

**KHOSROW MINUCHER, PETITIONER, VS. HON. COURT OF APPEALS
AND ARTHUR SCALZO, RESPONDENTS.***G.R. No. 142396. February 11, 2003*

Ponente: VITUG, J.

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Sometime in May 1986, an Information for violation of Section 4 of Republic Act No. 6425, otherwise also known as the “Dangerous Drugs Act of 1972,” was filed against petitioner Khosrow Minucher and one Abbas Torabian with the Regional Trial Court, Branch 151, of Pasig City. The criminal charge followed a “buy-bust operation” conducted by the Philippine police narcotic agents in the house of Minucher, an Iranian national, where a quantity of heroin, a prohibited drug, was said to have been seized. The narcotic agents were accompanied by private respondent Arthur Scalzo who would, in due time, become one of the principal witnesses for the prosecution. On 08 January 1988, Presiding Judge Eutropio Migrino rendered a decision acquitting the two accused.

On 03 August 1988, Minucher filed Civil Case No. 88-45691 before the Regional Trial Court (RTC), Branch 19, of Manila for damages on account of what he claimed to have been trumped-up charges of drug trafficking made by Arthur Scalzo. The Manila RTC detailed what it had found to be the facts and circumstances surrounding the case.

“The testimony of the plaintiff disclosed that he is an Iranian national. He came to the Philippines to study in the University of the Philippines in 1974. In 1976, under the regime of the Shah of Iran, he was appointed Labor Attaché for the Iranian Embassies in Tokyo, Japan and Manila, Philippines. When the Shah of Iran was deposed by Ayatollah Khomeini, plaintiff became a refugee of the United Nations and continued to stay in the Philippines. He headed the Iranian National Resistance Movement in the Philippines.

“He came to know the defendant on May 13, 1986, when the latter was brought to his house and introduced to him by a certain Jose Iñigo, an informer of the Intelligence Unit of the military. Jose Iñigo, on the other hand, was met by plaintiff at the office of Atty. Crisanto Saruca, a lawyer for several Iranians whom plaintiff assisted as head of the anti-Khomeini movement in the Philippines.

”During his first meeting with the defendant on May 13, 1986, upon the introduction of Jose Iñigo, the defendant expressed his interest in buying caviar. As a matter of fact, he bought two kilos of caviar from plaintiff and paid P10,000.00 for it. Selling caviar, aside from that of Persian carpets, pistachio nuts and other Iranian products was his business after the Khomeini government cut his pension of over \$3,000.00 per month. During their introduction in that meeting, the defendant gave the plaintiff his calling card, which showed that he is working at the US Embassy in the Philippines, as a special agent of the Drug Enforcement Administration, Department of Justice, of the United States, and gave his address as US Embassy, Manila. At the back of the card appears a telephone number in defendant’s own handwriting, the number of which he can also be contacted.

“It was also during this first meeting that plaintiff expressed his desire to obtain a US Visa for his wife and the

wife of a countryman named Abbas Torabian. The defendant told him that he [could] help plaintiff for a fee of \$2,000.00 per visa. Their conversation, however, was more concentrated on politics, carpets and caviar. Thereafter, the defendant promised to see plaintiff again.

"On May 19, 1986, the defendant called the plaintiff and invited the latter for dinner at Mario's Restaurant at Makati. He wanted to buy 200 grams of caviar. Plaintiff brought the merchandize but for the reason that the defendant was not yet there, he requested the restaurant people to x x x place the same in the refrigerator. Defendant, however, came and plaintiff gave him the caviar for which he was paid. Then their conversation was again focused on politics and business.

"On May 26, 1986, defendant visited plaintiff again at the latter's residence for 18 years at Kapitolyo, Pasig. The defendant wanted to buy a pair of carpets which plaintiff valued at \$27,900.00. After some haggling, they agreed at \$24,000.00. For the reason that defendant did not yet have the money, they agreed that defendant would come back the next day. The following day, at 1:00 p.m., he came back with his \$24,000.00, which he gave to the plaintiff, and the latter, in turn, gave him the pair of carpets.

