purposes of Article 9. The practice shows that where a receiving State has imposed a deadline for departure it has been much shorter than is granted in the case of normal termination of a diplomat's functions and the application of Article 39 of the Convention. Forty-eight hours' notice seems to be the shortest which could be justified as 'reasonable'. Those declared *persona non grata* or not acceptable leave well within any deadline.<sup>60</sup> In 2006, the issue of arrest warrants by a French judge against nine Rwandans for the murder of the former President of Rwanda led Rwanda to recall its Ambassador to Paris, to require the French Ambassador to Rwanda to leave within twenty-four hours and other French diplomats within seventy-two hours. These exceptionally short deadlines were, however, imposed in the context of a total breach of diplomatic relations.<sup>61</sup> In the partial award made in *Diplomatic Claim, Eritrea's Claim 20 (Eritrea v Ethiopia)* the Arbitral Tribunal (p. 73) held, responding to Eritrea's allegation that periods of twenty-five and forty-eight hours notice given to diplomats to leave were unduly short, that they were not—under the circumstances of an outbreak of hostilities between the two States—in breach of Article 9 since they did in practice allow the diplomats expelled to gather their families and belongings before departure.<sup>62</sup>

## Footnotes:

<sup>1</sup> Gentilis (1585) vol II chs XIII, XVII, XVIII, XIX, XXI; Hotman (1603) pp 65-71; Grotius (1625) II.XVIII.IV. 5-7; Bynkershoek (1721) chs XVII-XX.

<sup>2</sup> Satow (6th edn 2009) para 15.7; Adair (1929) p 49; Bynkershoek (1721) ch XVIII.

<sup>3</sup> Satow (1st edn 1917) vol I pp 246-8; Vattel (1758) IV.VII. 93, 98; Martens (1827) vol I p 149; Martens-Geffcken (1866) p 187 n 2.

<sup>4</sup> Moore (1905) vol IV pp 484-553, esp pp 494 (Jewett), 499 (Marcoleta), 502 (Catacazy), 531 (Poussin); Hackworth, *Digest of International Law* vol IV pp 447-52, Satow (6th edn 2009) para 15.8.

<sup>5</sup> Letter to Senor Isturiz, 12 June 1848: Moore (1905) vol IV pp 538-9.

<sup>6</sup> Moore (1905) vol IV p 538.

<sup>7</sup> Calvo, *International Law* (4th edn) vol 3 p 213.

<sup>8</sup> (1st edn 1917) vol I p 406.

<sup>9</sup> 26 AJIL (1932 Supp) 79; *Grant and Barker* (2007) at p 172.

- 10 UN Doc A/CN.4/91 Art 3; *ILC Yearbook* 1957 vol I pp 12-15, vol II pp 133-4, 1958 vol II p 91, para (6) of Commentary; A/Conf. 20/C.1/L.3 (French amendment); A/Conf. 20/14 pp 101, 103.
- 11 UN Doc A/Conf. 20/C.1/L.63.
- 12 26 *AJIL* (1932 Supp) 79.
- 13 1980 ICJ Reports 3.
- 14 At paras 81-7 of Judgment. On Security Council response, see Angelet (1999) at pp 151-2.
- 15 Satow (6th edn 2009) para 15.13; Dickie (1992) ch IX 'Spies and Diplomacy'.
- 16 1978 RGDIP 1094; 1983 RGDIP 865; Salmon (1994) para 630; Rousseau (1970) para 131 at pp 168-9; Grzybowski (1981) at p 55.
- 17 *The Times*, 7 and 24 May 1996.
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- 19 2000 RGDIP 506; 2000 RGDIP 1019.
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- 23 1980 DUSPIL 326.
- 24 House of Commons Foreign Affairs Committee Report 1985 paras 61-9; Review of the Vienna Convention, Cmnd 9497, paras 31, 82.
- 25 *The Times*, 12 December 1995.
- 26 96 ILR 279 at 313.
- 27 *The Times*, 10 April 1991.
- 28 *The Times*, 26 October 1995.
- 29 1987 RGDIP 594.
- 30 *The Times*, 10 September 1994.
- 31 Ashman and Trescott (1986) pp 122-3.
- 32 House of Commons Foreign Affairs Committee Report 1985 paras 106-10.
- 33 1986 RGDIP 424.
- 34 *The Times*, 10 August 1994.
- 35 *The Times*, 6 May 1989. cp evidence by Sir Antony Acland, then Permanent Under-Secretary, Foreign and Commonwealth Office, to the Foreign Affairs Committee of the House of Commons, printed in the Evidence to their 1985 Report at Q 66.
- 36 Hansard, HC Debs 16 July 2007 cols 21-8, Satow (6th edn 2009) para 15.16. Hartmann in 'The Lugovoy Extradition Case', 2008 ICLQ 194, sets out the facts and comments on the extradition aspect of the dispute.
- 37 Council Doc 11976/07 (Presse 174).
- 38 *The Times*, 12 May 1988.
- 39 *The Times*, 13 and 16 July 1988; 1988 *AJIL* 803.

