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DIPLOMATIC IMMUNITY-OPEN-DOOR POLICY To ESPIONAGE ACTIVITY AVOIDED (United States v. Kostadinov- United States v. Kostadinov)

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DIPLOMATIC IMMUNITY—OPEN-DOOR POLICY TO ESPIONAGE ACTIVITY AVOIDED—*United States v. Kostadinov*—*United States v. Kostadinov*[1] represents important vindication of longstanding State Department policy that the head of a trade mission located outside of Washington, D.C. is the only mission member entitled to diplomatic privileges and immunities. By reinstating the espionage indictment[2] against Penyu Kostadinov, the Second Circuit Court of Appeals prevented what would have been the creation of a whole new class of diplomatic "untouchables."[3]

Kostadinov was an employee of the People's Republic of Bulgaria. In 1979, he entered the United States as "assistant commercial counselor" in the Bulgarian trade mission in New York.[4] He was issued an "A-2" visa[5] and began a scheduled four-year term of duty. The term was extended beyond May 1983[6] due to Kostadinov's ongoing cultivation of an American source to provide him with classified material on sensitive national security subjects.[7] At a dinner in New York on September 23, 1983, Kostadinov paid his source $300[8] for a secret document from the Department of Energy,[9] and gave him a "shopping list" of some thirty secret and confidential documents.[10] Unbeknownst to Kostadinov, his source had been working in concert with the Federal Bureau of Investigation. The F.B.I. made audio and videotapes of the entire dinner transaction, including Kostadinov's statements that the

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1. 734 F.2d 905 (2d Cir.), *cert. denied sub nom.* Kostadinov v. United States, 469 U.S. 881, (1984). *See infra* note 20.

2. *See infra* note 14 and accompanying text.

3. Brief for Appellant at 10, United States v. Kostadinov, 734 F.2d 905 (2d Cir. 1984) [hereinafter Appellant's Brief]. Appellant United States noted that the District Court's decision "effectively create[d] more than a hundred new diplomats—all cloaked with absolute immunity—who have never before been recognized as having diplomatic status." *Id.*

4. United States v. Kostadinov, 572 F. Supp. 1547, 1552 (S.D.N.Y.), *aff'd*, 721 F.2d 411 (2d Cir. 1983). *See infra* note 15.

5. 572 F. Supp. at 1547, 1552. An A-2 visa connotes no diplomatic capacity—merely that the holder is a foreign government employee. *See* 8 U.S.C. § 1101(a)(15)(A)(i) and (ii); 8 C.F.R. § 41.12.

6. Government's Memorandum in Support of Continued Remand of Defendant Kostadinov at 8, [hereinafter Government's Memorandum]. (This memorandum was in reference to Kostadinov's pretrial bail hearing).

7. *Id.*

8. *Id.* at 5.

9. The document was entitled "Report on Inspection of Nevada Operations Office." 572 F. Supp. at 1548.

10. *Id.*

source could obtain the requested information over a long period of time, that he should be "very patient and very precautious"[11] and that Kostadinov looked forward to a long relationship with him.[12]

Upon leaving the restaurant, Kostadinov was arrested. The document and "shopping list" were promptly retrieved.[13] Kostadinov was arraigned the next day on charges of espionage and conspiracy to commit espionage, in violation of 18 U.S.C. section 794(a) and 18 U.S.C. section 794(c) (1982).[14] He was ordered held without bail pending trial.[15] On October 6, 1983, Kostadinov moved to dismiss the indictment on the grounds of diplomatic immunity, arguing that as a member of the "administrative and technical staff" of the Bulgarian Embassy[16] he was immune from criminal jurisdiction and prosecution, under 22 U.S.C. section 254d (1982)[17] and the Vienna Convention on

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11. Government's Memorandum, *supra* note 6, at 5.
12. *Id.* at 2.
13. 572 F. Supp. at 1548.
14. 18 U.S.C. § 794(a) provides:

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

Id. 18 U.S.C. § 794(c) provides:

