

THE INVIOLABILITY OF DIPLOMATIC ARCHIVES

IMMEDIATELY following Pearl Harbor, officials of the embassy of the United States at Tokyo and of the Japanese embassy at Washington destroyed their confidential diplomatic records. American Ambassador Joseph C. Grew asserted, "The moment we knew that the news of war had been confirmed I gave orders to burn all our codes and confidential correspondence."¹ Huge bonfires which emanated from the grounds of the Japanese embassy at Washington served as dramatic evidence that the Japanese treated their important archives similarly.² These actions illustrate that modern states are unwilling to entrust their vital documents to the diplomatic representatives of neutral governments at the outbreak of war, even though international law and practice dictate that records so deposited are inviolate. Such an attitude stimulates an inquiry into the extent to which diplomatic archives are considered inviolable under international law and the extent to which the principles of international law are being observed. This subject has never been adequately investigated by scholars, although it is a matter of definite importance to the international lawyer and diplomat on the one hand, and the historian and the archivist on the other.

What are diplomatic archives? For the purposes of this paper diplomatic archives are defined as the written evidences of the negotiations, activities and transactions of diplomatic representatives which are under the protection of diplomatic officials. The "archives" of Foreign Service establishments of the United States are defined by Executive Order to comprise "all official documents in the possession of such establishments." Diplomatic archives consist of copies of "despatches"³ to the home government; of "instructions" from the home government; of "notes" from the copies of notes to the foreign office of the state to which the official is accredited; of miscellaneous correspondence received and copies of miscellaneous correspondence sent. They comprise all official files preserved by the diplomatic agent, including those in open offices as well as those within the sealed vaults of the mission. The instructions received

¹ Joseph C. Grew, *Ten Years in Japan* (New York, 1944), 494.

² *The New York Times*, Dec. 8, 1941, 5, with illustration.

³ The terminology here used is that of the Department of State.

this week by the American ambassador at the Court of St. James have the same archival character as records of the activities of America's first representative to Austria-Hungary, which are presumably still at Vienna today. In effect, the character of archives under the care of an accredited diplomatic official or of a diplomatic representative of a neutral state is not altered by physical location or by time. This monograph embraces further a consideration of those papers of a diplomatic agent which are in transit. The term "diplomatic archives" does not include personal papers of the diplomat, such as family letters, which are distinct from his official files.

Diplomatic archives are of the utmost importance to the ambassador or minister. They provide him with a record of the past and present policies of his own government toward the government to which he is accredited, and of the commitments of that government to his own; they serve as a source of reference as to his country's citizens and business interests in the foreign state. Some of the documents are of a highly confidential nature, as, for example, instructions defining a diplomat's authority in negotiating a treaty. Should communications concerning this subject reach the hands of the foreign state, they might conceivably alter the latter state's policy to the detriment of the former. The mutual convenience of states, therefore, requires that messages in transit as well as documents on file be given protection. The problem of inviolability then is not merely a question of the ultimate preservation of the documents by the state which created them; it is primarily a question of the integrity and sanctity of the informational content of those records.

Under the above definition, the study of diplomatic archives and their inviolability is limited. It does not embrace consideration of the status of archives of the foreign office which have been seized after invasion by the enemy. For this subject the reader is referred to Dr. Ernst Posner's article, "Public Records Under Military Occupation," which appeared in a 1944 issue of the *American Historical Review*.⁴ Thus seizure and publication by the German government of the archives of the Polish or Dutch foreign offices is beyond the scope of this paper, although violation of a legation's archives at Warsaw is not. Secondly, this article is not concerned with the right of a diplomat to transmit messages to his home gov-

⁴ Ernst Posner, "Public Records under Military Occupation," *The American Historical Review*, XLIX (January, 1944), 217-219.

ernment. Bismarck so placed restrictions on foreign legations attempting to send information out of Paris during the Franco-Prussian War that diplomatic representations were made by the American government;⁵ while the British government placed prohibitions on the transmittal of cipher telegrams and diplomatic pouches from foreign embassies and legations at London between April 17 and June 19, 1944. Careful consideration of the inviolability of consular archives has likewise been divorced from this study. Consular archives are more apt to be desired for private reasons, such as for individual claims, than for political purposes of the state. Moreover, the development of consular inviolability has a different history. Inviolability of consular archives is an outgrowth of the common custom of states to guarantee immunity in the normal treaties of amity and friendship. The subject has been ably examined by Dr. Irvin Stewart in his *Consular Privileges and Immunities*.⁶

Finally, this study does not embrace a treatment of espionage and the attempts of governments to obtain information from diplomatic archives through special agents, or the efforts of governments to prevent this through the use of codes. The story of Metternich's postal system and of how suspected diplomatic mail was unsealed, copied, and resealed in such expert fashion that no recipient was the wiser⁷ is as intriguing a tale as that of the British foreign minister who was allegedly so competent that he had copies of all incoming and outgoing diplomatic mail of the embassies at London on his desk each morning.⁸ Mr. H. O. Yardley in his *American Black Chamber* tells us of how governments on the one hand develop secret codes and of how their neighbors try to break them.⁹

The question of inviolability of diplomatic agents has roots deeply imbedded in history. So fundamental a privilege was diplomatic immunity that Cicero declared: "The inviolability of ambassadors is protected both by divine and human law; they are sacred and respected so as to be inviolable not only when in an allied country, but also whenever they happen to be in the midst of the forces of

⁵ John Bassett Moore, *A Digest of International Law* (Washington, 1906), IV, 696-701.

⁶ Irvin Stewart, *Consular Privileges and Immunities* (New York, 1926), 35-59.

⁷ Josef Karl Mayr, *Metternichs Geheimer Briefdienst; Postlogen und Postkurse* (Wien, 1935).

⁸ Yonge, *Life and Administration of Lord Liverpool*, I, 239, quoted in Ward and Gooch, *The Cambridge History of British Foreign Policy, 1783-1919*, III, 549.