"At about 3:00 in the afternoon of May 27, 1986, the defendant came back again to plaintiff's house and directly proceeded to the latter's bedroom, where the latter and his countryman, Abbas Torabian, were playing chess. Plaintiff opened his safe in the bedroom and obtained \$2,000.00 from it, gave it to the defendant for the latter's fee in obtaining a visa for plaintiff's wife. The defendant told him that he would be leaving the Philippines very soon and requested him to come out of the house for a while so that he can introduce him to his cousin waiting in a cab. Without much ado, and without putting on his shirt as he was only in his pajama pants, he followed the defendant where he saw a parked cab opposite the street. To his complete surprise, an American jumped out of the cab with a drawn high-powered gun. He was in the company of about 30 to 40 Filipino soldiers with 6 Americans, all armed. He was handcuffed and after about 20 minutes in the street, he was brought inside the house by the defendant. He was made to sit down while in handcuffs while the defendant was inside his bedroom. The defendant came out of the bedroom and out from defendant's attaché case, he took something and placed it on the table in front of the plaintiff. They also took plaintiff's wife who was at that time at the boutique near his house and likewise arrested Torabian, who was playing chess with him in the bedroom and both were handcuffed together. Plaintiff was not told why he was being handcuffed and why the privacy of his house, especially his bedroom was invaded by defendant. He was not allowed to use the telephone. In fact, his telephone was unplugged. He asked for any warrant, but the defendant told him to 'shut up.' He was nevertheless told that he would be able to call for his lawyer who can defend him.

"The plaintiff took note of the fact that when the defendant invited him to come out to meet his cousin, his safe was opened where he kept the \$24,000.00 the defendant paid for the carpets and another \$8,000.00 which he also placed in the safe together with a bracelet worth \$15,000.00 and a pair of earrings worth \$10,000.00. He also discovered missing upon his release his 8 pieces hand-made Persian carpets, valued at \$65,000.00, a painting he bought for P30,000.00 together with his TV and betamax sets. He claimed that when he was handcuffed, the defendant took his keys from his wallet. There was, therefore, nothing left in his house.

"That his arrest as a heroin trafficker x x x had been well publicized throughout the world, in various newspapers, particularly in Australia, America, Central Asia and in the Philippines. He was identified in the papers as an international drug trafficker. x x x

In fact, the arrest of defendant and Torabian was likewise on television, not only in the Philippines, but also in America and in Germany. His friends in said places informed him that they saw him on TV with said news.

"After the arrest made on plaintiff and Torabian, they were brought to Camp Crame handcuffed together, where they were detained for three days without food and water."[1]

During the trial, the law firm of Luna, Sison and Manas, filed a special appearance for Scalzo and moved for extension of time to file an answer pending a supposed advice from the United States Department of State and

Department of Justice on the defenses to be raised. The trial court granted the motion. On 27 October 1988, Scalzo filed another special appearance to quash the summons on the ground that he, not being a resident of the Philippines and the action being one in personam, was beyond the processes of the court. The motion was denied by the court, in its order of 13 December 1988, holding that the filing by Scalzo of a motion for extension of time to file an answer to the complaint was a voluntary appearance equivalent to service of summons which could likewise be construed a waiver of the requirement of formal notice. Scalzo filed a motion for reconsideration of the court order, contending that a motion for an extension of time to file an answer was not a voluntary appearance equivalent to service of summons since it did not seek an affirmative relief. Scalzo argued that in cases involving the United States government, as well as its agencies and officials, a motion for extension was peculiarly unavoidable due to the need (1) for both the Department of State and the Department of Justice to agree on the defenses to be raised and (2) to refer the case to a Philippine lawyer who would be expected to first review the case. The court a quo denied the motion for reconsideration in its order of 15 October 1989.

Scalzo filed a petition for review with the Court of Appeals, there docketed CA-G.R. No. 17023, assailing the denial. In a decision, dated 06 October 1989, the appellate court denied the petition and affirmed the ruling of the trial court. Scalzo then elevated the incident in a petition for review on certiorari, docketed G.R. No. 91173, to this Court. The petition, however, was denied for its failure to comply with SC Circular No. 1-88; in any event, the Court added, Scalzo had failed to show that the appellate court was in error in its questioned judgment.

Meanwhile, at the court a quo, an order, dated 09 February 1990, was issued (a) declaring Scalzo in default for his failure to file a responsive pleading (answer) and (b) setting the case for the reception of evidence. On 12 March 1990, Scalzo filed a motion to set aside the order of default and to admit his answer to the complaint. Granting the motion, the trial court set the case for pre-trial. In his answer, Scalzo denied the material allegations of the complaint and raised the affirmative defenses (a) of Minucher's failure to state a cause of action in his complaint and (b) that Scalzo had acted in the discharge of his official duties as being merely an agent of the Drug Enforcement Administration of the United States Department of Justice. Scalzo interposed a counterclaim of P100,000.00 to answer for attorneys' fees and expenses of litigation.

