

**A CRITIQUE OF DIPLOMATIC IMMUNITY IN INTERNATIONAL LAW**

**BY**

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**BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE  
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NIGERIA**

**OCTOBER, 2015**

## **DECLARATION**

I hereby declare that the work in this Dissertation entitled: “**A CRITIQUE OF DIPLOMATIC IMMUNITY IN INTERNATIOANAL LAW**” was written by me in the Department of Public Law under the supervision of PROF. B.Y. IBRAHIM and DR. I.F. AKANDE. The information derived from the literature has been duly acknowledged in the text and a list of reference provided. No part of this thesis was previously presented for another degree or Diploma at any university.

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## CERTIFICATION

This Dissertation is entitle: **A CRITIQUE OF DIPLOMATIC IMMUNITY IN INTERNATIOANAL LAW”** by **Bashir Shuraihu LADAN** to meet the regulation governing the award of Mater of Law, (LL.M) of Ahmadu Bello University, Zaria and it is approved for its contribution to knowledge and literary presentation.

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## **DEDICATION**

This work is dedicated my mother Hajiya Khadija Ango Ladan for her overwhelming support and assistance that she has being rendering to me.

## **ACKNOWLEDGEMENT**

I am most grateful to God for making all things possible for me, seeing me through in all ramifications in the course of this study.

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## ABSTRACT

*Diplomatic immunity is one of the oldest elements of foreign relations, dating back as far as ancient Greece and Rome. Today it is a principle that has been codified into the Vienna Convention on Diplomatic Relations regulating past customs and practices of Diplomats. This convention has been influenced by three theories during different eras namely: personal representation, Extraterritoriality and functional necessity. The Vienna convention on Diplomatic relations further provides certain immunities to different levels of diplomatic officials, their staff and families. In view of this, the research critically analysed deterrent measures provided by the Vienna convention to assess the inadequacies occasioned by these measures to victims of diplomatic misconduct. The problem of the research is the continued abuse of these immunities by the Diplomats and these abuses could have direct consequences both for Diplomats, sending states, receiving state and the victim. Although the Vienna Convention on diplomatic relation provides remedies against diplomats, staff and families who abuse their position. But, that is not enough to cut abuses? Therefore, since there are many literatures on the above subject matter, the research methodology adopted was basically doctrinal. That is, use of standard books on the subject, journals, articles, internet, and relevant laws are the sources of information relied upon. The findings of the writer are (a) The deterrent measures provided by the Vienna convention were outdated and therefore ineffective. As a result, diplomats continue to abuse their immunity and occasioned grave injustice to the victims. (b) The convention did not provide means of settlement of individuals who were injured as a result of diplomatic misconduct. (c) Commissions of civil wrong by diplomatic official were not serious as criminal offences. In this regard, the writer finally concluded by recommending that (a) Criminal Immunity of a diplomat should be removed completely, so that where a diplomat commit any of the following crimes should be punished in the receiving state where such crime was committed. for example, murder, rape, smuggling of weapons, explosives, human beings, hard drugs and other heinous crimes. (b) Expansion of the International Court of Justice (ICJ) Jurisdiction on Diplomatic Criminal offences committed by diplomat, staff and their families. (c) Immunity from civil wrong be accorded to diplomats.*

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## ABBREVIATIONS

ANC	African National Congress
CCVCCR	Consular Convention Vienna Convention on Consular Relations
CSMSMC	Convention of Special Missions Special Missions Convention
Ed	editor/ edition
et al. et alii	(and others)
etc.	Et cetera
FAO	Food and Agricultural Organization
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
J	Judge
J.	Journal
CSSSLTCVCLT	Committee for State Security Law of Treaties Convention Vienna Convention on the Law of Treaties
LJ	Lord Justice
No.	Number
OAS	Organization of American States
OPVCDRCCSD	Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes
NATO	North Atlantic Treaty Organization
PPCPPCAIPPIDA	Prevention and Punishment Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents
UK	United Kingdom
UN	United Nations
CPIUN	Convention on the Privileges and Immunities of the United Nations

UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCDRV	Vienna Convention on Diplomatic Relations Volume



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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background to the Study

The rule of international law governing diplomatic relations were the product of long-established state practice reflected in the legislative provisions and judicial decisions of national law. The law has now been codified to a considerable extent in the Vienna Convention on Diplomatic Relations. Parts of the Convention are based on existing practice and other parts constitute a progressive development of the law. However, as ratifications mount up even the latter portions provide the best evidence of generally acceptable rules. The convention presently has at least 150 parties. The importance of the principles of law is embodied in the case concerning *United States v Diplomatic and Consular Staff in Tehran*<sup>1</sup> and judgment of 24<sup>th</sup> May 1980<sup>2</sup>. In its judgment on the merits, the court observed that ‘the obligations of the Iranian Government here in question are not merely contractual –but also obligations under general international law<sup>3</sup>. In that case, the government of Iran was held responsible for failing to prevent and for subsequently approving the actions of military in invading the United States Mission in Tehran and holding the diplomatic and consular personnel as ‘hostages’.

For English courts, the Diplomatic Immunity Act of 1708 was declaratory of the common law. The Act of 1708 has been repealed and replaced by the Diplomatic Principles Act of 1964<sup>4</sup> which sets out in a schedule those provisions of the convention which are incorporated into the law of the United Kingdom. The same Act replaces Section 1(1) of the Diplomatic Immunities (Commonwealth countries and Republic of Ireland) Act of 1952, which provides for immunity from suit. The Vienna Convention

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<sup>1</sup>International Court of Justice Reports (1979), p. 19

<sup>2</sup> Ibid (1979), pp. 30-43

<sup>3</sup> Ibid

<sup>4</sup> *Empson v. Smith* (1960), 1 QB 426

does not affect rules of customary law governing questions not expressly regulated by its provisions<sup>5</sup> and, of course, states are free to vary the position by treaty and tacit agreements based upon subsequent conduct.

Diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions, in each case through their authorized agents. Diplomacy in this sense may exist between states in a state of war or armed conflict with each other, but the concept relates to communication, whether with friendly or hostile purpose, rather than the material forms of economic and military conflict.

Normally, diplomacy involves the exchange of permanent diplomatic missions and similar permanent or at least regular representation is necessary for states to give substance to their membership of the United Nations and major inter-governmental organizations.

International law, along with diplomatic immunity is not imposed on states but is generally accepted through consensus and reciprocity, on the basis that peaceful compromise must override violent confrontation<sup>6</sup>.

Diplomats ensure that communications between states is made possible. As a consequence they are granted certain immunities to facilitate these functions within the state to which they are accredited<sup>7</sup>.

Diplomatic immunity means that foreign diplomats are not subject to the jurisdiction of local courts in respect of their officials and in most instances, their personal acts<sup>8</sup>.

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<sup>5</sup> See the Philippines Embassy Case, ILR 65, 146 at 161-2, 186.

<sup>6</sup> Hoffman, (2003), "*Reconstructing Diplomacy*" 5 British Journal of Politics and International Relations p. 533

<sup>7</sup> Shearer Starke's, (1994), *international law* led p. 384

<sup>8</sup> Hays, (2000), "*What is Diplomatic Immunity*" [http://www.calea.org/newweb/newsletter/No73/what is Diplomatic Immunity.htm](http://www.calea.org/newweb/newsletter/No73/what%20is%20Diplomatic%20Immunity.htm) [Accessed on 20 May 2005].



It is against this absolute immunity, that diplomatic immunity is critically examined. It is intended to consider whether diplomats, their staff and families need absolute criminal immunity.

Diplomatic immunity as it is understood today is a function of historic customs which have developed and have been to an extent codified. Diplomatic immunity is moulded around three major theories that originate in the mid 16<sup>th</sup> century: personal representation, *exterritoriality* and functional necessity.<sup>9</sup> The earliest theory, personal representation dictated that diplomat's immunity arose because the diplomat was an extension of the ruler sending him thereby granting him immunity. *Exterritoriality* dominated in the 18th century, which meant that the property and the person of the diplomat should be treated as though they existed on the territory of the sending State. Functional necessity limits immunities to those functions performed by the diplomat in his official capacity, and is today embodied in the introduction of the Vienna Conventions of 1961 and the UN International Immunities.

There are important reasons for diplomatic immunity but these reasons should be balanced against need to prevent crime and the need to project the right of the victims. Justice must be seen to be served by all concerned.

## **1.2 Statement of the Problem**

Diplomatic immunity means that foreign diplomats are not subject to the jurisdiction of local courts in respect of their official offices and, in most instances, their personal acts. There is continued increase in the numbers of diplomats in foreign countries.

The demand of diplomatic system has led to the development of several conventions regarding immunities, and the behavior of diplomats, to some extent, some countries like

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<sup>9</sup> McClanahan, (1989) *Diplomatic Immunity: Principles, Practices, Problems* 27-34 and Ogdon, (1936) *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and purpose of the Law* p. 63-194

the United States of America and the United Kingdom have considered changes in Foreign Policy and have re-examined and immunities given to foreign diplomats in their countries, but yet diplomats continue to abuse their rights.

The major problem is the continued abuse of these immunities and by the diplomats and these abuses could have direct consequences both for diplomats, sending States, receiving State and the victim.

For instance, in 2011, a Kuwait attaché in USA was charged with rape of his house keeper. Owing to his diplomatic immunity he was released.<sup>10</sup> Also, in 2002, British diplomats abroad escaped criminal prosecution on 21 occasions, as they were effectively cloaked by immunity. Can this be justifiable to the functions of a diplomat?

Also, a 19 year old son of the third attaché to the Ghanaian delegation committed rape, sodomy, assault and other crimes in New York City,<sup>11</sup> on 3 different individuals. The police after identifying him as the son of the Ghanaian diplomat, he was released and all charges dropped owing to his diplomatic immunity.<sup>12</sup> The victim has this to say “A man raped me and got away with it, because he is not a citizen, and because he is a relative of a diplomat. He claimed he has the right to rape me and I, as an American citizen, am not given the right to get justice.”<sup>13</sup> How can the victim here seek redress against the criminal actions of a diplomat?

Immunity carries with it an obligation: the duty to respect the laws and regulations of the receiving State. If this regard is a requirement, then surely the prosecution of the offending diplomat in the receiving State should be a reasonable and necessary means of

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<sup>10</sup> Washington times.com/news/2012/Dec/13/workers abuses by immune diplomat? page 11

<sup>11</sup> Ashman C and Trescott P (1987) *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes*, Acropolis Books Ltd: Washington D.C. p. 22

<sup>12</sup> Ibid p. 24

<sup>13</sup> Farahmand A M (1989-1990) “*Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse*” 16 *Journal of Legislation*. Boston, p. 99

ensuring such respect. If absolute criminal immunity continues, diplomatic relations between countries could deteriorate, if not collapse, thereby defeating the purpose of diplomatic immunity which enables a diplomat carry out his functions smoothly without hindrance in the receiving State.

### **1.3 Aim and Objectives**

This research aim at examining critically, the limitations of the various laws guiding the concept of diplomatic immunity with the to achieve the following objectives:-

1. To appraise the deterrent measures provided by the Vienna convention.
2. To assess the extent of diplomatic immunity abuses by diplomats, staff and their families.
3. To point out possible measures to curb diplomatic immunity abuses and proffer solutions that would ensure justice is being given to victims of diplomatic criminal acts.

### **1.4 Significance of the Research**

This research is of immense significance and contributes to knowledge because: the area in issue has raised criticism from concerned victims of diplomatic immunity abuses and the international community. It would therefore serve as useful information to academicians, policy makers, students and subsequent researchers in the field.

### **1.5 Scope of the Research**

This research covers the following:

1. The concept of Diplomatic Immunity.
2. This research also covers the Vienna Convention on Diplomatic Relations of 1961.

## **1.6 Research Methodology**

The research methodology adopted for this work is doctrinal research method; it is a visionary, conceptual research in nature. It shall be conducted in the library using standard Books on the subject, relevant laws, articles, journals and the use of internet.

## **1.7 Literature Review**

Although there is a large volume of literary works on international law largely by foreign scholars, Diplomatic immunity has not enjoyed robust academic attention by academic writers. However some few works written in the subject are reviewed here.

Whilst Starke, J. G.,<sup>14</sup> *Introduction to international Law*, tried to analyze diplomatic immunities by discussing classification of diplomatic envoys, appointment and reception of diplomatic envoys, rights, immunity of diplomats and termination of diplomatic mission, he did not discuss inviolability of diplomatic bag and courier, instances of violations of immunities as regards to diplomatic bag and diplomatic courier; members of the family of a diplomat's immunity, its abuses were also not discussed.

Shaw, M. N.<sup>15</sup>, on *International Law*, the field of diplomatic immunities is one of the most accepted and uncontroversial of international law topics, as it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this, here the writer did not discuss jurisdiction of the sending state as relates to power of prosecuting erring diplomat.

Gardiner, R. K., on *International Law*<sup>16</sup>, diplomatic relations constitutes a significant part of the means and context within which international law takes effect. Even lawyers dealing with issues of status and immunities solely within a national legal system will

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<sup>14</sup> Starke, J.G., (1977) *Introduction to International Law*, 8<sup>th</sup> ed. Butterworth. pp. 440-448.

<sup>15</sup> Shaw, M.N., (2003) *International Law*, 5<sup>th</sup> ed. Cambridge University Press, London. pp. 676-693

<sup>16</sup> Gardiner, R.K., (2003), *International Law*, Pearson Longman, London. pp. 339-387.

need to acquaint themselves with this fuller context. For example, the process by which diplomatic status is acquired is relevant to identifying the moment at which diplomatic immunity starts, or to the position of a diplomat who is travelling through a state which is neither his or her 'sending' (home) state nor 'receiving' (host) state. Likewise, the start of applicability of the Vienna Convention may prove necessary background when preparing a planning application for embassy premises, or when deploying technical staff from abroad to kit out such a building when nearing completion, in this book the writer did not discuss theories of Diplomatic Immunity as it is an important segment of Diplomatic Immunity,

Harris, D. J., on *Cases and Materials on International Law*<sup>17</sup>, it is elementary law that diplomatic immunity is not immunity from legal liability but immunity from suit. The Diplomatic Privileges Act, 1964, in his view clearly applicable to suits brought after the date on which that statute came into force in respect of acts done before that date Harris did not provide detailed explanation regarding Diplomatic Agents, Missions and consuls. Akehurst, M.A., on *Modern International Law*<sup>18</sup>, diplomatic relations are established by mutual consent between the two states concerned. However, they may be broken off unilaterally (often as a mark of disapproval of an illegal or unfriendly act by the other state). There is thus a double basis for diplomatic immunities; they are needed for the efficient performance of diplomatic functions, and they are also given because diplomats are representatives of states. Although, accepted as the basis of diplomatic immunities in previous centuries, is nowadays rather doubtful. However, the writer did not discuss deterrent measures as means of curbing diplomatic immunity abuses provided by the Vienna Convention.

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<sup>17</sup> Harris, D.J., (1998) *Cases and Materials on International Law*, 5<sup>th</sup> ed. Sweet & Maxwell, London p. 264-283.

<sup>18</sup> Akehurst, M., (1987) *Modern Introduction to International Law*, Allen and Unwin, London p. 113-122.

So also Nigerian authors like Okeke, C.N., on Theory and Practice of International Law<sup>19</sup>. Throughout history, diplomats and other envoys have needed immunities for the effective performance of their functions in the territory of the receiving state. However, it must be made clear that the principle of diplomatic immunity is accorded not for the benefit of the individual agent in question, but for the benefit of the state in whose service he is, in order that he may fulfill his diplomatic duties with the necessary independence and freedom, Okeke did not discuss any abuse of a diplomatic immunity. Ladan, M. T., in his book, Materials and Cases on Public International Law<sup>20</sup> discussed diplomatic immunity. His discussion however is only in a summary form, and he did not explain the various instances of violation of Diplomatic Immunity in all its ramifications. He touched on Vienna Convention on Diplomatic Relations without providing the enabling articles he referred to.

Umzurike, U. O., in his book Introduction to International Law<sup>21</sup> discussed and analyzed the Diplomatic and Consular Immunities, except that he did not dwell on the Vienna Convention on Diplomatic Relation of 1961, the genesis of the convention, convention on consular relation 1964 etc.

Hingorani, R. C., in his book Modern International Law<sup>22</sup> discussed and analyzed the various immunities accorded to diplomat. Not only that, he also, explained the various instances of violation of the laws of the receiving state by the diplomats of the sending states but failed to discuss other important issues regarding diplomatic immunities for example, the United Nations International Immunity, special mission, termination of missions etc.

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<sup>19</sup>Okeke, C. N., (1986) *The Theory and Practice of International Law in Nigeria*, Fourth Dimension Publishers, Ibadan. p 51-53.

<sup>20</sup>Ladan, M. T., Op.cit p. 39-41.

<sup>21</sup>Umzurike, U. O., (1993) *Introduction to International Law*, Spectrum Publishers, Ibadan pp.92-102.

<sup>22</sup>Hingorani, R. C., (1993) *Modern International Law*, Oxford & IBH Publishers, New Delhi p. 184-205.

Higgins, R.,<sup>23</sup> in her contributions, in the journal on the abuse of Diplomatic Immunities; did not discuss appointment and categories of heads of the missions.

Mitchells, R.,<sup>24</sup> in her article Rethinking Diplomatic Immunities; The article discussed the history of Diplomatic Immunities, its abuses but failed to look at the relevant sections of the Vienna Convention that discussed Diplomatic Immunities, also failed to discuss Diplomatic Agents, privileges and immunities etc.

From the above analysis of literatures reviewed, a conclusion can be drawn: Firstly, none of the literature was clearly written on Diplomatic Immunities under International Law. It is evidently seen that a wide gap exists which must be filled. Also, recent changes have occurred which needed to be exposed to the academics, students and the entire International communities with the hope of bringing out the developmental aspect of these changes. For example, the abuses experienced and the possible solutions to curb such abuses. None of these literatures above contained in one single document mentioned as this research.

## **1.8 Organizational Structure**

This research is divided into five chapters. Chapter one is the general background to the research. The chapter provides Statement of the Problem, Aims and Objectives to be achieved at the end of the research, Significance of the Research, the scope of the research indicating area of limitation of writing the research, the research methodology to be adopted, literature review and finally organizational layout.

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<sup>23</sup>Higgins, R., (1985) *Journal of International Law*, Westlaw Publishers, UK p. 65-67.

<sup>24</sup>Mitchells R., (1989)*Rethinking Diplomatic Immunities*, American University International Law Review 4, No. 1p. 42-50

Chapter two focuses on growth and development of diplomatic immunity. This includes the definition of terms and conceptual clarifications, meaning and nature of diplomatic immunity, personal representation, *extritoriality*, functional necessity.

Chapter three of the research provides an overview of Vienna convention. The first thing to be examined is the Vienna Convention on Diplomatic Relations 1961 which was the legal frame that diplomatic immunity derives its legal status. Thereafter, the meaning and nature of international law, highlight of the United Nations international immunity was made. Concepts like classification, appointment, reception and termination, staff family; diplomatic mission, special mission and termination of missions were equally examined. And a critic of deterrent measures provided by the Vienna convention was made such as *persona non grata*, waiver of immunity, jurisdiction of the sending state, reciprocity, breaking diplomatic ties and settlement of dispute.

Chapter four analysis the abuses of diplomatic immunity. In this regard, several abuses of diplomatic immunity will be examined and the response to such abuses. Personal inviolability of a diplomat, immunity from jurisdiction, Inviolability of diplomats residence and property, Inviolability of missions, inviolability of archives and documents, freedom of communications and the inviolability of official correspondence, diplomatic bags and couriers, diplomatic agents privileges and immunities, personal inviolability, there comes the members of the family and staff immunities: members of family, mission staff.

Lastly, chapter five is a Summary of the whole work including findings and recommendations.



