THE PSYCHOLOGY OF DIPLOMACY

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THE PSYCHOLOGY OF DIPLOMACY

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The frontispiece, "The Ambassadors" (1533) by Hans Holbein the Younger. Reprinted with the permission of the National Gallery Picture Library.

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Preface

Some topics can be clearly defined, and in these cases it is not difficult for people to agree on a definition of the topic, assumptions, and the scope of the topic. In the case of the psychology of diplomacy, the definition, assumptions, and scope were not readily apparent.

Part of the explanation for this may be that diplomats and psychologists come from very different backgrounds, traditions, and work environments. Diplomats spend their careers engaged in the reality of the relationships between nations. For most of a diplomat's career, this reality is focused on maintaining the ongoing relationship between his or her nation and other nations. Sometimes this means long postings to remote places, surviving in a bureaucracy, and the tedious and lonely work of adhering to instructions issued by a supervisor who is far away. Most diplomats would not think this has much to do with psychology. Most diplomats will focus on the details of the immediate task to be carried out and the best strategy for reaching the assigned objective.

But, if we examine the writings of psychologists, including those who contributed to this edited volume, the psychology of diplomacy has to deal with perceptions between nations and peoples. It has to do with how diplomats interact. It has to do with some of the fundamental psychological motivations of prejudice, fear, trust, suspicion, greed, and hope. Psychologists—and of course the members of any profession—are concerned about what they see as the current state of international relations. Psychologists are accustomed to dealing with interactions between individuals, and these psychologists may look for ways to address international problems in the same way as interpersonal problems are addressed. These psychologists may hope that by better understanding the psychology of diplomacy we may be able to make a contribution to better relations between nations and between peoples.

The psychologists may be taking too broad and idealistic a view, and the diplomats may be taking a view that is narrowly defined and too bounded by custom. It is not difficult to read the chapters contributed to this edited volume and determine which have been written by diplomats and which have been

written by psychologists. The diplomats tend to be focused on the details of reality; the psychologists tend to be focused on ideals and goals.

But perhaps these differences in views are instructive. It is easy for psychologists and others to view diplomacy and international relations from a distance and wonder why so many of the world's conflicts seem intractable. And it is easy for psychologists to wonder if taking a kinder, more conciliatory, stance might lead to mutual respect and accommodation where none now exist.

And it is equally easy for diplomats to reject the idealism of some psychologists as out of touch or uninformed.

The Charter of the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) declares that "Wars begin in the minds of men." There is certainly some face validity to that assertion. And if this is the case, then perhaps wars can be prevented by developing a better understanding of the psychology of diplomacy.

Harvey J. Langholtz

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The Psychology of Diplomacy

Harvey J. Langholtz

WHAT IS DIPLOMACY? AND WHAT IS THE PSYCHOLOGY OF DIPLOMACY?

To ask and answer the question, "What is diplomacy?" is to open a long discussion. The answer has changed over history. And the answer can change at any given time based on the context and the specific issue under discussion. To ask and answer the question, "What is the psychology of diplomacy?" is also to open a long discussion, made even longer by different sets of assumptions, wishes, perspectives, and differing answers to the question, "What is psychology?"

To even attempt to address the topic of the psychology of diplomacy, we must first have a sense of what the practice of diplomacy is like in terms of official structure, established protocol, and practical reality. In this introductory chapter we will examine the origins of diplomacy, the goals of diplomacy, how diplomacy is carried out, and some of the day-to-day realities and details that, in sum, start to form the psychology of diplomacy.

There are many useful and valid definitions of diplomacy. One fairly comprehensive such definition is by the U.S. scholar E. Plischke (as cited in Freeman, 1994, p. 75).

> Diplomacy is the political process by which political entities (generally states) establish and maintain official relations, direct and indirect, with one another, in pursuing their respective goals, objectives, interests, and substantive and procedural policies in the international environment; as a political process it is dynamic, adaptive, and changing, and it constitutes a continuum; functionally it embraces both the making and implementation of foreign policy at all levels, centrally and in the field, and involves essentially, but is not restricted to the functions of representation, reporting, communicating, negotiating, and maneuvering, as well as caring for the interests of nationals abroad.

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Fiction versus Function: The Persistence of "Representative Character" Theory in the Law of Diplomatic Immunity

Jeffrey K. Walker

THE NEED FOR INTERACTION

Diplomats and diplomatic intercourse, in one form or another, have been with us since the earliest days of human civilization. From the records of ancient Sumer and Egypt,[1] there is ample evidence that kings sent ambassadors to other monarchs for any number of reasons: to conclude peace or to make war, to demand reparation, to honor a more powerful monarch, or to negotiate for trade.

The need to interact with others is a fundamental impulse and a basic value underpinning primitive law.[2] "To be alive, to unite sexually, to possess something as 'mine,' and to live in association with others, are beginning values."[3] In the context of nations, the last of these primal impulses—the need to associate with others—is every bit as strong as with individuals.[4]

> Any group of independent states with interests and ambitions of their own, living side by side and united by some community of outlook and traditions, must have some degree of formal and organized contact with one another.[5]

Although the regular interaction of states has acquired a universal inevitability, that this interaction should take the form of the exchange of ambassadors or other formal envoys is not necessarily inevitable.[6] For example, at the height of the fifteenth-century movement toward the posting of permanent ambassadors, Lorenzo de Medici relied more on bankers and merchants with well-established contacts in foreign capitals and *entrepôts* than on his official ambassadors.[7] (With the rapid growth in international economic activity over the past 50 years, there would be ample opportunity to rely on similar less-formal forms of representation.) Concerning very important matters, heads of

state tend to meet face-to-face even today. Regardless of what alternative forms might be available, the standard method of diplomatic intercourse is through the exchange of ambassadors.

HISTORY OF DIPLOMATIC IMMUNITY

Just as the exchange of diplomatic envoys has a long history, so does the recognition that there was something special about them.[8] Whether as a matter of religious proscription, of sovereign immunity, or of functional necessity, diplomatic envoys have at all times enjoyed unique status and protection—in theory if not always in practice—within the community of nations.

Overview of the Theoretical Constructs

The development of the law of diplomatic immunity can be roughly divided into four main theoretical constructs. These are, in rough order of development, (1) religious or quasi-religious protections, (2) representative character, (3) extraterritoriality, and (4) functional necessity.[9] The last three of these theories were formally propounded between the late sixteenth and mid-eighteenth centuries, and each has had some influence on the development of modern diplomatic law in the nineteenth and twentieth centuries.[10]

Religious Protections

As was the case with the development of much primitive law, the original basis for the inviolability of envoys was religious. Whether envoys were viewed as honored guests who had a religiously sanctioned right to hospitality, as personifications of a divine ruler, or as earthly minions of supernatural messengers, the violation of their persons was widely considered in the ancient world to be offensive to the gods or sinful in the eyes of God.

Representative Character

Very early in the history of the use of envoys, dating back at least to the Greeks, a general norm arose based on religious precepts that envoys of all kinds (e.g., messengers, heralds, procurators, ambassadors) stood in the shoes of—indeed were an extension of the *person* of—the sovereign who sent them. This notion of an envoy as a personification of his sovereign, heavy with religious connotation, would have been quite familiar and acceptable to the peoples of the ancient world.[11] This idea that an ambassador "personif[ies] his master in a clear and unmistakable way"[12] would echo throughout the evolution of diplomatic law. As late as the mid-nineteenth century, for example, the U.S. attorney general noted that it was a tenet of customary international law that the authority of any ambassador or minister ended on the death of the monarch that appointed him.[13]

Extraterritoriality

A second theory of immunity, related to but distinct from representative character theory, developed much later as a result of the establishment of permanent embassies, beginning around the middle of the fifteenth century. Based on an extension of the canon law notion that church property and the people occupying it were beyond the criminal and civil reach of temporal rulers, the legal fiction emerged that diplomatic premises (and the people that occupied them) were not within the territory of the receiving state. The idea that diplomatic premises were considered extraterritorial from the jurisdiction of the receiving state enjoyed some prominence right through the nineteenth century,[14] particularly in major capitals such as Madrid and Rome.[15] This theory has since been generally rejected in the context of diplomatic envoys. However, the principle of extraterritoriality is still applied occasionally to the armed forces of a state residing in another state's territory,[16] although this situation is more often regulated by consensual "status of forces" agreements.

