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## Legal Implications of the Soviet Microwave Bombardment of the U.S. Embassy

### INTRODUCTION

Although the U.S. embassy in Moscow has been the target of Soviet microwave bombardment at least since 1959,<sup>1</sup> it has only been the publicity surrounding the former U.S. Ambassador to the Soviet Union, Walter Stoessel's health that has brought this practice to public prominence.<sup>2</sup> The primary concern about such radiation is the health of the staff, employees, and families within the embassy who are subjected to it. While the recent radiation levels have been relatively low<sup>3</sup> and are of the type associated with the use of radio, and television stations (non-ionizing, as compared to X-rays or Gamma rays<sup>4</sup>) little is

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<sup>1</sup> Microwave radiation was discovered within the embassy during Vice President Nixon's visit to Moscow in 1959, NY Times, May 1, 1976, at 21, col. 2.

<sup>2</sup> Speculation and conjecture between Stoessel's reported "strange blood ailment," Boston Globe, February 16, 1976, at 1, col. 1, and the microwave radiation were preceded and fueled by reports of recent increases in the radiation levels found in the embassy, NY Times, February 11, 1976, at 16, col. 4. Before the Stoessel incident, however, it was Jack Anderson who "broke" the story of the "Moscow Signal" in May of 1972. Washington Post, May 10, 1972, at B10, col. 2.

<sup>3</sup> Levels have been less than two microwatts per square centimeter since protests were made in February, 1976, and aluminum screens which have been installed has reduced this to less than 1 microwatt per square centimeter inside the embassy. NY Times, July 8, 1976, at 1, col. 1; Telephone Conversation with State Department official, Dixie Grimes, December 2, 1976. These levels are to be compared, however with the high of 18 microwatts per square centimeter in 1975, NY Times, April 26, 1976, at 5, col. 1 and perhaps as high as 400 microwatts per square centimeter in earlier years, Paul Brodeur, *Microwaves II*, The New Yorker, December 20, 1976, at 47, col. 2 (hereinafter cited as *Microwaves II*).

<sup>4</sup> ENCYCLOPAEDIA BRITANNICA, vol. 6, pp. 651-52, vol. 15, 389 (15th ed. 1975); NY Times, February 26, 1976, at 1, col. 3.

known of the long range medical effects of prolonged exposure to low levels of microwave radiation, but recent studies sight possible dangers.<sup>5</sup> The State Department is concerned enough at least to have commissioned Johns Hopkins University to conduct research on 600 embassy employees in order to determine the medical effects, if any, of past exposure they may have received.<sup>6</sup>

This article will examine the legal effects of the microwave bombardment. The analysis will attempt to resolve the following issues: I. whether the radiation bombardment is a *prima facie*<sup>7</sup> violation of international law, so as to give rise to Soviet responsibility of some kind; II. whether any defenses are available to the Soviets for their actions; III. what remedies may exist for the United States.

#### I. IS THE RADIATION BOMBARDMENT A PRIMA FACIE VIOLATION OF INTERNATIONAL LAW SO AS TO GIVE RISE TO SOVIET RESPONSIBILITY?

The relevant international law encompassing microwave bombardment of an embassy is the Vienna Convention on Diplomatic Relations (hereinafter, "Vienna Convention").<sup>8</sup> Although only arguably binding as representing customary international law for non-signatories,<sup>9</sup> the Vienna Convention is

<sup>5</sup> *Hearings on Radiation Control for Health and Safety Act of 1967 Before the Senate Commerce Committee*, 90th Cong., 2nd Sess., Part 2 at 963 (1968) (hereinafter cited as 1968 *Hearings*); BUREAU OF RADIOLOGICAL HEALTH, SYMPOSIUM ON THE BIOLOGICAL EFFECTS AND HEALTH IMPLICATIONS OF MICROWAVE RADIATION, June 1970, Print by the Department of H.E.W. (hereinafter cited as SYMPOSIUM).

<sup>6</sup> Dixie Grimes conversation, *supra* note 3; NY Times, July 2, 1976, at 20, col. 2; Boston Globe, May 31, 1977, at 1, col. 6.

<sup>7</sup> A *prima facie* violation will herein be considered to constitute: any set of facts sufficient to make out a violation of international law if no defenses were available.

<sup>8</sup> United Nations Doc. A/CONF 20/13, April 16, 1961; 55 Am. J. Int'l. L. 1064 (1961).