> If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

15. 572 F. Supp. at 1549. The case was split into two parts. Part I, reported at 572 F. Supp. 1547 (S.D.N.Y. 1983), affirmed Kostadinov's pretrial detention without bail. That decision was affirmed at 721 F.2d 411 (2d Cir. 1983). Part II, in the Southern District Court of New York, dealt with Kostadinov's motion to dismiss the complaint on the grounds of diplomatic immunity. It is Part II and the Second Circuit decision on the same question with which this comment is concerned.
16. The terms "embassy" and "mission" appear to be interchangeable. The Vienna Convention, *infra* note 18, uses only the term "mission"; the District Court and the Court of Appeals used both.
17. 22 U.S.C. § 254d provides:

> Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under Section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of

Diplomatic Relations.[18]

In an oral opinion rendered on January 17, 1984, Judge Vincent L. Broderick in the Southern District Court of New York granted Kostadinov's motion.[19] The government appealed and the Court of Appeals reversed the District Court, reinstating the indictment.[20] Both the District Court and the Court of Appeals focused on the fundamental legal issue of whether Kostadinov was entitled to diplomatic immunity as the "assistant commercial counselor" of the New York trade mission of the Bulgarian Embassy. The two courts also focused extensively on the Vienna Convention on Diplomatic Relations[21] and its statutory embodiment in 22 U.S.C. § 254a-e (1982), both of which are examined before proceeding to analyses of the courts' decisions.

The Vienna Convention on Diplomatic Relations was the work of the United Nations' International Law Commission (Commission), which sought to make uniform the rules of law regarding diplomatic intercourse and immunities.[22] The Convention, a self-executing

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procedure.

Id.

It should be noted that section 254b is not relevant to the instant case. § 254c, although seemingly relevant because it allows the President "on the basis of reciprocity" to extend more or less favorable treatment than provided in the Vienna Convention, is really not, at issue here.

18. Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. Art. 37, para. 2 provides that: "Members of the administrative and technical staff of the mission . . . shall . . . enjoy the privileges and immunities specified in Articles 29 to 35"; that is, pursuant to art. 31, para. 1, Kostadinov argued that he was "[a] diplomatic agent . . . [immune] from the criminal jurisdiction of the receiving State." *Id.*

19. Transcript of Oral Opinion United States v. Kostadinov, No. 83 Cr. 616 (S.D.N.Y. Jan. 17, 1984).

20. *See supra* note 1. Events have rendered the procedural posture of the case moot. Following the Supreme Court's denial of *certiorari* on October 9, 1984, the defendant filed a motion for leave to file a complaint in the Supreme Court under its original jurisdiction. This motion was denied in January of 1985. Conversation with counsel. On June 11, 1985, Kostadinov was one of four East Europeans exchanged on a Berlin bridge for 25 western agents who had been held prisoner in East Germany and Poland. N.Y. Times, June 12, 1985, at A1, col. 4. One State Department official described the exchange as "the biggest spy swap" in memory. *Id.*

21. Vienna Convention, *supra* note 18.

22. The International Law Commission (Commission) met in 1954 to begin drafting proposed articles and official commentary on diplomatic immunities and privileges. In 1958, the Commission forwarded its work to the General Assembly and recommended that the member states of the United Nations conclude an international convention based upon the proposed draft. In 1959, the General Assembly asked the Secretary-General to convene a conference in Vienna in the Spring of 1961 for that purpose. The conference met and the Vienna Convention on Diplomatic Relations was finalized. 734 F.2d at 908.

treaty,[23] was finalized in Vienna in 1961[24] and was entered into force for the United States on December 13, 1972.[25] At the time the Vienna Convention was entered into force for the United States, the Convention conflicted in some respects with the then governing statute dealing with diplomatic immunities and privileges, 22 U.S.C. sections 252 through 254.[26] This statute provided for a much broader grant of immunity than was required by the Convention.[27] That broad grant notwithstanding, an individual was not entitled to diplomatic immunity unless the State Department was notified of his or her status and actu-

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23. S. REP. No. 958, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1935, 1936. *See also* United States v. Enger, 472 F. Supp. 490, 542 (D.N.J. 1978), in which the court looked to the Convention's "detailed provisions and the absence of language requiring implementing legislation . . . to hold that it is a self-executing treaty." *Id.*

24. 734 F.2d at 908.