## CHAPTER TWO

### DEVELOPMENT OF DIPLOMATIC IMMUNITY IN INTERNATIONAL PRACTICE

#### 2.1 Introduction

The Preamble of the Vienna Convention states “*Recalling that people of all nations from ancient times have recognized the status of diplomatic agents...*” Building on this statement diplomatic immunity has been a facet of diplomatic relations for countless years, and is regarded as one of the oldest branches of international law. With the concentration of States in a geographical area interaction between States was inevitable, especially with the existence of a common language, culture or religion<sup>1</sup>. Envoys have since time immemorial been specifically chosen and sent in order to deliver messages, receive replies and report on any news from foreign States. These functions ensured the development of special customs on the treatment of ambassadors and other special representatives of other States<sup>2</sup>. Necessity forced most States to provide envoys with basic protection, both within the State of final destination and in States of transit<sup>3</sup>. The special immunities and privileges related to diplomatic personnel developed in part, as a consequence of sovereign immunity and the independence and equality of States<sup>4</sup>. With the establishment of permanent missions, sovereigns acknowledged the importance of ambassadors stationed in foreign States in order to negotiate and gather information<sup>5</sup>.

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<sup>1</sup> Parkhill J.S, (1997-1998) “*Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communication*” 21 Hastings International & Comparative Law Review p.568.

<sup>2</sup> Shaw M.N; (2003) “*International Law 5<sup>th</sup> ed*” Cambridge University Press, London p.676-693.

<sup>3</sup> Maginnis V.L, (2002-2003) “*Limiting Diplomatic Immunity: lessons Learned from the 1946 Convention on the Privileges and Immunity of the United Nations*” 28 Brooklyn Journal of International Law p.997.

<sup>4</sup> Shaw M.N ; Op.cit p.523.

<sup>5</sup> Parkhill J.S, Op.cit p.569.

As the nature and functions of diplomats changed from messenger to negotiator and in some instances to spy, so the legal basis of justifying diplomatic immunity changed.<sup>6</sup>

## **2.2 Meaning and Nature of Diplomatic Immunity**

Since the 16<sup>th</sup> century there have been three major theories of diplomatic immunity. Each theory plays a prominent role during different periods in history. These theories are:

- a. Personal representation,
- b. *Exterritoriality* and
- c. Functional necessity<sup>7</sup>.

Not only will their historical context be reflected but reference to their use in modern practice will be made in this study to indicate the role of each theory throughout the ages and how they apply today.

### **(a) Personal Representation**

This theory has the deepest and earliest origin. Long before the age of the modern diplomats and resident embassies there were rulers who sent representatives. The theory gained widespread recognition during the Renaissance period when diplomacy was dynastically oriented.<sup>8</sup> These representatives received special treatment. When the receiving State honoured them their ruler was pleased and unnecessary conflict was avoided<sup>9</sup>. Their representative was treated as though the sovereign of that country was conducting the negotiations, making alliances or refusing requests<sup>10</sup>.

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<sup>6</sup> Ibid p.571.

<sup>7</sup> McClanahan, G.V *Diplomatic Immunity* p.27-28.

<sup>8</sup> Willson, C.E, (1967) *Diplomatic Privileges and Immunities* p.2.

<sup>9</sup> McClanahan, G.V Op.cit p. 571.

<sup>10</sup> Ibid

The great theorists of the 16<sup>th</sup> and 17<sup>th</sup> century like Grotius, *Van Bynkershoek*, *Winquefort* and Vattel supported and encouraged the use of this theory<sup>11</sup>. Montesquieu describes representation as:

the voice of the prince who sends them, and this voice ought to be free, no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged.<sup>12</sup>

In *The Schooner Exchange v McFaddon*<sup>13</sup> the court held that by regarding the ambassador as the sovereign's representative, it ensured their stature. If they were not accorded exemptions, every sovereign would cast a shadow on his own dignity when sending an ambassador to a foreign State.<sup>14</sup>

If applied in modern times this theory would be less appropriate, in that it was based mainly on monarchies and not on sovereign States.<sup>15</sup>

This is an interesting concept, since a President of a sovereign State could be seen as having the same functions and stature as a monarch. Ross discredits this theory on three grounds. First, the foreign envoys cannot have the same degree of immunity as the ruler or sovereign.<sup>16</sup>

Second, the decline of the monarchs and the progression of majority vote make it unclear who the diplomat represents.

Last, the immunity does not extend from the consequences of the representatives' private actions.<sup>17</sup> Wright further criticizes the theory by placing the diplomat above the law of the

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<sup>11</sup>Barker J.C, *Diplomatic Privileges and Immunities* p. 35.

<sup>12</sup>Przetacznik, F. (1978) "*The History of the Jurisdictional Immunity of the Diplomatic agents in English Law*" *Anglo-American Law Review* p.355.

<sup>13</sup> Willson C.E, *Op.cit* p.115.

<sup>14</sup> *Magdalena Steam Navigation Co. v Martin 1859 QB* p. 107

<sup>15</sup>McClanahan, G.V. *Op cit.* p. 115.

<sup>16</sup>Ross, M. S., (1989) *4 American University Journal of International Law & Policy* p.177-178

<sup>17</sup>*ibid.* p. 1-5.

receiving sovereign, which is opposite to the principle that all sovereigns are equal.<sup>18</sup> Yet despite its declining popularity, the theory is still used, albeit infrequently. For example, in 1946, a federal court in New York granted diplomat immunity from service of process under this theory.<sup>19</sup> In the opinion of this researcher, this theory should be discarded because the theory seem to place the diplomat above the law.

**(b) *Exterritoriality***

This theory was of limited applicability in the early centuries after the establishment of resident embassies in the 15th century. It derived from imperfect notions of personal and territorial jurisdiction<sup>20</sup>. During this time there was a great emphasis over the supremacy of national law on everyone in the territorial state, irrespective of their nationality. In order to try and avoid this being imposed on diplomats, the theory of *exterritoriality* was developed<sup>21</sup>. This is based on the Roman law principle whereby a man took his own land's law with him when he went to another land<sup>22</sup>.

The crux of this theory is that the offices and homes of diplomats and even their persons were to be treated, throughout their stay, as though they were on the territory of the sending State and not that of the receiving State.<sup>23</sup> The irony of this theory is that a diplomat would not necessarily be immune for the same illegal conduct in the sending State, but could not be prosecuted for it.<sup>24</sup>

Further, ambassadors were seen in two ways, (a) as a personification of those who sent them, and (b) they were held to be outside the limits of the receiving State.<sup>25</sup>

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<sup>18</sup>Right "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 Boston University International Law Journal 197.

<sup>19</sup> Keaton J. J " (1989-1990) 17 *Hastings Constitutional Law Quarterly* p.567

<sup>20</sup>Przetacznik, F., (1978) *The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law* p. 63

<sup>21</sup> Ibid p. 348

<sup>22</sup>Ibid p. 68.

<sup>23</sup>McClanahan, G. V., op cit. p. 63.

<sup>24</sup>Maginnis V.L, p. 383.

<sup>25</sup>Przetacznik, F., op.cit p.354.

Authors like Emmerich de Vattel (1758) and James Lorimer (1883) emphasized that an ambassador's house and person are not domiciled in the receiving State, but in the sending State.<sup>26</sup> An example where this theory played a role is in 1987 concerning the security level of embassies in Moscow: the US Secretary of State said at a press conference that the Soviets "invaded" the sovereign territory of the US embassy.<sup>27</sup> Another example is with reference to political asylum in embassies: Cardinal Mind Zenty was given asylum in the American embassy in Budapest. No authority may force entry into an embassy or compel an embassy to remove a person given asylum.<sup>28</sup> What can be gathered from this is that asylum in an embassy was and is realized through the concept of *extritoriality*.<sup>29</sup>

In *The King v Guerchy*<sup>30</sup> in 1765, an English court did not prosecute a French ambassador for an attempt to assassinate another Frenchman. In *Taylor v Best*,<sup>31</sup> Jervis CJ declared that the basis of privilege is that the ambassador is assumed to be in his own country.<sup>32</sup> The Attorney General in *Magdalena Steam Navigation Co. v Martin*<sup>33</sup> expressed similar opinions. The decline of this theory can be seen, according to McClanahan, as a result of academic groups abandoning the theory in order to draft codifications for international law.<sup>34</sup> Other reasons stem from the vagueness of the term "extritoriality" leading to incoherent and politically motivated interpretations.<sup>35</sup> For instance, the term is persistently used to describe not only the mission, but all types of immunities enjoyed by the personnel, which seems contrary to the original understanding

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<sup>26</sup> McClanahan, G. V., op cit. p30.

<sup>27</sup> Ibid p.30-31.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid

<sup>30</sup> *The King v. Guerchy* (1765) 1 Bm. B1, 545; 96 Eng. Rep. 315

<sup>31</sup> (1854) 17 Victoria, 14 C.B. 487.

<sup>32</sup> *Wilson v Blanco* 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 718 (1889)

<sup>33</sup> See (1859) QB p. 107.

<sup>34</sup> McClanahan, G. V., op cit p.32p. 170

<sup>35</sup> Ross M .S (1989) "*Rethinking Diplomatic Immunity*: p.173

of the term.<sup>36</sup> The courts also found *extritoriality* conceptually difficult when finding that the actions of a diplomat were committed on the receiving State's soil rather than domestic soil.<sup>37</sup>

Also, in the researchers opinion, this theory is contradictory, where it places a diplomat in the receiving state as if he is in his home country and therefore would not liable for his criminal acts. What if he commit the offence in his home country, would he be liable or not?

**(c) *Functional Necessity***

This theory is more dynamic and adaptable than the other two theories and has gained acceptance since the 16th century to modern practice. The rationale behind a need for a diplomat's immunities is that it is necessary for him to perform his diplomatic function.<sup>38</sup>

Diplomats need to be able to move freely and not be obstructed by the receiving State. They must be able to observe and report with confidence in the receiving State without the fear of being reprimanded.<sup>39</sup> Grotius' dictum *omnis coactio abesse a legato debet*<sup>40</sup> stresses that an ambassador must be free from all coercion in order to fulfill his duties.<sup>41</sup>

Although Grotius, Van Bynkershoek and Wicquefort regarded it as necessary to protect the function of the mission, they felt that it was not the primary juridical basis of the law.<sup>42</sup> It was Vattel who placed the greatest emphasis on the theory in order for ambassadors to accomplish the object of their appointment safely, freely, faithfully and successfully by receiving the necessary immunities.<sup>43</sup> In the 18th century, the Lord Chancellor in *Barbuit*'s case declared that diplomatic immunity stem from the necessity

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<sup>36</sup> Willson, C.E, op.cit

<sup>37</sup> Parkhill, J.S., op.cit p. 572.

<sup>38</sup> McClanahan G. V., op.cit p. 572

<sup>39</sup> Ibid p. 384

<sup>40</sup> Ibid

<sup>41</sup> Przetacznik, F., op.cit p. 357.

<sup>42</sup> Barker, J. C., (1996) *Abuse of Diplomatic Privileges and Immunities* p. 46-47.

<sup>43</sup> Ibid p.171.

that nations need to interact with one another.<sup>44</sup> Similarly, in *Parkinson v Potter*<sup>45</sup> the court observed that an extension of exemption from jurisdiction of the courts was essential to the duties that the ambassador has to perform.

This theory gained credence during the First World War and gained even more impetus since then due to the expansion of permanent resident embassies, the increase of non-diplomatic staff to help perform diplomatic functions, and the increase of international organizations which require immunity to be granted to more people.<sup>46</sup> So it seems that necessity and the security to perform diplomatic functions are the real reasons for diplomatic immunity; hence the test is not whether acts are public, private or professional, but whether the exercise of jurisdiction over the agent would interfere with his functions.<sup>47</sup>

The primary advantage of this functional necessity is that it is adaptable and has safeguards against excessive demands for immunities. In other words, it restricts immunity to the functions of the diplomat rather than giving him absolute immunity. A disadvantage is that it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function.<sup>48</sup> Generally, diplomats should not commit criminal acts or act in a manner unbecoming of their status. A diplomat's behaviour in a foreign country is best described by the Arabic proverb: "*Ya ghareeb, khalleek adeeb*" which translates to "O stranger, be thou courteous"<sup>49</sup>.

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<sup>44</sup>*Buvot v Barbuit* (1737) Cas. Temp. Ld. Talb. p. 281.

<sup>45</sup>*Parkinson v Potter* (1885) 16 QBD p. 152.

<sup>46</sup>Przetacznik, F., op.cit p. 88.

<sup>47</sup>Ogdon, M. (1936) *Juridical Basis of Diplomatic Immunity*; p. 180.

<sup>48</sup>McClanahan, G. V., Op cit. p32.

<sup>49</sup>ibid p.33

What is of greatest importance is that diplomats should act in good faith for the protection of the receiving State's security? Functional necessity is recognized in the Vienna Convention, and was deemed practical under the UN Convention.<sup>50</sup>

Current juridical understanding of diplomatic immunity demonstrates that diplomats cannot be prosecuted for criminal or civil acts outside their diplomatic functions<sup>51</sup>. Yet it seems that in practice they have absolute immunity against criminal prosecution, whether their acts are during or outside their functions. Another criticism of this theory is that it is vague, since it does not establish what a "necessary" function of a diplomat is<sup>52</sup>. What is reflected in the theory is that diplomats cannot function properly without immunity. The extent of this immunity may be understood to mean that diplomats may break the law of the receiving State in order to fulfill their functions<sup>53</sup>.

Here also, this theory did not cover crimes committed by diplomat outside their official functions as the theory advocated for. Although the theory seems to be better than the previous ones

### **2.3 The Development of Diplomatic Immunity in International Practice**

The roots of diplomatic immunity are lost in history. Nicolson entertains the idea that tribes of cave-dwelling anthropoid apes would probably have had dealings with one another in such matters as drawing the limits of their relevant hunting grounds and bringing to an end a days battle<sup>54</sup>. Although his speculation cannot be proven, Barker believes it is not an unreasonable thought<sup>55</sup>. It is an interesting theory and possibly the

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<sup>50</sup> Maginnis, V.L. op.cit

<sup>51</sup> This is indicated in the Vienna Convention under Article 31

<sup>52</sup> Farahmand A. M., (1989-1990) 16 "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse" *Journal of Legislation* p.94

<sup>53</sup> Ross, M.S op.cit p.179

<sup>54</sup> Elgavish, D. (2000) "Diplomatic Immunity Exist in the Ancient Near East" *Journal of the History of International Law* p.73

<sup>55</sup> Barker, J.C, op.cit p. 14



genesis of social interaction between tribes. The earliest record of organized diplomatic immunity lies in Ancient Greece. Diplomatic missions, until the 15th century, were established strictly on an *ad hoc* basis and a diplomatic appointment and immunity ended once the diplomat had fulfilled his duties in the foreign State and returned home<sup>56</sup>. The Greek city-states and eventually all societies recognized that the practice of protecting foreign diplomatic personnel benefited all concerned. Envoys were accorded absolute immunity<sup>57</sup>. Reciprocity continued throughout the ages and is explained better as “*do unto their representatives as you would have them do unto yours*”<sup>58</sup>.

Ogdon indicates that there are three distinct periods of development, namely (a) in antiquity; (b) in the philosophy of the law-of-nature school in the 12th to 17th centuries and (c) views of positivist writers after the 17th century<sup>59</sup>. In ancient times messengers were able to depend on immunity for fear of the sending States’ strength or even their god<sup>60</sup>. If anyone broke the law in the receiving State they were expelled and punished in their own land. This was an immunity used on reciprocal custom. Eventually these customs became rights and were later codified as such in international treaties, like the Vienna Convention<sup>61</sup>. Immunity was respected. Clay tablets dating back to 1350 BC have been found which contain records of a widowed Egyptian queen who had no children. She sent a letter to the Hittite king setting out her predicament, and requesting that he would give her a son in marriage that would become Pharaoh of Egypt, and ensuring their children would too, ultimately take the throne<sup>62</sup>. The Hittite king was suspicious and

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<sup>56</sup> Parkhill J. C., (1997-1998) 21 *Hastings International & Comparative Law Review* p. 568

<sup>57</sup> Ross M. S., (1989) 4 *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities; American University Journal of International Law & Policy* pp. 176-177

<sup>58</sup> Frey L., and Frey M. (1999) *The History of Diplomatic Immunity* p. 4

<sup>59</sup> Barker, J. C., *op cit* p. 14

<sup>60</sup> Elgavish, D., (2000) “Did Diplomatic Immunity Exist in the Ancient Near East?” *Journal of the History of International Law* p. 73.

<sup>61</sup> McGinnis V. L., (2002-2003) 28 *Brooklyn Journal of International Law* p. 997

<sup>62</sup> McClanahan, G. V., *op cit* pp. 19-20

sent an envoy to investigate. The envoy confirmed the genuineness of the offer. A son was duly dispatched but was murdered when he entered Egypt. The Hittite reacted by marching into Syria, capturing the murderers, prosecuting them and condemning them, according to international practice of the time<sup>63</sup>.

Messengers and envoys were often exposed to harm during their travels. Not only exposure to temporary detention was possible, but also road blockages or kidnapping and murder by robbers and sometimes even by rulers of enemy territory they passed through<sup>64</sup>. Thus, in order to protect them, the sending and receiving States (in some circumstances) guarded them and tried to ensure their security. In Ancient Rome, hostage taking was a common means of ensuring security. The States through which the envoy would pass would willingly give a hostage to ensure safe passage. The hostage was well treated and would be released at the border. If the envoy was attacked, the hostage could be killed<sup>65</sup>.

Protection of envoys was achieved in several ways. Firstly, a specific appeal by the dispatcher to the recipient was sent<sup>66</sup>. This was usually attained by sending a letter to the receiving State requesting that someone watch over the envoy so that no one would interfere with their mission, and in return the sending State promised special benefits. Secondly and more menacingly, protection could be achieved by international agreement in that detention or murder of the envoy would lead to the cancellation of international agreements and the receiving State would suffer the consequences. Thirdly, it could be done by providing escorts as a means of defence<sup>67</sup>. In order to protect the messengers, escorts were provided by the receiving State<sup>68</sup>. According to some authors, there was

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<sup>63</sup> Ibid

<sup>64</sup> Elgavish D., (2000) op Cit p. 77

<sup>65</sup> Alan Hostages and Hostage Takers in the Roman Empire (2006) 64

<sup>66</sup> Elgavish D., (2000) Op. cit p. 81

<sup>67</sup> Ibid pp. 82-83

<sup>68</sup> Ibid

much political and military diplomacy during biblical times<sup>69</sup>. Many kings and queens sent messengers to rivals across vast geographical areas, and immunity was needed if they were relaying unwelcome news.

A perhaps familiar example is the visit of the Queen of Sheba to King Solomon around 940 BC. Such an important political, cultural and economic occasion would have required envoys to organize, negotiate and coordinate the visit<sup>70</sup>. It may even be argued that Moses, Aaron, Jonas, John the Baptist and even Jesus were ambassadors from God, indicating the stature of ambassadors as sacrosanct<sup>71</sup>. It has been debated whether messengers enjoyed unlimited freedom of movement in the Ancient Near East. According to Elgavish, messengers were not permitted to return home without the receiving States' permission<sup>72</sup>. Furthermore, Frey and Frey state that envoys could be detained for crimes which they were suspected of committing<sup>73</sup>. The Ancient Greeks found it useful to receive heralds (*kerykes*) and to grant them immunity<sup>74</sup>. Only heralds were considered wholly inviolable, which marked the beginning of today's concept of international diplomatic law. Envoys were not inviolable to the extent that heralds were; in the event that envoys committed crimes they were punished but could not be put to death<sup>75</sup>. The ancients appreciated the importance of communication between the States and thus took precautionary measures to protect envoys and heralds<sup>76</sup>. Anyone that injured a herald or intervened in his business met with severe punishment<sup>77</sup>. More importantly, alliances. The ambassadors would address the receiving State and be

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<sup>69</sup> McClanahan, G. V., op. cit p. 18

<sup>70</sup> Ibid p. 21

<sup>71</sup> Frey L., and Frey M., p. 18

<sup>72</sup> Elgavish D., (2000), op. cit p. 75

<sup>73</sup> Ibid pp. 19-20

<sup>74</sup> Ogdon, M., (1939) *Juridical Basis of Diplomatic Immunity*

<sup>75</sup> Frey L. and Frey M op.cit

<sup>76</sup> Ogdon, M., op. cit.