Functional Necessity

Beginning in the late nineteenth and early twentieth centuries, attempts were made, ultimately successful to a significant degree, to disregard the interesting but anachronistic legal fictions of representative character and extraterritoriality in favor of a positive, treaty-based regime of diplomatic immunities based to satisfy the needs of diplomatic missions when carrying out their routine representational functions. In order to eliminate reliance on legal fictions, the proponents of this functional necessity theory asserted that states should simply agree on what set of immunities were essential to allow diplomatic agents to perform their necessary functions and then to consent to limited reciprocal waiver of their otherwise exclusive state territorial sovereignty. Culminating in the 1961 and 1962 Vienna Conventions, this is the dominant (but not exclusive) theory underpinning diplomatic immunity in contemporary international law.

Religious Roots of Diplomatic Immunity

Envoys in many forms—ambassadors, legates, heralds, and messengers—have long been imbued with a religious or quasi-religious aura. Many commentators have noted that protections afforded envoys were originally based on religious taboos.[17] The concept of the inviolability of envoys is grounded in the sacred right of protection enjoyed by guests found in the customs of many

early cultures.[18] In Judeo-Christian religious culture, the intertwining of diplomacy and religion has deep roots.

> Diplomatic agents can trace their ancestry very far into the past, all the way back to the angels, the envoys of God. [The early modern jurist Alberico] Gentili recounts that King Herod, horrified by the death of his envoy to the Arabs, called the murder a horrible act in the eyes of nations—especially in the eyes of the Jews to whom the sacred law of God had been given by the angels who fulfilled the functions of heralds and ambassadors.[19]

The classical Greeks, although never fully developing a comprehensive system of diplomacy, sent envoys between the city-states of Hellas and to the kings of Persia. Homer records the diplomatic mission of Menelaeus and Odysseus to Troy in a futile attempt to retrieve Helen and avoid war.[20] However, envoys in classical Greece were little more than messengers, and often professional orators or actors were sent. They were not particularly well trusted and constituted little more than a specialized and less-respected form of herald.[21]

Nevertheless, both the Greeks and Persians were generally in agreement that envoys should not be molested.[22] In the fifth century B.C., Darius of Persia sent ambassadors to both Athens and Sparta to demand acknowledgment of his overlordship. The Greeks promptly killed the Persian envoys. The Spartans, convinced that their slaying of the Persian ambassadors had resulted in great misfortune to the city, sent their own ambassadors to Darius's successor Xerxes with the full expectation that the Persians would kill them in retaliation. Xerxes instead returned them unharmed. According to Herodotus, Xerxes spared the Spartan envoys because he knew any abusive treatment would violate "the usages of all mankind."[23] The Romans believed envoys were "also guarded by divine law."[24]

Roman and Canon Law

Both the Greeks and Romans deemed the right of sending and receiving ambassadors as a prerogative reserved to sovereigns. Although sovereigns had the right to refuse to receive another sovereign's ambassador, in Republican Rome such a refusal was almost always a precursor to war.[25]

In the earliest days of the Republic, nearly all Rome's relations were with other Italic peoples. During this period, envoys were treated as personifications of their sovereign and were therefore treated as the sovereign himself would be treated were he invited to Rome—as guests of the Senate.[26] Cicero believed that Rome's ambassadors likewise were the "personality of the Senate" and carried with them the full authority of the Republic.[27] Therefore, at least in the preimperial Republican period, "In Rome, the ambassador was recognized

as . . . a personification of the sovereignty and majesty of the State he represented."[28] This easy extension of a principle to which few would object (hospitality for a visiting sovereign) to a broader scope of application (treating a *representative* of the sovereign the same as the sovereign himself) is a good example of the practical extension of a legal principle to deal with new circumstances for which Roman jurists would become justly noted.

As would often occur in the development of the Roman civil law, the expansion of empire and the growing affluence of Rome demanded a more sophisticated interpretation of exactly what "hospitality" for the representatives of foreign sovereigns entailed. Throughout the late Republic and early Empire, Roman jurists argued the point whether or not foreign envoys should be subject to civil action before the Roman courts. Justinian's *Digest* captured this debate before pronouncing the official imperial position, with somewhat surprising reasoning for this early period:

> Paul (*Plautius*, Book 17) states that Cassius [a jurist] would allow an action against a legate if the action would not interfere with his duties; whereas Julian [another jurist] said all actions should be categorically refused. Paul: "Rightly so, for the reason for not granting the action is so that he may *not be distracted from the duties* he has undertaken as a legate."[29]

Even after the fall of Rome in the West, European rulers still maintained at least a minimal level of diplomatic intercourse throughout the Middle Ages through the use of envoys. During the Carolingian period, from the eighth through the tenth centuries, the normal function of an ambassador was very rudimentary: he delivered a letter from his sovereign and returned with a responding letter. Occasionally, ambassadors would discuss general views on the subject with the foreign sovereign or his advisors, but Carolingian ambassadors had no power to otherwise speak for their king.[30]

The body of papal opinions, scriptural teachings, and conciliar pronouncements that constitute the canon law evolved rather haphazardly for the first 12 centuries of the church's existence. Nevertheless, in one of the earliest attempts to collect and roughly organize canons by Isidore of Seville in the sixth or seventh century, one of his maxims—short prescriptive statements of positive law—of the *jus gentium* (law of nations) concerned the inviolability of ambassadors.[31] The rediscovery and systematic study of Justinian's *Corpus Juris Civilis* in the twelfth and thirteenth centuries led to a systematization of canon law mainly along Roman law lines.

With the pope wielding enormous power both temporally and spiritually, it is not surprising that the papacy found it necessary to both send and receive ambassadors. Up through the thirteenth century, popes utilized *nuncii* (basically ad hoc messengers) to carry out a remarkably robust correspondence with the Christian princes. But a *nuncio* was really nothing more than a form of herald, often referred to as a "living letter." However, beginning in the twelfth

century, popes sporadically began utilizing a proctor *(procurator)* for particularly important, timely, or complex missions. A *procurator* was sent with *plena potestas*—full powers—to negotiate on behalf of the pope. By the end of the thirteenth century, secular rulers, too, would begin using proctors. This was the type of envoy, a temporary representative with full powers to speak for his sovereign, that would evolve by the end of the fifteenth century into the permanent ambassador.[32]

Canon law, therefore, developed a body of law concerning the status and treatment of legates and other representatives of the pope and the Christian princes. Pope Gregory VII unabashedly adopted the ancient concept of the representative as the personification of the pontiff who sent him: "[O]ne sees in the legate the pope's own face and hears in his voice the living voice of the pope."[33] This somewhat overstated view was codified in the first systematic collection of canon law, Gratian's thirteenth-century work, *The Concordance of Discordant Canons,* universally known as the *Decretum.* Gratian, under the heading "What the law of nations is," states that the law of nations includes "the obligation of not harming ambassadors." In the standard gloss to this passage, the canonist Johannes Teutonicus adds, "If anyone impedes the ambassador of an ally or enemy, he is excommunicated according to the canons. . . . According to ordinance [municipal law], he is handed over to the enemy to be their slave."[34]

It was not only Christian canon law that recognized the inviolability of envoys. In Islam, the *sunna*—words and acts of the Prophet—includes Mohammed's command that envoys never be abused. Even after great provocation, Mohammed went as far as to assert that maltreatment of an envoy may be a just cause for war.[35] One commentator recounts the strength of Mohammed's conviction in this matter:

> In Arabia, the person of an ambassador was at all times considered as sacred. Mohammed established this inviolability. Always the ambassadors sent to Mohammed or his successors were not harmed. [In one instance, Mohammed told an envoy who had particularly displeased him] "If you weren't an envoy, I would have you killed."[36]

