

OTTAWA, 25th September, 1945.

MEMORANDUM FOR THE DEPUTY MINISTER:

The Under-Secretary of State for External Affairs has asked for the views of this department as to whether the Government of Canada can lawfully apprehend one Igor Gouzenko, an employee of the Embassy of the Union of Soviet Socialist Republics in Ottawa, and his wife, and without trial, hand them over to the Soviet Embassy for deportation to the Soviet Union. The Soviet Embassy allege that Gouzenko robbed some money belonging to the Embassy and has now hidden himself (presumably somewhere in Canada) together with his family.

The file does not show where the alleged theft took place. As the theft is alleged to be a theft of public funds from the Embassy, I shall assume for the purposes of this memorandum that it took place in the Embassy.

Every State has exclusive jurisdiction within its own territory but this jurisdiction is subject to certain limitations imposed by international law. The immunities given to members of foreign diplomatic services within a country are described by the term "extritoriality". This means nothing more than that a person or thing has some immunity from the local jurisdiction. See Brerley's "The Law of Nations", 2nd Ed., p. 142.

A diplomatic person is wholly exempt from criminal proceedings and from police action in the country to which he is accredited. This does not mean that it is not his duty to obey the criminal law or the police regulations of a country, but rather if he does not do so the only action that may be taken against him is a diplomatic complaint to his government, or in an extreme case, his expulsion. It may be that in cases of serious crimes, which can only be met by the application of restraint to the person, such restraint would have to be applied. See Brerley, supra, at p. 165.

According to Oppenheim, one of the privileges of envoys in reference to their extritoriality is self-jurisdiction within certain limits. As the members of an envoy's retinue are considered extritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline. He must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue, though in former centuries this used to happen. See Oppenheim's International Law, 5th Ed. Vol. I, p. 627.

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Lawrence's "Principles of International Law" at p. 314, says that in criminal matters that arise between members of the suite, the head of the legation takes and prepares the evidence, but sends the accused home for trial and he possesses a similar power as to the servants of the embassy, though its limits are uncertain and disputable. He says that at one time ~~very~~ extreme pretensions were put forward by ambassadors, among them was a claim to exercise civil and criminal jurisdiction over the members of their suites according to the laws of their own country, but that in modern practice no such right is conceded and it would not now be demanded.

Assuming that Gouzenko is still a member of the Soviet diplomatic staff, the municipal authorities in Canada have no right to arrest or try him for the crime even though it is alleged to have been committed in Canada. It would not appear, moreover, that the Extradition Act, c. 37 of the Revised Statutes of 1927, would apply even if the necessary treaty were in force with the Soviet Union. (My understanding is that no proclamation has ever been issued under Part II.) The Extradition Act does not appear to be very scientifically worded but I think it must be assumed that it applies only in the case of crimes committed in a foreign State as defined by para. (d) of s. 2. The words "foreign State" are by definition extended to vessels of a foreign State. There is no express extension, however, to embassies. The extension to vessels would seem to follow the decision of the Permanent Court of International Justice in the Lotus case where it was held that criminal law extended to the vessels of the State. See Brerley, 2nd Ed. p. 186-189.

The international law authorities referred to above appear to agree that a foreign envoy has power to order the arrest of a member of his staff and send him back to the home country for an offence alleged to have been committed in the embassy. This principle appears to be at least as well established as the immunity of legations from taxation and would therefore appear to be part of our law on the principle laid down by the Supreme Court of Canada in the Reference as to the powers to levy rates on foreign legations, 1943 S.C.R. 208.

It is submitted, therefore, that if an ambassador or members of his staff arrest another member of the staff and forcibly take him outside the country to be tried for a crime alleged to have been committed in the country, Canada cannot complain and the ordinary criminal law of the country could not be invoked to stop them. On the other hand, there would appear to be no authority for any member of the police force of Canada to assist in such proceedings.

As pointed out above, it would appear to be very doubtful whether the Extradition Act would apply in this case. In any event, it does not apply unless the Russians prefer the necessary charges and supply the necessary evidence to make out a prima facie case.

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In the case of a comparatively petty crime, the foreign envoy might, if he saw fit, hand the accused over to the local authorities to be tried.

The only other way in which the laws of Canada might be invoked against Gouzenko that I can see would be, if he were dismissed from the Russian diplomatic service, for us to invoke our immigration laws to deport him. If this were done, however, he could not be turned over to them in Canada but arrangements might be made so ~~to~~ time the deportation proceedings that the Russians would be able to pick him up at the moment of his exit from Canada.

W.R.J.

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