<sup>77</sup> To insult a messenger bearing peaceful news meant war. Although messengers were welcomed they were also feared. The ancients believed that strangers could have magical powers that could potentially be harmful.

assured of their safety immunity from judicial tribunals was permitted in order to prevent disruption in the performance of envoys' official functions, as is the case today. The Greek city-states, which were democracies at the time of the classical age (750-350 BC), were frequently at war.

Alliances meant victory over common enemies, and heralds were sent to the States to promote when returning home<sup>78</sup>. The rules governing diplomatic immunity did not evolve beyond very elementary principles. This may be a result of an inherent distrust and/or the distances and difficult terrain which hampered effective communication<sup>79</sup>. Rome's evolution from a city-state to a universal Empire forced her envoys to play a more prominent role than those of Ancient Greece. The inviolability of Rome's diplomats originated during the time of Romulus and *Tatius* (around 700 BC)<sup>80</sup>. The survival of Rome depended on creating alliances and exchanging representatives with neighboring States<sup>81</sup>. Rome sent eminent statesmen with senatorial rank as diplomats, known as *nuntii* or *oratores*<sup>82</sup>.

These *nuntii* were appointed by and received their credentials from the Senate itself<sup>83</sup>.

Diplomatic relations were regulated by an institution known as the College of *Fetials*, whose practice gave rise to *jus fetiale*<sup>84</sup>. Their immunity was regulated by political necessity and religious sanction, echoing the theories of personal representation and functional necessity. The *fetials* swore an oath to Jupiter, who was the guardian of alliances. The College also investigated any complaint raised against a diplomat involving the violations of diplomatic immunity. Once the *fetials* found a man guilty,

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<sup>78</sup> Elgavish D., (2000) op. cit p. 86

<sup>79</sup> Frey L., and Frey M., op. cit p. 6

<sup>80</sup> Ibid p. 38

<sup>81</sup> Ibid p. 37

<sup>82</sup> Ibid

<sup>83</sup> Barker, J. C., op. cit. p. 16

<sup>84</sup> Ibid p. 142

they would deport or surrender him to the wronged State<sup>85</sup>. Modern diplomatic practice follows a similar methodology; in that an offending diplomat can have his immunity waived or be declared *persona non grata*<sup>86</sup>.

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The rights of diplomats were sacred and of universal application<sup>87</sup>. These rights are derived from the *jus naturale* (natural law) and *jus civilis* (civil law)<sup>88</sup>. Interestingly, these philosophies were later incorporated during 529 to 534 into codified civil law, the *Corpus Juris Civilis*<sup>89</sup>. For instance the *Lex Julia de Vi* made it an offence to infringe on an ambassador's inviolability and any such infringement was considered a legitimate cause of war<sup>90</sup>. According to the *Digest*, any assault on a diplomat of the enemy was deemed an offence against *jus gentium* (law of the nations)<sup>91</sup>. Thomas Hobbes in the 17<sup>th</sup> century clarified the *jus gentium* by confining its application to international relations

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<sup>85</sup> Frey L., and Frey M. op.cit 39

<sup>86</sup> Denza E., (1998) *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed Clarendon Press Oxford. P. 65

<sup>87</sup>What must be noted is it was the Romans who recognized immunity of the whole envoy while the Greeks limited it to heralds.

<sup>88</sup> Frey L., and Frey M., (1999) *The History of Diplomatic Immunity*, Ohio State University Press: Columbus, p. 6

<sup>89</sup> Ogdon, M., op cit p. 21.

<sup>90</sup> Young, E., (1964) "The Development of the Law of Diplomatic Relations" *British University of International Law* p. 143.

<sup>91</sup>The *Lex Julia de vi publica* made it illegal to violate the immunity of a legate. Rome guaranteed the freedom of foreign ambassadors even during times of war and they agreed to surrender anyone who attacked an ambassador.

and equating the law of nations to the law of nature<sup>92</sup>. Diplomats performed a variety of tasks in the Roman Empire, which included negotiating treaties of trade, alliance and demanding restitution for any failure to comply with treaties. These are the primary functions of diplomats today<sup>93</sup>.

However, before the envoys were granted an audience before the Senate, they had to pass a “suspicious scrutiny” test. This required them to wait patiently before addressing the Senate and thereafter to wait long periods before they received an answer, after which they were quickly removed from the city<sup>94</sup>.

However, at the same time, the ambassador personified the sovereignty of the State and accordingly was treated as a guest of the Senate<sup>95</sup>. Harming the envoy was not only seen as a contravention against the law of the gods, but also of the law of the nations<sup>96</sup>. Rome’s relationship with its Empire was that of hegemony and not equality, and this is why Rome did not develop these rudimentary principles further. Romans frequently violated immunity vis-à-vis the barbarian lands by being brutal and aggressive. International law does not flourish in circumstances where all States are not given equal stature<sup>97</sup>. It has been stated that the first example of professional diplomacy can be accredited to the Byzantine Empire<sup>98</sup>. Even though there was a threat of the growing strength of Persia and the emerging Islamic Empire in the East, the Byzantines used diplomacy rather than war to expand their influence. Thus they introduced the first

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<sup>92</sup>Frey L., and Frey M., op. cit. p. 267.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid pp. 6 and 47.

<sup>95</sup> De Martens noted that the basis of inviolability of the diplomatic envoy was essentially religious and not the idea that the ambassador represented a sovereign. Frey and Frey History of Diplomatic Immunity 47. The decision to receive an envoy or not reflected Rome’s policies toward that foreign State.

<sup>96</sup> Frey L., and Frey M., op. cit. 57

<sup>97</sup> Ibid p. 143

<sup>98</sup> Barker, J. C., op. cit p. 18

department of government dealing not only with external affairs, but also with the organization and distribution of embassies abroad<sup>99</sup>.

During the middle Ages, Roman law, barbarian codes and canons of the church recognized the importance of diplomatic immunity<sup>100</sup>. Ambassadors were treated courteously and were given hospitality, and honorary receptions and gifts were bestowed upon even those who brought declarations of war. Not only envoys were inviolable, but also their goods and entourages. During this time, there was an increase in papal legates<sup>101</sup>.

The establishment of those diplomatic networks influenced the organization and the structure of the diplomatic corps<sup>102</sup>. Interestingly, envoys were not answerable for any crimes committed before their mission but were answerable for any crimes committed *during* the embassy<sup>103</sup>. When a crime was committed, they broke the laws of God and man<sup>104</sup>. The laws of God were of primary importance. China too considered itself a civilized nation but did not recognize the existence of other civilized nations. Owing to the fact that the Chinese believed that their own culture was dominant above others it saw no need to embark on diplomatic relations<sup>105</sup>. Frey and Frey observe that it was not only the Chinese who felt they were a dominant culture<sup>106</sup>; the same could be said about the Christians and Muslims, during the Middle Ages, with regard to each other. In each of these situations the “barbarians” were treated with disdain because each system developed exclusively according to their specific principles. The common bonds between the Greeks were language and religion; in Christianity was religion, as was the case with

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<sup>99</sup> Frey L., and Frey M., op.cit p. 77

<sup>100</sup> Ibid p.7

<sup>101</sup> Ibid p.79

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Similarly, Saxon and Gothic law provided for special protection and treatment of envoys and anyone disturbing envoys' immunity was to be punished.

<sup>105</sup> China did have some relations with Korea, Annam, Siam and Burma

<sup>106</sup> Frey L., and Frey M., op. cit

the Muslim countries. Japan and China had a common bond of culture<sup>107</sup>. Things began to change when trade by sea between the East and Europe became prominent<sup>108</sup>.

During the 13<sup>th</sup> and 14<sup>th</sup> centuries the growth of sovereign States challenged the medieval concept of universality and stimulated diplomatic activity. Laws were no longer based solely on Christianity, but were now in the hands of political powers<sup>109</sup>. After the decrease of religious tensions around the 15<sup>th</sup> century, the diplomat's role was enhanced by the growth of State power<sup>110</sup>. The increased role of diplomats made it imperative that their immunity and privileges be defined<sup>111</sup>. During the Renaissance, scholars and others pointed out that the natural law offered a sound argument for diplomatic immunity for the protection of envoys when performing their official functions. One of the best statements of a natural law basis for diplomatic immunity was formulated by Francisco's de Victoria in 1532<sup>112</sup>. The question asked was how would the Spanish know whether they had consented to and later violated the law of the nations, if they killed an ambassador sent by the French for the purpose of putting an end to an existing war between them? The purpose of this question was designed to settle the point whether the law of nations falls under natural or positivist law<sup>113</sup>. De Victoria's answer states the position of the ambassador with respect to his inviolability. He explained that there were two types of international law, one being a common consensus between all peoples and nations and the other being positive consent<sup>114</sup>. The ambassador fell under the type of

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<sup>107</sup> Ibid

<sup>108</sup> McClanahan, G. V., op. cit. pp. 24-25

<sup>109</sup> Frey and Frey op.cit p.8

<sup>110</sup> Diplomatic immunity became intertwined with the prestige of the dynastic State

<sup>111</sup> Frey and Frey op.cit pp. 8-9

<sup>112</sup> Ibid p. 455

<sup>113</sup> Ogdon M., op.cit (1937) p. 455

<sup>114</sup> Ibid p. 150



law which was from common consensus and he was considered to be inviolable among all nations<sup>115</sup>.

The basic principle of the naturalist doctrine was that of necessity; to protect ambassadors because of the importance of their functions<sup>116</sup>. An early application of necessity was made by Ayrault (a judge of the criminal court in Angers) when he explained that there was a more important basis of diplomatic immunity than *exterritoriality* and that was necessity of insuring inviolability to an agent<sup>117</sup>. Further, it was stated that the ambassador derives his protection from three sources, namely from the one sending him, from those to whom he is accredited, and from the important nature of negotiation which is his function to carry on<sup>118</sup>. Grotius even conceived in *De Jure Belli ac Pacis*<sup>119</sup> that wars would begin out of the maltreatment of envoys.

He wrote that there were two inherent rights of ambassadors abroad, namely the right of admission into the receiving State and the right to freedom from violence<sup>120</sup>. Grotius disagreed with other scholastic reasoning that immunity was based on natural law through necessity.

However, he ultimately concluded that immunity was based on natural law<sup>121</sup>. Grotius stated that the security of ambassadors outweighed any advantage which may have been derived from the punishment of his crimes. His safety would be compromised if he could be prosecuted by any other than the State who sent him. The sending State's views may be different from those of the receiving State and it is possible that the ambassador may encounter some form of prejudice for the crime for which he has been accused<sup>122</sup>.

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<sup>115</sup> Ibid p. 455

<sup>116</sup> Ibid p. 454

<sup>117</sup> Ibid p.69

<sup>118</sup> Ibid p. 456.

<sup>119</sup> "The Law of War and Peace"

<sup>120</sup> Ross M. S., (1989) 4 op. cit. p. 17

<sup>121</sup> Ogdon M., op. cit p. 40

<sup>122</sup> Ibid p. 457

Both the natural law and positivist thoughts have their weaknesses. The natural law school confused international law with theology or moral philosophy, while the positivists refused to look deeper into the political and juridical reasons that the practice was based upon. In other words, the naturalists defined immunity from the law of nature or God and the positivists from practice among States<sup>123</sup>.

One main rationale of necessity is securing the ambassador's position<sup>124</sup>. Samuel *Pufendorf* states that ambassadors are necessary in order to preserve peace or win the battle. This is embraced respectably by natural law<sup>125</sup>. In other words, ambassadors are necessary to convey messages of truce or surrender or even to declare war with a foreign State. *Pufendorf* further states that those who are sent as spies to another nation are not protected by natural law, but depended on the "mere grace and indulgence" of those who sent them<sup>126</sup>. Despite these statements it must be made clear that immunity did not give the ambassador a licence to commit crimes against the State without being punished.

Sir Edward Coke declared this in his *Fourth Institute* that:

If a foreign Ambassador...committed here any crime, which is contra jus gentium, as Treason, Felony, Adultery, or any other crime against the law of Nations, he loseth the privileges and dignity of an Ambassador as unworthy of so high a place, and may be punished here as any other private Alien<sup>127</sup>

The most significant of all applications of the Roman doctrine was in Spanish code system, which stated that any envoy that entered Spain (notwithstanding their religious standing) would be allowed to come and go in safety and security to their persons or property throughout their stay<sup>128</sup>. Even though an envoy who visited the country may

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<sup>123</sup> Frey L., and Frey M., op. cit p. 280

<sup>124</sup> Ibid

<sup>125</sup> Ibid p.267-269

<sup>126</sup> Ogdon M., op. cit pp. 457-458

<sup>127</sup> Ibid p.460

<sup>128</sup> Ibid p.461

have owed money to a Spanish individual, he would not be arrested or brought to court<sup>129</sup>. A fine example of diplomatic immunity was when the Bishop of Ross was found to have participated in a plot against the Crown of England in 1571<sup>130</sup>. At that time there had already been two prior incidents where ambassadors were not punished for their crimes, but were requested to leave the country. The Bishop was detained for a short period before being banished from the kingdoms<sup>131</sup>. Thus a strong precedent had already been set when Gentili and Hot man were called upon by Queen Elizabeth I's Council to advise her on the bringing to justice of a Spanish ambassador, Mendoza, who had conspired against the Queen. Both gentlemen advised the Council that he should not be punished, but rather be sent back to Spain<sup>132</sup>. Gentili stated that the natural law governing ambassadors was not found in theology or philosophy, but in the practice of nations<sup>133</sup>. Although both these theorists did not approve of sending Mendoza back, they had to adhere to the practice of nations. This can still be applied today: an ambassador or diplomat will not be detained for espionage activities against the receiving State<sup>134</sup>.

The period from 1648 to the French Revolution witnessed the greatest expansion of diplomatic immunity, but later the most obvious malpractices were restricted. The practice tended to reinforce the ideas of immunity as being personal, for example having immunity against criminal jurisdiction. By the 19<sup>th</sup> century natural law had declined, but it was reintroduced in the 20<sup>th</sup> century.<sup>155</sup> The leading positivist theorist was Van Bynkershoek, who argued that the law of nations was based on the common consent between nations through international customs or through treaties.<sup>156</sup> He expanded the concept and justified immunity, whether it be from questionable acts or not, in saying

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<sup>129</sup> Ibid

<sup>130</sup> Frey L., and Frey M., op. cit p. 174

<sup>131</sup> Ogdon M., op. cit pp. 175-176

<sup>132</sup> Ibid pp.461-462

<sup>133</sup> Ogdon, M., Op. cit p. 169

<sup>134</sup> Ibid

that an ambassador acted “*through wine and women, through favors and foul devices*.”<sup>135</sup> While many would agree with this statement, it oversimplifies the position.

The importance of an ambassador must ensure international stability.

This “modern” form of diplomatic immunity only took shape with the establishment of resident ambassadors<sup>136</sup>. This concept is defined as “*a regularly accredited envoy with full diplomatic status sent...to remain at his post until recalled, in general charge of the interests of his principal*.”<sup>137</sup> The first record of a resident ambassador arose in Italy around the mid-15<sup>th</sup> century<sup>138</sup>.

By the 1500s the major powers were already exchanging resident ambassadors between their courts<sup>139</sup>. It seems that the fear of war stimulated diplomatic activity, which further encouraged the establishment of resident embassies<sup>140</sup>. The establishment of resident embassies made ambassadors a symbol of goodwill and a source of gathering and relaying information in the foreign State<sup>141</sup>. Immunities and privileges of resident ambassadors were an innovation of the 16<sup>th</sup> and 17<sup>th</sup> centuries. During this era, the potential limitations of diplomatic immunity were a heated issue<sup>142</sup> and there were several debates, especially with regard to which of the three theories dominated in the international sphere<sup>143</sup>.

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<sup>135</sup> Frey, L. and Frey, M., op. cit p. 9.

<sup>136</sup> Ibid p. 276

<sup>137</sup> Ibid. 277

<sup>138</sup> Ibid

<sup>139</sup> Ibid

<sup>140</sup> Ogdon, M., op. cit. 27-28.

<sup>141</sup> Italian States began sending resident ambassadors to other parts of Europe. For example, Milan and Venice had one in France from 1495. Milan also had resident ambassadors in Spain, England and Rome. Spain sent a resident ambassador to Rome and England from 1480 to 1495. Even the Vatican sent nuncios to Spain, France, England, Venice and Rome by 1505.

<sup>142</sup> Frey, L op.cit p. 122

<sup>143</sup> Ibid p. 123

Throughout the 19th and early 20th century the “European” law of nations collided with other mutually exclusive, imperial and geopolitical systems<sup>144</sup>. Most of the change was based on Western thought and developing countries had contempt for international law and diplomatic practice and immunity as a Western construct. This meant that by accepting “European law”. States were allowing the Western powers to exercise dominance over them<sup>145</sup>.

The system of diplomatic privileges survived in spite of strong attacks against it, because of its necessity. Further, the increase of the scope of diplomatic functions led to the increase of the size and importance of diplomatic corps. Many saw this as an “outmoded and overly privileged elite “and even today most laymen believe this<sup>146</sup>. Many jurists believed that immunity was a denial of justice. For instance, what sense of justice does a victim have if the offending diplomat cannot be prosecuted? This was further reiterated when there was a growing acceptance of equality and democracy<sup>147</sup>. Making matters worse for the diplomatic institution were terrorists masquerading as diplomats or even diplomats abusing their power. In the 20<sup>th</sup> century there were two World Wars and several revolutions that undermined the traditional international society<sup>148</sup>. The breakdown of internal homogeneity and the expansion of the international community, together with socioeconomic changes and growth in military technology, triggered a “diplomatic revolution”<sup>149</sup>. This means that there was a need to limit and restrict diplomatic immunity<sup>150</sup>. Despite all these negative developments, governments have generally respected diplomatic immunity even through the two World Wars. The Allied

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<sup>144</sup> McClanahan G. V., op. cit p. 27

<sup>145</sup> Ibid

<sup>146</sup> Frey L., op. cit p. 292

<sup>147</sup> Ibid

<sup>148</sup> Ibid p. 293

<sup>149</sup> Ibid

<sup>150</sup> Ibid

forces honoured the rights of the representatives from Nazi Germany and Japan. Similarly, the United States representatives abroad were also immune<sup>151</sup>.

**In conclusion**, the drafters of the Vienna Conventions had the extremely burdensome task of incorporating the concerns and suggestions of all the countries involved in the early 1960's, especially with a history dating as far as the first civilized settlements. Despite this difficult task ahead of the mission, it was needed in order to put an end to the diverse opinions and customs<sup>152</sup>.