Sovereignty

Although the generally acknowledged rule that sovereigns were immune from each other's authority and jurisdiction formed the basis, by extension, for the immunity of envoys of the sovereign, in practice the envoys may well have received more rigorously guarded immunity than their kings. Historically, sovereigns were not always immune. For example, during the Crusades, Richard I of England was captured and held to ransom by Leopold of Austria. During the Middle Ages, a king was only too aware that "if he fell into alien hands, he might expect to be ransomed, mistreated, killed."[37] At the same time, monarchs during this period began to recognize the importance of envoys as

symbolic extensions of their own sovereign authority outside their borders. In one early collection of national law, the thirteenth-century Castilian compilation known as *Las Siete Partidas,* all envoys of foreign rulers were granted immunity be they "Christian, Moor, or Jew."[38]

The necessary connection between sovereignty and the ability to send and receive ambassadors was universally acknowledged by the sixteenth century. The issue of whether anyone other than a sovereign could appoint ambassadors, and by extension whether such ambassadors would enjoy immunity through their special relationship to the person appointing them, was settled in English law as a result of the matter of Mary, Queen of Scots. A panel of five noted civil law jurists appointed specifically to consider the matter found that

> [w]e think that the solicitor [envoy] of a prince lawfully deposed, and another [prince] being invested in his place, cannot have the privilege of an ambassador; for that none but princes and such others as have sovereignty may have ambassadors.[39]

EARLY MODERN DEVELOPMENT

Traced to the early religious notions of the sanctity of envoys, the representative character theory of diplomatic immunity has deep roots. However, as the Renaissance progressed and international legal theory developed along more secular and rational lines, the religious underpinnings of diplomatic immunity, as with much of the civil and criminal law, became less and less sustainable. Jurists sought theories deduced from human reason, rather than maxims sprung from divine inspiration. In the context of diplomatic law, the solution was found in evolving ideas of sovereignty sprung from the intellectual ferment of the Renaissance.

The Renaissance and Permanent Missions

By the early fifteenth century, the city-states of Renaissance Italy had developed sophisticated commercial and financial links between each other and with often far-flung non-Italian cities and kingdoms. As a result, the great Italian merchant cities were the first to establish permanent embassies to safeguard their commercial interests abroad. Although there is some dispute among historians, the first permanent embassy is generally thought to have been the 1450 accreditation of Nicodemus dei Pontramoli by the Duke of Milan to Cosimo de Medici in Florence.[40] The dispatch of other permanent ambassadors quickly followed, with the Duke of Milan sending a permanent envoy to France in 1460. The Venetians immediately imitated this practice, with the posting of permanent ambassadors to Burgundy (1469), France (1479), and England (c. 1500).[41]

However, during the early years of permanent diplomatic missions in the fifteenth and sixteenth centuries, the recognized primary purpose of embassies

was to gather information on foreign governments. Important negotiations were left to special ad hoc diplomatic missions and were seldom undertaken by the in-place permanent mission. As a result, a "diplomat was regarded as little more than a licensed spy" and was constantly under surveillance.[42] During this time, sovereigns who received permanent ambassadors would have had little incentive to make the foreign diplomats' work easier, other than as a matter of ritual or reciprocity.

These earliest permanent ambassadors, although scrupulously respected in their persons, were universally suspected in their motives. From the earliest days of permanent embassies in the 1450s to the end of the seventeenth century, permanent ambassadors were uniformly regarded as (at best) liars or (at worst) spies.[43] Foreign ambassadors to the Sublime Porte were literally kept under lock and key within the sprawling palaces of the Ottoman sultans. Peter the Great of Russia directed that all foreign ambassadors be constantly accompanied by a Russian "guard of honor" that kept the ambassador and his retinue under constant surveillance. Henry VII of England upon assuming the throne ordered all ambassadors banished from his court.[44] Henry IV of France refused to receive ambassadors, and Poland expelled all foreign envoys in 1660. In 1651, the Estates-General of the United Provinces held extensive debate on the usefulness of allowing foreign ambassadors to remain in the Netherlands.[45] The recurrent expulsion of various diplomatic agents even today for espionage activities demonstrates there may be some persistent basis in fact for this time-honored suspicion of permanent embassies.

Several factors coalesced by the mid-fifteenth century resulting in the establishment of permanent embassies. First, the Italian city-states had developed a variety of effective forms of central government that could speak for all—or at least a vast majority—of the citizenry. Second, the establishment beginning in the thirteenth century of universities produced a class of well-educated men with the requisite linguistic, rhetorical, and political skills necessary to undertake continuous representation for their home governments. Third, ambitious neighbors anxious to interact surrounded the Italian cities on all sides. Finally, the enormous amounts of surplus wealth produced by the commercial and banking activities of the great Italian merchant cities allowed for the expensive retention of permanent professional ambassadors in far-off capitals and commercial centers.[46] By the end of the fifteenth century, there was a general movement among the Italian cities and the great trading centers outside Italy toward permanent embassies.[47] Nevertheless, the dispatching of permanent ambassadors, always an expensive undertaking, was questioned by some of the leading commentators well into the sixteenth and seventeenth centuries.[48]

Throughout this period of rapid growth in permanent diplomatic missions, the echoes of the earlier quasi-religious tenet of strict inviolability of envoys remained. One of the most influential political and legal thinkers of the early modern period, the mid-sixteenth-century French philosopher Jean Bodin held

that ambassadors have a strict right to respect under all circumstances, including escort to and from the frontiers of the state to which they had been sent—not an insignificant concern when traveling in sixteenth-century Europe. Bodin stated that the person of an ambassador "is and should be sacred *(sacrée)* and inviolable."[49] The mid-sixteenth-century Spanish jurist Balthzar Ayala reiterated the notion that the ambassador was a personification of his sovereign: "An outrage offered to ambassadors is deemed offered to the king or State whose embassy they are carrying out."[50]

By the end of the sixteenth century, it was routine for ambassadors posted to key states for important causes to hold some court appointment or to stand in some other intimate relationship to the sovereign he represented.[51] This personal proximity to or familiarity with the sovereign bolstered the notion that the envoy was a personification of his king; that he personally knew the monarch's mind helped sustain this fiction. It was also at this time that the development of formal legal theory in the area of diplomatic immunities rapidly accelerated, beginning with the Oxford professor of civil law Alberico Gentili's seminal 1585 work, *De legationibus libri tres.* This was quickly followed by Francois Hotman's *L'ambassadeur* in 1603 and by Grotius' *De iure bellii ac pacis* in 1625. Of course, the many juristic philosophers of this epoch included some comment on the law of diplomatic immunity in every major work on international law.[52]

During the late Renaissance, legal theory concerning the protection of envoys developed apace with the increasing use of permanent legations and evolving ideas of sovereignty. One of the most influential writers among the Spanish Scholastics, Francisco Suarez, writing near the end of the sixteenth century, rejected the idea that the right to send ambassadors was an inherent incident of sovereignty. Instead, Suarez asserted that the right of sovereigns to send and receive ambassadors was actually based on positive state-made law within the law of nations,[53] but that once a sovereign agreed to accept an ambassador, inviolability of the envoy was a matter of natural law.[54] In short, a sovereign did not have to agree to accept envoys, but if he did agree, the envoys were inviolable under natural law. In keeping with his writings on the rights of non-Christian indigenous peoples in the Americas, Suarez extended the right of inviolability to the envoys of all sovereigns, including pagans.[55]