Then, on 14 June 1990, after almost two years since the institution of the civil case, Scalzo filed a motion to dismiss the complaint on the ground that, being a special agent of the United States Drug Enforcement Administration, he was entitled to diplomatic immunity. He attached to his motion Diplomatic Note No. 414 of the United States Embassy, dated 29 May 1990, addressed to the Department of Foreign Affairs of the Philippines and a Certification, dated 11 June 1990, of Vice Consul Donna Woodward, certifying that the note is a true and faithful copy of its original. In an order of 25 June 1990, the trial court denied the motion to dismiss.

On 27 July 1990, Scalzo filed a petition for certiorari with injunction with this Court, docketed G.R. No. 94257 and entitled "Arthur W. Scalzo, Jr., vs. Hon. Wenceslao Polo, et al.," asking that the complaint in Civil Case No. 88-45691 be ordered dismissed. The case was referred to the Court of Appeals, there docketed CA-G.R. SP No. 22505, per this Court's resolution of 07 August 1990. On 31 October 1990, the Court of Appeals promulgated its decision sustaining the diplomatic immunity of Scalzo and ordering the dismissal of the complaint against him. Minucher filed a petition for review with this Court, docketed G.R. No. 97765 and entitled "Khosrow Minucher vs. the Honorable Court of Appeals, et. al." (cited in 214 SCRA 242), appealing the judgment of the Court of Appeals. In a decision, dated 24 September 1992, penned by Justice (now Chief Justice) Hilario Davide, Jr., this Court reversed the decision of the appellate court and remanded the case to the lower court for trial. The remand was ordered on the theses (a) that the Court of Appeals erred in granting the motion to dismiss of Scalzo for lack of jurisdiction over his person without even considering the issue of the authenticity of Diplomatic Note No. 414 and (b) that the complaint contained sufficient allegations to the effect that Scalzo committed the imputed acts in

his personal capacity and outside the scope of his official duties and, absent any evidence to the contrary, the issue on Scalzo's diplomatic immunity could not be taken up.

The Manila RTC thus continued with its hearings on the case. On 17 November 1995, the trial court reached a decision; it adjudged:

"WHEREFORE, and in view of all the foregoing considerations, judgment is hereby rendered for the plaintiff, who successfully established his claim by sufficient evidence, against the defendant in the manner following: "Adjudging defendant liable to plaintiff in actual and compensatory damages of P520,000.00; moral damages in the sum of P10 million; exemplary damages in the sum of P100,000.00; attorney's fees in the sum of P200,000.00 plus costs.

"The Clerk of the Regional Trial Court, Manila, is ordered to take note of the lien of the Court on this judgment to answer for the unpaid docket fees considering that the plaintiff in this case instituted this action as a pauper litigant."[2]

While the trial court gave credence to the claim of Scalzo and the evidence presented by him that he was a diplomatic agent entitled to immunity as such, it ruled that he, nevertheless, should be held accountable for the acts complained of committed outside his official duties. On appeal, the Court of Appeals reversed the decision of the trial court and sustained the defense of Scalzo that he was sufficiently clothed with diplomatic immunity during his term of duty and thereby immune from the criminal and civil jurisdiction of the "Receiving State" pursuant to the terms of the Vienna Convention.

Hence, this recourse by Minucher. The instant petition for review raises a two-fold issue: (1) whether or not the doctrine of conclusiveness of judgment, following the decision rendered by this Court in G.R. No. 97765, should have precluded the Court of Appeals from resolving the appeal to it in an entirely different manner, and (2) whether or not Arthur Scalzo is indeed entitled to diplomatic immunity.