⁹ Herbert O. Yardley, *The American Black Chamber* (Indianapolis, 1931).

enemies."¹⁰ Coleman Phillipson in *The International Law and Custom of Ancient Greece and Rome* shows us that this axiom of the ancients had a corollary, for he wrote that: "Correspondence and all things essential to the regular performance of their duties were likewise considered inviolable."¹¹

Treatises on international law such as those by Oppenheim¹² and Satow¹³ usually contain little more than a brief statement that diplomatic archives are inviolable. Two modern scholars who have discussed the subject are almost unequivocal in their attitudes, and their statements deserve to be quoted. Shortly after the first World War the French writer, Dr. Maurice Travers in his *Le Droit Pénal International* wrote:

Archives, in contrast to the embassy or legation building as a whole, are inviolable in themselves. If it is not indispensable for the carrying out of a diplomatic agent's mission that the local police should not be able to enter the embassy or legation, it is, on the contrary, essential that the local authorities should never be able, under any pretext whatever, to gain access to the secrets of the archives; hence the principle, according to us an absolute one, of the inviolability of archives, a principle which is sufficient to remove the danger which it was desired to avoid in formulating the erroneous theory of the extra-territoriality of embassies and legations. . . . The inviolability of diplomatic archives exists as a result of their own character apart from any treaty provision. . . . The inviolability of diplomatic archives is not, like the immunity which diplomatic agents enjoy in their personal capacity, limited to any fixed period; it continues even when all the members of the mission or legation have been recalled; no distinction can be drawn from the nature of the rupture of diplomatic relations.¹⁴

¹⁰ Quoted, Edmund A. Walsh, *The History and Nature of International Relations* (New York, 1922), 53.

¹¹ Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London, 1911), I, 332.

¹² Lassa Oppenheim, *International Law, A Treatise*, Fifth edition, Lauterpacht (London, 1937), I, 617.

¹³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, Third edition, Ritchie (London, 1932), 163.

¹⁴ "Les archives sont, à la différence de la totalité de l'hôtel de l'ambassade ou de la légation, inviolables par elles-mêmes. S'il n'est pas indispensable au bon exercice de la mission d'un agent diplomatique que la police ne puisse pénétrer dans l'ambassade ou dans la légation, il est, au contraire, essentiel que jamais l'autorité locale ne puisse, sous un prétexte ou sous un autre, parvenir à se mettre au courant des secrets des archives; de là, le principe absolu selon nous, de l'inviolabilité des archives, principe qui suffit à écarter les dangers que l'on a voulu éviter en formulant la théorie erronée de l'exterritorialité des ambassades et légations. . . . L'inviolabilité des archives diplomatiques existe par l'effet de leur caractère propre, en dehors de toute clause contractuelle. . . . L'inviolabilité des archives n'est point, comme l'immunité dont jouissent, à titre personnel, les agents

Just a few years earlier Dr. T. S. Woolsey had inquired in *The American Journal of International Law* whether a foreign diplomatic agent may claim at will any papers as belonging to his government without identification and proof. He declared that

no one else can determine their character. No one else is in a position to know it. You have either got to trust your resident minister altogether, or not at all and have him recalled. If he is plotting against you, there is your right of self-defense, of course, but espionage or knowledge of his secrets by judicial process should not be necessary to self-defense; they are not consistent with real immunity. Nor is it immunity to surrender papers of which copies are kept. It is not the substance of the papers, but the knowledge derived from them which counts. Real immunity demands that you shall not know what they import.¹⁵

An examination of the practice of modern states reveals that the application of the general rule of inviolability varies; for the degree to which inviolability has been accorded seems to have been conditioned upon the circumstances in the case. The inquiry, therefore, has to be divided into separate categories as follows: unprotected diplomatic correspondence in transit; diplomatic papers in transit protected by seal; diplomatic papers protected by courier; diplomatic archives protected by the exterritoriality of the mission; protection of diplomatic archives after rupture in relations; the status of diplomatic archives before *de facto* and *de jure* claimants; and the status of diplomatic archives before third states.

I. *Unprotected Diplomatic Correspondence in Transit*

Upon the invention and utilization of the telegraph and cable in the last century and the wireless and radio in this, diplomatic messages, if urgent, were transmitted by wires or air waves. Information so transmitted could easily be utilized by the other state without any apprehension that its action would be discovered. If confidential, such messages travelled with the hope that the code could not be broken, or that the time taken to decipher the messages would be so long that other states could not use them to advantage.

The spectacular intercepting and decoding by the British government of the so-called Zimmermann note in 1917 is considered one of the immediate causes of the entry of the United States into the

diplomatiques, limitée à une durée déterminée; elle persiste, alors même que tous les membres de la mission ou de la légation auraient été rappelés; aucune distinction ne saurait même être tirée du caractère de la rupture des relations diplomatiques." Maurice Travers, *Le Droit Pénal International* (Paris, 1921), III, 203-204.

¹⁵ *The American Journal of International Law*, X (July, 1916), 592-593.

first World War. The German ambassador, von Bernstorff, had obtained permission from the Department of State to transmit messages in diplomatic pouches sent to and from the American embassy in Berlin and the Department of State. Knowing that it was not then the policy of the Department of State to decode diplomatic communications of other governments, Zimmermann of the German Foreign Office entrusted to an American despatch bag a coded message proving the willingness of Germany to help Mexico regain lost areas in southwest United States in the event of war.¹⁶ British espionage agents discovered and decoded the message; while the contents were divulged to the American government through appropriate diplomatic channels. Subsequently, the United States adopted a policy of decoding messages, which, according to Yardley,¹⁷ lasted a decade until the secretary of state put an end to such practices believing that it was not true statecraft.

It was proposed by the same author that the United States urge the governments of the world to sign a convention outlawing the practice of deciphering codes of other states; but when decoding can be done without detection, signed agreements are of little value. International law has not and cannot offer adequate protection to the telegraph, cable, and wireless.