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<sup>151</sup> Ibid p. 294

<sup>152</sup> Ibid p. 295

## CHAPTER THREE

### AN OVERVIEW OF THE VIENNA CONVENTION

#### 3.1 Introduction

The majority of States today have foreign representatives. This phenomenon, as discussed in the previous chapter, has become the principal machinery by which States interact with one another.<sup>1</sup> Formerly the term “diplomatic agent” referred only to the head of mission but now the term also includes members of staff. Article 1 of the Vienna Convention divides diplomatic staff into diplomatic agents, which includes the head of the mission, administrative and technical staff, service staff and lastly private servants.<sup>2</sup> The distinction between the different types of diplomats and staff has to be defined owing to the increase in the number of lower level diplomats and the increase in numbers of staff in missions.<sup>3</sup> Furthermore, its significance is accompanied by the notion of reducing immunity of staff in certain circumstances as opposed to having blanket immunity.<sup>4</sup>

#### 3.2 Vienna Convention on Diplomatic Relations of 1961

The development of diplomatic immunity over the years led to the Vienna Convention which became a universal Convention and its provisions clearly marked progression of custom into settled law and resolved areas of contention where practices conflicted.<sup>5</sup> According to Frey and Frey, Vienna in 1815 was the first site of a meeting for diplomatic agents. The first international attempt to codify the rules of diplomatic immunity was in

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<sup>1</sup> Maginnis V. L., (2002-2003) op cit p. 1021.

<sup>2</sup> Levi Contemporary International Law: A Concise Introduction 2ed (1991) 89

<sup>3</sup> Wallace, R. M. M., *International Law* 4ed (1997) Sweet & Maxwell: London p. 121.

<sup>4</sup> Opara V. N., (2003) “Sovereign and Diplomatic Immunity as Customary International Law: Beyond *R v Bow Street Metropolitan Stipendiary Magistrate and Other, Ex Parte Pinochet Ugarte*” *Wisconsin International Law Journal* 263 and *Levi International Law* pp. 81and 89.

<sup>5</sup> Denza E., (1998) *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed Clarendon Press: Oxford p. 1.

1895 with the Draft Convention of the Institute of International Law.<sup>6</sup> This resolution stipulated that diplomats enjoyed *extritoriality*.

This *extritoriality* was curtailed in 1929.<sup>7</sup> This is the genesis of the Vienna Convention. In 1927, the League of Nations Committee of Experts for the Progressive Codification of International Law drew up a report that analyzed the existing customary law of diplomatic privileges and immunities. The Havana Convention on Diplomatic Officers in 1928 brought the Latin American States together. The report was intended as a provisional instrument until a more comprehensive codification could be achieved.<sup>8</sup> The preamble of the Havana Convention states that diplomats should not claim immunities which are not essential in performing official functions. This led to the growing popularity of the functionalist approach.<sup>9</sup> Another important document was the Harvard Research Draft Convention on Diplomatic Immunities in 1932 (“the Harvard Convention”).<sup>10</sup> McClanahan states that had Harvard been an international organization instead of a prestigious university, it would have heavily impacted on thoughts of diplomatic immunity. However, owing to its academic nature, this document has persuasive value only and not many States implemented the provisions in national law.<sup>11</sup> The Harvard Convention was one of the first documents that attempted to make a clear distinction between official and non-official acts.<sup>12</sup> Creating this distinction aided in identifying when immunity could be relied upon.

However, this only applies to lower staff, since diplomats have absolute immunity against criminal prosecution.<sup>13</sup>

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<sup>6</sup> Frey L., and Frey M., (1990) op. cit. p. 480.

<sup>7</sup> Ibid and Barker J. C op. cit. p. 29.

<sup>8</sup> Ibid and Garretson “The Immunities of Representatives of Foreign States” (1966) 41 New York University Law Review 69.

<sup>9</sup> Frey L., and Frey M. p. 482.

<sup>10</sup> The Harvard Draft contains in its introductory comments the declaration that “the theory of extritoriality has not been used in formulating this present draft convention”.

<sup>11</sup> McClanahan, G. V., op cit p. 41

<sup>12</sup> Dinstein Y., (1966) “*Diplomatic Immunity from Jurisdiction Rationae Materiae*”



None of the earlier attempts managed to address the field in sufficient detail.<sup>14</sup> In 1957, following the General Assembly Resolution 685, the International Law Commission (ILC) accepted the task of preparing a draft Convention on Diplomatic Relations.<sup>15</sup> A E F Sandstorm was appointed Special *Rapporteur* and was responsible for drafting the report which would be later reviewed by the ILC.<sup>16</sup> The ILC later requested information and comments from all governments in order to receive input and draft an efficient document.<sup>17</sup> In 1961 the Vienna Convention, attended by 81 States and several international organizations (as observers) making use of the envoy structure, was held to discuss this draft document.<sup>18</sup> These States were able to reach consensus on many issues. The Vienna Convention was considered to be a success in that by 1985, 145 member States had acceded to it; ten years thereafter this number had increased to 174 member States.

The formulation of the Vienna Convention was a reaction to the absolute immunity granted to diplomats throughout the ages.<sup>19</sup>

Further, it sought to standardize the practice of diplomatic officers and missions in the receiving State. In addition, the preamble of the Vienna Convention states that one of the purposes of immunities and privileges is “*not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States*”.<sup>20</sup>

Furthermore, the preamble recognizes the theory of functional necessity as the dominant

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<sup>13</sup> Refer further to Article 31 of the Vienna Convention and Chapter 4. Maginnis V. L., (2002-2003) 28 Brooklyn Journal of International Law p. 998.

<sup>14</sup> Maginnis V. L., op. cit. p. 998.

<sup>15</sup> Ibid p. 385.

<sup>16</sup> Ibid

<sup>17</sup> Interesting to note is that the Draft of the ILC mentioned all three theories of diplomatic immunity, but stressed that it was guided by functional necessity in solving problems where practice provided no answer.

<sup>18</sup> The Vienna Convention came into force on 24 April 1964.

<sup>19</sup> An Introduction (1998) 291. An example of this is in the United States, where an Act in 1790 extended absolute immunity not only to ambassadors and their staff, but also to the ambassador's personal servants. See further Ross (1989) 4 American University Journal of International Law & Policy 180 and Chapter 6.

<sup>20</sup> Ross M. S., (1989) 4 American University Journal of International Law & Policy p. 181

theory.<sup>21</sup> Thus, the focus shifts from the *person* of the diplomat to his function in the mission.<sup>22</sup> A question that can be raised is whether diplomatic representatives adhere to this concept, especially when there are other Articles in the Vienna Convention that counter this.<sup>23</sup> Although the Vienna Convention reflects a shift from the theory of personal representation to functional necessity, the latter cannot exist in isolation. The preamble complements both these theories.

Similarly, the Vienna Convention signifies the rejection of the *extritoriality* theory and states that this theory was an “*unfortunate expression*” that would have led to many errors and to legal consequences that would be “*absolutely inadmissible*”.<sup>24</sup>

The Vienna Convention clarifies that diplomats are exempt from jurisdiction of the local courts only during their mission, but are not exempt from the law of the State.<sup>25</sup> It further grants many fiscal privileges, but also limited customs exemptions which many envoys abuse and use as a way to increase their salaries. Other countries at the same time denoted that custom exemption is based on international comity rather than law.<sup>26</sup> According to Denza, there are six provisions that may be singled out as marking significant developments of previous customary international law principles.<sup>27</sup>

Article 22 deals with the inviolability of mission premises. The Convention does not clearly state the ambit of inviolability of missions, but the implications of inviolability and provision of emergency or abuse may justify the receiving State’s entry onto the

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<sup>21</sup> It must be noted although the functional necessity theory is the dominant theory; there is also the inclusion and combination with the personal representation theory which forms part of the Vienna Convention.

Garley R. S. (1980-1981) 4 “Compensation for ‘Victims’ of Diplomatic Immunity in the United States: A Claims Fund Proposal” *Fordham International Law Journal* p. 143.

<sup>23</sup> With regard to immunities, Article 29 deals with personal inviolability, article 30 with inviolability of residence and property and Article 31 with immunity from jurisdiction. Furthermore, granting privileges such as exemption from tax (Article 34), personal service (Article 35) and customs and custom duties (Article 36) cannot be said to protect the diplomatic representative’s function alone, but his person too.

<sup>24</sup> Frey L. and Frey M., op cit p. 483-484 and Barker J. S., op cit. p. 57.

<sup>25</sup> Ibid Frey and Frey p. 485.

<sup>26</sup> Ibid p. 482-483.

<sup>27</sup> Denza E., op. cit. p. 3.

premises. Article 27 deals with the protection of all forms of diplomatic communication. Examples are the use of wireless transmissions and the fact that diplomatic bags are not searched by the receiving State. Article 31 looks at settled exemptions to civil jurisdiction in order to ensure them minimizing of abuse by diplomats. Article 34 looks into the basic principle of exemption from domestic taxes in all cases with some exceptions to taxes on private income and property arising in the receiving State, indirect taxes and charges levied for services rendered. Article 37 proved the most difficult to resolve in view of great diversity of approach by the parties to the Convention. This Article deals with the treatment of junior staff of diplomatic missions and families<sup>28</sup>. It limits civil jurisdiction while allowing full immunity from criminal jurisdiction. Article 38 deals with debarring nationals and permanent residents of the receiving State from all privileges and immunities<sup>29</sup>. Article 14 was formulated to help classify envoys and personnel. The motive of this Article was that before the First World War only powerful States sent and received ambassadors who enjoyed greater status than other envoys<sup>30</sup>. By the time of the Second World War the number of ambassadors rose, while the number of envoys declined. The Vienna Convention confirmed that heads of missions would take precedence<sup>31</sup>.

Although the Vienna Convention successfully codified several practices, not everyone got what they wanted<sup>32</sup>. For instance, the US argued unsuccessfully for retaining many diplomatic privileges while other States like Italy and Argentina wanted limited immunity. Colombia proposed the prohibiting of diplomatic personnel from engaging in

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<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> World War I helped undermine the traditional diplomatic order. Countries even blamed diplomats for the complicated networking of alliances which led to the war.

<sup>31</sup> Frey L. and Frey M., op. cit p. p. 432.

<sup>32</sup> For instance, the Mexican Delegation wanted the following article to be included in the Vienna Convention: "Diplomatic privileges and immunities are granted in order that the persons entitled to them may better perform their functions and not for the benefit of those persons."

commercial activity, which was supported by the Latin American countries and other countries like Egypt, India, Norway, Poland, Switzerland and South Africa. Despite such support the proposal was not included into the Vienna Convention<sup>33</sup>.

Debates such as these were necessary to limit immunity; otherwise diplomatic personnel would enjoy absolute immunity in all their actions.

A reason for the Vienna Convention's success is that it defined and refined the widespread customary practice. The Vienna Convention appears to guarantee efficiency and security through which States conduct diplomacy<sup>34</sup>. Importantly, it focuses only on permanent envoys and did not deal with ad hoc envoys and international organizations, which are dealt with by other Conventions. It further avoids controversial issues that would have started never-ending debates. In addition, its use of the restrictive and functional necessity approach helps restrict privileges and reduce the number of people who enjoyed them<sup>35</sup>.

The Convention contains 53 Articles that govern the behavior of diplomats, 13 of which address the issue of immunity. Only selected Articles that deal with immunity and abuses will be dealt with comprehensively in this thesis<sup>36</sup>. Nevertheless, the Vienna Convention as a whole cannot be ignored, and bears testament to the remarkable efforts of the original 81 States to reach agreement for the common good.

### **3.3 Meaning and Nature of International Law**

International law may be defined as that body of law which is composed for its greatest part of the principles and rules of conduct which States feel themselves bound to

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<sup>33</sup> Frey L. and Frey M., op. cit p. 487.

<sup>34</sup> Ibid

<sup>35</sup> Ibid p. 480-481.

<sup>36</sup> Ibid

observe, and therefore, do commonly observe in their relations with each other<sup>37</sup>, and which includes also:

- a. The rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with States and individuals; and
- b. Certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community.

In the writer opinion, International law refer to a body of principles, customs, and rules that are recognized as effectively binding obligations by sovereign states and other international persons in their mutual relations.

Also, International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of infringement<sup>38</sup>.

Furthermore, International law may be defined as a body of rules which nation-states consider as legally binding them in their relations *interse*. Such rules may either comprise international treaties or international customs which have acquired the force of law in the world community. Generally speaking, international law means such law which is operative in the world community. Therefore, it may not be correct to classify international law into particular, general and universal as is done by Oppenheim [1]. According to Oppenheim, particular international law is operative among a few states,

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<sup>37</sup> Starke, J.G. (1977) *An Introduction to International Law*, butter worth's 8<sup>th</sup> ed. P.44-448

<sup>38</sup> Glahn, V.G (1996): *Law Among Nations, An Introduction to Public International Law* 7<sup>th</sup> ed London

general international law among many states and universal international law among all states. International law is applicable to all the states and, therefore, is necessarily universal<sup>39</sup>.

### **Nature of International Law**

‘Law’, as one should understand, is a code of conduct to which people should conform in the interests of organized society lest the violator may be penalized for not conforming to it. This concept of law is as much correct with respect to municipal law as in the case of international law. The difference may, of course, lie in the fact that while municipal law regulates relations within a given state, international law prescribes a code of conduct which would no doubt invite censure whenever the same is violated. In this sense, international law is just like conventional law, i.e. contract law, which creates legal relations through consent of parties. Therefore, if conventional law could be considered as real law, one wonders why international law cannot be considered as law in the real sense.

It cannot be denied that there are some enforcement measures in international law also. Self help is one such measure. This measure may not be very desirable but this kind of redress existed in ancient societies and to some extent today also as part of law. The present Charter of the United Nations prescribes enforcement measures under Articles 5, 6, 41 and 42 against the violating states. These measures have the semblance of taking action against the wrong-doing states.

Therefore, it is safe to say that international law is as much law as any other law although it is not free from criticism that it may be weaker than the ordinary law of the land. Mere violations in the realm of international law should not dishearten the protagonists because violations occur both in municipal and international law.

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<sup>39</sup> Hingorani, R.C. (1993): *Modern International Law*, Oxford and IBH Publisher, New Delhi pp. 184-205

Unfortunately, observation of many rules of international law goes unnoticed while the violations are highlighted.

### **3.4 United Nations International Immunities**

‘International Immunities’ refers to the immunity enjoyed by international organizations and their personnel.<sup>40</sup> This thesis will not concentrate on international immunities but it must be briefly mentioned to indicate the relationship with diplomatic immunity.<sup>41</sup> For purposes of simplicity, this thesis will primarily focus on the UN. Many abuses are committed by UN officials in New York. The reason as to why New York is the city where most abuses by UN officials occur is due to the fact that the UN headquarters is based there, while diplomats receive their immunities from international custom, international organizations are granted immunity by international treaties and conventions.<sup>42</sup> The UN Charter and Convention do not define “international official”; however Suzanne Bastid’s 1931 definition has been accepted by most academics. She defines them as “*persons, who, on the basis of an international treaty constituting a particular international community, are appointed by this international community or by an organ of it and under its control to exercise,...functions in the interest of this particular international community*”.<sup>43</sup> From this definition the following can be established. International officials are not diplomats. They represent an international organization rather than a State.<sup>44</sup> International organizations have important

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<sup>40</sup> (1976) 33 Washington & Lee Law Review p. 91.

<sup>41</sup> For an in-depth discussion between international organization immunities and diplomatic immunities, refer to Brower “International Immunities: Some Dissident View on the Role of Municipal Courts” 41 Virginia Journal of International Law (2000-2001) 1.

<sup>42</sup> Ling Y., (1976) 33 “A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents” *Washington & Lee Law Review* p. 127.

<sup>43</sup> *Ibid* p.128.

<sup>44</sup> *Ibid* pp. 128-129.

responsibilities ranging from seeking to ensure human rights, to peace security, trade and the environment.

They resemble large multinational corporations and conduct billions of dollars' worth of transactions.<sup>45</sup> Example of international organizations are the United Nations (UN) and its subsidiary bodies, the International Monetary Funds (IMF), the International Bank of Reconstruction and Development (IBRD), Food and Agriculture Organization (FAO), International Atomic Energy Agency (IAEA), Organization of American State (OAS), and North Atlantic Treaty Organization (NATO) to name a few.

Initially, international organizations did not require privileges and immunities because they did not have a political mandate, but by the 19th century international immunities first appeared, even though international organizations only began to increase after the World War II.<sup>46</sup>

Even the Dumbarton Oaks proposal for the UN Charter did not include any provisions for immunity and privileges, as it was understood that not all officials needed immunity.<sup>47</sup> When international organizations with a political mandate began to emerge, many officials were granted diplomatic immunity because it was a convenient and stable model. This misapplication of immunity caused confusion, because the official represented the organization and their home State.<sup>48</sup>

The Preparatory Commission of the UN proposed the drafting of the Convention on the Privileges and Immunities of the UN.<sup>49</sup> This Convention was necessary to help implement Article 105 of the UN Charter that allows for immunities and privileges.<sup>50</sup>

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<sup>45</sup> Brower C. H., "International Immunities: Some Dissident View on the Role of Municipal Courts" 41 *Virginia Journal of International Law* (2000-2001) pp. 4-5.

<sup>46</sup> Maginnis V. L. (2002-2003) 28 op. cit p. 1010

<sup>47</sup> Frey L. and Frey M., op. cit. p. 557.

<sup>48</sup> Maginnis V. L., op. cit. pp. 1010-1011.

<sup>49</sup> Convention on the Privileges and Immunities of the United Nations, February 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16

<sup>50</sup> Ling Y. op. cit. p. 97.



Immunity is divided into four groups. The first group includes high-level personnel;<sup>51</sup> the second to fourth group includes the organization itself, the officials of the UN and experts on mission.<sup>52</sup> Article 18 of the UN Convention describes the immunity given to officials of the organizations. It must be noted that there is a distinction between permanent representatives, who are stationed at the UN headquarters throughout the year, and temporary representatives, who are sent for particular sessions or conference of the UN.<sup>53</sup> Under provision 15 of the UN Headquarters Agreement,<sup>54</sup> permanent representatives are accorded similar status to that of diplomats accredited to the sending State. Temporary representatives, on the other hand, enjoy only limited exemption from criminal jurisdiction in the receiving State; limited to official functions and not entitled to immunity to civil jurisdiction.<sup>55</sup>

Unlike the Vienna Convention it limits the privileges and immunities of UN officials to those necessary for independent exercise of their functions with regard to the organization.<sup>56</sup>

In *Westchester County v Ranollo*<sup>57</sup> chauffeur of the Secretary-General of the UN was arrested for speeding while driving the Secretary-General to an official UN Conference. At that time the court held that Ranollo was not acting in his official capacity. However, should he be tried today the UN Convention would consider his actions within his official function.<sup>58</sup> In other words the functional necessity theory is used to justify their immunity<sup>59</sup> there are similarities between the immunities of UN officials and diplomatic

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<sup>51</sup> The Secretary-General and Assistant Secretaries-General.

<sup>52</sup> Maginnis V. L., op. cit. p. 1013.

<sup>53</sup> Ling Y. op. cit. p. 95.

<sup>54</sup> The Headquarters Agreement with the United Nations 61 Stat. 3416; T.I.A.S. 1676; 11 U.N.T.S 11.

<sup>55</sup> Ling Y. op. cit. p. 120.

<sup>56</sup> An official act refers to any act performed by UN officials, experts or consultants which directly relates to the mission or project.

<sup>57</sup> (1946) 67 N.Y.S.2d p. 31.

<sup>58</sup> Supra at 35.

<sup>59</sup> Maginnis V. L., op. cit. p. 1011

personnel, especially with regard to personal inviolability, arrest and detention.<sup>60</sup> Immunities include immunity from criminal jurisdiction only with regard to official functions.<sup>61</sup>

The UN Convention provides two methods for the injured party to seek relief from an official abusing his position. The first is waiver of immunity granted by the Secretary-General<sup>62</sup> is only granted if it will not cause any prejudice to the interests of the organization.<sup>63</sup> Second method is where the UN settles with the claimants.<sup>64</sup>

The UN makes settlement available to claimants who have been injured by officials who have retained their immunity.<sup>65</sup>

### **3.5 Classification**

The Special Rapporteur to the ILC gave identical privileges and immunities to all members of the mission, including the administrative, technical and service staff, provided they were foreign nationals. However, as Articles passed through stages of ILC debates it became increasingly necessary to classify and distinguish between different categories of embassy staff.<sup>66</sup> The early years, States relied on the good faith of the sending State and it was considered intrusive to enquire into how the mission was organized. The only time the receiving State enquired into the organization of the mission was if it believed that the sending State was abusing the system.<sup>67</sup>

Article 1 of the Vienna Convention defines a diplomatic agent as the head of a mission or a member of the diplomatic staff having diplomatic rank. The head of the mission is

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<sup>60</sup> Ling Y. (1976) 33 op. cit

<sup>61</sup> Ibid

<sup>62</sup> Articles 20.