The doctrine of conclusiveness of judgment, or its kindred rule of *res judicata*, would require 1) the finality of the prior judgment, 2) a valid jurisdiction over the subject matter and the parties on the part of the court that renders it, 3) a judgment on the merits, and 4) an identity of the parties, subject matter and causes of action.[3] Even while one of the issues submitted in G.R. No. 97765 - "whether or not public respondent Court of Appeals erred in ruling that private respondent Scalzo is a diplomat immune from civil suit conformably with the Vienna Convention on Diplomatic Relations" - is also a pivotal question raised in the instant petition, the ruling in G.R. No. 97765, however, has not resolved that point with finality. Indeed, the Court there has made this observation -

"It may be mentioned in this regard that private respondent himself, in his Pre-trial Brief filed on 13 June 1990, unequivocally states that he would present documentary evidence consisting of DEA records on his investigation and surveillance of plaintiff and on his position and duties as DEA special agent in Manila. Having thus reserved his right to present evidence in support of his position, which is the basis for the alleged diplomatic immunity, the barren self-serving claim in the belated motion to dismiss cannot be relied upon for a reasonable, intelligent and fair resolution of the issue of diplomatic immunity."[4]

Scalzo contends that the Vienna Convention on Diplomatic Relations, to which the Philippines is a signatory, grants him absolute immunity from suit, describing his functions as an agent of the United States Drugs Enforcement Agency as "conducting surveillance operations on suspected drug dealers in the Philippines believed to be the source of prohibited drugs being shipped to the U.S., (and) having ascertained the target, (he then) would inform the Philippine narcotic agents (to) make the actual arrest." Scalzo has submitted to the trial court a number of documents -

- Exh. '2' - Diplomatic Note No. 414 dated 29 May 1990;

- Exh. '1' - Certification of Vice Consul Donna K. Woodward dated 11 June 1990;
- Exh. '5' - Diplomatic Note No. 757 dated 25 October 1991;
- Exh. '6' - Diplomatic Note No. 791 dated 17 November 1992; and
- Exh. '7' - Diplomatic Note No. 833 dated 21 October 1988.
- Exh. '3' - 1st Indorsement of the Hon. Jorge R. Coquia, Legal Adviser, Department of Foreign Affairs, dated 27 June 1990 forwarding Embassy Note No. 414 to the Clerk of Court of RTC Manila, Branch 19 (the trial court);
- Exh. '4' - Diplomatic Note No. 414, appended to the 1st Indorsement (Exh. '3'); and
- Exh. '8' - Letter dated 18 November 1992 from the Office of the Protocol, Department of Foreign Affairs, through Asst. Sec. Emmanuel Fernandez, addressed to the Chief Justice of this Court.[5]

The documents, according to Scalzo, would show that: (1) the United States Embassy accordingly advised the Executive Department of the Philippine Government that Scalzo was a member of the diplomatic staff of the United States diplomatic mission from his arrival in the Philippines on 14 October 1985 until his departure on 10 August 1988; (2) that the United States Government was firm from the very beginning in asserting the diplomatic immunity of Scalzo with respect to the case pursuant to the provisions of the Vienna Convention on Diplomatic Relations; and (3) that the United States Embassy repeatedly urged the Department of Foreign Affairs to take appropriate action to inform the trial court of Scalzo's diplomatic immunity. The other documentary exhibits were presented to indicate that: (1) the Philippine government itself, through its Executive Department, recognizing and respecting the diplomatic status of Scalzo, formally advised the "Judicial Department" of his diplomatic status and his entitlement to all diplomatic privileges and immunities under the Vienna Convention; and (2) the Department of Foreign Affairs itself authenticated Diplomatic Note No. 414. Scalzo additionally presented Exhibits "9" to "13" consisting of his reports of investigation on the surveillance and subsequent arrest of Minucher, the certification of the Drug Enforcement Administration of the United States Department of Justice that Scalzo was a special agent assigned to the Philippines at all times relevant to the complaint, and the special power of attorney executed by him in favor of his previous counsel[6] to show (a) that the United States Embassy, affirmed by its Vice Consul, acknowledged Scalzo to be a member of the diplomatic staff of the United States diplomatic mission from his arrival in the Philippines on 14 October 1985 until his departure on 10 August 1988, (b) that, on May 1986, with the cooperation of the Philippine law enforcement officials and in the exercise of his functions as member of the mission, he investigated Minucher for alleged trafficking in a prohibited drug, and (c) that the Philippine Department of Foreign Affairs itself recognized that Scalzo during his tour of duty in the Philippines (14 October 1985 up to 10 August 1988) was listed as being an Assistant Attaché of the United States diplomatic mission and accredited with diplomatic status by the Government of the Philippines. In his Exhibit 12, Scalzo described the functions of the overseas office of the United States Drugs Enforcement Agency, i.e., (1) to provide criminal investigative expertise and assistance to foreign law enforcement agencies on narcotic and drug control programs upon the request of the host country, 2) to establish and maintain liaison with the host country and counterpart foreign law enforcement officials, and 3) to conduct complex criminal investigations involving international criminal conspiracies which affect the interests of the United States.