II. *Diplomatic Papers in Transit Protected by Seal*

In accordance with long standing custom, diplomats have transmitted their mail under seal. The sealing of diplomatic despatches or diplomatic pouches protects the correspondence from search or seizure by the other state; while violation of this seal constitutes a serious breach of international law. Most serious is the violation of correspondence between the minister and his home government. When a privateer captured a ship on which diplomatic mail of the British minister to the United States was carried, President John Adams wrote on July 20, 1799: "I heartily reprobate the outrage on the British government, in violating [by a privateer] the seals of its accredited minister to the United States, and am desirous of taking such notice of it, as the respect we owe, not only to the government of Great Britain but to ourselves. . . ."¹⁸

Sealed diplomatic correspondence between diplomatic agents and

¹⁶ *War Memoirs of Robert Lansing* (New York, 1935), 226 ff.

¹⁷ Yardley, *American Black Chamber*, 370-371.

¹⁸ Moore, *A Digest of International Law*, IV, 710-711.

other foreign agents is likewise considered inviolable. In 1893 Turkish officials violated correspondence sent by the American consul at Sivas to the American minister at Constantinople. The secretary of state was quoted as advising the minister that "the inviolability of the privileged correspondence between recognized agents of the United States was one of the most obvious and indispensable prerogatives of foreign diplomatic representatives, and that any infringement of his rights in that regard would furnish occasion for earnest protest, especially if official correspondence, under his legislation's seal, addressed to a subordinate officer of the United States, were opened by the Turkish agents."¹⁹ Although correspondence from a consul was violated, a diplomatic infringement was involved because the communication was addressed to the American minister. Had a communication from the American minister to the American consul been seized, the secretary of state would have regarded it as a more serious violation of diplomatic immunity.

But rarely indeed has the diplomatic seal been violated in such a way that diplomatic protest can be made. The great danger, during the intrigues of the eighteenth and nineteenth centuries, was that clandestine agents might uncover diplomatic communications and abstract therefrom desired information. Therefore, other methods of protecting confidential diplomatic communications had to be utilized.

III. *Diplomatic Papers Protected by Courier*

The use of the courier is a greater protection than the seal in the transmittal of diplomatic mail. It is more particularly used during periods of war. The personal immunity of the courier is guaranteed under international law, and any interference with his movements becomes an immediate occasion for diplomatic protest. In 1943 the plane trip from Washington to Moscow of Joseph Davies, who served as a special courier for President Roosevelt, well illustrates that this means of communication is still much in vogue for the transmittal of diplomatic messages.

In 1646, during the period of the Protectorate in England, the King of France transmitted by courier diplomatic messages for his minister to England, Sabran, and his minister to Scotland, Montreuil, who was then at London. En route to London the courier was seized at Rochester; the documents were taken from him and

¹⁹ *Ibid.*, 712.

deposited on the second floor table of the residence of the Earl of Northumberland. Montrueil obtained access to the Earl's house and boldly regained the papers in the presence of servants of the Earl who were too startled to act. As the Earl entered the room, Montrueil protested vigorously for having contrary to the law of nations stopped his courier and taken from him letters which the king, his master, had sent him. He not only stoutly refused to hand back the papers, but he demanded reparation for the injury already done. A contemporary who wrote about this incident stated it might serve as an example and rule to ministers, who may learn with what courage and fearlessness they ought to act to maintain the dignity of their employment while conserving the honor, the grandeur and the reputation of their master.²⁰

Writing in 1758, the Swiss jurist Vattel considered that the violation of a diplomatic courier was one of the most serious breaches of international law. He wrote:

The couriers whom an ambassador sends and receives, his papers, his letters and dispatches, are all so essentially connected with the embassy that they must be regarded as inviolable; for if they were not respected it would be impossible to obtain the proper object of the embassy, nor could the ambassador fulfill the duties of his office with due security.²¹

On June 23, 1917, a German diplomatic courier, von Rautenfels, was seized at his hotel in Christiania (Oslo), Norway, while his baggage, which was under seal, and deposited at the railroad station, was taken into custody.²² Examination revealed no correspondence but quantities of explosives and other implements of war to be used presumably in Norwegian ports. The German minister protested (1) the seizure of the courier and (2) the breaking of the seals. Subsequently, the German Foreign Office disavowed the action, promising disciplinary measures against those involved, and gave assurance that future baggage sent by courier would be examined by the Foreign Office.²³

States have felt the right to place limitations on the use of the courier, particularly in war-time or in cases where the courier is

²⁰ Abraham de Wicquefort, *L'Ambassadeur et ses Fonctions* (Cologne, 1715), 1, 494-496.

²¹ Emmerich de Vattel, *The Laws of Nations*, Carnegie Classics of International Law edition, Scott (Washington, 1916), 396.

²² *The New York Times*, June 25-30, July 2, July 15, 1917; *Aftenposten*, June 24, 1917, ff.

²³ *Oversigt (II) over saker behandlet av Utenriksdepartementet under krigen som egner sig for Offentliggjørelse* (Christiania, 1920), 49-54.

suspected of using his official position for personal gain. In 1862 Secretary of State Seward declared that the courier's luggage was "exempt . . . from search, unless its bulk or other circumstances afford reasonable ground for suspicion that the courier has abused his official position for the purpose of smuggling."²⁴ When on July 13, 1917, the Department of State notified foreign embassies and legations that it would honor only regularly employed couriers,²⁵ it probably would have felt justified in seizing communication on a courier not covered by these regulations.

IV. *Diplomatic Archives Protected by the Exterritoriality of the Mission*

The diplomatic residence and chancery have been given a peculiar place in international law by jurists who have developed the theory of extritoriality. The mission has come to be regarded as the ground of the country represented and outside the jurisdiction of the state in which it lies. While certain modern scholars tend to place more emphasis on the fact that immunity in reality arises from the necessity of adequate intercourse between states, and in effect the immunity given is conditioned and not absolute, it is nevertheless true that the diplomatic archives deposited in the mission have been accorded a greater degree of inviolability than those anywhere else.

