DIPLOMATIC IMMUNITY by Grant V. McClanahan (New York: St. Martin's Press, 1989) pp. xvii +283.

Incidents like the grant of temporary asylum to Noriega by the Vatican nuncio in Panama, the entry by American troops into the *hotel* (residence) of the Nicaraguan ambassador in Panama City, or the immunity from criminal suit by both senior and junior diplomats in a variety of countries,[1] all indicate the significance of *Diplomatic Immunity*[2] at the present time. A number of matters relating to the 'principles, practices and problems' connected with such immunity form the subject of this monograph by a former senior member of the United States diplomatic service.

Mr. McClanahan rightly draws attention to the explosion in the number of those entitled to such immunity consequent upon the increase in the number of sovereign states and international organizations, the officials of which are invariably treated as if they were diplomats. He argues that it is perhaps time to depart from the principle that every diplomat as a representative of his state is entitled to immunity by virtue of that representation, suggesting instead that immunity should attach to those whose functions really demand that they be immune from local jurisdiction.[3] Sir Nicholas Henderson, in his Foreword, points out that the "book explains why anyone who is engaged in the art of resolving international problems peacefully, which is what diplomacy is about, or is responsible for those involved in it, will insist that without immunity the task is impossible."[4] In its judgment on *U.S. Embassy in Tehran* the International Court of Justice emphasized this fact, while "[t]he Vienna Convention [on Diplomatic Relations 1961, which has codified the customary law and supplemented it to some extent] accepted the idea that the functions of diplomats were essential to intergovernmental relations and that immunities for diplomats were required so that they could carry out these functions in an unhampered, efficient manner."[5] The *United States Foreign Missions Act*,[6] however, "emphasizes that diplomatic missions and diplomats receive benefits from the receiving state. These benefits are not to be regarded as a sort of entitlement that representatives of foreign states by their nature can automatically expect to enjoy, but rather a kind of payment from the United States which they ought to stay on their toes and work hard to deserve, a payment that needs to be rationed by the United States and distributed in return for proven service to the interests of the United States."[7]

While one might question the general validity of the last phrase, arguing rather that the task of the diplomat is 'to serve the interests' of his home state, it cannot be denied that "[t]hey have been accredited to help their work, not licensed to override accepted

1. See, for example, Ashman and Trescott, *Outrage* (London: W.H. Allen, 1986) *passim*.
2. G.V. McClanahan, *Diplomatic Immunity* (New York: St. Martin's Press, 1989).
3. See, for example, *ibid.* at 182-183.
4. *Ibid.* at xii.
5. *Ibid.* at 96.
6. *United States Foreign Missions Act*, 1982, Public Law 97-241.
7. *Supra*, note 2 at 96.

behavior."[8] Therefore they "enjoy their privileges and immunities within the limits of applicable law, customary practices, and considerations of reciprocity. In practice, they are limited also by the receiving government's level of tolerance or suspicion,"[9] and the receiving government's level of tolerance is likely to be radically reduced if they overlook the fact that the *Vienna Convention* provides that "it is the duty of all persons enjoying privileges and immunities to respect the law and regulations of the receiving State."[10] In fact, more and more countries, and particularly the United Kingdom and the United States, are now making it clear to foreign missions that they will interpret this provision strictly and are requiring undertakings that, for example, parking fines will be paid, persons charged will have their immunity raised or will be returned home, and have been warned that in exceptional circumstances diplomatic relations may be severed or heads of missions may be expelled.

While the author bases much of his discussion on English and United States practice, he appears to not always be aware of instances in which the United Kingdom has gone further than the United States in restricting immunity. Thus, he appears to consider that the United States has made a great breakthrough in providing that prosecution for a criminal offence might take place after a diplomat has departed and subsequently returned to the United States.[11] But subjection to civil process had already arisen in the United Kingdom as early as 1963,[12] and the same principle would obviously apply in the criminal area. When he discusses a 1987 case in which the United States refused to waive immunity to permit criminal proceedings in England,[13] he omits to mention the leading case in which such immunity was raised, *R.* v. *Kent*,[14] and one might have expected some mention of *R.* v. *Madan*,[15] in which immunity was raised insofar as criminal jurisdiction was concerned, but not execution.