<sup>63</sup> Maginnis V. L., op. cit p. 1018.

<sup>64</sup> Article 29.

<sup>65</sup> Maginnis V. L., op. cit p. 1021.

<sup>66</sup> Denza E., op. cit p.13-14.

<sup>67</sup> Ibid p. 15-16.

the person who is sent by the State to act in that capacity.<sup>68</sup> General rule is that diplomatic agents are persons designated by the sending State, and the receiving State simply receives representatives in their country. It should be noted that bearing a diplomatic passport does not itself indicate diplomatic status; neither does the possession of a diplomatic visa or an identification card issued by the foreign ministry constitute acceptance as a diplomatic agent with such status.<sup>69</sup>

The controversy regarding the designation and relative status of diplomatic representatives was resolved by the Congress of Vienna of 1815 and the same classifications have been adopted by Article 14 to 18 of the Vienna Convention.<sup>70</sup> 14 divides heads of diplomatic missions into three classes

1. *Ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank.*
2. *Envoys, ministers, and internuncios accredited to Heads of State.*
3. *Chargés d'affaires accredited to Ministers for Foreign Affairs.'*

The title of nuncio denotes a permanent diplomatic representative of the Holy See. In 1965, the Holy See established a new rank of Apostolic Pro-Nuncio which was accredited to States which did not bestow a representative of the Holy See the status of doyen of the diplomatic corps.<sup>71</sup> A problem when classifying diplomats is that when ambassadors were sent on a temporary mission they were called Extraordinary, as contrasted with resident envoys. However, today the title Ambassador Extraordinary and Plenipotentiary is given to all ambassadors, whether resident or not.<sup>72</sup> An issue concerning the second grouping of diplomats is that it is virtually non-existent, and there have been debates on whether to simplify the classification of the head of mission into

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<sup>68</sup> Brown J. (1988) 37 "Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations" *International & Comparative Law Quarterly* p. 386.

<sup>69</sup> Ibid

<sup>70</sup> Lawrence T. J., (1910) *The Principles of International Law* 6 ed. D.C. Heath & Co.: Boston

<sup>71</sup> Denza E. op. cit p. 91.

<sup>72</sup> Feltham R. G., (1998) *Diplomatic Handbook* 7ed Longman: London p. 384.

just to two classes. When the change was proposed it was rejected primarily by the major powers.<sup>73</sup> Therefore, the heads of missions remained divided into three classes.

The primary responsibility of heads of missions is to carry out the instructions of their ministry and to report back to it with the information gathered.<sup>74</sup> They are expected to use their initiative in recommending policy that the government should adopt and report any significant information; they are responsible to their own government and the receiving State for the conduct of the mission.<sup>75</sup> Technology now ensures instantaneous contact between the missions and the sending State.

Diplomatic agents should in principle be of the nationality of the sending State with the intention of serving the sending State's interest. Heads of missions may be accredited to more than one State, provided there is no objection on the part of any of the States concerned. This is generally used in interest sections.<sup>76</sup> The head of mission may also act on behalf of his State for any international organization.<sup>77</sup>

The category a diplomat falls into determines the degree of privileges and immunities to which they may be entitled.<sup>78</sup> The US Department of State has reserved the right to determine the proper classification of diplomatic staff. However, a US district court has said that diplomats do not hold such a right or discretion, especially when the rights and prerogatives of third parties may be affected.<sup>79</sup> UK's Foreign and Commonwealth Office sometimes tries "informally to persuade missions to withdraw a nomination in cases where the appointee is clearly fulfilling an administrative and technical rather than a diplomatic function".<sup>80</sup>

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<sup>73</sup> Denza E., p. 92.

<sup>74</sup> Feltham R. G., op. cit p. 12

<sup>75</sup> Ibid p. 16-17.

<sup>76</sup> Ibid.

<sup>77</sup> Feltham op. cit pp. 16-17.

<sup>78</sup> Brown J. op. cit p. 55.

<sup>79</sup> Ibid p. 56.

<sup>80</sup> Ibid.

A record of all the names and designations of heads of mission, staff and other institutions and individuals received in a diplomatic capacity are documented in the diplomatic list. This includes all personnel in the mission, the date of taking up function, names, rank of staff, address of the mission and resident addresses, whether they are married or not, whether a spouse has accompanied them and in some countries the names of unmarried daughters over the age of 18 years.<sup>81</sup>

The list is regularly revised and printed to ensure the right of the diplomat's status and immunity.<sup>82</sup> A clear distinction must be drawn between the list compiled by the mission and the list compiled by the foreign ministry: the list compiled in the mission cannot be regarded as evidence of entitlement to immunity. It must be noted that notification is not a limitation on the right of the sending State to freely appoint its members.<sup>83</sup> No differentiation may be made between heads of mission on account of their standing between missions except in matters of precedence and protocol.<sup>84</sup> In certain States the diplomatic representative of the Holy See takes precedence over all other heads of States in the same category. This was especially the case within Christian States.

The Vienna Convention does not make mention of the role of the doyen or stipulate his functions.<sup>85</sup> This can be the result of countries being sovereign to one another and the decrease of religion as a political influence. For his diplomatic colleagues the doyen acts as a spokesperson on matters of common concern especially on status, protocols, privileges and immunities. He speaks for the diplomatic body on public occasions and informs colleagues of developments of general interest to them.<sup>86</sup> Should the head of mission be temporarily vacant, absent or unable to fulfill his functions, the next member

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<sup>81</sup> McClanahan, G. V op. cit pp.86-91

<sup>82</sup> Ibid.

<sup>83</sup> Denza op. cit. p.72-74.

<sup>84</sup> Article 16 para.1. Refer to Lord Gore-Booth (ed) Satow's Guide 163. There are four order of precedence and these depend on the situation or functions.

<sup>85</sup> Denza op. cit. p. 97-98.

<sup>86</sup> Ibid.

of the diplomatic staff with seniority will fill the post as chargé d'affaires ad interim.<sup>87</sup> In order for this charge to be formalized, the receiving State must be notified and advised when the head of the mission will resume his functions. It must be noted that the chargé d'affaires ad interim is not accredited to the receiving State and is not officially the head of the mission, but merely acts as the head of the mission until such time as the head of the mission is liable to resume his function.<sup>88</sup> The chargé d'affaires ad interim is unable to continue with his appointment, the Ministry of Foreign Affairs and not the current chargé d'affaires ad interim may appoint a new chargé. In the event there is no diplomatic member available, a member of the administrative or technical staff may be appointed, but only if this has been approved by the receiving State.<sup>89</sup>

### **3.5.1 Appointment of Diplomat**

The appointment of diplomats is necessary in diplomatic practice. It is the right of the receiving State to help decide whether or not a diplomat may enter its borders.<sup>90</sup> This in turn assists in limiting the number of foreign representatives from entering the receiving State and potentially causing disorder and/or abusing their status.

During the 19th century the practice of seeking confidential approval from the receiving State went from general practice to customary rule. Therefore, before a head of mission is appointed to a post, the receiving State must first give its approval.<sup>91</sup> Article 4 of the Vienna Convention provides for the sending State to make certain that the agreement has been given by the receiving State for the representative it proposes to accredit as the head

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<sup>87</sup> Denza E., op. cit p. 101 and Lord Gore-Booth (ed) *Satow's Guide to Diplomatic Practice* 5ed (1979) Longman: London p. 87.

<sup>88</sup> Denza E. p. 101.

<sup>89</sup> Feltham R. G., op. cit

<sup>90</sup> Preuss L. (1932-1933) 10 "Capacity for Legation and Theoretical Basis of Diplomatic Immunities" *New York International Law Quarterly Review* p. 175.

<sup>91</sup> Brownlie I., op. cit

of the mission.<sup>92</sup> The receiving State has the power to refuse acceptance and is not obliged to give reasons for its decision to the sending State.<sup>93</sup> The UK claimed that it had a right to be free in its choice of ambassadors. Although it had to conform to the practice on agreement it expected reasons to be given for refusals.<sup>94</sup> Article 4 is the exception to Article 7, which states that the sending State is permitted to freely appoint the members of the staff of the mission.

The justification lies in the sensitivity of the appointment of a head of mission and the need for acceptance by both States to ensure effective diplomacy.<sup>95</sup>

The agreement procedure is welcomed due to its informal nature. A head of mission is provided with credentials to prove his authenticity to the Head of State; this can include the curriculum vitae of the member.<sup>96</sup> If the Head of State (who is a sovereign) dies, the credentials of all heads of mission accredited to the sovereign become invalid and therefore require renewal from the new Head of State. This practice does not apply to the death of a President.<sup>97</sup> The agreement may be revoked after it has been given, provided that the new head of mission has not yet arrived in the receiving State's territory. If the head of the mission is already in the receiving State, the appropriate options available to the receiving State are to declare the head of the mission *persona non grata* or to request the removal of the head of mission.<sup>98</sup> Preuss states that it is as much the right of the State that requests an agreement as it is for the State refusing it that an envoy that is personally declared *persona non grata* before arrival should not enter into the State and perform any functions.<sup>99</sup> An example of a withdrawal was in 1968 when King Faisal of Saudi Arabia

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<sup>92</sup> Ibid p. 353 and Lord Gore-Booth (ed) *Satow's Guide* 89.

<sup>93</sup> Ibid

<sup>94</sup> Denza E., *op. cit.* p. 39

<sup>95</sup> Ibid p.40.

<sup>96</sup> Feltham, R.G *Op. cit.* p.291.

<sup>97</sup> Ibid p.5.

<sup>98</sup> Denza, E. *Op. cit.* p. 89.

<sup>99</sup> Preuss, L. *Op. cit.* p. 440.

withdrew the agreement to the appointment of Sir Horace Phillips as Ambassador, on the grounds that the Saudi Arabian government had become aware that he was of Jewish descent.<sup>100</sup> Since the receiving State is not required to give reasons for the refusal of the agreement, there are no legal constraints on its discretion<sup>101</sup> of criminal activity or serious violation of human rights would be a sufficient reason to refuse an agreement in democratic States.<sup>102</sup> In 1984, the US rejected the nomination of Nora Astorga as the Ambassador for Nicaragua for his involvement in the assassination attempt on the President of Nicaragua. It has been accepted that the reasons for refusal should relate to the proposed head of mission, rather than to the relations between the two States.<sup>103</sup> States may refuse to receive diplomatic representatives either: (a) generally, or in respect to a particular mission of negotiation; or (b) because a particular representative is not personally acceptable.<sup>104</sup> As a consequence of the right to refuse diplomatic relations or the right to refuse specified individuals, a State may impose certain conditions on the reception of individuals.<sup>105</sup> Through these conditions it is possible for States to avoid their own nationals taking part in a foreign diplomatic mission and thus prevent a situation which is contrary to policy in most States.<sup>106</sup> Once agreement is obtained, the accrediting State can proceed with the formal appointment of its representative.<sup>107</sup>

### **3.5.2 Reception and Termination of Diplomat Functions**

Article 10 requires that the Ministry for Foreign Affairs of the receiving State be notified of the appointment of members of the mission, the day and place of arrival and their final

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<sup>100</sup> Denza E., *Op. cit.* p. 41-42.

<sup>101</sup> *Ibid.* p. 42-43.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Shearer *International Law* 385.

<sup>105</sup> Preuss L., *op. cit.* p. 175.

<sup>106</sup> Preuss *op. cit.* p. 176.

<sup>107</sup> Shearer *International Law* 385. Another well-known example is where Emperor Nicholas I of Russia refused to receive Sir Stratford Canning in 1832 on personal grounds.



departure or the termination of their functions with the mission.<sup>108</sup> In practice, as part of the notification process, some States have required that a great number of details be submitted.<sup>109</sup> From these details the foreign ministry can classify the staff appropriately and accord privileges and immunities.

The importance of the notification system is that it enables the foreign ministry of the receiving State to know who is a diplomatic agent. Australia considers it the prerogative of the government to know the status of diplomatic representatives.<sup>110</sup>

On arrival, the head of the mission will usually be met by the Chief of Protocol of the receiving State. From there, he must inform the Minister of Foreign Affairs of the receiving State of his arrival and request an appointment so that he may present the minister with a copy of his credentials.<sup>111</sup> The head of mission hold the rank of chargé d' affaires entire, he will be accredited by the Minister of Foreign Affairs, to whom he will deliver his letter of appointment. Once the head of mission has officially assumed his functions he should, in accordance with diplomatic protocol, introduce himself to the other heads of missions in the receiving State.<sup>112</sup> If the functions of the head of mission or a member of the diplomatic staff have come to an end, a note announcing their recall must be sent to the Minister of Foreign Affairs.<sup>113</sup> With regard to the head of mission, he must request an audience with the Head of State to bid farewell. The head of mission's function is terminated either when he leaves the country or at an earlier date if it is specified in the note announcing his recall.<sup>114</sup> What occurs in practice is the successor of the diplomat being recalled while delivering his credentials will also hand his

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<sup>108</sup> This includes notification in advance of the date, place and time of arrival or departure of any member of the staff or families.

<sup>109</sup> Brown J., *op. cit.* p. 55-56.

<sup>110</sup> *Ibid* p. 57.

<sup>111</sup> Requesting an audience with the Minister of Foreign Affairs and presenting his credentials signifies the formal assumption of his duties.

<sup>112</sup> Feltham R. G., *op. cit.* p.96.

<sup>113</sup> *Ibid* p. 419.

<sup>114</sup> *Ibid.* p.308.

predecessor's letter of recall to the Minister of Foreign Affairs of the receiving State.<sup>115</sup> Article 43 deals with the termination of the duties of a diplomatic agent. This Article shows the effects of the pressure which the Vienna Conference was under in its concluding stages.<sup>116</sup> For instance, Article 13 lays down how and when the head of mission takes up his functions. Therefore Article 43 should be its counterpart, prescribing when, in what instances and the time at which a diplomatic agent is regarded as having terminating his functions.<sup>117</sup> The Conference was aware of this problem, but due to time constraints they did not clarify the text.<sup>118</sup> Denza states that there are four possible ways to terminate the functions of a diplomatic agent:<sup>119</sup> through the expiration of a fixed time period, or the completion of a specific task by the agent; through death of the diplomatic agent; by a breach of diplomatic relations which may or may not occur on the outbreak of armed conflict;<sup>120</sup> by disappearance of the sending or the receiving sovereign.<sup>121</sup>

Article 44 indicates the duty to grant facilities for departure. This is especially necessary when there is deterioration in relations between the sending and receiving State, particularly when there is an outbreak of war or armed conflict and the right to a safe departure is of great importance. However, in ordinary circumstances, this is not of great importance except for conferring exemption for exit visa requirements.<sup>122</sup> An ideal example is that of the Libyan shooting in the UK, which will be discussed in detail in Chapter 4.

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<sup>115</sup> Lord Gore-Booth (ed) *Satow's Guide* 100 and 174.

<sup>116</sup> Denza E., p. 385.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* p. 418-419.

<sup>120</sup> It is common for the diplomatic mission to remain in the receiving state during violent conflict as long as the physical safety of the members is reasonably assured. Where safety becomes a serious concern, the practice is often for the sending state to withdraw the staff or even the entire mission.

<sup>121</sup> Lord Gore-Booth *op. cit.* pp. 70 and 177.

<sup>122</sup> Denza *op. cit.* p. 389.

### 3.5.3 Staff of the Mission

The need for discussing various levels and categories of staff will indicate what level of immunity they are allotted. Immunity and privileges have changed from past practices of absolute immunity to restricted immunity.

Members of diplomatic staff are defined as the members of staff of the mission having diplomatic rank, which include attachés, advisers and members of other ministries.<sup>123</sup>

Article 1 of the Vienna Convention divides the staff of the mission into the following categories:

1. The diplomatic staff, which consists of the members of the mission having diplomatic rank as counsellors, diplomatic secretaries or attachés.
2. The administrative and technical staff, which include clerical assistants and archivists.
3. The service staff, who are the other employees of the mission itself, such as drivers and kitchen staff.<sup>124</sup>

The value of ensuring proper classification of staff is to prevent, for example, a driver being notified as a member of the administrative and technical staff who enjoys full immunity from criminal jurisdiction, while they instead belong to the service staff, who enjoy immunity in respect of acts performed during the course of their duties.<sup>125</sup>

Article 7 allows for the sending State to freely appoint members of staff subject to certain exceptions.<sup>126</sup> The text of Article 7 seems clear, but several delegations at the Vienna Convention found that the Article needed consent from the receiving State. It was decided in *R v Lambeth Justices, ex parte Yusufu*<sup>127</sup> that Article 7 was qualified by

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<sup>123</sup> Feltham R.G op. cit p. 90.

<sup>124</sup> Brownlie R. G. op. cit pp. 17-20.

<sup>125</sup> Brown J. op. cit p. 56.

<sup>126</sup> Exceptions include: Article 5 dealing with Multiple Accreditation, Article 8 with Nationality of the diplomatic staff, Article 9 with Persona non grata and Article 11 with the size of the Mission.

<sup>127</sup> (1985) TLR 114 DC-.

Article 10<sup>128</sup> and that failure to notify the receiving State destroyed the representative's claim to immunity. Further, Article 7 does not indicate whether the receiving State has to provide reasons should there be a rejection of any particular representation.<sup>129</sup> Since heads of missions and diplomatic agents follow a system of notification it would only be sensible that notification of staff should also follow this route. If the freedom of the sending State to appoint members is to be effective, then the persons appointed must be admitted to the receiving State and exempted from immigration restrictions. Further, the freedom to appoint extends to the freedom to dismiss. This freedom is broadened to allow the sending State the freedom to specify the functions members are to perform, and their classification.<sup>130</sup> Article 10 sets out the duties of notification of the receiving State, which previously was imposed not by customary rules, but through common practice. Notification is not only required for the nomination of members of staff, but also of the arrival and departure of members of staff and domestic staff, including their families<sup>131</sup> has been stated by governments like the UK that the Vienna Convention has not provided an objective definition of staff categories. The UK aired its concerns in its White Paper in 1985 by stating:

*“[I]t is virtually impossible in most cases for the FCO [Foreign and Commonwealth Office] to tell whether a person should more properly be described as a diplomat or as a member of the administrative and technical staff or indeed as a member of the mission at all.”*<sup>132</sup>

Governments then can investigate the matter after notification and then answer the questions relating to nationality, residence and family status.<sup>133</sup> The duration of any appointment depends on various factors like the number of staff, their importance,

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<sup>128</sup> Article 10 provides for notification of staff appointments and movements.

<sup>129</sup> Denza E. op. cit. p. 51-52

<sup>130</sup> Ibid p. 53-54.