In 1608, Minister Richardot, who served at The Hague as a diplomatic representative for Archduke Otto, left in the drawer of the table at his house his instructions, which were discovered by his landlord. These were turned over to the local authorities, who published them. Richardot, in protesting the seizure and publication of these papers, wrote that it was a violation both of the *Ius Hospitii* and the religious respect which is due to ambassadors, whose persons and goods ought to be in entire safety. De Wicquefort, describing the case, observed that no one ever doubted that the security which is due to public persons extends also to their letters.²⁶

In 1717 and 1718 two serious violations of diplomatic archives arose which are significant not only because they reflect the attitude of diplomats of that day but also because they appear to admit an ex-

²⁴ Moore, *A Digest of International Law*, IV, 711.

²⁵ Green Haywood Hackworth, *Digest of International Law* (Washington, 1940-1944), IV, 621.

²⁶ Wicquefort, *L'Ambassadeur et ses Fonctions*, I, 494.

ception to the heretofore strict rule that all archives of diplomats should be held inviolable. In 1717 the Swedish minister at London, Gyllenborg, was suspected of being involved in a Jacobite plot to overthrow George I. It is related that when officers of the British government entered the residence of Gyllenborg in London they "found him making up dispatches, which they told him they had orders to seize; and they even insisted upon searching his cabinet, which, upon the refusal of his Lady to deliver the keys, they actually broke open."²⁷ While the minister protested this action as a direct violation of the law of the nations, the British government addressed a circular letter to the diplomatic corps resident at London in which they expressed their regret at the seizure of public minister's papers, but justified their action upon the ground of public necessity. This explanation was accepted by all except the Spanish minister who protested that the archives of a diplomat "are the repositories of his secrets" and seizure "seemed sensibly to wound the Law of Nations."

A similar incident, which took place in 1718, concerned Prince Cellamare, ambassador from Philip of Spain, who was involved in a conspiracy to overthrow the regency in France. After the conspiracy was detected and the files of the emissary seized and examined, Prince Cellamare vigorously protested the violation of the law of nations and the prerogatives of his office. In this case also a circular letter was sent out to the ministers resident at the French capital; but no one protested "tous regardant une telle conspiration comme devant faire cesser tout privilège."²⁸ It is to be particularly observed that after the examination, the diplomatic archives were placed in the Louvre until the time when they could be turned over to two trusted men of the King of Spain. Although the archives had been subjected to search and seizure, the violating power otherwise respected the sanctity of the archives and the right of Spain to regain them.

Vattel in discussing these instances concludes that while ordinarily diplomatic archives are inviolable "on those grave occasions when the ambassador has himself violated the law of nations by forming or favoring dangerous plots or conspiracies against the State, the immunity of his papers does not prevent their seizure in order to discover the details of the plot."²⁹ This doctrine, however, has grave

²⁷ Robert Plumer Ward, *An Inquiry into the Foundation and History of the Law of Nations in Europe* (Dublin, 1795), II, 329-330. In London edition, see 548-549.

²⁸ Charles de Martens, *Causes Célèbres du Droits des Gens*, Second edition (Leipzig, 1858), I, 149.

²⁹ Vattel, *The Law of Nations*, 396.

implications; for it is tantamount to admitting that if one state suspects the motives of another, it may seize the other's diplomatic archives. In any event the cases just cited are almost unique in the annals of international law.

During the first World War, two incidents arose between the United States and German governments relating to the extent to which the principle of inviolability of diplomatic archives of the mission might be applied. Could inviolability be extended to diplomatic archives in any buildings under the jurisdiction of the ambassador or to archives in any offices maintained by persons cloaked with diplomatic immunity?

Shortly after the beginning of the war, the American embassy at Berlin assumed responsibilities at the British consulate in that city. On the evening of October 7, 1914, police authorities raided the consulate, seizing official papers of Ambassador James W. Gerard, particularly accounting records dealing with relief work. After protest by Gerard, Zimmermann of the Imperial Foreign Office apologized for the incident, promised to make amends, and asked as a favor that the matter be dropped. Later some of the seized documents were returned; but there continued to be a question during the remainder of the war as to whether all the papers had been restored.⁸⁰

On April 17, 1916, police officials at New York City raided the office of Wolf von Igel, a German diplomatic official, formerly secretary to Captain Franz von Papen, but at the time the *de facto* military attaché. Papers seized during the absence of von Igel were found to be most compromising in character, involving German agents in acts of violence and sabotage. Although von Igel was indicted for violation of the United States criminal code, he was eventually released on the basis of his diplomatic status; but the custody of the papers formed the basis of considerable correspondence between Secretary of State Lansing and Ambassador von Bernstorff. The latter alleged that the documents seized from von Igel's table were official papers belonging to the German embassy at Washington, which had been taken contrary to international law. Secretary Lansing, on the other hand, defended their seizure on the ground that the records did not come within the bounds of diplomatic inviolability: "Documents obtained an acquired immunity from the

⁸⁰ *Foreign Relations of the United States*, 1916, Supplement, 820-822.

fact that among other things they are under official seal, that they are on Embassy premises, or that they are in the actual possession of a person entitled to diplomatic immunity." Since the Department of State had not recognized the diplomatic status of the building of the military attaché at New York City, there were no grounds under Secretary Lansing's definition for the inviolability of the records. Lansing offered to return the documents as an act of comity, provided that the ambassador would identify those which were diplomatic documents; but the German ambassador did not choose to be placed in such an embarrassing position.³¹

This case involves the difference between the intrinsic value of archives and the value of archives for their informational content. The important fact was that the United States had obtained the information from the documents; while the ultimate fate of the papers was distinctly a secondary matter. On the other hand, had the United States returned the records, the cases against the saboteurs, whom the documents incriminated, could not have been carried on as effectively; for, under international comity, the return of the documents ought to have prevented the use of certified copies at the criminal trials.