The Vienna Convention on Diplomatic Relations was a codification of centuries-old customary law and, by the time of its ratification on 18 April 1961, its rules of law had long become stable. Among the city states of ancient Greece, among the peoples of the Mediterranean before the establishment of the Roman Empire, and among the states of India, the person of the herald in time of war and the person of the diplomatic envoy in time of peace were universally held sacrosanct.[7] By the end of the 16th century, when the earliest treatises on diplomatic law

were published, the inviolability of ambassadors was firmly established as a rule of customary international law.[8] Traditionally, the exercise of diplomatic intercourse among states was undertaken by the head of state himself, as being the preeminent embodiment of the state he represented, and the foreign secretary, the official usually entrusted with the external affairs of the state. Where a state would wish to have a more prominent diplomatic presence in the receiving state, it would then send to the latter a diplomatic mission. Conformably with the Vienna Convention, the functions of the diplomatic mission involve, by and large, the representation of the interests of the sending state and promoting friendly relations with the receiving state.[9]

The Convention lists the classes of heads of diplomatic missions to include (a) ambassadors or nuncios accredited to the heads of state,[10] (b) envoys,[11] ministers or internuncios accredited to the heads of states; and (c) charges d' affaires[12] accredited to the ministers of foreign affairs.[13] Comprising the "staff of the (diplomatic) mission" are the diplomatic staff, the administrative staff and the technical and service staff. Only the heads of missions, as well as members of the diplomatic staff, excluding the members of the administrative, technical and service staff of the mission, are accorded diplomatic rank. Even while the Vienna Convention on Diplomatic Relations provides for immunity to the members of diplomatic missions, it does so, nevertheless, with an understanding that the same be restrictively applied. Only "diplomatic agents," under the terms of the Convention, are vested with blanket diplomatic immunity from civil and criminal suits. The Convention defines "diplomatic agents" as the heads of missions or members of the diplomatic staff, thus impliedly withholding the same privileges from all others. It might bear stressing that even consuls, who represent their respective states in concerns of commerce and navigation and perform certain administrative and notarial duties, such as the issuance of passports and visas, authentication of documents, and administration of oaths, do not ordinarily enjoy the traditional diplomatic immunities and privileges accorded diplomats, mainly for the reason that they are not charged with the duty of representing their states in political matters. Indeed, the main yardstick in ascertaining whether a person is a diplomat entitled to immunity is the determination of whether or not he performs duties of diplomatic nature.

Scalzo asserted, particularly in his Exhibits "9" to "13," that he was an Assistant Attaché of the United States diplomatic mission and was accredited as such by the Philippine Government. An attaché belongs to a category of officers in the diplomatic establishment who may be in charge of its cultural, press, administrative or financial affairs. There could also be a class of attaches belonging to certain ministries or departments of the government, other than the foreign ministry or department, who are detailed by their respective ministries or departments with the embassies such as the military, naval, air, commercial, agricultural, labor, science, and customs attaches, or the like. Attaches assist a chief of mission in his duties and are administratively under him, but their main function is to observe, analyze and interpret trends and developments in their respective fields in the host country and submit reports to their own ministries or departments in the home government.[14] These officials are not generally regarded as members of the diplomatic mission, nor are they normally designated as having diplomatic rank.

In an attempt to prove his diplomatic status, Scalzo presented Diplomatic Notes Nos. 414, 757 and 791, all issued post litem motam, respectively, on 29 May 1990, 25 October 1991 and 17 November 1992. The presentation did nothing much to alleviate the Court's initial reservations in G.R. No. 97765, viz:

"While the trial court denied the motion to dismiss, the public respondent gravely abused its discretion in dismissing Civil Case No. 88-45691 on the basis of an erroneous assumption that simply because of the diplomatic note, the private respondent is clothed with diplomatic immunity, thereby divesting the trial court of jurisdiction over his person.