25. The Senate advised ratification of the Vienna Convention on Sept. 14, 1965 and the President ratified it on Nov. 8, 1972. Vienna Convention, *supra* note 18, proclamation.

26. 22 U.S.C. §§ 252-254 was the modern codification of the Act of 1790 which governed diplomatic immunities. United States diplomatic law, with its sweeping privileges and immunities, *see infra* note 27, was untouched for nearly two hundred years. 22 U.S.C. §§ 252-254 was finally repealed on September 30, 1978, to be replaced by the Diplomatic Relations Act, 22 U.S.C. § 254a-e (1978). The Diplomatic Relations Act harmonized United States statutory diplomatic immunity law with the Vienna Convention. It also had an impact on tort law, *see infra* note 27.

27. 22 U.S.C. § 252 (1976) provided that:

> Whenever any writ of process is sued out or prosecuted by any person in any court of the United States, or of a state, or by any judge or justice, whereby the person of *any ambassador or public minister* of any foreign prince or state, authorized and received as such by the President, or *any domestic or domestic servant of* any such minister is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. (emphasis added).

Id.

In contrast, Art. 31 of the Vienna Convention, *supra* note 18, limits those privileges and immunities according to one's position in the mission. For example, the Diplomatic agent and his household family members are entitled to full immunity from criminal and civil jurisdiction, whereas members of the administrative and technical staff (Kostadinov's alleged position) are accorded full criminal immunity but limited immunity from civil and administrative jurisdiction.

One of the biggest impacts the Diplomatic Relations Act has had is in tort law. The Diplomatic Relations Act has attempted to rectify abuses of diplomatic privileges by requiring diplomatic mission members to carry liability insurance for their automobiles (and other vehicles). *See* Valdez, *Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411 (1981). Note, *The Effect of the Diplomatic Relations Act*, 11 CAL. W. INT'L L.J. 354 (1981); Comment, *A New Regime of Diplomatic Immunity: the Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661 (1980).

ally recognized it.[28] Thus, the State Department had the power to exclude a person, and its determination of that person's status was a nonjusticiable issue.[29] Yet, when 22 U.S.C. sections 252 through 254 was repealed on September 30, 1978 and replaced by the Diplomatic Relations Act, which incorporated the Vienna Convention and was codified at 22 U.S.C. section 254a-e (1982), the exclusionary language was not retained. The District Court thereby concluded that because the exclusionary language had not been retained, neither had the State Department's exclusionary power.[30] This conclusion was fundamental to the District Court's reasoning in granting Kostadinov's motion to dismiss the indictment on the ground of diplomatic immunity.

In granting Kostadinov's motion, the District Court did not neatly articulate the logical steps it followed. The focus of its concerns, however, can be narrowed to three core issues: 1) whether the Office of the Commercial Counselor was a part of the Bulgarian Embassy;[31] 2) whether Kostadinov properly became a staff member of that embassy;[32] and 3) whether the State Department may withhold privileges and immunities from embassy staff personnel.[33]

In addressing the first issue, the District Court looked at the circumstances surrounding the creation of the Office of the Commercial Counselor. The Court noted the extensive negotiations and eventual

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28. 22 U.S.C. § 252 required that the ambassador or public minister be "authorized and received as such by the President" (i.e., through his agent, the State Department). In United States v. Coplon, 88 F. Supp. 915 (S.D.N.Y. 1950), the court noted a State Department memorandum declaring that

> [A]n individual is not entitled to claim diplomatic status and immunities unless he is a foreign official accredited to the Government of the United States, *notified to* the Department of State and *accepted by* the Department for this purpose, or is a member of the family, staff or retinue of such official. (Emphasis added).

Id. at 919.

29. The court observed in United States v. Enger, 472 F. Supp. 490, 506-07, n.19, that

> The courts are bound by a determination of the Department of State that an alien claiming diplomatic status is entitled to that status, since this is construed as a nonreviewable political decision . . . . The case for allowing judicial review is stronger where the Executive finds an individual not to have been a diplomat . . . but even so the courts have generally acceded to the determination of the Executive.