During the first decade after the Soviet government came into power, Soviet trade delegations, which had been set up in various countries to encourage commercial relations, were invaded and their archives seized. These delegations were presumably performing consular functions but seem to have been considered by the Russians as diplomatic or at least quasi-diplomatic. Wherever possible, the Soviet government tried to obtain for such offices extraterritorial privileges by treaty.

The violation on May 3, 1924, of the archives of the Soviet trade delegation in Berlin by the Wilhelmstrasse was the first action of this kind. The event occurred during a communist incident when two hundred police agents broke into the delegation building, where they examined the archives. The Soviet government strongly decried this as a breach of international law, giving outward expression of their displeasure by boycotting German goods. In this clear-cut case of the violation of Soviet archives, the German Foreign Office eventually recognized its obligations and responsibilities under international law; it apologized for the raid, offered to pay reparations

³¹ *Ibid.*, 809-815.

for the damage done and actually removed responsible police officials. The status of the delegation was strengthened on October 12, 1925, by a treaty which provided in part that the quarters occupied by the Soviet trade delegation were to be protected in accordance with the principle of extritoriality.³²

China was the next country to violate the archives of a Soviet trade delegation. At Peking on April 6, 1927, Chinese soldiers entered the office of the Soviet trade delegation and the building of the Soviet military attaché, which was attached to the embassy, although they did not enter the embassy itself. Large quantities of official documents were seized and examined.³³ It was reported that the Chinese government acted only after obtaining consent from the dean of the diplomatic corps at Peking; but if the approval of the diplomatic corps lessens the seriousness of the offense, that body, it seems, should at least give justification for its action.

In the month following the China incident, on May 12, 1927, the celebrated "Arcos Raid" took place in London. The Arcos building, which was searched by London police under authority from Downing Street, contained records of Arcos Limited, a commercial trading firm, and records of the Soviet trade delegation. When the Soviet official guarding the delegation protested the invasion and refused to hand over the keys, police forcefully broke into safes with pneumatic drill machinery and even opened sealed diplomatic mail.³⁴ This action was in specific violation of a 1921 trade agreement containing a provision that a certain number of official agents of each country could enjoy immunity from arrest and search.³⁵ The Baldwin government defended the step taken on the floor of the House of Commons by asserting that the Soviets had obtained an important secret British military document which it was necessary to regain. Although no evidence was forthcoming that the sought-for paper had been found, the British government in a White Paper published some of the data seized and broke off diplomatic relations.³⁶ On May 28, 1927, Litvinoff addressed the British Foreign Office as

³² Louis Fischer, *The Soviets in World Affairs* (New York, 1930), II, 582-583.

³³ *Ibid.*, 686-693.

³⁴ *Ibid.*, 735-737. For additional information on this and the preceding two notes, see T. A. Taracuzio, *The Soviet Union and International Law* (New York, 1935), 190. For translating Russian publications mentioned in the latter, I wish to acknowledge indebtedness to Dr. Constantine D. Kojouharoff of the staff of the Library of Congress.

³⁵ *British and Foreign State Papers*, 1921, CXIV, 376-377.

³⁶ *Russia No. 2 (1927). Documents illustrating the Hostile Activities of the Soviet Government and Third International against Great Britain* (Command Papers, 2874).

follows: "The Soviet Government places on record that the British Government had no legitimate grounds . . . for . . . infringement of the Trade Agreement of 1921 in the form of a police raid on the extra-territorial premises of the Soviet official agent. . . ." ³⁷

These cases involving quasi-diplomatic offices vary as to detail. The German case was concerned solely with general principles of international law; yet apology was given for the offense and reparation made. The British case concerned also a treaty provision; but Downing Street took the attitude that incriminating documents had been found. It broke off relations, published data it considered compromising, leaving to public opinion to decide whether the documents found justified the means employed. Violation by the Chinese government suggests that the seriousness of the offense varies according to the type of building searched. China invaded (*a*) the Soviet trade delegation and (*b*) the building of the Soviet military attaché, but did not invade (*c*) the Soviet embassy adjoining close by. It would appear that the violation of the trade delegation was the least serious offense, the duties connected with that establishment not being generally recognized as purely diplomatic duties, the violation of the building of the military attaché a more serious offense, and the violation of the Soviet embassy too serious an offense to be undertaken.

V. Protection of Diplomatic Archives After Rupture in Relations

When a break in diplomatic relations occurs, a government concerned is faced with one of three alternatives in handling its post records: It may direct the diplomatic representative to destroy the archives, to bring them back with him, or to leave them under seal. Often more than one course is taken, depending upon the bulk of the records and the confidential nature of some of them. Since in time of war a mere seal on diplomatic documents is hardly any protection at all, nations of the world for several decades have followed a custom of permitting the departing envoy to turn the post records of his country over to the representative of a neutral state which is recognized by both belligerents. The archives are either left in the same building in which they were formerly housed, while the neutral representative is acknowledged to have diplomatic immunities ex-

³⁷ *Russia No. 3 (1927). A Selection of Papers Dealing with the relations between His Majesty's Government and the Soviet Government, 1921-1927* (Command Papers, 2895), 71.

tended over a wider physical territory, or the archives are removed from the chancery of the belligerent to the chancery of the neutral representative. This custom has become so deeply rooted in international procedures that by the time of the last war it was a widely acknowledged practice.³⁸ Uruguay, in permitting its ministers to take over diplomatic archives of other nations in times of stress, declares such action to be "according to international practice."³⁹