<sup>9</sup> D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, 103-66 (1971) (hereinafter cited as D'AMATO); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 12 (2nd ed. 1973) (hereinafter cited as BROWNLIE); P.J. O'KEEFE, *Immunities of the Diplomatic Family*, 25 INT'L & COMP. L.Q. 329, at 330 (1976) (hereinafter cited as O'Keefe).

clearly law between the U.S. and U.S.S.R. as they have both ratified it.<sup>10</sup>

If the radiation bombardment is a violation of the Vienna Convention it would have to be in violation of those articles conferring the privilege of inviolability upon the embassy premises,<sup>11</sup> the Ambassador,<sup>12</sup> his residence<sup>13</sup> or his staff.<sup>14</sup>

### A. *Inviolability of the Diplomatic Agent*

Article 29 of the Vienna Convention states:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

It should be remembered that the underlying purpose of inviolability like all the privileges and immunities bestowed by the Convention "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."<sup>15</sup> In accord with that reasoning the privilege of inviolability is premised on the assumption that the mission can operate more efficiently if its agents are free from harm and insult.<sup>16</sup> To achieve this end a *duty* is imposed upon the receiving State which requires it to "offer the entitled per-

<sup>10</sup> U.S.S.R. ratification March 28, 1964, effective April 24, 1964. 500 U.N.T.S. 96, 204 (1964). U.S.A. ratification effective December 13, 1972. U.S.T. 23.3.3227; T.I.A.S. 7502. See D'AMATO, *supra* note 9, at 107.

<sup>11</sup> Vienna Convention, *supra* note 8, Art. 22.

<sup>12</sup> *Id.* Art. 29.

<sup>13</sup> *Id.* Art. 30.

<sup>14</sup> *Id.* Art. 37.

<sup>15</sup> *Id.* Preamble; The theory of *ne impediatur legatio* or "functional theory" is now one of the predominant conceptual bases for diplomatic privileges and immunities (having supplanted the theory of extritoriality). This theory satisfies "the need of states for independence and freedom of action, which requires that their diplomatic representatives be exempt from all exercise of authority which might impede the performance of their functions." Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunities*, 10 N.Y.U.L.Q.Rev. 170, at 187 (1933) (hereinafter cited as Preuss).

<sup>16</sup> O'Keefe, *supra* note 9, at 343; League of Nations Committee of Experts for the Progressive Codification of International Law. *Diplomatic Privileges and Immunities*, 20 AM. J. INT'L. L. Spec. Supp. 149 (1926).

son all the protection that is necessary to safeguard him in his life and the pursuit of his occupation."<sup>17</sup>

The difficulty arises, of course, in determining the extent of this duty to protect the diplomat. With respect to the crucial words: "shall treat him with due respect and shall take all appropriate steps to prevent . . ." one commentator has pointed out,

In a practical sense, the determination of "appropriate steps" must rest with the receiving State. This is the only authority capable of assessing accurately the extent of the danger posed by any threat and the response necessary to thwart it.<sup>18</sup>

However true this may be, its validity can be questioned, when applied to dangers other than those posed by non-officials or officials acting *ultra vires*. In other words, as a practical matter only the receiving State itself can determine the scope of its duty to protect the diplomat from non-official actions against him. But is the receiving State also to determine the scope of its duty to protect the diplomat from *official* actions against him? What is the scope and effect of this phrase?

Each State will have its own interpretation, but whether the sending State, the host State, or some third party ultimately determines how far this duty to protect from harm of insult extends, it is submitted that an objective standard should be used. The following principles have been suggested: 1) the mere presence of damage does not, *ipso facto*, impose responsibility upon the receiving State. 2) The receiving State's duty is somewhat greater than the due diligence owed to prevent injuries to aliens. 3) The obligation would have to be directly proportional to the predictability of the commission of harm or insult, or in other words, the greater the risk, the greater the duty.<sup>19</sup>

In applying such principles to obtain an objective standard several points should be noted: first, as previously stated,<sup>20</sup> the

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<sup>17</sup> O'Keefe, *supra* note 9, at 344.

<sup>18</sup> *Id.*

<sup>19</sup> 8 CANADIAN Y.B. OF INT'L L. 356 (1970).

<sup>20</sup> See text accompanying note 16, *supra*.

duty owed to the agent extends not only to harm (injury to body), but to insult (injury to dignity) as well. Second, there exists in most industrialized nations safety standards for maximum microwave irradiation exposure, developed for industrial occupational safety. Thus, from a legal standpoint, if the duty owed to a diplomatic agent is greater than that which is owed to aliens, and if the *predictability* of the harm or insult is also a factor in determining the duty owed, then at minimum it would seem a duty to prevent harm arises on the part of the receiving state at the moment when recognized safety levels of radiation in the sending state's embassy exceeds domestic safety levels, for it is for the purpose of preventing harm that those standards are established.

However sound this hypothesis may be in the abstract, when it is applied to the specific facts of the U.S. embassy's situation in Moscow, several conceptual difficulties arise. Consider: 1) the U.S. safety standard is 10,000 microwatts per square centimeter (micro W/cm<sup>2</sup>), 2) the Soviet safety standard is 10 micro W/cm<sup>2</sup>, and 3) the exposure levels in the U.S. embassy have at times surpassed the Soviet standard, but have not come near the U.S. standard.<sup>21</sup> Does a duty arise because the Soviet standard has been exceeded? Is the U.S. estopped from claiming a duty exists because the U.S. standard has not been exceeded?

To answer these questions it is necessary to analyze the objectives behind each country's safety standard, keeping in mind the legal standard the host State must ultimately meet (*viz.* prevention of harm and insult<sup>22</sup>).