As to the recent incidents in Panama, it is worth reminding ourselves of the provision in the *Vienna Convention* that the actual categories in which a diplomat's freedom is not to be constrained include "their homes, for there their dignity and their work are also inviolable,"[16] while 'diplomatic premises' include "the residence of the mission."[17]

While there is no rule of international law recognizing a general right of diplomatic asylum, it is well-known that Latin American practice tends to recognize this 'right', particularly for overthrown heads of state, and by the 1954 *Caracas Convention on Diplomatic Asylum*, an asylee may "stay only long enough to be allowed to leave the territory of the receiving state under that state's guarantee of safe passage. If the receiving state requires the post to be closed [as apparently Panama threatened the

8. *Ibid.* at 33.
9. *Ibid.* at 126.
10. *Vienna Convention*, Article 41, para. 1.
11. *Supra*, note 2 at 107 and 133-136.
12. See, *Ghosh* v. *D'Rozario*, [1963] Q.B. 106.
13. *Supra*, note 2 at 137-139.
14. (1941), 110 L.J.K.B. 268.
15. [1961] 2 Q.B. 1.
16. *Supra*, note 2 at 1-20.
17. *Ibid.* at 50.

Vatican], the departing diplomat can take the asylee with him, or if that is not feasible, transfer him to asylum in another post's premises."[18] Moreover, while the "U.S. government's policy in recent years has been to try to avoid giving asylum except in cases of mob violence, ... recent administrations have made exceptions due to congressional and public sympathy towards persons who seek asylum in U.S. diplomatic and consular premises in Communist countries [as happened with Cardinal Mindzenty in Budapest, and after the suppression of the demonstrations in Beijing]. There is a feeling that any such asylum seeker claiming to be in danger because of political or religious views should be given the benefit of the doubt. While nothing should be done to entice or even encourage asylum, once persons take the initiative to seek asylum, they will not be expelled from the premises."[19]

Mr. McClanahan makes some reference to the position of the staffs of international organizations and of the personnel of official missions. However, although there is some internal evidence to suggest that the work was not completed until after September 1988,[20] he does not discuss the recent quarrel about the attendance of Arafat at the United Nations, and the attempted closure of the P.L.O. mission in the United States, attempts condemned by the International Court of Justice.

For a Canadian reader a large part of the material may be considered irrelevant since it deals with application of United States national legislation. However, much of this is based on accepted international practice, as may be seen when the American position is contrasted with that applicable in Britain. It is, of course, only natural that an American ex-diplomat publishing a work under the auspices of the Institute for the Study of Diplomacy at Georgetown University would concern himself primarily with his own country's attitudes. However, perhaps we may question whether it is factually correct to state that the letter-bomb campaign of the seventies was "mainly addressed" to United States Information Agency offices.[21]

Despite the relatively recent adoption of the *Vienna Convention*, there have been numerous suggestions that it be amended. Those who are aware of securing multilateral international agreement in any field will recognize the folly of such proposals. Moreover, recalling that the "British have had long and extensive diplomatic experience in all regions of the world [, t]heir strong endorsement of the *Vienna Convention* is indicative of the stake all nations' diplomats have in the continuation of the current international rules of diplomatic privileges and immunities.... On balance, it seems safe to predict that as long as there are independent sovereign states, there will be a strong functional need for diplomatic privileges and immunities. The institution of immunity for the accredited, resident representatives of such states has been a constructive factor. It has ensured an essential minimum of independence and freedom for those representatives. Immunity has enabled diplomats to work abroad with the peace of mind required for success in performing difficult tasks in a sometimes hostile environment. At some distant time when

18. *Ibid.* at 56.
19. *Ibid.*
20. See, for example, *ibid.* at 157.
21. *Ibid.* at 158.

the nation-states ... learn to get along with each other as well as the culturally diverse cantons of Switzerland do, then diplomatic immunity may become an anachronism."[22] Since neither we nor our children, nor our children's children are likely to see such a development, one can safely recommend McClanahan's *Diplomatic Immunity* as a useful introduction to one aspect of diplomatic law.

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22. *Ibid.* at 176 and 184.