An incident known as the Montagnini Case serves as a classic illustration of the regard given by one state to the diplomatic archives of a state with which it had broken off diplomatic relations. When France had terminated its relations with the Vatican in 1904, it permitted the former papal representative, Monseigneur Montagnini, to reside in Paris. Later, suspecting the monseigneur of intrigue against the state, French officials had him escorted to the border; while on December 11, 1906, they invaded his residence at Paris and seized his papers. The Quai d'Orsay made a careful distinction between records created before the break in diplomatic relations, truly diplomatic archives, and records created after the break, private papers. The former were placed under seal, unread, until they could be turned over to the Vatican through the good offices of the diplomatic representative of a third state; while the latter were given the most careful examination and the widest publicity.⁴⁰

Sharply in contrast with this is the flagrant violation of British diplomatic archives at Petrograd during the Russian revolution, when the British embassy and its contents were left in the care of the Dutch minister. Despite the fact that the embassy building had on its door a sign and sealed notice that it was under the protection of the Netherlands legation, armed forces on August 31, 1918, invaded the embassy and seized records, at the same time killing Captain Francis Cromie, a British officer, who courageously defended the building. While the embassy was being invaded, Dutch officials vehemently protested against this "unheard-of breach of international law" but were not even permitted to be present at the search. The action was justified by the commandant of Petrograd, Shatof, on the alleged ground that the British were implicated in the murder of Uritski, commissioner at Petrograd for combatting counter-revo-

³⁸ James W. Garner, *International Law and the World War* (London, 1920), 1, 53-55.

³⁹ A. H. Feller and M. O. Hudson, *Diplomatic and Consular Laws and Regulations* (Washington, 1933), II, 1381.

⁴⁰ Paul Fauchille, *Traité de Droit International Public*, Eighth edition (Paris, 1926), I, Part III, 74. Travers, *Le Droit Pénal International*, III, 205-208.

lution. The diplomatic corps planned to draw formal attention to this act while the Dutch minister made demands against the Russian authorities, declaring that he would hold that country responsible "in every respect for consequences of this breach of international law which was quite unique in history," and insisting that all documents which had been seized be turned over to him.⁴¹

While the above instance is the only case found by the writer where the archives of a mission were seized during the period of the first World War, it must be admitted that the practice of turning over diplomatic archives to neutrals has inherent weaknesses. In the first place the neutral state is usually not willing to assume as strong a stand to maintain inviolability of another's diplomatic archives as it would its own. Thus a Department of State circular instruction of August 17, 1914, advised diplomatic and consular officers that their function in such instances was "merely that of a custodian of the property and archives of the unrepresented government. Any interference on the part of private persons or officials with such property should be the subject of an unofficial representation or protest to the authorities. . . ."⁴² In December, 1914, when Turkish officials opened consular archives of the British and French governments, violating the American consular seal on the door of a room, the American ambassador at Constantinople was directed to "use discretion in presenting this request, remembering that the Government of the United States used only moral persuasion in its efforts to protect other nationals and was not under obligation to use force."⁴³

In the second place, difficult situations are apt to arise in the event that the neutral state, which has permitted its diplomats abroad to protect diplomatic archives of other states, become a belligerent. The diplomatic representatives of the former neutral must assume the responsibility of turning the archives previously protected as well as its own archives over to a second neutral. When in May, 1940, the Department of State authorized the American minister at The Hague to protect British diplomatic archives left in that city, it was careful to instruct the minister that no Polish archives which may have been taken over by the British, be included; appreciating that the German government, after the fall of Warsaw, held the

⁴¹ *Foreign Relations of the United States*, 1918, Russia, I, 665-666, 675-678.

⁴² *Ibid.*, 1914, Supplement, 741.

⁴³ Hackworth, *Digest of International Law*, IV, 505.

view that the Polish government no longer existed.⁴⁴ It might be concluded that the degree of inviolability of diplomatic archives protected by a neutral is conditioned by the fortunes of war.

VI. *Status of Diplomatic Archives Before De Facto and De Jure Claimants*

During periods of civil strife, it occasionally happens that two factions from the same state attempt to maintain diplomatic relations with outside states. Sometimes a dispute arises as to the custody of the post records which had been created by representatives of the *de jure* government; while the outside state is called upon to settle the delicate question as to which of the contenders is entitled to the archives. Such a problem confronted Switzerland in 1918 when a representative of the former Russian government and an official agent of the Soviets quarrelled over diplomatic archives left at Berne. The archives being thus threatened, the Swiss government, after consulting a noted jurist, put the archives under seal. In this condition they remained for an indefinite period.⁴⁵ Switzerland thus acted as a ward for the Russian people or the government that it might some day recognize.

A problem of a somewhat different character faced the Norwegian government. Following the outbreak of the Spanish Civil War, in 1936, the Spanish minister left Oslo; and the chargé d'affaires, Señor Felipe Campuzano, notified the Norwegian Foreign Office of his allegiance to General Franco, thus severing his relations as representative of the Madrid government. Señor Campuzano placed some of the diplomatic archives at his home in Oslo, and the rest with a storage firm in that city. Subsequently, the Loyalist government of Spain appointed Dr. Joaquin Alvarez Pastor as secretary of legation and chargé d'affaires *ad interim*. In 1937 Dr. Alvarez attempted to obtain these records. Through representations to the Norwegian Foreign Office, he succeeded in obtaining a temporary court order. The order, dated November 13, 1937, and effective until March 15, 1938, placed the archives which were at the home of Señor Campuzano under the custody of the sheriff and restrained

⁴⁴ *Ibid.*, 503.

⁴⁵ Compare: Fauchille, *Traité de Droit International Public*, 1, Part III, 75; Charles Morton, *Les Privilèges et Immunités Diplomatiques: Étude Théorique Suivie d'un Bref Exposé des Usages de la Suisse dans ce Domaine* (Lausanne, 1927), 57.

Señor Campuzano from regaining those deposited with the storage firm.