<sup>131</sup> Article 10.1

<sup>132</sup> Higgins, R (1986) 80 “UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report” *American Journal of International Law* p. 135

<sup>133</sup> Ibid

policies and any arguments in favour of remaining in office for a lengthy period. These arguments can include the need to settle down domestically before they begin to concentrate on their work; the need for an opportunity to get to know and understand the country, its language, history, politics and culture; and the need to make personal contacts and save on travel and costs of transfer expenses for the government.<sup>134</sup> A disadvantage of the above is that the representative may become emotionally involved in the problems of the receiving State and be unable to act and advise his own government without influence. Another problem is that the representative, by staying so long in the receiving State, may begin to lose touch with the attitudes and events of his home country.<sup>135</sup>

#### **3.5.4 Family Members of a Diplomat**

According to Higgins, the UK Government stated that the Vienna Convention requires but has failed to provide a definition of “*members of the family forming part of the household*”.<sup>136</sup> Concern behind this lacuna is that receiving States, and to a lesser extent sending States, are uneasy about supporting unnecessarily large diplomatic entourages. Receiving States also have added pressure from family members seeking local employment. Family members are not bound by Article 42 to refrain from practising for personal profit in any professional or commercial activity. States are in the practice of prohibiting employment of family members in the absence of any bilateral agreements or arrangements. A severe problem is when family members commit offences.<sup>137</sup> Examples of these occurrences will be considered in more detail in Chapter 4.

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<sup>134</sup> Feltham R. G., op cit. p. 12.

<sup>135</sup> Ibid

<sup>136</sup> Higgins R. (1986) 80 op. cit p. 138.

<sup>137</sup> Brown J. op. cit. p. 63.

The Canadian Department of External Affairs notified its policy to all heads of mission in 1986 whereby “member of the family” was interpreted as those “dependent” on the diplomatic agent, and this could be

the spouse, the aged or infirm parents of either spouse; unmarried sons/daughter under the age 21 who live with their parents; unmarried sons/daughters between the ages of 21 and 25 who are attending a Canadian educational institution full-time and living with their parents; and unmarried sons/daughters over the age 21 who are physically or mentally disabled.<sup>138</sup>

Courts have not had any difficulty in finding that minor children form part of the “members of the family”.<sup>139</sup> The courts have had difficulty deciding as to whether adult children dependent on a diplomat parent is entitled to immunity. The Vienna Convention does not provide any clarification. The UK’s practice is to allow children of the age 18 or over the equivalent immunity as the rest of the family, provided they are clearly resident with the family members of the mission and are not engaged in employment on a permanent basis.<sup>140</sup>

The US Secretary of State issued a policy to all the heads of missions in 1986 that recognized that the concept of “family” differs among societies and claims that it should be resolved according to the standards of the receiving States and on the basis of reciprocity. In the US, application of ‘family’ includes a spouse of a member of a mission and his unmarried children under the age of 21. Children under the age of 23 who attend an institution on a full-time basis also fall under the definition. Other persons who reside with diplomats in his household can, under exceptional circumstances and with the approval from the Department of State, be considered “family”.<sup>141</sup>

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<sup>138</sup> Brown J. op. cit. p. 65. See further the Circular Note No. XDC3660. Countries like Australia and New Zealand closely followed the Canadian policy.

<sup>139</sup> A grandson has been accepted as a “member of the family” and together with spouses it has been held that they enjoy immunity and inviolability.

<sup>140</sup> Higgins R. op cit p. 138.

<sup>141</sup> Brown J., op. cit. p. 66.

Thus, as Brown states, the term “*member of the family*” should not be interpreted narrowly, for it can in certain circumstances include extended family.<sup>142</sup>

### 3.5.5 Diplomatic Mission

The establishment of diplomatic missions is through mutual consent and understanding of the functions that will be undertaken by the mission and its representatives.<sup>143</sup>

Diplomatic missions consist of diplomatic representatives from the sending State to the receiving State together with the staff. The functions of the missions are consistent with the functional approach theory as stated in the Vienna Convention. The first time that this had been published in a formal legal instrument was in Article 3 in the listing of functions.<sup>144</sup> By agreeing to establish permanent diplomatic missions, a State implicitly accepts certain obligations, namely, to provide a facility and immunity that enables the mission to function satisfactorily and for those working in the mission to have personal privileges to carry out their functions.<sup>145</sup> Diplomatic missions are situated in the capital of the State, and additional offices may only be established in other parts of the country with permission.<sup>146</sup> For instance in South Africa, the Republic of Finland has embassy offices in both Pretoria and Johannesburg, while the embassy of France is situated in both Pretoria and Cape Town.<sup>147</sup> Article 11 provides that without a specific agreement between States, the receiving State may require that the size of mission be kept within reasonable limits.<sup>148</sup> The test is not an objective one, but simply the opinion of the receiving State. However, it must be pointed out that should the receiving State object to

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<sup>142</sup> Ibid.

<sup>143</sup> Feltham R. G., op. cit. p. 3

<sup>144</sup> Berridge G., (2005) *Diplomacy: Theory and Practice* 3ed Macmillan: New York p. 16.

<sup>145</sup> Feltham R. G., op. cit. p. 8

<sup>146</sup> Ibid p. 7

<sup>147</sup> <http://www.dfa.gov.za/foreign/forrep/forf.html> [Accessed on 28 June 2013].

<sup>148</sup> Feltham R. G., op. cit. p. 7

the size of missions it would be a breach of the provision.<sup>149</sup> Yet limiting the size of a mission could possibly aid in reducing abuses of immunities. This will be discussed in Chapter 4.

### 3.5.6 Special Mission

Special ad hoc missions are sent by the sending State to fulfill a specific purpose. Such missions may be accredited irrespective of whether there are permanent diplomatic and consular missions and relations.<sup>150</sup> The Convention on Special Missions in 1969<sup>151</sup> was formulated to guarantee immunities to special missions. Interestingly, this Convention only came into force in June 1985 and it is based primarily on the Vienna Convention, but also borrows some texts from the Consular Convention.<sup>152</sup> The Special Missions Convention was drafted only after the conclusion of the Vienna Convention.<sup>153</sup> Special missions have different motives for their existence; for instance, where a foreign minister visits another State for negotiations, or a visit of a government trade delegation to another country for official business.<sup>154</sup> For example, in 1978, a US-Egypt agreement allowed for the formation of a special mission that headed an Economic, Technical and Related Assistance Agreement. This mission was to carry out and discharge the responsibility of the US Government to Egypt.<sup>155</sup>

The preamble of the Special Missions Convention acknowledges that it was based on and complements the Vienna Convention and Consular Convention. Furthermore, it states that the functional necessity theory forms the foundation for the immunities and

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<sup>149</sup> Brownlie I. op. cit. p. 354

<sup>150</sup> Silva G. E., (1991) *"Diplomatic and Consular Relations"* M Bedjaoui (ed) *International Law: Achievements and Prospects* Martinus Nijhoff Publishers: Dordrecht p. 439

<sup>151</sup> Convention of Special Missions December 8. 1969, Annex to GA Res. 2530, 24 UN GAOR Supp. (No. 30 at 99, UN Doc, A/7630 (1969) [hereinafter referred to as the Special Missions Convention].

<sup>152</sup> Wallace R. M. M. op. cit. p. 157.

<sup>153</sup> Frey, L. op cit p. 100.

<sup>154</sup> Brownlie I. op. cit. p. 367

<sup>155</sup> McClanahan, G. V., op. cit. p. 2.



privileges granted to special missions.<sup>156</sup> As with most conventions, Article 1 contains a list of definitions which lays down the necessary condition a mission must fulfill in order to be regarded as a special mission.<sup>157</sup> In order for a special mission to be established, there needs to be consent from the receiving State. Unlike permanent missions, consent for special missions can vary from a formal treaty to a tacit consent.<sup>158</sup> Further, the Special Missions Convention, unlike the Vienna Convention, does stipulate the functions of the mission. Article 3 states the functions of the special mission would be determined by mutual consent of the parties involved. Should there be any conflict; the sending State would decide how to deal with such conflict.<sup>159</sup>

Article 6 allows for two or more States to send a special mission at the same time to another state in order to work together on a subject of common interest.<sup>160</sup> The sending and receiving of special missions occurs between States that have diplomatic or consular relations, but Article 7 states that it is not a prerequisite that such relations must be present.<sup>161</sup> With regard to the appointment of members taking part in the special mission, as based on Article 7 of the Vienna Convention, there are two distinct differences. Firstly, Article 8 applies to all members of the special mission, while in permanent missions it only refers to the head of the mission; and secondly, the sending State must inform the receiving State of the size and composition of the special mission.<sup>162</sup>

The composition of the special mission depends on the nature of the task. There is no distinction made between special missions of a technical nature and those of a political

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<sup>156</sup> Shearer International Law 393 and O'Connell International Law 2ed (1970) Vol. 2 913.

<sup>157</sup> Article 1 and International Law Commission "Draft Articles on Special Missions with Commentaries" (1967) vol. 2 Yearbook of the International Law Commission 348.

<sup>158</sup> Article 2 and International Law Commission (1967) Yearbook of the International Law Commission 349.

<sup>159</sup> Ibid. Article 3.

<sup>160</sup> Article 6. International Law Commission (1967) Yearbook of the International Law Commission 350 and Wallace International Law 133.

<sup>161</sup> Article 7 and International Law Commission (1967) Yearbook of the International Law Commission 350.

<sup>162</sup> Ibid.

nature. However, the Special Missions Convention does stipulate that every special mission must include at least one representative from the sending State.

Commencement of the functions of the special mission occurs as soon as it makes official contact with the Ministry of Foreign Affairs or the specific organ. The location of the mission is mutually agreed upon between the States and its office is established near the place where it performs its functions.<sup>163</sup> With permanent missions, special missions enjoy inviolability of their premises, archives and documents, and freedom of communication.<sup>164</sup> Article 27, dealing with freedom of movement, is based on article 26 of the Vienna Convention, except for one difference that the words “as is necessary for the performance of the functions of the special mission” was added and this further emphasized the fact that they are short-term and specific, thus not requiring too much freedom of movement to travel as widely as is needed in permanent missions.<sup>165</sup> Privileges and immunities are granted to members of special missions to an extent similar to that accorded to permanent diplomatic missions.<sup>166</sup> Immunity from jurisdiction includes immunity from criminal prosecution and limited civil immunity, as stipulated in Article 31 of the Special Missions Convention and Article 31 of the Vienna Convention.<sup>167</sup> This is extended to members’ families.<sup>168</sup> Members of the administrative and technical staff also enjoy the privileges and immunities that are specified in Articles 29 to 34 of the Special Missions Convention, except that immunity from civil and administrative jurisdiction does not extend to acts performed outside of official acts.<sup>169</sup>

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<sup>163</sup> International Law Commission (1967) *Yearbook of the International Law Commission* p. 356.

<sup>164</sup> Article 25, 26 and 28. Refer to Lord Gore-Booth (ed) *Satow’s Guide* 159.

<sup>165</sup> Article 27 and International Law Commission (1967) *Yearbook of the International Law Commission*. 360.

<sup>166</sup> *Shearer International Law* 393 and International Law Commission (1967) *Yearbook of the International Law Commission*. 361

<sup>167</sup> Article 31 and International Law Commission (1967) *Yearbook of the International Law Commission* 362.

<sup>168</sup> Article 39.

<sup>169</sup> Article 36.

Members of the service staff and private staff only enjoy immunities in respect of acts performed in the course of their duties, but they also are granted exemption from dues and taxes on the emoluments they receive and exemption from social security legislation.<sup>170</sup> Nationals of the receiving State receive immunities only with regard to the official acts performed by them.<sup>171</sup> Immunities are granted to a mission in transit through a third State only if that State has been informed beforehand of the transit and no objection has been raised.<sup>172</sup> As with the Vienna Convention, members of the special mission must respect the laws and regulation of the receiving State and not interfere with its internal affairs.<sup>173</sup>

Should a member abuse his position, the receiving State reserves the right to declare such member *persona non grata* at any time. This rarely occurs, owing to the short duration and limited field of activity performed by special missions.<sup>174</sup> The sending State also has the right to waive the member's immunity, expressly to allow for prosecution.<sup>175</sup>

### **3.5.7 Termination of Mission**

A diplomatic mission can be terminated in various ways.<sup>176</sup> The most common way is by recall by the accredited State. Termination of missions may be withdrawn by mutual agreement or through an act of foreign policy, such as prelude to war.<sup>177</sup> A letter of recall is handed to the Head of State or the Minister of Foreign Affairs and the envoy in turn receives a *Lettre de Récréance* acknowledging the recall. Another method is where the

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<sup>170</sup> Article 37 ad 38.

<sup>171</sup> Article 41 and International Law Commission (1967) Yearbook of the International Law Commission 365.

<sup>172</sup> Article 43. Shearer International Law 393 and International Law Commission (1967) Yearbook of the International Law Commission 365.

<sup>173</sup> Article 48 and International Law Commission (1967) Yearbook of the International Law Commission 367.

<sup>174</sup> Article 12 and International Law Commission (1967) Yearbook of the International Law Commission 353.

<sup>175</sup> Article 41. This provision is similar to Article 32 of the Vienna Convention.

<sup>176</sup> Lord Gore-Booth *op. cit.* p. 174.

<sup>177</sup> Feltham R. G., *op. cit.* p. 9.

sending State notifies the receiving State that the mission's function has come to an end.<sup>178</sup>

Article 9 allows for recall at the request of the receiving State, and should such an event occur the receiving State is not obliged to provide reasons or any explanations for such a request.<sup>179</sup> More obvious scenario would be where the receiving State delivers passports to the mission and its staff when a war breaks out between the sending and receiving States. Furthermore, the receiving State may declare representatives *persona non grata* and thus no longer recognise them as members of the mission.<sup>180</sup> Even if a mission is withdrawn and diplomatic relations have broken off between the countries, contacts between them are rarely ever terminated completely. A prime example is when consular offices are used to ensure ongoing relations. States are interdependent and relations usually continue through some intermediary in the receiving State.<sup>181</sup> In some instances the head of the mission leaves temporarily and then returns. However, in more serious cases, the head of mission and the majority of the staff depart, leaving a few people who will remain to protect the interests of their country. These members retain their personal immunities, enabling them to still communicate with their government and continue to function normally, except they may not fly their national flag or display their national emblem on the premises.<sup>182</sup>

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<sup>178</sup> As regulated by Article 43 of the Vienna Convention.

<sup>179</sup> Shearer I. A., *Starke's International Law* 11ed (1994) Butterworths: London p. 389.

<sup>180</sup> *Ibid* p. 390.

<sup>181</sup> Feltham R. G. *op. cit*

<sup>182</sup> *Ibid*.

### 3.6 A Critique of Deterrent Measures Provided by the Vienna Convention

International law does not offer unrestrained licence to individuals with immunity. An element of granting immunity is the obligation to obey local laws.<sup>183</sup> Hill considers and explains Sir Cecil Hurst's outline of procedure to be followed in diplomatic channels.<sup>184</sup> The first step is to address the person charged with the injury by highlighting that the diplomat's behaviour would reflect perilously on his diplomatic career and on the public opinion of the citizens of the receiving and sending State. Should this approach be ineffective, the matter must be carried over to the head of mission? If this too is ineffective, the Minister of Foreign Affairs of the receiving State will communicate with the head mission.<sup>185</sup> If the head of the mission agrees to charge, the necessary arrangement of settlement or waiver will be organized. In the event that the head of mission does not take any action, the receiving State may appeal to the sending State.<sup>186</sup> Ways in which abuses of privileges and immunities can be controlled are: the declaration of persona non grata, waiver of immunity, handing the offender over for prosecution in the jurisdiction of the sending State, reciprocity, breaking off diplomatic ties and settlement of disputes.

#### 3.6.1 Persona Non Grata

The diplomatic officer must be acceptable to the receiving State if he is to have any official status at all. Article 9 of the Vienna Convention allows for the receiving State. This has, today, largely fallen into disuse. In 1976, the Libyan ambassador to Egypt was expelled after being found distributing anti-President Sadat leaflets.<sup>187</sup>

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<sup>183</sup> Article 41.

<sup>184</sup> Hill C. (1931) 25 "Sanctions Constraining Diplomatic Representatives to Abide by the Local Law" *American Journal of International Law* p. 25

<sup>185</sup> *Ibid*

<sup>186</sup> *Ibid*

<sup>187</sup> *Ibid*

Diplomats have also been required to leave following the discovery of the use of violence or implication in a threat. For instance, three Syrian diplomats were expelled by the West German Government in 1986 following the discovery that they had supplied explosives used in terrorist attacks in Berlin in 1994, Iranian diplomats were expelled from Argentina after an investigation found evidence linking them to a bombing of the Argentine-Jewish Aid Association which had killed close to a hundred people.<sup>188</sup>

Article 41 had made it clear that diplomats should not interfere in the internal affairs of the receiving State.<sup>189</sup> So in 1988, the government of Singapore asked for a recall of a US diplomat on grounds of interfering in Singapore's domestic affairs by persuading lawyers opposed to the government to stand for the forthcoming elections.<sup>190</sup>

Article 9 is not used in every case of suspected serious crime. It is used sparingly, especially in instances of persistent or serious abuse, for example, in cases where diplomats cannot be prosecuted and waiver is not granted.<sup>191</sup> There is the need to give reason for expulsion, as it is clear cut: a crime was committed and the responsible diplomat cannot be prosecuted or punished. Thus the fear of reciprocal action by the sending State will not be relevant because no other options are available to the receiving State.<sup>192</sup> Hill points out that this method is effective, in that it prevents gross violations of the laws of the receiving State and prevents repeated violations by removing the offender.<sup>193</sup> In theory, the statement is correct. However, it can be argued that in practice and from the examples above that this is clearly not the case.

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<sup>188</sup> Denza E., *op. cit* p. 65-66.

<sup>189</sup> This is related to personal comments or activities by diplomats that were not made on instruction by the sending State.

<sup>190</sup> Denza E. *op. cit* p. 67

<sup>191</sup> Barker J. C *op. cit*

<sup>192</sup> *Ibid* p. 168.

<sup>193</sup> Hill C. *op. cit* p. 25

### 3.6.2 Waiver Immunity

The waiver of immunity, empowered by Article 32, is the “act by which the sending State renounces the immunity with regard to the person concerned”.<sup>194</sup> Once waiver occurs, the local court in the receiving State will have jurisdiction to prosecute and punish the offender.<sup>195</sup> The preamble of the Vienna Convention states that the purpose of a diplomatic agent’s immunity is not to benefit the individual, but to ensure that his performance to represent his State is unhindered.<sup>196</sup>

There was a debate in both the ILC and the Conference as to who was entitled to waive immunity and whether there should be a distinction between civil and criminal jurisdiction.<sup>197</sup> A further aspect of the problem was whether the head of the mission was entitled to waive immunity of any member of his staff or if it always required formal decision by the sending state. The view that the head of mission could waive immunity was rejected by the majority of the ILC.<sup>198</sup> Furthermore, waiver by the sending State is a serious decision, for it places the diplomatic agent, as far as legal responsibility is concerned, in a situation where he is equal to that of a citizen in the receiving State.

Diplock LJ in *Empson v Smith*<sup>199</sup> interprets diplomatic actions as voidable rather than void. It has been stated by international authors and a court decision by Kerr LJ in *Fayed v Al-Tajir*<sup>200</sup> that jurisdictional immunity is not personal to the diplomatic agent but belongs to the sovereign of the sending State; hence that waiver can only be given by the sending State and not by a diplomatic agent.<sup>201</sup>

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<sup>194</sup> Prezetacznik F., op cit p. 384

<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> In criminal cases immunity could be waived by a formal decision of the sending State, while in civil cases it could be waived by the diplomatic agent himself.

<sup>198</sup> Barker J. C. op cit. p. 120.

<sup>199</sup> ( 1965) [2] All ER 887

<sup>200</sup> [1987] 2 All ER 396

<sup>201</sup> Prezetacznik, F. op cit p. 384.