Enlightenment Legal Theory

In his landmark 1625 work on international law, *De iure belli ac pacis,* Hugo Grotius addressed the issue of the immunity of diplomats. Grotius realized that the Roman law provided an inadequate basis for diplomatic relations since by the first century B.C.—the period of the classical Roman jurists—such relations were nearly all intraimperial. Rather than providing a blueprint for relations between nominally coequal sovereigns, Roman law governed the relationship

between the Roman *municipia* and its extensive colonies.[56] Based on his observation of state practice, Grotius subscribed to the idea that the ambassador was a direct representative of the dignity and majesty of his sovereign and was therefore entitled to the same privileges and immunities. However, in attempting to explain this theory, Grotius compared the effect of the receiving state's lack of legal control over the ambassador to the ambassador being physically outside the territory of the receiving state. This unfortunate choice of metaphor, misunderstood as a literal principle by some subsequent commentators, resulted in the confused notion that Grotius endorsed the extraterritorial principle of immunity for envoys.[57] Although a novel fiction, Grotius's apparent support of an extraterritorial principle, coupled with his enormous general influence in international law, led by 1750 to a wide acceptance of the extraterritorial principle, particularly in the context of diplomatic premises.[58]

From Grotius's work in the early seventeenth century onward, what originally had developed as a quasi-religious notion that an ambassador was inviolable as a matter of religious or natural law developed into an extension of a sovereign's undisputed personal immunity to cover his formally accredited agents.[59] The eighteenth-century Dutch jurist Cornelius Bynkershoek explained this shift from personification to agency in the context of diplomatic envoys in his work *De foro legatorum.*

> An ambassador does indeed represent his prince, but only in the sense that one fulfilling a commission represents the one giving the commission, and so the representation is confined to those things covered by the commission. Therefore care must be taken lest any delay or impediment be placed in the way of the ambassador.[60]

Christian Wolff, a contemporary of Bynkershoek, concurred in this more restrictive view of the relationship between ambassador and sovereign.

> Therefore, it does not belong to this right to extend the representation to the dignity itself of the sender, or his majesty, consequently by the law of nature an ambassador is not the same moral person as the sender.[61]

This extension of agency theory to the envoy–sovereign relationship, by then widely known as *representative character,* was a characteristic Enlightenment exercise in recasting fundamental legal constructs like diplomatic immunity in reason, rather than divine mandate.[62] Nevertheless, the purging of the religious basis of immunity left undisturbed the legal fiction that the ambassador stood in the shoes of his sovereign by agency if not by supernatural personification. Equally, this shift did not lessen the emotive force of the representative character of ambassadors—princes still strongly held as a matter of honor that an insult to their ambassador was a personal insult to themselves.[63] This was not, therefore, quite the same as the well-developed principal–agent relationship found in the law merchant or in the developing law of contract.

The universal acceptance of the principle of diplomatic immunity by the end of the eighteenth century was also manifested by the actions of the nascent U.S. government. One of the first acts passed by the newly constituted Congress was a statute recognizing the immunity of foreign envoys from the jurisdiction of U.S. courts.[64]

Modern Development

The law concerning immunity of diplomats enjoyed universal acceptance by the second half of the twentieth century. So much so that the International Court of Justice, when considering the potential culpability of the government of Iran for failing to protect the American diplomats taken hostage at the U.S. embassy in Tehran in 1979, found that the principle of inviolability may have matured into a peremptory norm of international law or *jus cogens.* As such, the principle of diplomatic inviolability would be binding upon all states—with or without their consent—and cannot be abrogated by treaty or other agreement.[65]

The Modern Idea of Sovereignty

The representative character theory of diplomatic immunity was based on an extension of sovereign immunity from the *person* of the sovereign to *representatives* of that sovereign. But what exactly does sovereignty entail? What rights and privileges appertain to sovereign states, however defined?[66] First and foremost, states have the right to autonomy, independence, and liberty—in short, *to exist as an entity* within the community of nations.[67] Second, states have the right to sovereignty (in terms of exclusivity) and jurisdiction within their borders—put simply, *internal autonomy.*[68] Third, states are entitled to *legal equality* within the international community.[69] Finally, states are entitled to representation within the international system, particularly within international institutions[70] and bilaterally with the consent of other individual states.[71]

The idea that state sovereigns enjoy absolute immunity from another sovereign's jurisdiction began eroding with the 1917 Russian Revolution and has accelerated since the end of World War II due to the widespread state ownership of airlines, shipping lines, and other purely commercial enterprises.[72] Governments quickly recognized that absolute immunity from their own domestic civil and criminal processes gave an enormous competitive advantage to foreign state-owned enterprises at the expense of competing domestic privately owned companies.[73] Therefore, as the customary attributes of sovereignty have constricted, so have the hitherto near-absolute immunities of diplomatic agents.

The Triumph of Functional Necessity Theory?

One of the more innovative jurists of the Enlightenment, Emerich de Vattel, was the first to suggest the stripping away of legal fictions from the law of

diplomatic immunity. Vattel, with impeccably rational deduction, reasoned that one could observe from history and current state practice that nations universally recognized the necessity of diplomatic intercourse. Based on this recognized necessity and the fact that sovereigns could not possibly conduct any but a small fraction of their relations with other sovereigns in person, nations must send and receive envoys. Therefore, reasoned Vattel, if you must have ambassadors, reason dictates that states should not interfere with ambassadors lest they be unable to accomplish their mutually agreed upon functions.[74] This utilitarian argument—immunity for the sake of diplomatic efficiency—was in keeping with the overarching secularization of thought throughout the Enlightenment. Why base something as important as a waiver of sovereignty on religious or quasi-religious grounds when a rational basis would do nicely? Because, as Vattel recognized, the sending and receiving of ambassadors was an "indispensable obligation" to promote the common welfare and safety of nations, provide a means to peacefully settle disputes, and to facilitate general intercourse among states,[75] it was perfectly rational and efficient to ensure diplomats could go about their work protected from local interference.

In 1926, a senior legal counsel from the British Foreign Office, Sir Cecil Hurst, declared the representative character theory of diplomatic immunities a dead letter. Hurst was bemused by the extensive amount of written debate between authors on the matter.

> In fact, it is a very simple thing. Privileges and immunities are founded on necessity: they are indispensable to maintaining international relations. . . . [Representative character] theory could have had some usefulness, but it did not accord with the facts. It came in the end to absurd consequences and it was definitively repudiated by modern authors and court decisions.[76]

In the flush of internationalist fervor that followed the victory of the Allied Powers over fascism in World War II, many legal commentators rushed to proclaim the end of old notions of sovereignty, including strict diplomatic immunity as an extension of sovereign immunity, in favor of the new international repository of sovereignty, the United Nations. One of the leading international law scholars of this period, Hersch Lauterpacht, systematically dismantled the traditional supports for a theory of sovereign immunity: the assumed *sovereignty, independence, equality,* and *dignity* of states.[77] Lauterpacht dismissed concerns that limiting sovereign immunity, and by extension diplomatic immunity, would offend the principles of *independence* and *equality.* Why should these principles prevent a state being brought before a foreign court if subject to the same procedures and substantive law as citizens of the foreign state?[78] In addition, Lauterpacht could not see how *sovereignty* could be offended if a state were brought before a foreign court as a party to a contract made within the foreign state or as a defendant in a tort action that arose within the receiving state's territory. In fact, Lauterpacht argued, there is a greater

affront to the foreign state's sovereignty because it is denied the traditional sovereign authority to enforce contracts that were made or redress injuries that had been incurred within its borders.[79]

It was with the least tangible of these concepts that Lauterpacht had the most difficulty. Having disposed of the other three traditional bases for sovereign—and by extension diplomatic—immunity, Lauterpacht conceded that the only remaining rational basis was *dignity.* However, he found that basing any legal principle on anything as anachronistic as dignity was quite ill-advised.

> [Dignity is] alien to the conception of the rule of law, national and international, and to the true position of the State in modern society.[80]

How, reasoned Lauterpacht, could any state's dignity (while not conceding this was even a valid basis for concern) be offended as long as equal due process was available in the foreign court? After all, state governments routinely submit to the jurisdiction of their own national courts.[81]

Although a perfectly rational argument, Lauterpacht missed a significant point. States, particularly new states emerging from the yoke of colonialism, cared deeply about *dignity.* In the case of many new and desperately poor states, the seemingly equal dignity within international organizations such as the UN General Assembly afforded to each state, no matter how small or powerless, provided significant political validation. Even in the face of economic and political backwardness, new states could claim a seat at the table, even if the meal was someone else's treat.