- 40 Press releases from Ministry of Foreign Affairs, Belgrade, 9 and 10 October 2008.
- 41 *Guardian, Daily Telegraph*, 1 June 1984.
- 42 1986 AJIL 951.
- 43 House of Commons FAC Report 1985, *The Abuse of Diplomatic Immunities and Privileges* paras 64–7.
- 44 Review of the Vienna Convention, 1985, Cmnd 9497, paras 60–71, esp para 69; 1986 ICLQ 433 at 434.
- 45 *The Times*, 7 and 8 September 1988, *Daily Telegraph*, 12 September 1988; *The Times*, 13 and 14 September 1988, esp article by Michael Evans.
- 46 Hansard HC Debs 8 March 1979 col 750; 6 June 1980 WA cols 871–2; 29 January 1991 WA col 458; 18 April 1994 WA col 5; 11 July 2013 c32WS.
- 47 *The Times*, 15 August 2003.
- 48 *The Times*, 16, 21, 22, and 23 October 1976; Satow (6th edn 2009) para 15.14.
- 49 *Observer*, 25 July 1999.
- 50 Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, printed in 1988:27 ILM 1617 at 1633. A similar approach is taken in the 2011 Revised Version, ‘Diplomatic and Consular Immunities, Guidance for Law Enforcement and Judicial Officers’ which stresses that requiring the departure of a person entitled to immunity is ‘an extreme diplomatic tool ... used only after the most careful consideration’.
- 51 [2002] 3 FC 24, noted in 2002 Can YIL 557.
- 52 Conseil d’Etat, 9 April 1998; 115 ILR 442.
- 53 Statement by Selwa Roosevelt, Chief of Protocol, before the Senate Committee on Foreign Relations, 5 August 1987, printed in McClanahan (1989) at p 247; circular Note to Chiefs of Mission at Washington of 19 December 1988, 1989 AJIL 558.
- 54 See text of a speech by the Parliamentary Under-Secretary of State in 1987 to the Royal Institute of International Affairs, 1987 BYIL 561 at 564.
- 55 Review of the Vienna Convention on Diplomatic Relations, 1985, Cmnd 9497, para 80. Extracts from the Review are printed in 1985 BYIL 437. The circular sent to Heads of Diplomatic Missions in London is in 1985 BYIL 436.
- 56 Review of the Vienna Convention on Diplomatic Relations, 1985, Cmnd 9497, para 74; Hansard HL Debs 4 May 1988 col 670; 7 May 1991 WA col 41; 11 May 1993 WA col 60; 16 April 1994 WA col 2. The numbers levelled off at that point.
- 57 One anomalous—and questionable—exception was the *Diplomatic Immunity from Suit Case*, 61 ILR 498, where the Provincial Court of Heidelberg upheld the immunity from prosecution of a student whose original notification as a member of the mission of Panama had been rejected by the German Government and who following an accident due, it was alleged, to his drunken driving, had also been declared *persona non grata*. The court said that if the diplomat was not withdrawn his immunity subsisted until the receiving State gave actual notice under Art 9.2.
- 58 2000 AJIL 534.
- 59 Hansard HC Debs 29 June 1981 WA cols 284–6, printed in 1981 BYIL 435 at 436.
- 60 Richtsteig (1994) p 32; Salmon (1994) paras 636, 637.

**61** *The Times*, 25 November 2006.

**62** 135 ILR 519; RIAA Vol XXVI 381.