In terms of paragraph 2 of the Vienna Convention, waiver must always be express and irrevocable.<sup>202</sup> In recent years there has been an increase of rigorous request for waiver. In the UK it is standard practice to press for waiver in case of drunken driving. In other countries it has also become common to persuade the local press to take up victims' grievances to pressure governments into granting waiver.<sup>203</sup> Negotiation for waiver seldom occurs because the sending State has no obligation to waive immunity.<sup>204</sup>

However instances where waiver has occurred, such as in 1977 when a second-ranking diplomat from the Republic of Georgia to the US was held responsible for the death of a sixteen-year-old American girl in a car accident.<sup>205</sup> The diplomat was driving at 80 miles an hour in 25 mile zone. A blood test was taken and it was established that the diplomat's blood alcohol was twice the legal limit.<sup>206</sup> Immunity was invoked, but President Clinton withheld \$30 million in aid to Georgia. As a result the President of Georgia waived the immunity of the diplomat and he was duly prosecuted.<sup>207</sup>

When a diplomat is found smuggling drugs and claims immunity, the receiving State in most instances will request waiver of immunity from the sending State.<sup>208</sup> For example, in 1985, London police arrested a man in possession of two kilograms of heroin that he obtained from a house in London. The police went to the house and searched the premises and found more heroin.<sup>209</sup> The occupant claimed immunity as a third secretary of the Zambian mission. When confirmation was made of the man's identity, they

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<sup>202</sup> In Civil cases it can be expressed or implied. Paragraph 2 of Article 32 explains the circumstances in which it is presumed to be implied. As a result of the distinction between waiver in criminal and civil cases it led to the change in paragraph 4 from the original draft that stated "waiver of immunity from jurisdiction in respect of legal proceedings shall not be held to imply waiver of immunity regarding execution of the judgment".

<sup>203</sup> Denza E. op cit. p. 1002.

<sup>204</sup> Maginis v. L., op cit p. 1002.

<sup>205</sup> Schmidt R. (1998) "Testing the Limits of Diplomatic Immunity", Maggi, Waltrick

"Family Settles Georgian Case; McQueen Case still Pending" from an e-mail received from the US mission in South Africa.

<sup>206</sup> Ibid.

<sup>207</sup> Wallace R. M. M op. cit p. 130

<sup>208</sup> McClanahan, G. v. p. 156.

<sup>209</sup> Ibid



stopped their search and withdrew.<sup>210</sup> The Zambian Mission protested and the Foreign Office issued an apology. The police had strong suspicions that the drugs had arrived through a diplomatic pouch, so the foreign Office approached the mission and demanded the waiver of immunity on the third secretary.<sup>211</sup> The Head of the mission, displeased, consulted with President Kaunda, who swiftly waived immunity and the third secretary was arrested and prosecuted. In a letter, Kaunda conveyed that diplomatic immunity was never intended to prevent investigation of serious crimes.<sup>212</sup>

There have been instances where the sending State would grant a conditional waiver. For example, in 1989, Van den Borre, a 25-year-old soldier assigned as a clerk in the Belgian Embassy in Washington D.C admitted to the murders of Egan, a gay airline reservation clerk, Simons, a gay cab driver.<sup>213</sup> The Belgian government waived his sentence.<sup>214</sup>

Despite the fact that the above examples show that some States do waive immunity of diplomats, family or staff, waiver is seldom granted.<sup>215</sup> The decision to waive immunity is not based on a legal decision but rather on a political basis; for instance, retaliatory measures taken against their own diplomats or even fabricated charges being brought against their personnel in the receiving State.<sup>216</sup> Waiver is a good remedy if States are willing to grant it. A possible solution is for a State to enter into agreements for automatic waiver in serious criminal offences. This would serve as a better deterrent than merely having the option to waive immunity.

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<sup>210</sup> Ibid

<sup>211</sup> Ibid

<sup>212</sup> Ibid.

<sup>213</sup> Farahmand A. M., op cit.

<sup>214</sup> Ibid

<sup>215</sup> Barker J. C (2000) op. cit p. 170.

<sup>216</sup> Ibid

### 3.6.3 Jurisdiction of the Sending State

Another deterrent is a diplomat to face the jurisdiction of his own national courts for crimes committed in the receiving state.<sup>217</sup> Courts have the competency to try a national for an offence committed abroad if the offence is punishable under the laws of his own country and the country where the offences was committed.<sup>218</sup> The purpose behind this is to ensure that diplomats who were recalled or expelled cannot avoid legal action being taken against them in their own countries, since they have no immunity at home.<sup>219</sup> It further allows victims to pursue the diplomat in the sending State, especially with regard to civil suits.<sup>220</sup> A major drawback is that while there is a threat to respect the laws of the receiving State for fear of being prosecuted at home. The sending State is not obliged to prosecute its diplomatic personnel.<sup>221</sup> Silva asserts that if the sending State does not waive immunity to allow the receiving State to prosecute, it then has a moral duty to bring the person before its courts. Despite this, it does not often happen and diplomats frequently go unpunished.<sup>222</sup> Another drawback apart from jurisdiction is that an act constituting an offence in the receiving state might not be an offence in the sending State.<sup>223</sup> Nonetheless, not being able to bring suit against diplomats in the receiving State does not mean that the problem is relieved of liability.<sup>224</sup> Denza explains that it is difficult to use this remedy in criminal cases. The diplomats cannot be extradited so he is able to be physically present to stand trial in the sending State. Furthermore, witnesses in

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<sup>217</sup> Article 31(4). This provision does more than restate a rule that has never been challenged at any time. There were several attempts though to make this provision more effective. However, some States were reluctant to provide a forum in every case where someone wished to sue or prosecute.

<sup>218</sup> Barker J. C (1996) op. cit p. 118.

<sup>219</sup> Hill C. op cit. p. 255

<sup>220</sup> Barker J. C (1996) op cit p. 112

<sup>221</sup> Maginnis v. L op cit p. 1004

<sup>222</sup> Do Nascimento e Silva G. E. op. cit. p. 444

<sup>223</sup> Barker J. C (1996) op cit p. 117.

<sup>224</sup> Farhangi L. S "Insuring Against Abuse of Diplomatic Immunity" (1985-1986) 38 *Stanford Law Review* p.1532

the receiving State could not be compelled to travel in order to testify.<sup>225</sup> In most instances, where a government is ready to allow criminal proceedings to take place it would be logistically simpler and more cost-effective to waive immunity.

This remedy is usually used in civil cases. In 1982, the adopted son, Francisco Azeredo da Silveira Jr, of the Brazilian ambassador went to a club and dance venue known as ‘The Godfather’ in the US.<sup>226</sup> He got into an argument over a packet of cigarettes. After Silveira was told to leave he pulled out handguns and started yelling that he was part of the Mafia and threatened to kill the bouncer, Skeen.<sup>227</sup> Skeen then pursued Silveira as he fled from the club. Silveira fired five times and Skeen was hit three times.<sup>228</sup> Skeen tried to claim medical costs, but failed.<sup>229</sup>

Even if this remedy is used in criminal cases, it is not effective, as shown in 1999 when a Russian diplomat used diplomatic immunity to avoid being prosecuted for drunken driving and colliding with two women.<sup>230</sup> The Russian ambassador assured the Canadian Government that the diplomat would be prosecuted in Russia and serves a sentence of five years in prison. Yet Russian law professor believed that he would only receive a suspended sentence.<sup>231</sup> Unfortunately, no information could be obtained to compare the predicted or actual outcome. With regard to traffic violations, Israeli Government in 1979 recommended that the Israeli diplomat in foreign States pay their parking violation fines or else faced being penalized in Israel.<sup>232</sup> This concept can be adapted to apply in more serious offences.

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<sup>225</sup> Denza E. op cit p. 166

<sup>226</sup> Skeen v Federative Republic of Brazil 566 Supp. 1414 (DDC 1983) and Goodman (1988-1989) 11 Houston Journal International Law 404.

<sup>227</sup> Ashman C., and Trescott P. Op. cit p. 72

<sup>228</sup> Goodman D. H., op. cit p. 404

<sup>229</sup> Ashman C., and Trescott P. op cit p. 83.

<sup>230</sup> Betrame et al “Drinking with Impunity: A Russian Diplomat’s behavior results in tragedy” (2001) <http://www.macleans.ca/topstories/world/article.jsp?content=46435> [Accessed on 28 December 2014].

<sup>231</sup> Ibid

<sup>232</sup> Benedek M. L. op. cit p. 392.

### 3.6.4 Reciprocity

Reciprocity stands as a keystone in the construction of diplomatic privilege.<sup>233</sup> It is the largest contributor to the binding force of international law. Through reciprocity there is a more profitable cooperation and friendly relations usually occur.<sup>234</sup> Furthermore, it forms a constant and effective sanctions for the adherence to the Vienna Convention.

Every State is both the receiving and sending State. This basic concept arising out of reciprocity is that in the event that there is failure to accord privileges and immunities to diplomatic missions or its members it would likely to be met by a countermeasure of the other State.<sup>235</sup>

Reciprocity has been stated by Southwick to be the “truest sanction” provided by diplomatic law.<sup>236</sup> This was shown in *Salm v Frazier*<sup>237</sup> where the court stated that reciprocity guarantees the respect and independence of representatives. States usually adhere to the law of immunities primarily because of the fear of retaliation. All diplomatic privileges and immunities are extended to the representatives of the sending State are on the understanding that such privileges and immunities will be reciprocally accorded to the representatives of the receiving State.<sup>238</sup>

In 1957, Australia submitted comments on the Draft Articles on the Convention by the ILC and objected to the general requirement that the receiving State should treat all members of diplomatic missions equally. It remarked that reciprocity was essential in order to deal with countries that imposed restriction on missions in their territory.<sup>239</sup>

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<sup>233</sup> Keaton J. J op cit. p. 575

<sup>234</sup> Levi Contemporary International Law A Concise Introduction 2ed (1991) 20

<sup>235</sup> Denza E., op cit p. 1

<sup>236</sup> Southwick J. T o. cit p. 89.

<sup>237</sup> *Salm v Frazier* Court of Appeal Rouen 1933, translated in 28 A.J.I.L (1943) 382.

<sup>238</sup> Keaton J. J. op cit p. 575.

<sup>239</sup> Leyser J. (1965) “Diplomatic and Consular Immunities and Privileges” D P O’Connell (ed) *International Law in Australia* The Law Book Company Limited: Sydney p. 448.

Through reciprocity, a state can attempt to punish diplomats in the sending State. As a result of this, reciprocity has merged into a social process, the process of globalization and the development of technology making interaction between State inevitable.<sup>240</sup> The disadvantage of reciprocity is that series of aggressive or subtly reciprocity actions can eventually result in the official degeneration of relations between nations.<sup>241</sup> It is in a State's interest to respect diplomatic immunity in order to ensure the safety and respect of its diplomats

However, this concept can be abused, as was shown in May 1987. Chaplin, the second ranking diplomat in Iran was beaten and arrested by Iranian Revolutionary Guards on unspecified charges. This incident was followed by the arrest of Gassemi, an Iranian consulate in Manchester, for charges of shoplifting, reckless driving and assaulting an officer.<sup>242</sup> When used negatively, as it was in this instance, reciprocity has the effect of tit-for-tat.

### **3.6.5 Breaking Diplomatic Ties**

Previously, the rupture of diplomatic relations between countries was considered a serious measure. In most cases, this rupture would lead to war. In 1973, Great Britain broke off diplomatic ties with France as a result of the execution of Louis XVI and ordered the French ambassador to leave the country. A few days later, France declared war.<sup>243</sup>

In some instances it is a measure used as the only remaining option to stop serious abuses. Gaddafi's regime in Libya came into power after a military coup in 1969. He

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<sup>240</sup> Barker J. C (2000) op cit p. 31

<sup>241</sup> Southwick J. T op cit. p. 89.

<sup>242</sup> The British government insisted that Gassemi had partial immunity limited to his official acts. The refusal of the Iranian government explanation and apologies for Chaplin's ordeal led to the expulsion of five Iranian officials, including Gassemi.

<sup>243</sup> Lawrence T. J. op cit. p. 301-302

renamed the embassy People's Bureau and has continually abused and exploited diplomatic immunities, hiding terrorist weapons in their missions and communicating plots of terrorists' murders against opponents of the regime through diplomatic bags and coded messages. The US went as far as closing down the Libyan People's Bureau in the hope of curbing these abuses.<sup>244</sup> Even in the Libya shooting in London where Constable Fletcher was killed, Britain broke diplomatic tie as a last resort, because no other remedy had worked.<sup>245</sup>

Using this remedy might ensure that diplomats from that specific country never commit a crime in the receiving State again, but once again, the perpetrator goes unpunished. Yet it is interesting to note that although countries have severed diplomatic ties, it does not mean that two countries do not negotiate or converse at all.<sup>246</sup> A group of diplomats of the State will work under the flag of another State. This is known as "interest" section and is regulated by Article 45 and 46 of the Vienna Convention. For instance, when the 1991 Gulf War broke out. Iraq and UK had severed ties; however, an interest section of Iraq was attached to the Embassy of Jordan in the UK. The Embassy of Jordan is known as the protecting power which allows Iraq to conduct diplomatic relations in their embassy.<sup>247</sup> Interest sections can also be established as a step towards reconciliation between disengaged States. An example was in 1955 when the Soviet Union and the South African government severed relations. However, as a result of their common and strong interest in the economic sphere of gold and diamond marketing, and the domestic changes in South Africa by the 1980s, interest sections were opened under the protection of the Austrian Embassies in Moscow and Pretoria.<sup>248</sup>

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<sup>244</sup> McClanahan G. v op. cit p. 146.

<sup>245</sup> Denza E. op. cit p. 65.

<sup>246</sup> Berridge G. (2005) *Diplomacy: Theory and Practice* 3ed (2005) Macmillan: New York p. 138.

<sup>247</sup> Ibid

<sup>248</sup> Ibid

### 3.6.6 Settlement of Disputes

The Vienna Convention provides the optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes.<sup>249</sup> The Optional Protocol provides for settlement of disputes arising out of the interpretation of the Vienna Convention. Any disputes arising between States concerning diplomatic functions are to be heard in the ICJ.<sup>250</sup> The disputes heard are over the interpretation of the Vienna Convention that cannot be resolved by arbitration or by judicial settlement.<sup>251</sup> An example of when the Optional Protocol was used was in the Tehran hostage case. What distinguished this event from other disputes was the failure of Iran to use any remedies provided for in the Vienna Convention.<sup>252</sup> The disadvantage is that it does not provide a settlement alternative for individuals who are injured as a result of diplomatic misconduct.<sup>253</sup> Furthermore, not many states make use of this optional Protocol, which makes this form of remedy ineffective.

In the opinion of this researcher, every state with representative abroad needs protection for its diplomats, the embassy, documents and bags. Any criminal act committed by the diplomat that is unlawful has no effect on the functioning of the mission and thus the offender should be punished accordingly.

There is no justification for refraining from prosecuting a diplomat who rapes, kills, smuggles illegal items or commits any other serious crime. Further, there is even less convincing rationale for families and staff of diplomats to be treated with same immunity. Since deterrent measures provided by the Vienna Convention do not seem to be effective, and are also outdated. The society is dynamic and therefore review of old rules

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<sup>249</sup> Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes Apr. 18, 1961, 23 U. T. S 3374, 500 U.N.T.S 241 [hereinafter refer to as the Optional Protocol].

<sup>250</sup> *Maginnis v. L* op. cit p. 1005.

<sup>251</sup> Most matter are resolved by the Ministry of Foreign Affairs

<sup>252</sup> Denza E., op. cit

<sup>253</sup> *Maginnis v. L*. op cit p. 1005

and laws is inevitable in order to have a progressive society with clear direction and control.

**In conclusion**, there are powerful reasons for diplomatic immunity, but these reasons should be balanced against the need to prevent crime and the need to protect the rights of victims. Justice must be seen to be served by all concerned. diplomatic immunity must not become diplomatic impunity. Immunity carries with it an obligation: the duty to respect the laws and regulations of the receiving state. If this regard is a requirement, then surely the prosecution of the offending diplomat in the receiving state should be a reasonable and necessary means of ensuring such respect.



## CHAPTER FOUR

### ANALYSIS ON ABUSES OF DIPLOMATIC IMMUNITY

#### 4.1 Introduction

The concept of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions.<sup>1</sup> It is considered to be the exception to the general rule of territorial jurisdiction.<sup>2</sup> “Immunities” can be defined as the exemption from local jurisdiction.<sup>3</sup> Bartos, mentions that immunities have a legal basis.<sup>4</sup>

The primary abuses of diplomatic immunity can be divided roughly into three categories: the commission of violent crimes by diplomats or their family; the illegal use of the diplomatic bag; and the promotion of state terrorism by foreign governments through the involvement of their embassies in the receiving State.<sup>5</sup> Many nations have been affected by diplomats abusing their immunity, but the US is seeing the larger share, since the embassies are situated in Washington DC and the UN officials reside in New York City.<sup>6</sup> Barker suggests that abuse occurs where the diplomat is subject to substantive law, but when he breaks it; the receiving State has no jurisdiction over him. The fact that the receiving State is not entitled to enforce its jurisdiction against a person because of his immunity is due to the existence of two distinct but related concepts: inviolability and immunity from jurisdiction.<sup>7</sup> Inviolability is the foundation of diplomatic immunities.<sup>8</sup>

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<sup>1</sup> Keaton J. J. (1989-1990) Vol. 17 “Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?” *Hastings Constitutional Law Quarterly* p. 567.

<sup>2</sup> Higgins R. (1985) *op. cit* p. 641.

<sup>3</sup> *Ibid* p. 351-352.

<sup>4</sup> Barker, J. C., *op. cit* p. 67.

<sup>5</sup> Farahmand A. M., *op. cit* p. p. 97.

<sup>6</sup> *Ibid*

<sup>7</sup> Barker J. C., *op. cit.* p. 71.

<sup>8</sup> Fauchille and the ICJ have stated this concept.

Inviolability of the person is one of the first principles of diplomatic law that has remained prominent. The inviolability of premises was confirmed soon after the establishment of permanent missions.<sup>9</sup> It is reinforced by the immunities from jurisdiction of the receiving State given by virtue of diplomatic law. It has been said that inviolability demands, as a prerequisite, immunity from jurisdiction.<sup>10</sup>

## **4.2 Limitation to Diplomatic Agent's Privileges and Immunities**

### **4.2.1 Personal Inviolability**

Diplomats are accorded the highest degree of Immunities. Prior to the Vienna Convention, the diplomats received the greatest immunity. They could not be arrested they were actually engaged in plotting against the State they were accredited to, and even in extreme circumstances an application for their recall was implemented.<sup>11</sup> In 1917 the Swedish ambassador to England was a prime suspect in a conspiracy to overthrow Georgia.<sup>12</sup> The British government obtained evidence by intercepting some letters. The ambassador was expelled from Britain.<sup>13</sup>

The Vienna Convention, as mentioned in Chapter 2, adopted the functional necessity theory to justify the diplomat's immunities.<sup>14</sup> These immunities are given to diplomats on the basis of reciprocity. Any government which fails to provide these to a diplomat within its territory knows that it could suffer not only collective protest from the diplomatic corps in its own capital, but also retaliation against its own representative in a foreign State.<sup>15</sup>

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<sup>9</sup> Barker J. C., op. cit. p. 67.

<sup>10</sup> Barker J. C., pp. 76-77

<sup>11</sup> Lawrence T. J., op. cit p. 310-311.

<sup>12</sup> Ibid .

<sup>13</sup> Ibid.

<sup>14</sup> Ibid

<sup>15</sup> Lord Gore-Booth, op. cit. p 107.