"x x x x x x x x

“And now, to the core issue - the alleged diplomatic immunity of the private respondent. Setting aside for the moment the issue of authenticity raised by the petitioner and the doubts that surround such claim, in view of the fact that it took private respondent one (1) year, eight (8) months and seventeen (17) days from the time his counsel filed on 12 September 1988 a Special Appearance and Motion asking for a first extension of time to file the Answer because the Departments of State and Justice of the United States of America were studying the case for the purpose of determining his defenses, before he could secure the Diplomatic Note from the US Embassy in Manila, and even granting for the sake of argument that such note is authentic, the complaint for damages filed by petitioner cannot be peremptorily dismissed.

“x x x x x x x x

"There is of course the claim of private respondent that the acts imputed to him were done in his official capacity. Nothing supports this self-serving claim other than the so-called Diplomatic Note. x x x. The public respondent then should have sustained the trial court's denial of the motion to dismiss. Verily, it should have been the most proper and appropriate recourse. It should not have been overwhelmed by the self-serving Diplomatic Note whose belated issuance is even suspect and whose authenticity has not yet been proved. The undue haste with which respondent Court yielded to the private respondent's claim is arbitrary."

A significant document would appear to be Exhibit No. 08, dated 08 November 1992, issued by the Office of Protocol of the Department of Foreign Affairs and signed by Emmanuel C. Fernandez, Assistant Secretary, certifying that "the records of the Department (would) show that Mr. Arthur W. Scalzo, Jr., during his term of office in the Philippines (from 14 October 1985 up to 10 August 1988) was listed as an Assistant Attaché of the United States diplomatic mission and was, therefore, accredited diplomatic status by the Government of the Philippines." No certified true copy of such "records," the supposed bases for the belated issuance, was presented in evidence.

Concededly, vesting a person with diplomatic immunity is a prerogative of the executive branch of the government. In *World Health Organization vs. Aquino*,^[15] the Court has recognized that, in such matters, the hands of the courts are virtually tied. Amidst apprehensions of indiscriminate and incautious grant of immunity, designed to gain exemption from the jurisdiction of courts, it should behoove the Philippine government, specifically its Department of Foreign Affairs, to be most circumspect, that should particularly be no less than compelling, in its post litem motam issuances. It might be recalled that the privilege is not an immunity from the observance of the law of the territorial sovereign or from ensuing legal liability; it is, rather, an immunity from the exercise of territorial jurisdiction.^[16] The government of the United States itself, which Scalzo claims to be acting for, has formulated its standards for recognition of a diplomatic agent. The State Department policy is to only concede diplomatic status to a person who possesses an acknowledged diplomatic title and "performs duties of diplomatic nature."^[17] Supplementary criteria for accreditation are the possession of a valid diplomatic passport or, from States which do not issue such passports, a diplomatic note formally representing the intention to assign the person to diplomatic duties, the holding of a non-immigrant visa, being over twenty-one years of age, and performing diplomatic functions on an essentially full-time basis.^[18] Diplomatic missions are requested to provide the most accurate and descriptive job title to that which currently applies to the duties performed. The Office of the Protocol would then assign each individual to the appropriate functional category.^[19]

But while the diplomatic immunity of Scalzo might thus remain contentious, it was sufficiently established that, indeed, he worked for the United States Drug Enforcement Agency and was tasked to conduct surveillance of suspected drug activities within the country on the dates pertinent to this case. If it should be ascertained that Arthur Scalzo was acting well within his assigned functions when he committed the acts alleged in the complaint, the present controversy could then be resolved under the related doctrine of State Immunity from Suit.

The precept that a State cannot be sued in the courts of a foreign state is a long-standing rule of customary

international law then closely identified with the personal immunity of a foreign sovereign from suit[20] and, with the emergence of democratic states, made to attach not just to the person of the head of state, or his representative, but also distinctly to the state itself in its sovereign capacity.[21] If the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the immunity of the foreign sovereign from suit without its consent. Suing a representative of a state is believed to be, in effect, suing the state itself. The proscription is not accorded for the benefit of an individual but for the State, in whose service he is, under the maxim - *par in parem, non habet imperium* - that all states are sovereign equals and cannot assert jurisdiction over one another.[22] The implication, in broad terms, is that if the judgment against an official would require the state itself to perform an affirmative act to satisfy the award, such as the appropriation of the amount needed to pay the damages decreed against him, the suit must be regarded as being against the state itself, although it has not been formally impleaded.[23]