Developing State Practice

Beginning in the immediate aftermath of World War II—but really harkening back to the Russian Revolution—many states began asserting a more restrictive interpretation of the heretofore absolute theory of sovereign immunity. In 1952, the acting legal advisor to the U.S. State Department issued a landmark memorandum setting out a restrictive interpretation of immunity as the official U.S. position.[82] The U.S. codified the so-called Tate Letter's restrictive immunity in the 1976 Foreign Sovereign Immunity Act.[83] Fearing that important U.S. business centers like New York City would now gain an advantage over London in attracting commercial activities, the British Parliament followed the American lead in 1978 with the State Immunity Act.[84]

Vienna Conventions

The opening for signature of the 1961 Vienna Convention on Diplomatic Relations (and its companion the 1962 Vienna Convention on Consular Relations) represented a triumph for the functional necessity theory of diplomatic immunity.[85] The immediate and resounding acceptance[86] of the 1961 Vienna

Convention was a result of the confluence of several factors. First, diplomatic law had remained fairly stable for some time. Second, there was a keen interest among states in clear rules of reciprocity of treatment, particularly with the rapid expansion of the number of new states in the late 1940s and the 1950s. Finally, there was mutual interest in reaching a compromise on uniform rules between states, the International Law Commission, and the United Nations Sixth Committee (International Law).[87]

THE PSYCHIC VALUE OF REPRESENTATIVE CHARACTER

So with the broad acceptance of the Vienna Convention, including its codification of the functional necessity theory of immunity, one would have expected representative character and its baggage of legal fictions to have slipped from the scene without a ripple. However, although diplomatic law may have rejected the idea that ambassadors personify their sovereigns, diplomatic practice has not.

Of course, representative character is a legal fiction—the ambassador does not corporeally represent anyone but himself. Nevertheless, it is hardly the first such legal fiction to influence the development of positive law in important ways.[88] The fiction that the envoy personified his sender, in law and dignity if not in fact, served as a mechanism allowing diplomats to carry out their functions free from the threat of interference by a host nation's coercive institutions while leaving intact the emotive force of the principle of absolute territorial sovereignty.[89] Given the great flurry of controversy over the perceived erosion of the internal sovereignty of state governments in the face of foreign interventions in domestic humanitarian crises or internal civil conflicts, territorial sovereignty still carries substantial emotional weight. With international institutions in the early stages of development and international society still grasping at consensus regarding even the most fundamental issues, the fiction of representative character still holds appeal. As Sir Henry Maine observed in regard to primitive societies, "It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society."[90] In the infantile society of nations, the fiction that the envoy is a physical personification of his sovereign has likewise proven a durable myth.

If it is true that humans, and nations as an aggregation of humans, act toward each other either with *egoism* (self-interestedly at the expense of others) or with *sociability* (in cooperation with others, self-interestedly or not),[91] to which impulse does one attribute the universal acceptance of diplomatic immunity? Realists would not—indeed cannot—accept that states act out of sociability for any reason.[92] But is the legal regime of diplomatic immunity purely a tit-for-tat exchange of self-interests? On the other hand, can we presume that states waive the exercise of a fundamental sovereign prerogative—control of those

within their borders—out of nothing more than an impulse to sociable cooperation? The truth, as is often the case, lies somewhere between. In an increasingly interconnected world, there is substantial psychic value to be gained from ensuring the continuous and safe presence of diplomatic envoys within the borders of other states.

Even during the age of industrialized war with millions of lives at stake, the sanctity of diplomats has generally been respected.[93] The question is, of course, why? At least part of the answer lies in the fact that diplomatic envoys fulfill a complex need for intrahuman contact between sovereign states, both by providing a human face to national policies and by supplying a tangible way to directly affect the "person" of a foreign sovereign, be it a monarch, a dictator, or an elected assembly.

Physical Control

Once diplomats are formally received within a host state, they are in many ways subject to the whims of the receiving government and the winds of political change in the relations between the host country and the envoy's home country. As such, they represent a tangible object against which governments can react to express pleasure, rebuke, or warning. One of the mechanisms used to some effect as a form of diplomatic signaling by both the United States and the Soviet Union throughout the Cold War was expulsion of diplomatic personnel or the use of the persona non grata designation. Under accepted legal principles, diplomatic personnel may be declared non grata and expelled for any reason or no reason, and the host state is under no legal obligation to provide an explanation.[94] This mechanism proved to be an effective form of registering displeasure between the two superpowers whose nuclear arsenals rendered more aggressive forms of signaling unacceptably dangerous.

One of the earliest and most infamous cases of a host state declaring another sovereign's envoy non grata and immediately expelling him was the case of the sixteenth-century Spanish ambassador to England, Don Bernadino de Mendoza. Caught assisting in the plot of Mary, Queen of Scots to overthrow Elizabeth I, a treasonous act for any subject of the realm, Don Bernadino was immediately expelled, his well-honored diplomatic immunity from criminal prosecution all that stood between him and the same fateful end met by his English and Scottish coconspirators.

After the Napoleonic Wars, a period within which European Great Power diplomacy was developed to a subtle and highly nuanced art, expulsions were normally accomplished with little notice and as discretely as possible. That is not the case in modern practice; the expulsion of diplomats is as often intended to serve as a public remonstrance of a foreign government than as a rebuke of an individual diplomat's peccadilloes.

Talleyrand once advised his diplomats, "Above all avoid an excess of enthusiasm."[95] Diplomacy is and always has been a nuanced business. Signaling in

diplomacy is highly stylized and the often-ossified rituals of diplomatic intercourse can often severely limit the availability of nonverbal or unscripted signals. However, international mass media, in particular television, has probably changed this forever.[96]

Dignity and Prestige

The elaborate trappings of diplomatic precedent and protocol developed in response to the fiction that all sovereign states are equal within the community of nations. This is factual nonsense—there have always been stronger and weaker states—but the pretext of sovereign equality has been enshrined in the constitutional documents of international society.[97] That the ideal of sovereign equality (and its visible diplomatic manifestations) has proven persistent, even in the face of vast disparities in the political, military, and economic power of states, is hardly surprising, for "the cost of sovereignty is low and the psychic satisfaction it provided was high."[98]

> Sovereignty is the fantastic representative of infantile pride . . . As *individuals*, we usually have to abdicate our "absolute sovereignty" . . . by the second or third year of life. But individually we retain, and collectively we luxuriate, in expressing [in the form of state sovereignty] traces of these early forms of thought which represent us as free and independent in *all* our actions.[99]

Since the rapid decolonization that followed World War II, and again after the dissolution of the Soviet Union, small and new states, as well as national, religious, and ethnic movements, have often found self-validation and international recognition, even in a purely ritualistic form, through the rites of diplomacy. It is often these newest and smallest states (or even substates) that most crave the ritual expression of equality among state representatives, regardless of the actual strength or weakness of their respective nations.

> If the doctrine of sovereignty helps fulfill deeply-rooted emotional needs, then arguments alone—no matter how valid—cannot convince sovereignty's champions to abandon it.[100]

It is within this highly stylized milieu, wherein the pretense is tentatively maintained that states are coequal sovereigns, that even the smallest states can find recognition, the façade of equality, and some full measure of dignity within international society.[101]

> Ritual is used to resolve what may be one of the greatest areas of conflict for the developing individual, that is, what is inside and what is outside? This is, in effect, to define the individual, to separate one biological unit from the mass that is the remainder of the species.[102]

From the earliest days of diplomatic intercourse, ritual and prestige were inextricably mixed. Because the theory of diplomatic capacity was grounded in the notion that the ambassador was a direct proxy of his sovereign, complex rules of precedence and protocol emerged very quickly.