The U.S. standard of 10,000 micro W/cm<sup>2</sup> was first proposed in 1953<sup>23</sup> and was based on theoretical grounds with an assump-

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<sup>21</sup> Reports of high levels of exposure have ranged anywhere from 18 microwatts per square centimeter to 400 microwatts per square centimeter, *see* note 3, *supra*.

<sup>22</sup> Vienna Convention, *supra* note 8, Art. 29. It is in fact the objectives which those safety standards represent, and not the standards themselves which is germane in determining the legal standard. So the mere fact that a country has not established a safety standard would not relieve it of its duty; the reasons underlying safety standards exist irrespective of whether standards have been adopted. Adopted standards is merely a starting place.

<sup>23</sup> Paul Brodeur, *Microwaves I*, *The New Yorker*, December 13, 1976, at 78, col. 3 (hereinafter cited as *Microwaves I*).

tion (generally accepted at the time) that the only effects of microwave irradiation were thermal ones (microwaves tend to heat organic tissue). It was also assumed that since microwaves, unlike x-rays and Gamma-rays, are nonionizing they have no accumulative biomedical effect.

However, in the 24 years since the current U.S. standard was proposed, there have been competent medical studies which seriously undermine the assumptions upon which the standard is based.<sup>24</sup> For example, Dr. Milton Zaret, a practicing ophthalmologist and associate professor of ophthalmology at the New York University-Bellevue Medical Center, who has done extensive microwave research both independently and for the U.S. government, has stated:

"The American National Standard Institute's standard is not a safe standard. Instead it is a statement defining the highest possible degree of occupational risk. It was based solely on whole body thermal burden calculations. It ignored the question of organ sensitivity and delayed effects following chronic low level exposure."<sup>25</sup>

Professor Herman Schwann of the University of Pennsylvania, who first proposed the U.S. standard has said, "No one knows if standards of safe exposure, which may be adequate for adults, are safe for children."<sup>26</sup>

In contrast to the U.S., the Soviet and Eastern Bloc countries have based their safety standards not on theoretical postula-

<sup>24</sup> Professor Russel Carpenter, for one has conducted experiments which contradict both these assumptions which casts doubt upon the validity of that standard to prevent harm. Professor Carpenter testified as to the results of his experiments on microwave irradiation of the eyes of rabbits before the U.S. Senate Commerce Committee: ". . . the effect of microwave power on the eye *can be cumulative*, so that single episodes of exposure to radiation which are not of themselves harmful, may become hazardous if they are repeated sufficiently often. . . . Microwave cataracts are *not merely the result of microwave heating*, but are caused by some other property of this radiation." 1968 *Hearings, supra* note 5 at 963-64 (emphasis added).

<sup>25</sup> *Hearings on the Effectiveness of the 1968 Radiation Control for Health and Safety Act Before the Senate Commerce Committee*, 93rd Cong., 1st Sess., at 101 (1973) (hereinafter cited as 1973 *Hearings*).

<sup>26</sup> 1968 *Hearings, supra* note 5, at 700. Two children were sent home from the U.S. Embassy in Moscow for blood tests in June, 1976. NY Times, June 26, 1976, at 3, col. 1.

tions, but on field observation, surveys and experimentation. At the 1970 Symposium on the Biological Effects and Health Implications of Microwave Radiation, Karel Marha of Czechoslovakia explained how their 10 micro W/cm<sup>2</sup> standard was developed:

From the point of protecting people against possible damaging effects of electromagnetic fields, naturally the threshold biological effects of the field intensity are of importance. In respect of the heat effect it is agreed that heating of the organism occurs at power densities of 10-15 [thousand] [micro] W/cm<sup>2</sup> in animals as well as man. This level for thermal effects is in agreement with theoretical calculations.

For cataract induction 10 [thousand] [micro] W/cm<sup>2</sup>; for changes in auditory apparatus 1 [thousand] [micro] W/cm<sup>2</sup>; for feeling of pain in the skin .6 [thousand] [micro] W/cm<sup>2</sup>.

For microwave frequencies biological effects may be induced at power densities as low as .1 [thousand] [micro] W/cm<sup>2</sup> . . . . Considering the large differences observed in the sensitivity of different people an additional safety factor of 10 was applied to arrive at the value of 10 micro W/cm<sup>2</sup>.

. . . . These maximum admissible values of irradiation admissible in Czechoslovakia were decided so as to prevent not only damage to the organism, but to prevent unpleasant subjective feelings as well.<sup>27</sup>

Thus the fact that the U.S. safety standard at *most* is meant only to be protective against harm, coupled with the fact that its effectiveness of achieving even this limited goal is questionable, shows that the U.S. safety standard cannot adequately be used to meet the legal standard of preventing *harm and insult*. On the other hand, the question of whether the legal standard may even be below the U.S.S.R.'s safety standard is still open.