Id. See also In re Baiz, 135 U.S. 403 (1890) and United States v. Coplon, 84 F. Supp. 472, 475 (S.D.N.Y. 1949) (the court averred that "[d]iplomatic status is a political question and a matter of state; the finding of the Secretary of State must be accepted unquestioned.") *Id.*

30. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 36-38.

31. *Id.* at 18.

32. *Id.* at 39.

33. *Id.* at 35.

treaty between the United States and Bulgaria regarding financial claims,[34] and the United States subsequent authorization to the Bulgarian Legation to establish a commercial office in New York. Although this authorization was contained not in the financial agreement, but in a press release issued by the State Department,[35] the District Court nevertheless found that this statement of authorization was "an essential part of the total agreement and . . . constituted a binding agreement under international law."[36] The court further noted (and the government conceded on appeal)[37] that the New York commercial office was regarded by both Bulgaria and the United States as a part of Bulgaria's mission.[38] The court accepted Kostadinov's argument that there were no "non-mission foreign government employees of Bulgaria since all employees of the Embassy of Bulgaria [were] members of the staff of the mission under the Convention and the Diplomatic Relations Act."[39] The court reasoned that once the trade office was established as part of the Embassy, it followed that Kostadinov was a member of the mission's "administrative and technical staff," and thereby entitled to immunity.[40]

The next prong of the court's inquiry was whether Kostadinov had properly become a staff member of the mission. The court found that Kostadinov had, because of what it deemed Bulgaria's proper notification to the State Department of Kostadinov's status: form DA 394, filed on behalf of Kostadinov in New York, identified him as "assistant commercial counselor of the Bulgarian Embassy's commercial counselor's office."[41] Because the State Department did not "specifically ob-

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34. These negotiations resulted in the Agreement between the Government of the United States of America and the Government of the People's Republic of Bulgaria regarding Claims of United States Nationals and Related Financial Matters, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5347.

35. Department of State, Press Release No. 355 (July 2, 1963).

36. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 17.

37. In Appellant's Brief, *supra* note 3, at 7n* the government stated that

> For purposes of this appeal we do not challenge the District Court's finding that the trade office is 'part of the Embassy' and therefore that its premises are inviolable. What is at issue . . . is the . . . far more radical conclusion that Kostadinov is entitled to diplomatic status merely by virtue of his working at the trade office . . . .

Id.

38. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 19. As will be discussed, the designation of whether the trade office constituted part of the Bulgarian mission was germane to both Kostadinov's and the government's arguments. Critical was the definition of "mission"—did it mean offices or personnel?

39. Corrected Brief for Appellee, United States v. Kostadinov, No. 83 Cr. 616, at 16.

40. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 41.

41. *Id.* at 41.

ject"[42] to this form's classification of Kostadinov, the court reasoned that the State Department had accepted him.[43] And because the State Department had accepted Kostadinov, his title as "assistant commercial counselor" made him a member of the "administrative and technical staff of the Bulgarian Embassy."[44]

Having found that Kostadinov was a bona fide staff member of the mission, the court moved to the final prong of its analysis: whether the State Department had the right to withhold privileges and immunities from embassy staff personnel. Although acknowledging that the State Department had steadfastly maintained since 1939 that "the only foreign diplomatic officer . . . permitted to reside and maintain offices in New York City will be the ranking commercial or financial officer,"[45] the court posited that such policy, "no matter how consistently articulated or how long it has been held, must be evaluated in light of the international commitments which bind the United States."[46] Rejecting the Government's argument that the State Department's policy constituted non-acceptance of Kostadinov, the court insisted that the State Department had accepted Kostadinov as a member of the mission's administrative and technical staff but had declined to extend to him the diplomatic privileges, which were his due under Article 37 of the Vienna Convention.[47] The court opined that the State Department was "arrogating to itself on a continuing basis powers that it undoubtedly had prior to the adherence to the Vienna Convention, but which it ha[d] no longer."[48] It was trying to create a "fourth category [of mission members] not authorized by the Vienna Convention . . . [or] by 22 U.S.C. § 254, that is, members of the technical and administrative staff who are not entitled to privileges and immunities."[49] This, Judge Broderick held, in light of its binding duties under the Vienna Convention, was *something the State Department could not do.* Kostadinov was therefore deemed a member of the administrative and technical staff of the mission and found to be immune from criminal

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42. *Id.* at 42.