As a result of a lawsuit brought by Dr. Alvarez against Señor Campuzano, the Norwegian court, in 1938, rendered a decision to the effect that maintenance of control and administrative authority over parts of Spain failed to give a *de facto* government rightful possession of the archives. Even if a *de facto* government were entitled to some immunities, it certainly was not entitled to an immunity of this type.⁴⁶ In effect the court decreed that it was the government which Norway had recognized which was the rightful owner of the records. Fortified with a court order, Dr. Alvarez obtained that portion of the records which had been placed at the storage firm. These records were found at the Spanish legation at Oslo a few weeks thereafter by Señor Campuzano, whose government was victorious in the Civil War.⁴⁷

VII. *The Status of Diplomatic Archives Before Third States*

The cases so far discussed concern primarily inviolability of archives between two states. The question now to be raised is whether diplomatic archives are inviolable before all states because of their nature, or whether it is because of the implied or implicit duties and obligations resulting from the recognition by one state of another. Oppenheim⁴⁸ has pointed out that couriers have the right of innocent passage through third states. From this we might infer that if diplomatic archives generally fall into the hands of a third state they should be accorded inviolability. But the unsettled nature of most immunities to be granted third states is reflected in a note from the British Foreign Office in 1930 concerning the immunities in Great Britain of the American ambassador to Spain, who desired passage through Great Britain, but was threatened with a libel suit in that country. The Foreign Office was quoted as stating that "the courts would find no reported case decisive on the point and would have to decide it according to their view of international law and that, in view of the difference of opinion among textbook writers, it was impossible

⁴⁶ "Guerre Civile. Droit à la Detention des Archives d'une Légation," *Revue de Droit International et de Legislation Comparée*, Third series, XX (1939), 411-422.

⁴⁷ I wish to acknowledge thanks to Señor Felipe Campuzano and to Dr. Halvdan Koht, at that time foreign minister of Norway, for reminiscences concerning this incident.

⁴⁸ Oppenheim, *International Law, A Treatise*, 1, 635.

to predict the result."⁴⁹ In practice the inviolability of diplomatic archives before a third state seems to rest upon no stronger ground than international comity, adequate enough in time of peace but wholly inadequate in time of war.

In 1777, during the American Revolution, the American Congress sent a diplomatic agent, Arthur Lee, to negotiate at the court of Frederick the Great. The British minister in Prussia, Hugh Elliot, obtained access to Lee's private diplomatic journals by bribing servants at his lodging, and by making duplicate keys to the rooms in which Lee stayed. Shortly after the journals were seized they were returned intact, but only after essential information had been extracted for the use of the British Foreign Office.⁵⁰ Despite the fact that Lee had not been accredited to the Prussian government, the case created a sensation in diplomatic circles. The British government offered no apology for Elliot's act, but rather approved the deed, since George III rewarded Elliot handsomely for what he had done. This case, which might properly come under espionage, is aggravated by the fact that an official diplomatic agent was directly involved. Although the incident violates the propriety of diplomatic intercourse between Prussia and Great Britain, it is hard to say that it is a violation of international law.

In 1915 when the German military attaché in the United States, Franz von Papen, and the naval attaché were recalled, the Department of State obtained from the British Foreign Office safe-conduct passes for their return to Germany.⁵¹ Upon the arrival of von Papen at Falmouth, January 2, 1916, British authorities searched him and seized his papers. Although he vigorously protested this action as a violation of international law, his case was somewhat weakened by the fact that he had in his possession a copy of a note from the Department of State to Ambassador von Bernstorff which read in part: "It is to be also understood that they will, of course, perform no unneutral act, such as the carrying of despatches to the German Government."⁵² The British were quick to print selections of documents found as a White Paper.⁵³ They appear to have kept the data

⁴⁹ Hackworth, *Digest of International Law*, IV, 538-539.

⁵⁰ John Bassett Moore, *Principles of American Diplomacy* (New York, 1918), 19-23.

⁵¹ *Foreign Relations of the United States*, 1915, Supplement, 952.

⁵² "The Papen Papers," *The Living Age*, Eighth series, II (April, 1916), 131-143.

⁵³ *Miscellaneous. No. 6* (1916). *Selection from Papers found in the Possession of Captain Von Papen, Late German Military Attaché at Washington, Falmouth January 2 & 3, 1916* (Command Papers 8174).

relating to von Papen's official activities in the United States, but observed a courtesy in arranging for the return of his private family papers.⁵⁴ During the same year, the Austrian ambassador-elect to the United States, Count Tarnowski, while travelling under a safe-conduct pass, was similarly examined and his papers seized.⁵⁵

An actual case of invasion of an embassy by a representative of a third state occurred on November 11, 1942, when the German Gestapo not only forcibly entered the Brazilian embassy at Vichy, but ransacked archives as well.⁵⁶ In ordering the Germans to leave, the Brazilian ambassador to France, Dantas, declared: "I do not know your Führer. I am the Ambassador of Brazil, accredited to Marshal Pétain." He was answered coldly by one German: "I am a soldier and obey my orders," while another threatened him with a pistol. An appeal to Monsieur Laval and Marshal Pétain proved fruitless; for the old marshal merely expressed the hope that facts so contrary to his will would not impair relations between the two countries.⁵⁷ Subsequently, the Brazilian Foreign Office instructed the Portuguese government, which handled Brazilian affairs in Berlin, to condemn the action of the German military force. In the Brazilian press the incident was treated as a violation of international law. But the status of diplomatic archives of third states, particularly during time of war, is very uncertain and insecure. In practice, warring states have accorded much greater protection to diplomatic archives which are within their own territory and which belong to the states with which they have broken relations, provided the records are in the hands of the representative of a neutral and under seal.

General Conclusions

An examination of the foregoing incidents unfolds certain definite principles. The observance of inviolability of diplomatic archives has varied in accordance with the circumstances. While a telegram cannot be protected by international law, a message under seal is accorded diplomatic inviolability but has been broken open with

⁵⁴ Diplomatic Post Records, Great Britain, Classified Correspondence, 1916, CVI, No. 820, the National Archives.