Both the U.S. and the U.S.S.R. standards have been established assuming steady frequency and relatively short term irradiation. This is because the standards are set primarily for industry, where it is assumed the worker would be exposed to just one frequency of microwaves for a maximum of eight hours

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<sup>27</sup> SYMPOSIUM, *supra* note 5, at 189, 190.



a day. However, the "Moscow Signal" (as the microwave bombardment of the U.S. Embassy is sometimes called) is carried on around the clock and is generated at multiple frequencies with widely fluctuating patterns.<sup>28</sup> Both U.S.<sup>29</sup> and Eastern Bloc Countries<sup>30</sup> agree that the safety standards break down under such conditions. For example, Czechoslovakia lowers their standard to 1 micro W/cm<sup>2</sup> when it is assumed exposure is at certain pulsed frequencies for 24 hour periods.<sup>31</sup>

The above considerations demonstrate that the host State's duty to prevent *harm* to the diplomat may arise when microwave levels are as low as 1 micro W/cm<sup>2</sup>, and clearly arise at levels of 10 micro W/cm<sup>2</sup>, but as has been often repeated, the duty owed by the host State extends to prevent *insult* as well as *harm*. For this aspect of the duty other considerations such as the knowledge that physical harm can be induced by microwave irradiation without any conscious awareness by the subject,<sup>32</sup> lack of any consent on the part of those being irradiated, the intentional aspect of the irradiation they are being exposed to,<sup>33</sup> and the lack of any real medical certainty to the possible extent of damage being inflicted upon them are all relevant factors and combine to support a conclusion that: as long as there is a competent medical basis which can support reasonable doubts as to the safety of prolonged irradiation of humans, then it is reasonably foreseeable that the dignity of humans subjected to any levels of intentional exposure without his or her consent would be affronted. Consequently a corresponding duty would arise on the part of the host State to prevent such indignity.

But regardless of the acceptability of this last conclusion that *any* level of intentional irradiation is a dereliction of the host State's duty, it is submitted that in the present situation, the fact that the 10 micro W/cm<sup>2</sup> safety standard has been exceeded is sufficient to state, *prima facie*, that the Soviet Union has

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<sup>28</sup> *Microwaves II*, *supra* note 3, at 47.

<sup>29</sup> SYMPOSIUM, *supra* note 5, at 20.

<sup>30</sup> *Id.*, at 189.

<sup>31</sup> *Id.*, at 190.

<sup>32</sup> 1968 *Hearings*, *supra* note 5, at 964.

<sup>33</sup> NY Times, February 26, 1976, at 1, col. 3.

failed in its responsibility to either treat the diplomatic agent "with due respect" or to take "all appropriate steps to prevent any attack on his person or dignity."

### B. *Inviolability of the Premises*

Article 22 of the Vienna Convention states:

1. The premises of the Mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the Mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the Mission against any intrusion of damage and to prevent any disturbance of the peace of the Mission or impairment of its dignity.

Paragraph two of this Article imposes a duty on the host state to prevent any impairment of the dignity of the Mission's premises. This paragraph can be used both, as a basis for strengthening the conclusion just reached (that the microwave bombardment violates the host state's duty to the diplomatic agent), and as a basis for arguing that the bombardment is also in violation of the host state's duty to the diplomatic mission itself. To reduce the amount of radiation penetrating into the U.S. embassy, it has been necessary to install aluminum screens on all the embassy windows.<sup>84</sup> It appears that these screens not only accentuate the indignity imposed upon the diplomatic agents, by acting as a constant reminder of the microwaves' unseen presence, but the screens also mar the dignity of the embassy itself by physically symbolizing to visitors and passerbys the fact that the embassy is being subjected to treatment against its consent.

However, a more consequential question concerning Article 22 is not so much whether the microwave radiation imposes an indignity upon the premises, but whether it constitutes an impermissible "entry" within the meaning of paragraph one. It should first be pointed out that article 22 does not put the embassy premises outside the territorial limits of the receiving

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<sup>84</sup> NY Times, April 26, 1976, at 5, col. 1.

State, but merely makes them inviolable.<sup>35</sup> Although technically still under the jurisdiction of the receiving State, inviolability prohibits all nonconsensual entries onto the embassy premises, and places the duty of conformance upon the receiving State.

The duty of the receiving State to the sending State is the positive one of preventing entry upon the premises of a mission by persons clothed with government authority. . . . Protection against invasion of the premises of a mission or of a member of a mission means protection against any attempt to enter the premises against the will of the chief or other members of the mission. The duty, however, goes further than that. The receiving State is under a duty to protect the premises against any acts tending to interfere with the enjoyment or possession of such premises.<sup>36</sup>

This excerpt from a draft containing language identical in material respects to Article 22, supports a construction of the phrase "agents of the receiving State may not enter . . ." is to be considered interpretive and explanative of inviolability rather than a specific prohibition in addition to inviolability. Nonconsensual entries by agents are *specifically* limited as this represents the most notorious violation of the concerns behind inviolability, those concerns being "to ensure the efficient performance of the functions of diplomatic missions"<sup>37</sup> by preventing interference "with the enjoyment or possession of such premises."<sup>38</sup>

The fact that nonconsensual entries by agents are specifically proscribed does not preclude the possibility that nonconsensual entries of microwaves might not also be proscribed. Although microwaves are not specifically limited *by the words* of Article 22, the same concerns which lead to the specific limitation of agents are nonetheless present in the

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<sup>35</sup> The principle of extritoriality has been generally discredited as a fiction without basis in law or fact. 7 WHITEMAN, DIGEST OF INTERNATIONAL LAW 353 *et seq.* (1970) (hereinafter cited as WHITEMAN); PREUSS, *supra* note 15, at 183.