43. *Id.* In making this determination, the court referred to the United States delegation to the Vienna Convention, which noted that a mission staff member may be tacitly accepted by the receiving state, because "[u]nless the receiving state objects to the appointment, he [the staff member], will thereby have been 'accredited' in the dictionary meaning of the term." *Id.*

44. *Id.* at 43.

45. Letter from George T. Summerlin, Chief of Protocol of the State Department for the Belgian Ambassador to the United States (Nov. 4, 1939), *cited in* 734 F.2d at 909.

46. Transcript of Oral Opinion Kostadinov, No. 83 Cr. 616, at 37-38.

47. *Id.* at 42-43.

48. *Id.* at 43.

49. *Id.*

jurisdiction.[50]

The Second Circuit Court of Appeals disagreed and began its argument by criticizing what it called a "misconception"[51] by the District Court, namely, that the District Court's emphasis on the "physical aspect of a 'mission.' "[52] The Court of Appeals, noting that the Vienna Convention does not expressly define "mission,"[53] held that the term referred to personnel.[54] It found ample support in the International Law Commission's official commentary to the Vienna Convention.[55] Simply because one worked on mission premises, the court stated, "it does not [necessarily] follow that . . . [one] is a member of the mission."[56] Kostadinov, solely by virtue of working in a building "which is considered a part of the Bulgarian Embassy,"[57] was not an established mission member.[58]

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50. *Id.* at 43-45.

51. 734 F.2d at 908.

52. *Id.*

53. *Id.* at 907.

54. *Id.* at 908.

55. Report of International Law Commission to the General Assembly, 13 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3859 (1958), *reprinted in* 2 Y.B. INT'L L. COMM'N. 89, U.N. Doc. A/CN.4 SER.A/1958/Add.1 [hereinafter Report]. In the commentary to draft Article 8 (final Article 9), the Commission referred to the "appointment of *persons* who compose the mission." *Id.* at 91, para. 2 (emphasis added). Likewise, the commentary to draft Article 10 (final Article 11) refers to the "choice of *persons* comprising the mission." *Id.* at 92, para. 2. (emphasis added). Although the court noted that the language of Article 12 of the Vienna Convention referred to "offices forming part of the mission," Vienna Convention, *supra* note 18, art. 12, and suggested that "[a]t first blush this article appears to be an isolated reference to physical structures as comprising a 'mission,' despite the many clear statements to the contrary in the Convention and the commentary." 734 F.2d at 909. The court added that the commentary to this article (draft Article 11) stated that "[t]he provisions of this article have been included to forestall the awkward situation which would result for the receiving Government if mission premises were established in towns other than that which is the seat of the Government." Report, *supra* at 92.

56. 734 F.2d at 910.

57. *Id.* at 911.

58. *Id.* The court further observed that delegates to the Vienna Convention "demonstrated their clear aversion to conferring diplomatic status upon purely consular officials even when those officials maintained offices on mission premises." *Id.* at 910. Citing the United Nations Conference on Diplomatic Intercourse and Immunities, Official Records Vol. 1, U.N. Doc. A/CONF. 20/14 Add.1 (summary record of plenany meetings and of meetings of the committee of the whole), Vienna, 2 March-14 April 1961 [printed in Geneva 1962], the court stated "[t]he delegates from Brazil, for example, observed that consular sections on mission premises operated as consulates, not as parts of missions, and that consular personnel often remain behind when their nation's diplomatic missions are recalled." 734 F.2d at 910. For a general discussion of consular privileges and immunities, *see* Whiteman, 7 DIGEST OF INTERNATIONAL LAW 716 (1970); for a more specific discussion *see* Sipkov, *Consular Conventions Between the United States and the Com-*