In *United States of America vs. Guinto*,[24] involving officers of the United States Air Force and special officers of the Air Force Office of Special Investigators charged with the duty of preventing the distribution, possession and use of prohibited drugs, this Court has ruled -

"While the doctrine (of state immunity) appears to prohibit only suits against the state without its consent, it is also applicable to complaints filed against officials of the state for acts allegedly performed by them in the discharge of their duties. x x x. It cannot for a moment be imagined that they were acting in their private or unofficial capacity when they apprehended and later testified against the complainant. It follows that for discharging their duties as agents of the United States, they cannot be directly impleaded for acts imputable to their principal, which has not given its consent to be sued. x x x As they have acted on behalf of the government, and within the scope of their authority, it is that government, and not the petitioners personally, [who were] responsible for their acts." [25]

This immunity principle, however, has its limitations. Thus, *Shauf vs. Court of Appeals*[26] elaborates:

"It is a different matter where the public official is made to account in his capacity as such for acts contrary to law and injurious to the rights of the plaintiff. As was clearly set forth by Justice Zaldivar in *Director of the Bureau of Telecommunications, et al., vs. Aligaen, et al.* (33 SCRA 368): 'Inasmuch as the State authorizes only legal acts by its officers, unauthorized acts of government officials or officers are not acts of the State, and an action against the officials or officers by one whose rights have been invaded or violated by such acts, for the protection of his rights, is not a suit against the State within the rule of immunity of the State from suit. In the same tenor, it has been said that an action at law or suit in equity against a State officer or the director of a State department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff, under an unconstitutional act or under an assumption of authority which he does not have, is not a suit against the State within the constitutional provision that the State may not be sued without its consent. The rationale for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice.

"x x x x x x x x

"(T)he doctrine of immunity from suit will not apply and may not be invoked where the public official is being sued in his private and personal capacity as an ordinary citizen. The cloak of protection afforded the officers and agents of the government is removed the moment they are sued in their individual capacity. This situation usually arises where the public official acts without authority or in excess of the powers vested in him. It is a well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice and in bad faith or beyond the scope of his authority and jurisdiction." [27]

A foreign agent, operating within a territory, can be cloaked with immunity from suit but only as long as it can be established that he is acting within the directives of the sending state. The consent of the host state is an indispensable requirement of basic courtesy between the two sovereigns. Guinto and Shauf both involve officers and personnel of the United States, stationed within Philippine territory, under the RP-US Military Bases Agreement. While evidence is wanting to show any similar agreement between the governments of the Philippines and of the United States (for the latter to send its agents and to conduct surveillance and related activities of suspected drug dealers in the Philippines), the consent or imprimatur of the Philippine government to the activities of the United States Drug Enforcement Agency, however, can be gleaned from the facts heretofore elsewhere mentioned. The official exchanges of communication between agencies of the government of the two countries, certifications from officials of both the Philippine Department of Foreign Affairs and the United States Embassy, as well as the participation of members of the Philippine Narcotics Command in the "buy-bust operation" conducted at the residence of Minucher at the behest of Scalzo, may be inadequate to support the "diplomatic status" of the latter but they give enough indication that the Philippine government has given its imprimatur, if not consent, to the activities within Philippine territory of agent Scalzo of the United States Drug Enforcement Agency. The job description of Scalzo has tasked him to conduct surveillance on suspected drug suppliers and, after having ascertained the target, to inform local law enforcers who would then be expected to make the arrest. In conducting surveillance activities on Minucher, later acting as the poseur-buyer during the buy-bust operation, and then becoming a principal witness in the criminal case against Minucher, Scalzo hardly can be said to have acted beyond the scope of his official function or duties.

All told, this Court is constrained to rule that respondent Arthur Scalzo, an agent of the United States Drug Enforcement Agency allowed by the Philippine government to conduct activities in the country to help contain the problem on the drug traffic, is entitled to the defense of state immunity from suit.

WHEREFORE, on the foregoing premises, the petition is DENIED. No costs.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Ynares-Santiago, Carpio, and Azcuna, JJ., concur

[1] Rollo, pp. 39-42.

[2] Rollo. p. 51.

[3] Linzag vs. CA, 291 SCRA 304.

[4] Minucher vs. Court of Appeals, 214 SCRA 242.

[5] For documentary Exhibits Nos. 1-8, see Rollo, pp. 143-155.