<sup>36</sup> Harvard Research Paper. 26 AM. J. INT'L L. SUPP. 56 (1932) (hereinafter cited as Harvard Research Paper).

<sup>37</sup> Vienna Convention, *supra* note 8, Preamble.

<sup>38</sup> Harvard Research Paper, *supra* note 36.

case of microwaves. And microwave bombardments can violate these concerns just as easily, although perhaps not as notoriously, as the agents of the host state, for it is clear that certain levels of microwave irradiation can interfere with the enjoyment of the premises.<sup>39</sup>

In the case of the host State's agents the effect of requiring the mission's consent is that of giving *control* to the sending state of who may and who may not enter the mission. I.e., it is the sending State who is given the right to decide how much interference with the enjoyment of their premises they will or will not tolerate from the host State's agents (at least within the embassy's premises). Since the same concerns that are present with respect to "agents" are present with respect to "microwaves," the reasons which give the sending State the right to decide what kind and how many agents are to be allowed on the premises also argue for giving the sending State the right to decide what kind and how much radiation is to be allowed in its airspace. In other words, the concerns behind inviolability require that consent be given by the mission before *any* microwave bombardment by the host state could take place, and failure to obtain such consent would be in violation of Article 22.

The above argument is of necessity based on an interpolative reading of Article 22, as the presence of microwaves was not an explicit concern of the Convention's parties. It therefore is open to the infirmities associated with such construction. For instance, it would most likely be attacked on the ground that prohibition against *entry* in Article 22 is directed at "the agents of the receiving state" and to construe microwaves as "agents" contravenes the "ordinary meaning" principle of treaty inter-

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<sup>39</sup> For example, "Typical symptoms are pains in the head and eyes, fatigue connected with overall weakness, dizziness, and vertigo when standing for a longer period. Sleep at night is restive and superficial, there is sleepiness during the day. Exposed individuals are subject to changing moods, they often become irritated to the point of becoming intolerable. Hypochondric reactions are manifested along with feelings of fear. Sometimes those affected feel nervous tension or, on the contrary mental depression connected with inhibition of intellectual functions mainly decreased memory." SYMPOSIUM, *supra* note 5, at 188; *cf.* Boston Globe, May 31, 1977, at 9, col. 2.

pretation.<sup>40</sup> However, "the doctrine of ordinary meaning involves only a presumption; a meaning other than the ordinary may be established, but the proponent of the special meaning has a burden of proof."<sup>41</sup> The previous analysis has attempted to overcome this presumption by arguing that the underlying principle (if not the words) of Article 22 has been violated by the entry of microwaves into the embassy without its consent. Hence to obviate violating the principle (and *a fortiori* the parties' intention), the words which are meant to effectuate that principle should be given a broader than ordinary meaning.<sup>42</sup> Yet even if this argument ultimately fails to meet its burden of overcoming the ordinary meaning of Article 22, this in no way affects the previous inviolability arguments based on Article 29. It might also be noted that similar personal inviolability arguments can be made with respect to the inviolability of the families and staff of the diplomatic agents.<sup>43</sup>

### C. *Soviet Responsibility*

If the Soviet microwave bombardment of the U.S. embassy does constitute violations of the Convention as the prior analysis suggests, does this give rise to any responsibility on the part of the Soviets? To quote from the *Chorzow Factory* case,<sup>44</sup> ". . . it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation . . . the Court has already said that reparation is the indispensable complement of a failure to

<sup>40</sup> BROWNIE, *supra* note 9, at 607.

<sup>41</sup> *Id.*

<sup>42</sup> As has been said by Professor Lauterpacht, "The common intention [of the parties] in relation to the particular case must be derived from the common intention of the treaty as a whole — from its policy, its object, and its spirit." H. LAUTERPACHT, XXVI BRITISH Y.B. INT'L L. 48, 79-80 (1949). "Furthermore, what is clear and unambiguous may not necessarily be comprehensive. Hence even when the language of the treaty is clear it still remains to decide whether every category of event has been comprised exclusively within it." 1 D.P. O'CONNELL, INTERNATIONAL LAW, 272-73 (1965).

<sup>43</sup> Vienna Convention, *supra* note 8, Art. 37, gives the same immunities to the diplomatic agent's family and staff as Article 29 gives to him.

<sup>44</sup> P.C.I.J. Ser. A. No. 9, at 21 (1927); BROWNIE, *supra* note 9, at 420.

apply a convention, and there is no necessity for this to be stated in the convention itself.”