The Second Circuit reasoned, however, that even if Kostadinov *was* an established mission member, he could still be deprived of immunities. The court pointed to what it perceived as the State Department's authority for its non-acceptance of Kostadinov as a diplomatic agent: Article 9 of the Convention. Article 9 provides:

> 1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State. 2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.[59]

The court maintained that by its consistent policy regarding the non-diplomatic status of all but the heads of trade missions located outside of Washington, D.C., the State Department had "made it abundantly clear"[60] that Kostadinov was "not acceptable."[61] Because Bulgaria was on notice of Kostadinov's unacceptability[62] and chose to let him remain in the United States, the United States could, pursuant to Article 9 "refuse to recognize [Kostadinov] as a member of the mission."[63]

The final part of the court's opinion dealt, but only summarily,

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munist Countries, 9 INT'L J.L. LIB. 207 (1981).

59. Vienna Convention, *supra* note 18, art. 9.

60. 734 F.2d at 912.

61. *Id.*

62. The court again recited some of the State Department's actions which made clear its policy regarding diplomatic immunty: e.g., shortly after the State Department issued its statement authorizing the establishment of the Bulgarian trade office in New York, it informed the Bulgarian Minister in Washington that only the Bulgarian Commercial Counselor in New York would be entitled to diplomatic immunity, 734 F.2d at 911; on April 25, 1973, the State Department circulated notes to the chief diplomatic officer of each embassy in Washington, reminding each one that except for the senior financial, economic and commercial officers in New York, all mission personnel entitled to diplomatic immunity were required to live in the Washington area. Consistent with its treatment of Kostadinov's predecessor, the State Department never issued Kostadinov a diplomatic identity card upon his arrival, nor did the State Department ever place Kostadinov's name on the diplomatic blue or white lists it prepares. *Id.* at 912.

63. *Id.* at 910.

with Article 11 of the Convention,[64] which states:

> 1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
> 2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

The court, in its cursory discussion of this article, stated that "[t]he United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept, as members of that mission, officials of a certain category, namely, assistant commercial counselors based in New York. Furthermore, it did so on a nondiscriminatory basis."[65]

Therefore, the Court of Appeals' concluded that Kostadinov was not a member of the Bulgarian mission entitled to immunity from criminal prosecution, and reversed the order dismissing the indictment.[66]

It is submitted that the Court of Appeals' incisive decision was correct, but that it was reached by a misapplication of Article 9 of the Vienna Convention. It is further submitted that the court's analysis would have been more persuasive had it been grounded on Article 11, rather than Article 9, of the Vienna Convention.

The Court of Appeals' reliance on Article 9's language that the receiving State "may at any time"[67] notify the sending State of a mission member's unacceptability, did little to refute the District Court's assertion that the State Department had created a "fourth category [of mission members] not authorized by the Vienna Convention" and was "arrogating to itself . . . powers that it ha[d] no longer."[68] Rather, the Court of Appeals' reliance on Article 9 seemed inappropriate vis-à-vis Kostadinov and his situation, as the commentary to Article 9 of the Convention reveals.

That commentary makes reference to the *"procedure"* (emphasis added)[69] for notifying the sending State that a mission member is *persona non grata* or not acceptable. The commentary notes that the pro-

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64. Vienna Convention, *supra* note 18, art. 11.
65. 734 F.2d at 913.
66. *Id.*
67. Vienna Convention, *supra* note 18, art. 9.
68. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 43.
69. Report, *supra* note 55, at 91, para. 3.

cedure depends on the person's status in the mission, that is, whether or not he is the head of the mission.[70] The commentary continues:

> As regards other members of the mission, they are in principle freely chosen by the sending State, that is to say, their names are not submitted in advance; but if at any time—if need be, before the *person* concerned arrives in the country to take up his duties—the receiving State finds that it has objections to *him*, that State may, as in the case of a head of mission who has been approved, inform the sending State that *he* is *persona non grata*, with the same effect as in the case of the head of the mission.[71] (Emphasis added)