> The crux of this matter was that appearances—the right to a place of honor in public ceremonies; coats of arms; the grant by one ruler to another of some particular title . . . clearly and indeed brutally symbolised power and status. Any change in ceremonial indicated a rise or fall in the standing of a state or its ruler; diplomats therefore watched with a jealous eye the formalities observed on any great public occasion.[103]

Therefore, in an environment where even a seemingly meaningless change in protocol might lead to a nasty diplomatic imbroglio, the ability to use direct manipulation of protocol and ritual to communicate meaning is greatly restricted.[104] Although vigorously monitored and enforced, rights of precedence based on the relative importance of states obviously change over time. Shifting alliances can also cause a reworking of the diplomatic pecking order.[105]

Short of physical assault, the ultimate insult to the dignity of an ambassador or chief of mission, and by extension to his sending state, is a declaration of him or her as persona non grata. During negotiations preceding the 1961 and 1962 Vienna Conventions, one of the leading members of the International Law Commission warned that declaring a head of mission persona non grata without clear cause would likely lead to the sending state feeling "its dignity affronted and relations between the two might suffer" as a result.[106] Keep in mind this succinct exposition of the personification implicit in representative character theory is from a member of the very commission that sought to jettison what they found to be the anachronistic representative character theory. This is a strange way to support functional necessity theory.

THE SOCIAL PSYCHOLOGY OF DIPLOMACY?

What then is the present state of diplomatic immunity? Although much of the international legal community, led by the International Law Commission, has sought to stamp out what may seem an anachronistic legal fiction, representative character theory has proven remarkably resilient. The reason for this is that the permanent posting of diplomats and maintenance of embassies abroad is a twofold enterprise. First, the day-to-day functioning of diplomacy at the microlevel is undeniably important to the nitty-gritty work of international relations. The economic role of embassies greases the wheels of international trade. Increasing numbers of foreign nationals living abroad have placed growing demands on consular services. Low-level exchange of information between government agencies, usually facilitated by embassy staff, helps ensure uniformity in regulatory and enforcement activities. In order efficiently to perform these often mundane but important functions, diplomats

must remain unhampered by fear of interference by receiving state agencies or courts. Undeniably, this free exercise of traditional diplomatic activities creates a functional necessity for diplomatic immunities. These are the purposes the Vienna Conventions were intended to advance.

However, stripping the purpose of permanent envoys to the barest utilitarian functions misses much of the traditional sociological role fulfilled by diplomatic representatives. The mutual exchange of and respect for diplomats represents an important mechanism for bolstering solidarity within the society of states. As in any social relationship or grouping, maintaining solidarity is necessary to fostering the desire "to remain together at work or play, in trade, or under the same flag and government."[107]

Ritual plays a powerful role in social groups, particularly "primitive" societies like the international community.[108] The ritual exchange of diplomats, like any ritual, can be a powerful tool for creating and perpetuating social solidarity.[109] Ritual, after all "demarcates, emphasizes, affirms, solemnizes, and also smoothes over critical changes in social relationships."[110] The sending and receiving of diplomats is not merely a utilitarian function to smooth trade and communication between states. Like other rites of intensification,[111] the ritual of diplomatic interaction is intended to reinforce among states an intense awareness of the existence of a "community of nations" and their status as nominally coequal members of that community. In short, this diplomatic ritual of intensification helps ensure that a nation—or worse, whole classes of nations—do not become alienated from the basic tenets and goals of the international community. When states become alienated (North Korea seems an apt example in this context), dire consequences can accrue to their own people and to the international community at large. As with alienated individuals within a social group, such states "live incomplete, normless, and relatively meaningless lives."[112] And as with highly alienated individuals in society, highly alienated states can wreak havoc within the larger community of nations. There is, therefore, a cost to excluding states from the diplomatic rituals.

The nineteenth-century English political economist Walter Bagehot analyzed this same kind of utilitarian–ritualistic dichotomy in his influential study of the English system of government, *The English Constitution*.[113] Bagehot acknowledged that the Crown performed two seemingly contradictory roles in English society—one functional (the day-to-day business of government through the Cabinet, Privy Council, and the "Queen-in-Parliament") and one ritualistic (the traditional ceremony of monarchy). Bagehot described these separate roles as the *efficient parts* and the *dignified parts* of the English Constitution. The efficient parts consist of the actual mechanisms through which the government "works and rules," whereas the dignified parts include "those which excite and preserve the reverence of the population."[114] Much the same kind of bifurcation of purpose appears to be at work in diplomatic immunity, although as Bagehot pointed out well over a century ago, "There are indeed men who reject the dignified parts."[115]

CONCLUSION

Diplomats, rather than existing as mere functionaries, represent in a universally acknowledged way the sovereignty of their sending state—a real-time presence in a foreign country of the presumed equality and dignity of their state. The persistence of seemingly archaic forms of protocol, the deference paid to heads of mission at social functions, even the presence of a foreign state's flag in another nation's capital—all demonstrate an essential symbolic representative character inherent in the presence of permanent envoys that cannot be reduced by positive law to a mere efficient function. Because the importance of diplomatic intercourse cannot be quantified merely in numbers of trade contracts signed or amounts of foreign aid received, states will continue to engage in the ritual of representative character diplomacy to allow some tangible (albeit ritualistic) mechanism for directly manifesting honor, disdain, or anger toward a nominally coequal sovereign in an intrinsically personal and human way.

NOTES

1. See, for example, McCoubrey, Hilaire, *Natural Law, Religion, and the Development of International Law* 177–89.

2. See Bederman, David, *International Law in Antiquity* 135–36 (2000). The inherent sociability of humans has been the subject of much interest and comment by philosophers for many centuries. In Book I, Part II, of his *Politics*, Aristotle makes his famous assertion that man is, by nature, a political animal. He continues:

> The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state. A social instinct is implanted in all men by nature. . . .

The seventeenth-century philosopher and jurist Samuel von Puffendorf stated in a chapter entitled "On Natural Law" from his 1673 work *De Officio Hominis et Civi (The Duty of Man and the Citizen)*, I.iii.7:

> Thus then man is indeed an animal most bent upon self-preservation, helpless in himself, unable to save himself without the aid of his fellows, highly adapted to promote mutual interests; but on the other hand no less malicious, insolent, and easily provoked, also as able as he is prone to inflict injury upon another. Whence it follows that, in order to be safe, he must be sociable, that is, must be united with men like himself, and so conduct himself toward them that they may have no good cause to injure him, but rather may be ready to maintain and promote his interests.

This is not to say that the idea of inherent sociability is not without its detractors, with equally notable thinkers like Jean-Jacques Rousseau and Emmanuel Kant among them.

3. Davitt, Thomas E., *The Basic Values in Law: A Study of the Ethico-Legal Implications of Psychology and Anthropology* 9 (1968).

4. It is of course possible to make too much of this Platonic notion that states are just men writ large, but there is undeniably some organic texture to the behavior of states—or any human collective—discernible from their interaction with other similar entities. This is not a completely uncontroversial position, however. The great French sociologist Emile Durkheim in his 1912 work, *The Elementary Forms of Religious Life*, boldly asserted that society is a reality *sui generis*. Quoted in Scheff, Thomas J., *Bloody Revenge: Emotions, Nationalism, and War* 75 (1994).

5. Anderson, M. S., *The Rise of Modern Diplomacy* viii (1992).

6. See Professor Bederman's discussion of personal diplomacy in the ancient world, *supra* note 2, at 90–91.

7. Anderson, *supra* note 5, at 9–10. The practice of using bankers or merchants to perform duties as official envoys was, by the nineteenth century at the latest, considered very bad form. Denza, Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 382 (2d ed. 1998). The possibility of using such persons as formal representatives was extinguished formally by the 1961 Vienna Convention on Diplomatic Relations, which specifically forbids diplomatic agents to engage in professional or commercial activity. Vienna Convention on Diplomatic Immunity, article 42, in Brownlie, Ian, *Basic Documents in International Law* 226 (3d ed. 1984).

8. The preamble to the Vienna Convention on Diplomatic Relations states, "Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents." *Vienna Convention, supra* note 7, at 213.

9. For a broad discussion of each, see, e.g., Barker, J. Craig, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* 35–55 (1996).