In general the elements of responsibility may be summed up as follows:<sup>45</sup>

1) An act or omission in violation of international law, (or put somewhat differently, conduct on the part of a State contrary to that required of it by given international obligation);

2) The unlawful act, as a general rule, must be imputable to the legal person of the State; that is to say, the conduct in question must be attributed to those organs or agents of the State's which are qualified by municipal law to accomplish “State acts”;

3) resultant damage to the claimant State either directly, in the person of its nationals, or both.<sup>46</sup>

The first element has been shown in the Soviet's dereliction of their duty concerning inviolability. The second element may have been difficult to meet if it were not for Soviet acknowledgment that they are responsible for the microwave radiation.<sup>47</sup> The third element is met by damage done directly to the U.S. by affronting the dignity of its officials and embassy premises, and could also be met if physical harm can be shown to have resulted to any U.S. citizen while at the embassy as a result of being irradiated. In the latter case, particular items of financial loss directly resulting from the radiation would have to be proved,<sup>48</sup> whereas no proof of financial loss is necessary for the violation of the diplomatic immunity of inviolability<sup>49</sup>.

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<sup>45</sup> A. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE, 22 (Kraus reprint 1970) (hereinafter cited as FREEMAN).

<sup>46</sup> Defenses to a State's responsibility are generally considered separately. BROWN-LIE, at 442, *supra* note 9. For analysis *see* text accompanying notes 50-67, *infra*.

<sup>47</sup> The Soviets admitted using microwaves after having denied it for 15 years, NY Times, February 26, 1976, at 1, col. 3. Just one week earlier the Soviets, while acknowledging radiation presence in the embassy, claimed it was due to nearby industrial enterprises and was compounded by the embassy's roof antennas. NY Times, February 19, 1976, at 3, col. 6.

<sup>48</sup> In such situations some authorities add a fourth element, *viz.* the exhaustion of local remedies, but there is dispute over this point. FREEMAN, *supra* note 45, at 22, fn. 1.

<sup>49</sup> BROWN-LIE, *supra* note 9, 444-45.

## II. ARE THERE ANY DEFENSES AVAILABLE TO THE SOVIETS FOR THEIR ACTIONS?

When the Soviets acknowledged aiming microwaves at the U.S. embassy, they defended their action by claiming it is necessary in order to interfere and block the U.S. listening devices located on the embassy premises.<sup>50</sup> The U.S. has apparently accepted this as at least the primary purpose behind the radiation,<sup>51</sup> discounting other speculated reason.<sup>52</sup>

Given the nature of their justification the Soviets most likely would classify their actions as a retortion.<sup>53</sup> Inconsistent with such a claim, however, is the fact, as shown previously, that their actions are in contravention of international law. "Retortion is retaliation by one State for a harmful though lawful act of another State by a harmful and *lawful* act of the same or similar nature."<sup>54</sup>

At best the Soviet's action could be termed a reprisal.<sup>55</sup> "Reprisals, in contradistinction to retortion, are measures which would, taken in isolation, be unlawful, but may be taken exceptionally when one State violated the rights of another State, for the sole purpose of forcing the delinquent State to abide by law."<sup>56</sup> Thus, for the Soviet's bombardment to be justified by reprisal it must be shown *inter alia* that the U.S.'s eavesdropping actions from the embassy premises are also illegal.

Generally mere eavesdropping on another country's communications is not "normally" considered to be an international

<sup>50</sup> NY Times, February 26, 1976, at 1, col. 3.

<sup>51</sup> The "impairment purpose" would be consistent with the facts that it does interfere with the listening devices and the beams are highly directional. NY Times, May 2, 1976, at 9, col. 1.

<sup>52</sup> *E.g.*, deliberately used to induce illness or to recharge hidden bugging devices. *Id.*; BUT SEE Boston Globe, May 31, 1977, at 1, col. 3.

<sup>53</sup> The Soviets discount any dangerous effects of the microwave radiation by showing it is of the type found near TV and radar stations and much less dangerous than X-rays. *Id.* But, for a polemic against this view see *Microwaves II*, *supra* note 3, at 66-72.

<sup>54</sup> MAX SORENSEN (ed.), *MANUAL OF PUBLIC INTERNATIONAL LAW*, 753 (1968). (Emphasis added, hereinafter cited as SORENSEN).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

wrong.<sup>57</sup> However, "normally" this is only the general rule when the listening is being done from contiguous land not under the jurisdiction of the State whose emissions are being heard.<sup>58</sup> Since a foreign embassy is still technically considered within the sovereign jurisdiction of the host country,<sup>59</sup> eavesdropping from the embassy premises may not as easily fall within the international toleration of such practices.

Article 41 of the Vienna Convention states in part, "The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention". Is eavesdropping a use of the premises which is compatible with the diplomatic function? Recourse could be had to Article 3 of the Convention which states:

1. The functions of a diplomatic mission consist *inter alia* in:

.....

- (d) ascertaining by all lawful means conditions and developments in the receiving State and reporting thereon to the Government of the sending State.