Article 9 distinctly refers to an *individual*—not an entire *class* of officials—whom the receiving State finds "not acceptable." Reference to the "procedure" regarding notification implies requisite affirmative action from the receiving State which in turn demands some kind of response from the sending State.[72] If the response is not forthcoming within a reasonable time, the receiving State may then declare that individual *persona non grata*[73]; announce that his functions are terminated, that he is "no longer recognized as a member of the mission; and that he has ceased to enjoy diplomatic privileges."[74]

This procedure most likely describes a receiving State's only possible recourse against a diplomat accused of spying; it surely does not describe the rather ordinary sequence of events surrounding Kostadinov's entry into and stay in the United States. The State Department's policy regarding the status of employees of trade missions (which the District Court admitted was "established beyond peradventure")[75] was not directed at Kostadinov personally, but rather at officials in his par-

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70. *Id.*

71. *Id.* at para. 4.

72. This would seem, in fact, to support the District Court's conclusion that because the State Department never "specifically" objected to Kostadinov, it had accepted him. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 42. This, notwithstanding the Court of Appeals' response that "nothing in the convention requires that the receiving state must either expel the person concerned or accept him as a member of the mission." 734 F.2d at 911.

73. The drastic sanction of declaring a mission member *persona non grata* is, however, rarely applied except in extreme cases, such as "espionage or [a] very serious crime." 54 TUL. L. REV., *supra* note 27, at 672. For a discussion of defenses raised against espionage indictments against foreign nations, *see* Note, *A Comparison and Analysis of Immunities and Defenses Raised by Soviet Nationals Indicted Under United States Espionage Laws*, 6 BROOKLYN J. INT'L L. 259 (1980).

74. Report, *supra* note 55, at 91, para. 7.

75. Transcript of Oral Opinion, Kostadinov, No. 83 Cr. 616, at 37.

ticular category.

A more persuasive argument is based on Article 11. Article 11 grants the receiving State the right, "[i]n the absence of specific agreement to the contrary," to limit the size of the mission to what it (the receiving State) considers "reasonable and normal."[76] Article 11 also allows the receiving State "within similar bounds" (that is, "[i]n the absence of specific agreement to the contrary" and pursuant to what it considers "reasonable and normal") to refuse to accept on a "non-discriminatory basis . . . officials of a particular category."[77]

In the instant case, the State Department did not have a "specific agreement to the contary" regarding the Bulgarian trade mission's size. It merely had a statement in the form of a press release authorizing the establishment of a commercial office in New York.[78] This press release was not a bilateral treaty and did not regulate the specifics of Bulgaria's trade mission.[79] And even if, *arguendo,* one were to accept the District Court's assertion that the State Department's press release was an "essential part"[80] of the 1963 financial agreement between Bulgaria and the United States and thereby a "binding agreement,"[81] it still did not constitute a "specific agreement *to the contrary*"[82] (emphasis added) which would have precluded the State Department's limiting of mission size.[83]

Thus, the State Department was within its rights to limit the size

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76. Vienna Convention, *supra* note 18, art. 11.

77. *Id.*

78. *Supra* note 35.

79. 734 F.2d at 912.

80. *Supra* note 35.

81. *Id.*

82. Vienna Convention, *supra* note 18, art. 11.

83. As the Court of Appeals pointedly noted at 734 F.2d at 907, quoting from the Report, *supra* note 55, at 90, para. 7, "[w]ith regard to trade missions, it should be noted that the question of commercial representation as such—i.e., apart from the commercial attaches of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement." Although one of the functions of a diplomatic mission is to promote the "economic" relations between the sending and receiving State, Vienna Convention, *supra* note 18, art. 1, Kostadinov could not reasonably be called a "commercial attache of a diplomatic mission" for that is not even how *he* described his position in the trade mission. By his definition, Kostadinov was a member of the "administrative and technical staff," which Article 1 defines as those mission members employed "in the administrative and technical services of the mission." *Id.* As Sir Gerald Fitzmaurice and the Chairman of the draft commission respectively observed, "It was useful to make it clear that members of a trade mission did not *ipso facto* qualify for diplomatic immunity;" and "[i]f . . . the trade mission was a distinct body, its members would not automatically enjoy diplomatic status; their status could, of course, be regulated by bilateral agreement." *See Summary Records of the International Law Commission,* 1 Y.B. INT'L L. COMM. 110 (1958).

of the trade mission. It effectively did so by its declared policy regarding the non-diplomatic status of all but the head of a trade mission located outside of Washington, D.C. The State Department's omnibus actions served to make the New York trade mission a "mission" of one, consisting simply of the mission's head.[84] Although this State Department policy did not perhaps constitute an *express* limitation on the *number* of persons working in this specific New York trade office, it certainly constituted an *implied* limitation on the number of persons working there; that is, the sending State could send more than one employee to the New York office, but it did so at its own risk, knowing full well that only the head of that office would qualify for diplomatic immunity.

