
At a press briefing on May 29, Richard Boucher, the spokesperson for the U.S. State Department, said, in answer to a question about the status of foreign diplomats in Iraq, "There are diplomats who were previously accredited to the Saddam regime, who have been residing in former mission residences, who are still there. We do not regard those as diplomatic missions. They're accredited to a regime that is no longer existent, and, therefore, their accreditation would have lapsed." Later in the same briefing Mr. Boucher asked rhetorically, "Do [these diplomats in Baghdad] have diplomatic accreditation? Do they have diplomatic status? Do they have diplomatic immunity? No. They don't." [1] He did not explain why the regime change in Iraq would result in a loss of immunity for the diplomats.

Diplomatic and consular immunities are regulated, respectively, by the 1961 Vienna Convention on Diplomatic Relations [2] and the 1963 Vienna Convention on Consular Relations. [3] These are multilateral treaties to which Iraq and the United States, among many others, are parties. Mr. Boucher's statements raise issues under the Convention on Diplomatic Relations ("the Convention"). Its purpose "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." [4] Under articles 29-31 of the Convention, diplomatic agents and their property enjoy broad immunities from interference and from the criminal and civil jurisdiction of the receiving State, though their immunities may be waived by the sending State under article 32.

Article 3 of the Convention sets out a non-exclusive list of the functions of a diplomatic mission: "(a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) negotiating with the Government of the receiving State; (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; [and] (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

The Convention addresses only tangentially how it is to operate in time of war, limiting itself to a few issues that could arise between two States at war or otherwise at odds with each other. [5] It has been observed that "Practical considerations will almost always favour the continuation of relations, though not necessarily the retention of a permanent mission. This has become more obvious in the light of some recent cases where diplomatic relations subsisted even while armed conflict was taking place between sending and receiving States - as between India and Pakistan in 1965 and 1971." [6]

The operation of the Convention during armed conflict and military occupation is a legal matter as well as a practical one. When Iraq invaded Kuwait in 1990 and occupied the country, it took steps to close the foreign diplomatic and consular missions there. The United States and others sponsored a U.N. Security Council resolution that was adopted with no negative votes, as Resolution 674. In it, the Security Council, acting under Chapter VII of the U.N. Charter, condemned the Iraqi authorities and occupying forces for violating the Vienna Conventions on Diplomatic and Consular Immunity and the Geneva Convention Relative to the Protection of Civilians in Time of War. [7] The Security Council demanded that Iraq fulfill its obligations under those Conventions and that it rescind its orders for the closure of diplomatic and consular missions in Kuwait and for the withdrawal of the immunity of their personnel. [8] The resolution did not expressly tie those demands to the illegality of Iraq's invasion, but rather expressed them as reflections of Iraq's treaty obligations as the State then in control of Kuwait.

Nothing in the Convention on Diplomatic Relations expressly addresses retention or loss of immunities if the government of the receiving State has been deposed. The only mechanism it provides for terminating the immunities of a foreign diplomat is for the receiving State to declare him or her *persona non grata*, under article 9. The Convention does say in article 4 that the agreement of the receiving State must be given before the sending State may send a new head of mission. It also says in article 13 that the head of the mission is considered as having taken up his [or her] functions in the receiving State upon presentation of credentials to the receiving State's Ministry of Foreign Affairs.

It could be argued that when the regime that approved and accepted a diplomat's credentials has been deposed, those credentials are no longer in force. On the other hand, it is apparent from the functions of a diplomatic mission, set forth above, that a diplomatic mission has important responsibilities on behalf of the sending State that do not depend on the continuing existence of the government that originally accredited the officials of the mission. In the case of an occupied territory, such as Iraq, ^[9] the occupying power takes over (temporarily) many of the duties of the government it has deposed. ^[10] The diplomatic agents in Baghdad would have a continuing interest in performing their normal functions (for example, to protect the nationals of the sending State) as best they can under the conditions of occupation. Since the responsibilities of an occupying power do not include accreditation of diplomats, sending States would be without any diplomatic protection in their efforts to protect their national interests in present-day Iraq, if the State Department's view is correct. When Mr. Boucher was asked if there are now no diplomatic privileges in Iraq, he answered in the affirmative, "because there's no government in Iraq to grant those privileges." ^[11]

It could also be argued that because a receiving State may at any time break off diplomatic relations with any sending State, the overthrow of a government of the receiving State *ipso facto* results in such a breaking of relations with all sending States unless or until a new government is in power and is able to make a decision as to whether to continue diplomatic relations. But the breaking of relations is not a remedy designed for use against all missions of all sending States. Instead, it is normally a mechanism for situations of hostility or disapproval between individual governments or between the receiving government and an identifiable bloc of other governments. Moreover, under article 45 of the Convention, when diplomatic relations are broken, the sending state may protect its interests in a way that would not be available if no foreign state has diplomatic privileges in the receiving state - it may normally entrust the protection of its interests to a third State acceptable to the receiving State. ^[12]

Mr. Boucher was less certain about the status of foreign embassy property in Baghdad than about the status of diplomats, saying that he would have to check on it. Under article 22 of the Convention, "The premises of the [diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." The question of accreditation to a former regime does not arise, since mission premises are not accredited to the receiving State or government. Under Article 45, the receiving State must protect sending States' mission premises even in the case of armed conflict.

It may be instructive to compare the State Department's current position on diplomatic immunities in Iraq with its position in Iran shortly after the Shah was deposed and replaced by a government controlled by the Ayatollah Khomeini in 1979. ^[13] On February 14, 1979, three days after Ayatollah Khomeini selected and appointed his own Prime Minister, an armed group attacked the U.S. embassy in Tehran. The U.S. ambassador surrendered and about 70 Americans were taken captive, but they were later released on orders from Khomeini's headquarters. (It was several months later that the embassy was forcibly occupied for a long period, resulting in the Iran hostages crisis.) It does not appear from the public record that the U.S. ambassador, who had been accredited to the Shah's regime, was accredited to the new regime in the three days before the February 14 attack on the embassy. Neither the United States nor Ayatollah Khomeini's appointed government questioned the existence of diplomatic immunities for the American diplomats or for the embassy premises.