⁵⁵ *Ibid.*, LVI, No. 701. I wish to acknowledge indebtedness to the Division of Research and Publication of the Department of State for permission to examine files covering notes 54 and 55.

⁵⁶ *The New York Times*, Nov. 14, 1942.

⁵⁷ This is based upon a translation of an article appearing in the Brazilian press. It was received by the writer through the courtesy of the Brazilian embassy at Washington.

apologies. A courier gives a considerably greater degree of safety to a diplomatic message. Archives housed in buildings under the care of the ambassador or minister are usually accorded the highest degree of protection. The *sanctum sanctorum* is the mission itself, for in one modern instance at least, its archives remained untouched while archives around it were seized indiscriminately. But once a state has determined to violate the archives of a diplomatic office, it apparently makes no distinction as to whether the archives are lying open on the table, whether they are locked up, or whether they are under seal in the archival vault of the embassy. No secret is made of the fact that the British government drew no such distinction at the time of the Arcos raid in 1927.

During war, international law so breaks down that only those subjects which are reciprocally agreed upon for mutual benefit will be adhered to by some belligerents. But evidence does point to the fact that in almost every instance during the first World War, diplomatic archives were turned over to neutral representatives by whom they were administered or preserved until peace came. It will be impossible to determine fully the treatment of diplomatic archives during the present war until after hostilities. Two things, however, are apparent. Governments would rather destroy archives than trust their confidential files to possible seizure by the enemy. Secondly, governments are willing to turn over their non-confidential correspondence to the protection of diplomatic representatives of neutrals. Perhaps the realization that confidential archives have in the majority of cases been taken from the files before papers are turned over to a neutral representative acts as a safeguard to what is left behind.

Violations of diplomatic archives have been approved by the diplomatic corps and by authorities on international law in the event that the representative attempted to overthrow the government of the state to which he is accredited. Judging from actions of modern states, violation by a third state of archives created as the result of relations of two other states rests upon a much weaker foundation than archives protected because of the relationship of two formerly accredited states. On the other hand, there is one school of thought, of which Dr. Maurice Travers is the leading exponent, which holds that there are no circumstances under which diplomatic archives may be violated. This, certainly, is the desideratum. It can be main-

tained with logic that once a loophole is admitted in the rule that diplomatic archives are inviolable, any state may under an allegation to suit its convenience seize the archives of another. In so acting the state merely assumes the risk that if no incriminating documents are found, it is obliged to render apologies.

A step forward was taken in the protection of diplomatic archives by a provision incorporated in the codification of international law by the American states and adopted at Havana, Cuba, February 20, 1928: "Diplomatic officers shall be inviolate as to their persons, their residence, private or official, and their property. This inviolability covers: . . . The papers, archives and correspondence of the Mission."⁵⁸ This statement, however, does not carry us beyond the physical limitations of the mission. It is hoped that the general treatises on international law will treat this subject in a degree comparable to its importance.

Second to the question of the inviolability of the informational content of the documents is the question of the permanent preservation of the documents by the original custodian. What happens to the papers after they have been taken? Do they become part of a case file to be maintained among the records of the aggressor state? Are they destroyed? Are they returned after the desired information has been gleaned? The French have observed a neat rule from the eighteenth century to the twentieth that the archives themselves be handed back to the state which created them. But, usually, the archives are only obtainable after difficult and formal negotiations with the result that they often find their way into the hidden recesses of the foreign office of the violator.

The Importance of Safeguarding Diplomatic Archives

Does seizure of diplomatic archives or destruction to prevent seizure mean a serious loss to posterity? Admittedly, the bulk of the important diplomatic correspondence in modern times is recorded at least in essence with the home government. But the future value of these records is suggested by the following examples:

I. The post records often contain detailed information about incidents which is only reflected in brief or in synopsis form among the records of the foreign office. For example, letters from American citizens abroad and copies of letters to them are maintained at Ameri-

⁵⁸ Manley O. Hudson, *International Legislation* (Washington, 1931), IV, 2390.

can diplomatic posts but are usually not copied for use by the Department of the State. Sometimes detailed information preserved at the post becomes of important administrative worth. During the present war, the Department of State has used diplomatic post records over an half century old for important administrative purposes. This information was not available in the department's home office files.

2. The post records serve as security for the preservation of information when despatches or copies of outgoing instructions which are held in the central files of the foreign office and which are borrowed by the operating divisions become lost or mislaid. Then, too, before the use of the typewriter, there were often apt to be differences between the outgoing communications and the copies maintained in the copy books. Such important variations have occurred between the original despatch or instruction and the recorded copy as made by the nineteenth century copyist that some scholars invariably examine both the original communications and the copy in the copy book in their studies of American foreign relations.

3. The difference in the filing arrangement between that adopted in the foreign office and that used in the posts is often a boon to the historian. In the early twentieth century the Department of State filed its correspondence according to a numerical subject scheme, but instructed the posts to file correspondence chronologically. Historians usually utilize both files but rely heavily on one or the other depending upon whether they are making a study of a particular post or of a special subject relating to several posts. This difference in arrangement is so important that sometimes studies become too extensive and are prohibitive to the general scholar if recourse must be made solely to the foreign office files. The mass of integrated materials in a foreign office, for example, may be of such a nature as almost to prohibit a scholar from making a study of an individual post.

Because of the hazards involved in the preservation of post records, special consideration ought to be given to their care. There are two ways that foreign offices can do this. In the first place they can arrange for periodic transfers of post records to the home office after definite periods of time. Thus, diplomatic officers may be instructed to transfer to the home office all records not needed in the current business and which are over twenty years old, every ten years. In the second place, careful consideration ought to be

given to the care of archives immediately prior to a possible break in diplomatic relations. For example, plans should be made to transfer confidential records by plane and to transfer routine or non-confidential records to the care of a neutral diplomatic representative under seal. By so acting the foreign office not only protects its records for future administrative uses, but also serves the historian who follows.

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