The State Department's policy was also well within the purview of paragraph 2 of Article 11; the State Department, on a "non-discriminatory basis,"[85] consistently refused to accept "officials of a particular category."[86] Bulgaria and Kostadinov were not singled out for special discriminatory treatment—*all* persons of Kostadinov's position were and are, in the language of Article 11, refused "acceptance" and declined diplomatic immunity.[87]

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84. Although the commentary to Article 11 (draft Art. 10) declares that "[p]aragraph 1 of the article refers to cases where the staff of the mission is inordinately increased . . . [s]hould the receiving State consider the staff of a mission unduly large, it should first endeavor to reach an agreement with the sending State." Report, *supra* note 55, at 92, para. 3. The commission also declared:

> At the same time, criteria must be laid down which are to guide the parties, or which, in the *absence of agreement* between the parties, are to be observed in the arbitral or judicial decision to which it would be necessary to have recourse. As so often happens when conflicting interests are the subject of a compromise, these criteria are *necessarily vague*. (Emphasis added).

Id. at para. 5.

85. Vienna Convention, *supra* note 18, art. 11.

86. *Id.*

87. Appellant's Brief, *supra* note 3, at 9-10n.** confirms that

> As of August 1983, a total of thirty countries had commercial or economic offices in New York similar to the Bulgarian trade office. Each is listed in the State Department's Diplomatic List under the country's heading as 'Office of the Commercial Counselor,' 'Office of the Financial Counselor,' 'Office of Economic and Commercial Affairs' or a similar appellation . . . . At the present time, there are thirteen Bulgarian government personnel working at the Bulgarian trade office . . . . In all, there are more than a hundred employees situated like Kostadinov, *i.e.*, subordinate officials working out of trade offices and *not hitherto recognized as diplomats*. (Emphasis added).

Also, the United States Senate, in recommending ratification of the Vienna Convention in 1965, clarified that the Convention was generally more restrictive than the then prevailing United States policies. An Executive Report of the Senate Foreign Relations Committee stated:

The State Department's actions regarding Kostadinov thus appear justified by both the Vienna Convention[88] and the Diplomatic Relations Act of 1978.[89] The Court of Appeals was correct in its decision; however, it was not completely accurate and logically persuasive in its reliance on Article 9 of the Convention. Article 11 is more appropriate to the facts at hand.

The importance of the Court of Appeals' decision cannot be understated. A contrary decision would have defeated longstanding State Department policy and created a new class of diplomatic "untouchables." There would have been every incentive for an unfriendly sending State to infiltrate into a receiving State its most skilled espionage agents in the guise of subordinate trade officials, the sending State comfortable in the knowledge that its agents would be cloaked with full immunity from criminal prosecution. Such new doors to espionage activity shall not be opened.

Blanche G. Lark

> [S]ince there are a great many more foreign official representatives in the United States than those attached to permanent diplomatic missions accredited to the Government of the United States, the committee received assurances that the Vienna Convention applied only to the latter group. Members of trade missions and other negotiating groups . . . are not within the scope of this convention. It is strictly limited to the permanent diplomatic missions maintained by foreign governments at the seat of foreign governments.

S. COMM. FOR. REL. EXEC. REP. No. 6, 89th Cong., 1st Sess. 10, *cited in* Appellant's Brief at 26, United States v. Kostadinov, No. 83 Cr. 616 (S.D.N.Y. Jan. 17, 1984).

88. Vienna Convention, *supra* note 18.

89. 22 U.S.C. § 254a-e (1982).