[6] For Documentary Exhibits Nos. 9-13, See Rollo, pp. 156-168.

[7] Eileen Denza, "Diplomatic Law, A Commentary on the Vienna Convention on Diplomatic Relations," 2nd Edition, Clarendon Press, Oxford, 1998, at 210.

[8] Ibid.

[9] Article 3 of the Vienna Convention enumerates the functions of the diplomatic mission as

(a)

representing the sending State in the receiving State;

(b)

protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c)

negotiating with the Government of the receiving State;

(d)

ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e)

promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

[10] Ambassadors are diplomatic agents of the first class, who deal, as a rule with the Minister of Foreign Affairs or the Secretary of State, as the case may be. (Melquiades J. Gamboa, "Elements of Diplomatic and Consular Practice, A Glossary," Central Lawbook Publishing, Co., 1966, p. 19.)

[11] Envoys are diplomatic agents of the second class. This is the title of the head of legation as distinguished from an embassy, the head of which is called Ambassador Extraordinary and Plenipotentiary. Like the Ambassador, the envoy is also accredited to the Head of State. (Gamboa, p. 190.)

[12] Charges d' Affairs are either en titre or ad interim. Charges d' Affairs en titre are appointed on a permanent basis and belong to the fourth class of diplomatic envoys, the other three being ambassadors, ministers plenipotentiary and envoys extraordinary, and ministers resident. He is the head of the legation in his own right and is not accredited to the head of State but to the foreign office. According to Radloric, charges d' affairs are sometimes used to described a person who has been placed in custody of the archives and other property of a mission in a country with which formal diplomatic relations are not maintained. Charges d' affairs ad interim, in contrast are usually those second in command of the diplomatic mission – minister, counselor or first secretary, who are only temporarily in charge of the mission during the absence of the head of the mission. He is not accredited either to the Head of State or the Foreign Office. (Gamboa, Ibid., pp. 51-52.)

[13] The classification of diplomatic representatives was considered significant before because direct communication with the head of state depended on the rank of the diplomat and, moreover, only powerful states were regarded as entitled to send envoys of the highest rank. At present however, diplomatic matters are usually discussed not with the head of state but with the foreign secretary regardless of the diplomat's rank. Moreover, it has become the practice now for even the smallest and the weakest states to send diplomatic representatives of the highest rank, even to the major powers. (Cruz, International Law, 1985 Edition, p. 145.)

[14] Gamboa, supra., pp. 32-33.

[15] 48 SCRA 242.

[16] J.L. Brierly, "The Law of Nations," Oxford University Press, 6th Edition, 1963, p. 244.

[17] Denza, supra., at 16.

[18] Ibid.

[19] Ibid., at 55.

[20] Charles G. Fenwick, "International Law," Appleton-Century-Crofts, Inc., New York, 1948, p. 307-308.

[21] The international law on sovereign immunity of states from suit in the courts of another state has evolved from national court decisions with good deal of variance in perspectives. Even though national cases have been the major source of pronouncements on sovereign immunity, it should be noted that these constitute evidence of customary international law now widely recognized. In the latter half of the 20th century, a great deal of consensus on what is covered by sovereign immunity appears to be emerging, i.e., that state immunity covers only acts which deal with the government functions of a state, and excludes, any of its commercial activities, or activities not related to "sovereign acts." The consensus involves a more defined differentiation between public acts (*juri imperii*) and private acts (*jure gestionis*). (Gary L. Maris, "International Law, An Introduction," University Press of America, 1984, p. 119; D.W. Grieg, "International Law," London Butterworths, 1970, p. 221.)

The United States for example, does not claim immunity for its publicly owned or operated merchant vessels. The Italian courts have rejected claims of immunity from the US Shipping Board, although a state body, as it could not be identified with the American government on the ground that undertaking maritime navigation and business as a commercial enterprise do not constitute a sovereign act. (D.W. Grieg, "International Law," London Butterworths, 1970, p. 221.)

[22] See *Schooner Exchange vs. McFaddon*, 7 Cranch 116 (1812), cited in Charles G. Fenwick, "International Law," New York, 3rd Edition (1948), p. 307.

[23] *United States of America, et al. vs. Guinto, etc., et al.*, G.R. No. 76607, 26 February 1990.

[24] 182 SCRA 644.

[25] At pp. 653-659.

[26] 191 SCRA 713

[27] At pp. 727-728.

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