10. *Id.*, at 49. See generally, Henkin et al., *International Law* 1201–02 (3d ed. 1993).

11. The myths of the Olympian pantheon, for example, were replete with stories of any number of deities assuming human or animal form to manifest themselves to—and cavort with—mortals.

12. Anderson, *supra* note 5, at 12.

13. Dreener, David R., *The United States Attorneys General and International Law* 266 (1957). Attorney General Cushing also noted that this customary rule did not apply to the American republics because the executive power is continuous and there was therefore no need for a custom to reappoint ambassadors with a change in presidents.

14. See, e.g., the Austro-Hungarian Empire's 1895 law on civil jurisdiction, exempting, "Persons enjoying extraterritorial status by virtue of the principles of international law." Act of 1895 to Establish Rules Governing Jurisdiction, art. 9, cited in *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities* 15 (UN Legislative Series, vol. VII, 1958). U.S. Attorney General Cushing wrote in 1855 that extraterritoriality of diplomats "is the unanimous doctrine of all publicists, and is recognized in England, as it is in the United States, by statute." 7 *Opinions of the Attorney General* 386 (1855).

15. Barker, *supra* note 9, at 39–45. In practice, immunity from the criminal and civil jurisdiction of the receiving state often extended to whole sections, known as *franchises du quartier*, of the capital. Some of these diplomatic quarters were quite large and extended for many blocks around an embassy. The modern analogy to *franchises du quartier* is the occasional granting of asylum by an embassy to a national of the receiving state. See, generally, *Department of State Bulletin* 50 (Oct. 1980) (U.S. policy on asylum in embassies).

16. Strisower, Leo, "L'exterritorialité et ses principales applications," 1923 *Recueil des cours de l'academie de droit internationale* 911 (Walker's trans.).

17. Barker, *supra* note 9, at 33–34. The author specifically cites to works by De Martens (1866 *Le guide diplomatique*) and Alberico Gentili (1585 *De legationibus*).

18. Van der Molen, Gesina H. J., *Alberico Gentili and the Development of International Law* 92 (1968).

19. Stuart, Graham, "Le droit et la pratique diplomatiques et consulaires," 1934 *Recuil des cours de l'academie de droit internationale* 463 (Walker's trans.).

20. Barker, *supra* note 9, at 15.

21. *Id.*

22. Bederman, *supra* note 2, at 91–94.

23. Hosack, John, *Law of Nations* 3 (facsimile reprint 1982) (1882) (citing Herodotus, Book VII, v. 136).

24. Cicero, "On the Response of the Soothsayer," *quoted in* Grotius, *De jure bellie ac pacis* bk. II, chapter xviii, §1 (1646) (*Classics in International Law* series, F. W. Kelsey trans. (1925) at 939.

25. Phillipson, Coleman, *International Law and Custom of Ancient Greece and Rome* 309–10 (1911). For example, the Romans refused to receive ambassadors from Rhodes in 169 B.C. and from Ptolemaic Egypt in 161 B.C. In both instances, Rome went to war with these states shortly after refusing their ambassadors.

26. Frey, Linda S. and Marsha L. Frey, *The History of Diplomatic Immunity* 37 (1999).

27. Phillipson, *supra* note 244, at 330.

28. *Id.*

29. D. 5.1.24–28. Paul was one of the most influential jurists within the collection of juristic writings assembled into what would become known as Justinian's *Digest*.

30. Ganshof, Francois L., *The Middle Ages: A History of International Relations* 42 (1953, Remy Inglis Hall trans. 1970).

31. Doyle, John P., "Francisco Suarez on the Law of Nations," in Mark W. Janis and Carolyn Evans, eds., *Religion and International Law* 109 (1999). The *Etymolgies* of Isidore of Seville included the maxim *legatorum non violandorum religio* at v. 6. This maxim was also incorporated by Gratian in his later *Decretum* at D. 1, c. 9.

32. Brundage, James A., *Medieval Canon Law* 116–17 (1995).

33. Frey & Frey, *supra* note 26, at 78.

34. Gratian, *Decretum*, D.1, c. 9 (in "The Treatise on Laws," DD. 1–20, A. Thompson, trans., with the Ordinary Gloss, J. Gordley, trans. 1993).

35. Frey & Frey, *supra* note 26, at 88.

36. Echid, Ahmed, "Islam et le droit des gens," 1934 *Recuil des cours de l'academie de droit internationale* 421 (Walker's trans.). Citing the International Court of Justice's *US Diplomats* decision, 1980 ICJ 41, regarding the seizing of U.S. diplomatic personnel in Iran, one commentator states that Islam has continued to contribute to the development of the law of diplomatic immunity. See Gamal M. Badr, "A Survey of Islamic International Law," in Janis and Evans, *supra* note 31, at 99–100 (1999).

37. Lewis, Charles, *State and Diplomatic Immunity* 15 (3d ed. 1990).

38. *Las Siete Partidas*, part 7, title 25, law 9 (quoted in Frey & Frey, *supra* note 26, at 86).

39. *Quoted in* Hosack, *supra* note 23, at 157–58.

40. Barker, *supra* note 9, at 21. A nineteenth-century historian, Otto Krauske, claimed that the first permanent ambassador was sent by the Duke of Milan, but to Genoa in 1455. Van der Molen, *supra* note 18, at 88.

41. Van der Molen, *supra* note 18, at 88.

42. Anderson, *supra* note 5, at 13.

43. Van der Molen, *supra* note 18, at 89–91.

44. *Id.*

45. Hurst, Cecil, "Les immunités diplomatiques," *Recuil des cours de l'academie de droit internationale* 119 (1926). A noted jurist of the seventeenth century, Richard Zouche, quotes another commentator, Paschal, on the matter of the honesty of ambassadors:

> I would have an ambassador rely on truth, the most certain of the virtues, and her faithful comrade reticence. Yet I am not so simple or rude as to exclude the diplomatic lie altogether from the mouth of an ambassador.

Zouche, *An Exposition of Fecial Law and Procedure* pt. II, § iv.17.21 (1650 ed.) (J. L Priestly trans., in the *Classics of International Law* series [1911]) at 97.

46. Anderson, *supra* note 5, at 2–3.

47. *Id.* at 8–9. Oddly, the greatest power of the age, France, was the last to engage to any significant extent in the sending of permanent embassies abroad.

48. Alberico Gentili did not think much of permanent embassies and steadfastly asserted that sovereigns retained the right to refuse to allow permanent embassies. Hugo Grotius likewise thought that rulers could easily do without them, relying instead on special envoys or other ad hoc representatives. Van der Molen, *supra* note 18, at 98.

49. Gardot, André, "Jean Bodin: sa place parmi les fondateurs du droit international," 1934 *Recuil des cours de l'academie de droit internationale,* 655 (Walker's trans.).

50. Ayala, Balthazar, *De jure et officious et disciplina militarii,* bk. I, ch. ix, §2, *quoted in* Brown, *infra* note 53, at 269. The 1582 edition translated by J. P. Bates is also available in the *Classics of International Law Series* (1912).

51. Anderson, *supra* note 5, at 12. The U.S. attorney general stated in 1855 that diplomatic immunity extended to all diplomatic personnel with a "direct putative relationship to the sovereign" regardless of their title. 7 *Opinions of the Attorney General* 210–11 (1855).

52. Barker, *supra* note 9, at 22–23.

53. Suarez, Francisco, *De legibus,* bk. II, ch. xix, §7, *cited in* Scott, James Brown, *Law, the State, and the International Community* 269 (1939). This would also be the explicit position incorporated into the 1961 Vienna Convention on Diplomatic Relations. Article 2 of this convention states, "The establishment of diplomatic relations between States and of permanent diplomatic missions, takes place by mutual consent." *Vienna Convention, supra* note 7, at 214.

54. Doyle, *supra* note 31, at 108. This is still the accepted rule today and few commentators have questioned the prerogative of state sovereigns to refuse ambassadors from particular states. *But see,* Wolff, *infra* note 75, at ch. ix, §1045 (p. 528) ("Those who claim that it is merely a matter of choice whether or not anyone wishes to admit ambassadors, comes to a rash decision . . .").