.....

But this is circuitous and of no real help as it merely changes the form of the question back to the original, i.e., is eavesdropping lawful activity?

Assuming, *arguendo*, that eavesdropping from the embassy is unlawful; that alone is not enough to justify the Soviets bombardment of microwaves as a reprisal. Another condition of reprisals is that it "must be proportionate to the injury suffered, that is, they cannot result in losses and injury disproportionately greater than those caused by the delinquent State. . ."<sup>60</sup>

It is with this condition that an attempt to characterize the bombardment as a reprisal meets great difficulty. It is submitted

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<sup>57</sup> Rubin, Alfred. *Seizure of the Pueblo: Some International Law Aspects*, 114 Cong. Rec. 2350 (February 6, 1968); 68 AM. J. INT'L L. 227, at 241 (1974); 18 INT'L & COMP. L. Q. 961, at 968 (1969).

<sup>58</sup> *Id.*

<sup>59</sup> See note 35, *supra*, which points out the disrepute of the extritoriality doctrine. But, compare Soviet domestic law: "premises occupied by diplomatic missions . . . enjoy extritorial rights. . ." Harvard Research Paper, *supra* note 36.

<sup>60</sup> SORENSEN, *supra* note 54, at 753.



that the two actions can be differentiated by the fact that eavesdropping seems to be an entirely passive activity whereas the radiation bombardment is clearly active. This alone shows little, but certainly where reprisals are concerned, other passive acts would be preferable to active ones.

Secondly, the U.S. violation would be that of Article 41, paragraph 3 of the Vienna Convention which prohibits using the diplomatic mission in a manner inconsistent with the function of the mission.<sup>61</sup> The Soviet violation would be that of the inviolability of the diplomatic agents,<sup>62</sup> families, staff<sup>63</sup> and of the premises itself.<sup>64</sup> The disproportionality of these two "violations" is illustrated by the commentary of the International Law Commission to Article 40 paragraph 3<sup>65</sup> of the "Draft Articles on Diplomatic Intercourse and Immunities":

Paragraph 3 stipulates that the premises of the mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfill the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative, but on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission.<sup>66</sup>

The purport of this statement would seem to all but preclude the Soviet's action being justified as a reprisal. The privilege of inviolability can in no way be deemed to sanction or authorize using the embassy premises improperly (e.g., eavesdropping),

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<sup>61</sup> "The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and receiving state." Vienna Convention, *supra* note 8, Art. 41. It should be remembered that for purposes of analysis it has been *assumed* this eavesdropping is a violation of international law. No claim is being made as to whether eavesdropping from an embassy would violate Article 41 in absence of such an assumption.

<sup>62</sup> Vienna Convention, *supra* note 8, Art. 29.

<sup>63</sup> *Id.*, Art. 37.

<sup>64</sup> *Id.*, Art. 22.

<sup>65</sup> Draft Article 40 paragraph 3 was adopted by the Vienna Convention as Article 41 paragraph 3 with only immaterial grammatical changes being made in its wording. II YEARBOOK OF THE INT'L L. COMM. 78, at 104 (1958).

<sup>66</sup> *Id.*; WHITEMAN *supra* note 35, at 360-61.

but the fact that they are being used improperly does not justify violating the premises' inviolability. This does not foreclose all types of reprisals by the Soviets but it does foreclose any reprisal on their part which would consist in a violation of inviolability (which would include microwave bombardment).

The most obvious action which would easily meet the reprisal condition of proportionality would be the very same type of action giving rise to the reprisal. In other words eavesdropping of the U.S. from the Soviet embassy in Washington, D.C. This is in fact an action already established in Washington by the Soviets,<sup>67</sup> which in itself throws additional weight to a conclusion that the Soviet's microwave radiation bombardment is a violation in international law to which no legitimate defense can be raised.

### III. WHAT REMEDIES MAY EXIST FOR THE UNITED STATES?

Given the above conclusion. One may ask what is to be done about it? At the time of this writing the bombardment was still proceeding, although the day to day levels had been reduced to well below previous highs.<sup>68</sup> The State Department was proceeding via "all channels"<sup>69</sup> to get the bombardment stopped. Negotiations, the first step, are underway<sup>70</sup> and settlement by these means is the most desirable.<sup>71</sup>

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<sup>67</sup> NY Times, February 26, 1976, at 1, col. 3.

<sup>68</sup> NY Times, July 8, 1976, at 1, col. 1.

<sup>69</sup> Dixie Grimes Conversation, *supra* note 3; Boston Globe, May 31, 1977, at 1, col. 3.

<sup>70</sup> Negotiations between the U.S. and the U.S.S.R. have been under way at least since February, 1976. NY Times, February 13, 1976, at 6, col. 1. The Carter Administration is continuing negotiations under Secretary of State Cyrus Vance and reportedly does not take the matter lightly. Boston Globe, May 31, 1977, at 1, col. 3.