55. *Id.* at 112.

56. Barker, *supra* note 9, at 22–23.

57. Barker, *supra* note 9, at 39–45.

58. Denza, *supra* note 7, at 113. See also, Grotius, *De iure pacis ac belli,* II.xviii. vii–ix.

59. Barker, *supra* note 9, at 35–39.

60. Bynkershoek, Cornelius, *De foro legatorum,* ch. vii (1744 edition of the 1721 G. Laing trans.) (*Classics of International Law* series, 1995 reprint, at 37). Nevertheless, Bynkershoek recognized the emotive appeal of the idea that ambassadors actually personified their sovereigns. In answering the question why there was need for diplomatic immunity, Bynkershoek wrote, "[B]ecause they are the representatives everywhere of their prince, because they are messengers and negotiators of peace and treaties, and because without them the association and blessed tranquility of nations cannot be preserved." *Id.* at ch. v (p. 27).

61. Wolff, Christian, *Jus gentium methodo scientifica pertratatum,* ch. ix, §1055 (1737) (J. Drake trans., in the *Classic of International Law* series (1934) at 532–33).

62. Wolff rejected outright any quasi-religious or natural law notions of immunity, finding the basis of immunity in the consent of states. "Those who claim the sanctity of an ambassador is a part of the common law of all nations *(jus gentium)* imagine a right which does not exist." *Id.* at ch. ix, §1062 (p. 536).

63. Bynkershoek, *supra* note 60, at ch. v (p. 27).

64. Statutes 118 § 26 (1790), *cited in* Dreener, *supra* note 13, at 156.

65. Hannikainen, Lauri, *Peremptory Norms in International Law* 193 (1988). However, as Professor Haanikainen points out, the English text of the ICJ decision does not exactly track the language of the Vienna Convention on the Law of Treaties, article 53, that deals with the non-derogability of *jus cogens* norms. Whereas the English text uses the term "imperative" rather than peremptory, the French text of the decision uses identical language to the French text of article 53.

66. *See generally,* "Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations," UN Doc. A/2625 (1970); Fiore Pasquale, *International Law Codified* 62 at 107 (1918); Louis Henkin, "International Law: Politics, Values and Functions," 216 *Recuil des Cours* 26–27 (1989-IV). *Cf.* Martti Koskenniemi, "Sovereignty—Prologemena to a Study of the Structure of International Law as Discourse," 4 *Kansainoikeus Ius Gentium* 71, 106 (1987).

67. *Charter of the United Nations,* art. 2, para 4. The International Court of Justice's opinion in the 1949 *Corfu Channel Case* stated that within the international community, "The sovereignty of States has now become an *institution,* an *international social function* of a psychological character . . ." *United Kingdom v. Albania,* 1949 I.C.J. 43 (opinion of J. Alvarez); Henkin, *supra* note 66, at 28.

68. Pasquale, *supra* note 66, at 107.

69. *Id.,* at art. 2, para 2.

70. *Id.,* at art. 4.

71. *Vienna Convention on Diplomatic Relations,* art. 2, *supra* note 7, at 214.

72. Hsiung, James C., *Anarchy and Order: The Interplay of Politics and Law in International Relations* 100–101 (1997).

73. This economic reality was one of the driving forces behind the issuance of the Tate Letter in 1952. *See* note 82, *infra.*

74. Cited in Barker, *supra* note 9, at 46–49.

75. Vattel, Emerich, *The Law of Nations or the Principles of International Law* bk. IV, ch. v (1758 ed., Charles Fenwick trans.) (*Classics of International Law* series, 1995

reprint, at 362). This view that there was a moral obligation on states to send and receive ambassadors was endorsed by Vattel's contemporary, Christian Wolff, who stated that ambassadors were necessary

> according to that duty imposed by nature by which one nation ought to contribute what it can to the presentation and perfection of another in that in which it is not self-sufficient, so that they may promote the common good as members of the supreme state.

Wolff, *supra* note 61, at ch. ix, §1044 (p. 527).

76. Hurst, *supra* note 45, at 121–22, 145 (Walker trans.).

77. Barker, *supra* note 9, at 194–97.

78. *Id.* at 196.

79. *Id.*

80. Lauterpacht, Hersch, "The Problem of Jurisdictional Immunities of Foreign States," 28 *British Yearbook of International Law* 220 (1951).

81. See, e.g., the Federal Tort Claims Act, 28 U.S.C. §§2671–2680.

82. Letter from Jack B. Tate, acting legal advisor, Department of State (19 May 1952), 26 *Department of State Bulletin* 984 (1952).

83. 28 U.S.C. §§ 1330, 1332(a), 1391(f) and 1601–1611 (1976).

84. State Immunity Act (1978), c. 33.

85. Hsiung, *supra* note 72, at 99.

86. According to the official UN treaty database, there are currently 179 states party to the Vienna Convention on Diplomatic Relations. The list of states is available at http://untreaty.un.org.

87. Denza, *supra* note 7, at 1–3.

88. The systematic development of modern tort and contract law, for example, depended in many ways on the acceptance of certain fictions. Fuller, Lon L., *Legal Fictions* 52–53 (1967). For example, implied consent, assumption of the risk, trespassers as invitees to attractive nuisances, and last clear chance are all examples of legal fiction introduced to mitigate otherwise unwanted results from strict application of legal maxims. Historically, the Roman jurists built an elaborate body of civil law from a handful of archaic rules and procedures through the use of legal fictions.

89. *Id.*

90. Maine, Henry Sumner, *Ancient Law* 24–25 (14th ed. 1891). Maine saw three primary mechanisms for legal change: legal fictions, equity, and legislation. He believed that law developed through these three phases in roughly historic order.

91. Carr, E. H., *The Twenty Years Crisis: 1919–1939* 177 (1939).

92. See, e.g., Waltz, Kenneth, *Theory of International Politics* 91 (1979). Waltz states, "[N]o state intends to participate in the formation of a structure by which it and others will be constrained."

93. Nussbaum, Arthur, *A Concise History of the Law of Nations* 231–32 (rev. ed. 1962).

94. *Vienna Convention*, art. 9, *supra* note 7, at 215–16. Article 9 states, "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*."

95. Cohen, Raymond, *Theatre of Power: The Art of Diplomatic Signalling* 7 (1987).

96. *Id.* at 7.

97. UN Charter, art. 2(1).

98. Levi, W., *Law and Politics in International* Society 116 (1976), quoted in, Schoenfeld, C.G., *Psychoanalysis Applied to Law* 122 (1984).

99. West, Raynard, *Conscience and Society: A Study of the Psychological Prerequisites of Law and Order* 55 (1945).

100. Schoenfeld, *supra* note 98, at 127.

101. Nafziger, James A. R., "The Functions of Religion in the International System," in Janis and Evans, *supra* note 36, at 160.

102. Group for the Advancement of Psychology, *Us and Them: The Psychology of Ethnonationalism* 37–38 (1987).

103. Anderson, *supra* note 5, at 18.

104. Cohen, *supra* note 95, at 143.

105. Anderson, *supra* note 5, at 61–62.

106. Barker, *supra* note 9, at 102.

107. Honigman, John J, *Understanding Culture* 75 (1977).

108. The world community as a primitive society is an old idea, tracing back at least to Thomas Hobbes in the seventeenth century.

109. *Id.* at 169.

110. Lewis, I. M., *Social Anthropology in Perspective: The Relevance of Social Anthropology* 136 (2d ed. 1985).

111. *Id.* at 171.

112. Oldenquist, Andrew, "Autonomy, Social Identities, and Alienation," at 54 (in Geyer and Heinz, eds., *Alienation, Society, and the Individual: Continuity and Change in Theory and Research* 51–60 [1992]).

113. Bagehot, Walter, *The English Constitution* (2d ed. 1873).

114. *Id.* at 44.

115. *Id.*