<sup>71</sup> If negotiations should break down there is a whole panoply of possible procedures ranging from mediation and conciliation to judicial procedures, *see* SORENSON, *supra* note 54, at 673-737. It should be noted however that the U.S.S.R. did not sign the optional Protocol (to the Vienna Convention) Concerning Compulsory Settlement of Disputes, which in essence means that they do not have to submit to jurisdiction of the International Court of Justice over this matter. 500 U.N.T.S. 242 (1964). Several reasons can be speculated as to why resolution of this problem may be difficult. First there is the continuing mystique of detente, with the accompanying desire to reach a strategic arms' control agreement. Administration

If negotiations break down, the United States could resort to some form of retaliation to try and persuade the Soviets to cease their bombardment. This article will not presume to suggest any specific action which the U.S. should take, however, it will suggest the limits to which such action can go within the bounds of legality.

First, the U.S. is bound by article 2 (3) of the United Nations Charter:<sup>72</sup> "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered." Likewise article 2 (4) states that States should refrain from the use or threat of force.<sup>73</sup>

Secondly, any U.S. action would have to meet the requirements of reprisal. Reprisals, as previously discussed, are acts in response to the unlawful acts of another State which themselves would be unlawful if committed in isolation. The conditions which must be met for an act to be considered a reprisal are: 1) The offending State's act must have been unlawful; 2) Redress must be demanded before counteraction is taken; 3) The counteraction taken must be proportional to the offending act.<sup>74</sup>

Condition one has already been met as has been shown.<sup>75</sup> The second condition too has been met as evidenced by negotiation

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policies may relegate the microwave bombardment to a relatively low priority. Secondly, the State Department has a dilemma in pursuing this matter. To vigorously pursue its claims requires the revealing of possible health hazards to the U.S. citizens being exposed. Yet since the State Department has known of the existence of the radiation for some time it may be subjecting itself to liability for not pressing its claims earlier or disclosing the possible health hazards to its employees. Thirdly, since the Soviet radiation bombardment levels are well below the official U.S. safety standard, to claim these levels are harmful implicitly undermines the validity of the U.S. standard, which standard has been used for the United States' defense systems. Thus a change in the standard could literally threaten hundreds of billions of dollars worth of defense and military installations (virtually every advanced defense weapon employs radar, which is a form of microwave radiation).

<sup>72</sup> 1 U.N.T.S. xvi (1945); 39 AM. J. INT'L L. SUPP. 190, at 191 (1945).

<sup>73</sup> *Id.*

<sup>74</sup> SORENSEN, *supra* note 54, at 753.

<sup>75</sup> See text accompanying notes 15-43, *supra*.

and protests.<sup>76</sup> Thus, the third requirement, that of proportionality, is the crucial one which any U.S. counteraction must meet.

Of course, the exactly proportional reprisal would be the microwave bombardment of the USSR embassy in Washington. But this has been already precluded as a possible counteraction by the State Department because to do so would be "immoral."<sup>77</sup> Any other action of course would have to be subjected to a specific analysis balancing the degree of harm, type of injury, etc., which the contemplated act will commit with the degree of harm, type of injury, etc., already being inflicted by the microwave radiation. But in no case may the reprising act exceed the compulsion which would reasonably be necessary to secure settlement.<sup>78</sup>

Other actions involving the Soviet diplomatic mission's privileges and immunities would be the most likely candidates to meet this test. Restricting travel privileges,<sup>79</sup> the use of wireless communications,<sup>80</sup> or the exemption of custom duties<sup>81</sup> are also a few possibilities.

### CONCLUSION

The legal implications of the Soviet's practice of bombarding the U.S. Embassy in Moscow with microwaves are significant in and of themselves. Such practices arguably violate four separate articles of the Vienna Convention on Diplomatic Immunities,<sup>82</sup> and perhaps customary international law as well.<sup>83</sup> Any claims of possible justification for such violations can meet the legal requirements of neither retortion nor reprisal.<sup>84</sup>

The concern over this Soviet practice, however, goes beyond the normal considerations accompanying a violation of inter-

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<sup>76</sup> NY Times, February 13, 1976, at 6, col. 1; NY Times, May 20, 1976, at 3, col. 6; Boston Globe, February 16, 1976, at 1, col. 1, May 31, 1977, at 1, col. 3.

<sup>77</sup> NY Times, February 29, 1976, Sec. IV, at 2, col. 3.

<sup>78</sup> SORENSEN, *supra* note 54, at 753.

<sup>79</sup> Vienna Convention, *supra* note 8, Art. 26.

<sup>80</sup> *Id.*, Art. 27.

<sup>81</sup> *Id.*, Art. 36.

<sup>82</sup> Articles 22, 29, 30, and 37. Vienna Convention, *supra* note 8.

<sup>83</sup> See notes 9 and 15, *supra*.

<sup>84</sup> See notes 50-67, and accompanying text, *supra*.

national law. As was stated in the introduction, the legal considerations are only one aspect of this affair. The primary concern should, foremost and always, be the health of those individuals within the embassy who must be subjected to the bombardment without knowing what the consequences may be.

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