Under Article 29, diplomats are accorded full immunity and, like the inviolability of a mission, this has two aspects. Firstly, there is immunity from action by law enforcement of the receiving State, and secondly there is the special duty of protection by the receiving State to take appropriate steps against attack.<sup>16</sup> Ogdon adds a third aspect, stating that the State has a duty to punish individuals who have committed offences against diplomats, which most foreign States make provision for in domestic law.<sup>17</sup>

In the past 5 years diplomats have been in more physical danger than ever before. These attacks have shown the dark side of their “special, official, immunity status”.<sup>18</sup> McClanahan succinctly points out that it is ironic that people involved in diplomatic work are often criticized in the media for being ineffective and only attending cocktail parties, formal functions and ceremonies. Yet unfortunately, diplomats, their homes and family are targets of violent groups and oppositions.<sup>19</sup>

A spate of kidnappings of senior diplomats occurred in the late 1960s and 1970s. The object of a kidnapping is always to extract a particular demand from a government. The threat of the execution of a diplomat and the failure to fulfill the demand leads to the refusing government being held responsible for his death.<sup>20</sup> As a consequence of the high incidence of political acts of violence directed against diplomats and other officials,<sup>21</sup> the General Assembly of the UN adopted a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents.<sup>22</sup> The

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<sup>16</sup> Ibid p. 121

<sup>17</sup> Ogdon, M., op cit p. 117

<sup>18</sup> McClanahan G. V., op. cit p. 148.

<sup>19</sup> Ibid p. 149.

<sup>20</sup> Lord Gore-Booth op cit. p. 199

<sup>21</sup> Article I of the Conventions includes in the list of protected heads of states and their families, diplomats and their families and agents on international organizations of an intergovernmental character.

<sup>22</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents Dec 14, 1973, 28 U.S.T 1975, 13 I.L.M 43, UN Doc. A/Res/3166(XVIII) [hereinafter referred to as Prevention and Punishment Convention]. Some states like the UK, do not have special offences in regard to diplomats and so although violent attacks are punishable in the ordinary course of criminal law, the courts will take into account that the attack was against a diplomat. See O’Keefe “privileges and immunities of the Diplomatic Family” (1976) 25 International and Comparative

foreseen offences are primarily murder, kidnapping, attacks upon the person, violent attacks upon Official and private premises, and any threats or attempt to commit any of the above Offences.<sup>23</sup> Nations ratifying the Prevention and Punishment Convention make these crimes Punishable with appropriate penalties, which take into account the gravity of the offence, and either extradite offenders or apply the domestic law.<sup>24</sup> The draft text was prepared with the utmost urgency through a Working Group without the appointment of a special Rapporteur.

Where there is a threat to the safety of a diplomat, such as mob attack or kidnapping, the Receiving State should provide special protection, like an armed guard or bodyguards.<sup>25</sup>

In Guatemala City on 28 August 1968 an American ambassador, John Gordon Mein, was returning to his office after lunch when his official car was blocked in a down-street.<sup>26</sup>

Seeing a number of men in uniform climb out of the vehicle coming towards him, Mein jumped out of his car and began running. The men shot the ambassador and he died instantly. This incident shocked the world.<sup>27</sup> Another incident involving the same members of the organization that tried to kidnap Mein was the Federal German ambassador was forced from his car and held captive.<sup>28</sup> The kidnappers demanded the release of 17 political prisoners in exchange for the return of the German ambassador. While negotiations were in progress between the Guatemalan and German governments, the demand was raised to 25 prisoners and \$700,000, which the Germans offered to pay.

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Law Quarterly 344. A lists of diplomats who have been killed since 1947 can b found in Wilson Diplomatic Privileges and Immunities (1967) 52-53.

<sup>23</sup> Article 2.

<sup>24</sup> Brownlie I., op cit. p. 367-368.

<sup>25</sup> Lord Gore-Booth op. cit. p. 122,

<sup>26</sup> Ibid p. 199-200

<sup>27</sup> Ibid

<sup>28</sup> Lord Gore-Booth op cit p. 199-200

The Guatemalan government refused to set Convicted prisoners free and the body of the ambassador was found with a bullet in his head.<sup>29</sup>

Where a government is aware of a possible kidnapping, or diplomats situated in countries such as in South America or in Middle East<sup>30</sup> where diplomats are vulnerable to terrorist attacks, extra measures should be taken in the tightening of their security and the protection of these diplomats.<sup>31</sup> Although the Vienna Convention does place a duty on the receiving State to protect diplomats, the receiving state would reasonably expect that mission's and diplomats would take measures to protect themselves.<sup>32</sup> In addition, Barker point out that in times of peace and when relations between the receiving and sending State are normal and undisturbed, diplomats are entitled to minimum protection; in event of war or internal tension involving the two states, the receiving States is under a duty to reinforce the means of protection to missions or diplomats who have become Vulnerable.<sup>33</sup>

#### **4.2.2 Immunity from Jurisdiction**

Jurisdictional immunity entails that persons with immunity cannot be brought before the courts for any illegal acts or offences committed while in the receiving State during the period of their functions.<sup>34</sup> The distinction is well summarized in *Dickinson v Del Solar*<sup>35</sup> where it was emphasized that diplomatic immunity does not signify immunity from legal, but liability, but rather imports exemption from local court jurisdiction. This

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<sup>29</sup> Ibid.

<sup>30</sup> Several attacks that occurred appeared to be a coordinated campaign to Kidnap or Kill envoys from Muslim nations. In November 2003 two Japanese diplomats and an Iraqi driver were murdered in Iraq near Tikrit while on the way to attend a conference.

<sup>31</sup> Lord Gore-Booth op. cit p. 202.

<sup>32</sup> Ibid

<sup>33</sup> Barker J. C., p. 74

<sup>34</sup> Ibid p.77.

<sup>35</sup> (1930) 1 KB 376.

extends to all jurisdictions whether civil, administrative or criminal.<sup>36</sup> Thus, a diplomatic agent who commits an illegal act in the receiving State cannot be prosecuted in the local courts as the courts would be incompetent to pass upon the merits of action brought against such a person”.<sup>37</sup>

The rationale behind jurisdiction is to prosecute and punish those who commit illegal acts or offences.<sup>38</sup> Immunity from criminal jurisdiction of a diplomatic agent, provided in article 31, means that the diplomat cannot be brought before the criminal courts of the receiving State for illegal acts or offences committed in that State during his stay, which is contrary to the rule of law and justice.<sup>39</sup>

The scope of offences which may be considered is very broad. The largest category of offences involving diplomats has been, inter alia, drunk and negligent driving, parking offences and drugs possession, although, incidents have also been reported of rape, assault and robbery.

The incident of the ambassador of Papua New Guinea has been a widely discussed event with regards to diplomats’ drunk and negligent driving. Ambassador Kiatro Abisinito was driving his car whilst intoxicated and into the rear of a parked car in which two people were sitting. The ambassador was traveling at such a speed that his car hit two empty cars on the opposite of the street, jumped a sidewalk, hit another car waiting at an intersection and bounced back across the street where it smashed into a small brick wall.<sup>40</sup> The police charged the ambassador with failing to pay attention to driving, which could lead to fines of up to \$ 100 000. The police and the State Department agreed that owing to his status, he could not be prosecuted. What makes this incidence important is

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<sup>36</sup> Ibid

<sup>37</sup> Przetacznik, F. op. cit. p. 351.

<sup>38</sup> Przetacznik op. cit p. 358.

<sup>39</sup> Ibid

<sup>40</sup> Larschan B. (1987-1988) 26 “The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?” *Columbia Journal of Transnational Law* p. 284-285.

that the office of Foreign Missions revoked the ambassador's driving permit the next day. The State Department also asked the US State Attorney to prepare a criminal case against the ambassador or in the event that one of the people hit by Abisinito were to die.<sup>41</sup> While the ambassador could not be prosecuted at the time, a criminal charge against him would bar his later re-entry into the U.S. This served as a warning to diplomats to obey the law.<sup>42</sup>

Another incidence that sparked debate was in 1976, where a cultural attaché to the Panamanian Embassy ran a red light in Washington DC and collided with the car of American physicians Brown and Rosenbaum. The incident rendered Brown a quadriplegic, while Rosenbaum<sup>43</sup> escaped unharmed. Diplomatic immunity prevented any charges or suit being laid against the Panamanian.<sup>44</sup> Brown's medical bills were extensive and she quickly exhausted her insurance coverage. Despite pleas to the Panamanian embassy for support, the offending ambassador refused to offer any help to Brown.<sup>45</sup> Brown's life could never be the same. It would have been justifiable for the attaché to be held legally responsible for her medical bills and charged with negligent Driving.

In the above instances, the diplomats were immune from jurisdiction and the victims could not prosecute, or were not able to claim for compensation. Government should consider whether diplomatic relations should be prioritized over the protection of its citizens which gave the government its power.

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<sup>41</sup> McClanahan G. V., op. cit. p. 132-133.

<sup>42</sup> Southwick J. T., (1988-1989) 15 "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms" *Syracuse Journal of International Law & Commerce* 83 p. 90

<sup>43</sup> Ibid

<sup>44</sup> Ashman C. and Trescott (1987) P. *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes!* Acropolis Books Ltd: Washington D.C. pp. 308-309.

<sup>45</sup> Ibid

Article 31 lays down no procedure as to when, how immunity should be pleaded or established. These issues are usually left to the law of each state.<sup>46</sup> When a court determines the issue of immunity, it must do so on the facts at the date when the issue comes before it and not on the facts at the time when the conduct or events gave rise to a charge or when proceedings were begun<sup>47</sup>. There was a suggestion by the Venezuelan delegation at the Vienna convention to place an obligation on the sending State to prosecute a diplomat accused of an offence that is punishable by both States. This suggestion seems appropriate and reasonable, but it was criticized as being too extreme.<sup>48</sup> Even though the same act may be recognized as an offence under both jurisdiction, the potentials exists that the consequences and the sanction for such an act may be vastly different. Immunity should be granted on the functions of the diplomat, his rationale *materiae*, and not his *rationae personae*.<sup>49</sup> The distinction is that the former deals with permanent substantive immunity from local law, while the latter deals with exemption from judicial process in the receiving State,<sup>50</sup> meaning that *rationae personae* expires at the end of an assignment while *rationae materiae* continues.<sup>51</sup>

Although this seems the ideal interpretation of ‘immunities’ in this context it did not stop a high ranking Afghan diplomat who was on his way to buy an air-conditioner at an appliance store from driving into a woman over a dispute over a parking space.<sup>52</sup> He was not prosecuted.<sup>53</sup> The question to be asked is what is the justification for not punishing

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<sup>46</sup> Denza E. op. cit p. 253

<sup>47</sup> Ibid p. 256

<sup>48</sup> Kerley E. L. op cit p. 124

<sup>49</sup> Distein Y. op cit. p. 78.

<sup>50</sup> Ibid p. 80

<sup>51</sup> Ibid p. 81

<sup>52</sup> Goodman D. H., (1988-1989) 11 “Reciprocity as a Means of Curtailing Diplomatic Immunity Abuse in the United States: The United States Needs to Play Hardball” *Houston Journal of International Law* p. 404.

<sup>53</sup> Ibid



him, for hurting<sup>54</sup> someone over a parking space and protect his ability to fulfill his functions? Diplomats have been caught saying “*The safety of the citizens isn’t as important as the Meeting I’m going to*”<sup>55</sup> “*if I choose to leave my car in the middle ...it would be none of your damned business*” It is not too extreme to prosecute a diplomat who does not respect local laws, the citizens of the receiving State and even their own employees?<sup>56</sup>

A further issue that arises is whether a diplomat may claim immunity in the third state for alleged criminal offences. During the 16<sup>th</sup> and 17<sup>th</sup> centuries it was custom for diplomats who wished to cross foreign territory to get to their post to seek assurance of safe-conduct from the ruler of the foreign country. During the 19<sup>th</sup> and early 20<sup>th</sup> centuries, controls on travel became general and restrictive measures were implemented, i.e. diplomats had to obtain a prior visa if necessary.<sup>57</sup> Article 40 adopts a strictly functional approach to the question of privileges and immunities to be given to diplomats passing through a third state. The third state is obliged to accord the diplomat inviolability to ensure transit or return only if the government of the diplomat is recognized by the third state.<sup>58</sup> This is also extended to his family members who are accompanying him or travelling separately to join him.<sup>59</sup> Proceedings may be brought against them, provided that it does not involve arrest.<sup>60</sup>

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<sup>54</sup> Ashman C and Trescott P. op cit p. 323

<sup>55</sup> Ibid p. 325

<sup>56</sup> See Ahmed v Hoque 2002 WL 1948006 (S.D.N.Y Aug. 23, 2002).

<sup>57</sup> Lord Gore-Booth op. cit. p. 151-152.

<sup>58</sup> In R v Guildhall Magistrates Court, ex parte Jarret Thorpe Times Law Report 6 October 1977 the husband of a counselor at the Embassy of Sierra Leone in Rome was arrested, for an outstanding charge of false accounting, in Heathrow Airport about to board an aircraft heading for Rome. He carried a diplomatic passport with the necessary visa and had arrived in London without his wife to conduct personal business.

<sup>59</sup> Ibid

<sup>60</sup> Lord Gore-Booth op. cit. p. 152-154

This is illustrated in *R v Governor of Pentonville Prison, ex parte Teja*.<sup>61</sup> Teja was arrested on leaving Heathrow Airport bound for Geneva following a warrant, charging him with number of offences, issued by the Republic of India. The court accepted that he was on a mission from the Costa Rica government and held a diplomatic passport.<sup>62</sup>

The Ambassador of Costa Rica wrote to the Secretary of State for Foreign and Commonwealth Affairs requesting Teja to be released under Article 40. The court rejected the argument that he was proceeding to Geneva to take up his post there, as there was no embassy for Costa Rica in Switzerland, thus he had no immunity and was subsequently prosecuted.<sup>63</sup>

#### **4.2.3 Inviolability of a Diplomat's Residence and Property**

There was no distinction between the residence of the ambassador and the premises of the mission. However, as a result of the growing numbers of diplomatic and official staff, it is often necessary to separate these premises.

Many States enacted legislation conferring inviolability on the residence of the diplomat and later expresses provision was made for inviolability in the Havana Convention.<sup>64</sup> The nature of the property was made clear by the ILC, which stated that it denoted a residence distinct from the mission, which could include a hotel room, an apartment or house, whether owned or leased.<sup>65</sup> A second residence such as a holiday home or a hotel room away from the capital would also have inviolability of the principal residence.<sup>66</sup> The papers and correspondence of a diplomat under customary law were not accorded inviolability.

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<sup>61</sup> *R v Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274 (CA). See further Brown (1988)

<sup>62</sup> *Supra*

<sup>63</sup> *Supra*

<sup>64</sup> Denza *op. cit.* p. 221

<sup>65</sup> *Ibid* p. 221 -222

<sup>66</sup> *Ibid*

However, the Vienna Convention goes beyond customary practice and confers Inviolability on all papers and correspondence that may be private in character.<sup>67</sup> The inviolability of a diplomat's property does not mean that he is exempt from the law and regulations of the receiving State.<sup>68</sup> The diplomat's property includes movable and immovable property, ranging from houses and furniture to motor vehicles and lawn mowers.

A scenario like this in *Agbor v Metropolitan Police Commissioner*<sup>69</sup> where a Nigerian diplomat moved out of his flat for "redecorating". When the diplomat moved out, a Biafran family moved in. The Nigerian High Commissioner claimed that the residence still maintained its inviolability and requested police assistance to evict the family. However, the court found out that the diplomat had moved out permanently and it had thus lost its inviolability.<sup>70</sup>

Article 36 provides that the personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds of suspicion that it contains articles that are not for official use of the mission or for personal use of the diplomat or his family.<sup>71</sup>

Possessing a diplomatic passport means that personal luggage is seldom subjected to inspection.<sup>72</sup> Possessing a diplomatic passport does not necessarily mean immunity from criminal jurisdiction. For instance, *US v Noriega and Others*<sup>73</sup>

General Noriega was charged with narcotic offences. The court held that a diplomatic passport might secure certain courtesies in international travel, but was without

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<sup>67</sup> Ibid p. 224

<sup>68</sup> This goes back to Article 41, where diplomats must respect the laws and not interfere in the internal politics of the receiving State.

<sup>69</sup> *Agbor v Metropolitan Police Commissioner* [1969] 2 All ER 707

<sup>70</sup> Supra

<sup>71</sup> *McClanahan, G. V.*, op cit p. 157

<sup>72</sup> *Denza E.*, o. cit p. 171.

<sup>73</sup> *US v Noriega and Others* US District Court, Southern District of Florida, 8 June 1990, 99 ILR 143 and *Denza Diplomatic Law* 255

significance in law.<sup>74</sup> Most drug traffickers who are caught receive severe penalties, but for diplomats, the worst that can happen is a loss of and possible expulsion from the country's diplomatic service; therefore, most diplomats seem ready to take the risk because of the potential rewards.<sup>75</sup>

In the event that there are grounds of suspicion, the bags may be inspected in the presence of the diplomat agent or his or her authorized representative. Some airports routinely allow the luggage to be sniffed by dogs to check for drug. If the dogs sense drugs, the diplomat is normally requested to open the suspicious bag.<sup>76</sup> If the diplomat does not allow his baggage to be inspected or tested by agent of the aircraft carrier, the carrier is under no obligation to carry him.<sup>77</sup> Interestingly, in September 1986, the Italian Foreign Ministry announced that as an anti-terrorism measure, all diplomats' Baggage and pouches in Italy would be scanned by metal detectors and possibly by X-ray machines. However, Britain and the US have resisted this practice, except on specific occasions.<sup>78</sup>

### **4.3 Limitation to Inviolability of Missions**

The inviolability of mission premises was generally established in customary law by the 18<sup>th</sup> century. It is now considered one of the most important immunities.<sup>79</sup> One of the first examples illustrating the inviolability of a mission from judicial process and executive action is the Sun Yat-Sen incident of 1896. Sun Yat-Sen was a Chinese national and a political refugee who was detained as a prisoner in the Chinese Legation in London. Once his friends became aware of this, they applied to court for the issue of

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<sup>74</sup> Denza E. op. Cit.

<sup>75</sup> Farahmand A. M op. cit p. 99.

<sup>76</sup> Ibid.

<sup>77</sup> Article 39

<sup>78</sup> McClanahan G. V. p. 63.

<sup>79</sup> Berridge G. op cit. p. 116.

a writ of *habeas corpus*.<sup>80</sup> The court refused to issue the writ, doubting the decorum of the action, and considered the matter to be for diplomatic proceedings. From this the British government formally requested the Chinese Minister to release him, which was done the following day.<sup>81</sup>

Before the Vienna Convention, it was remarked that ambassadors were deemed to be outside the territory of the receiving State, with the use of the *extritoriality* theory.<sup>82</sup> Today, Article 22 declares that the premises of the mission are inviolable and that agents of the receiving State, including police, process servers, building safety and health inspectors, and fire brigades, may not enter such premises without the consent of the head of the mission.<sup>83</sup> Even when the British authorities wished to construct a new underground railway line running underneath the premises of several embassies, the express consent of each embassy was sought.<sup>84</sup>

During the formulation of Article 22, there was a concern about the position of the mission if an emergency endangering human life or public safety occurred on the mission premises.<sup>85</sup> The original draft of paragraph 1 gave authorities and agents of the receiving State power of entry in an extreme emergency once the permission was obtained by the receiving State's foreign ministry. The difficulty arose in finding examples of past State practice supporting this position.<sup>86</sup> Thus the ILC concluded that such an addition was inappropriate and unnecessary. At the Conference there was some debate over the issue of allowing entry in case of a fire, epidemic or other extreme

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<sup>80</sup> Lord Gore-Booth *op. cit.* p. 350.

<sup>81</sup> *Ibid*

<sup>82</sup> Denza E. *op. cit.* p. 113.

<sup>83</sup> Article 22.

<sup>84</sup> Lord Gore-Booth *op. cit.* p. 50.

<sup>85</sup> Denza E. *op. cit.* pp. 120-121.

<sup>86</sup> *Ibid*

emergency.<sup>87</sup> This was objected to on the basis that the receiving State might abuse this power and enter into the mission in what it considered an “extreme emergency”. The Conference clearly decided that the inviolability of the mission should be unqualified.<sup>88</sup> In other words, any crimes committed on the mission’s premises are regarded in law as taking place in the territory of the receiving State, but no right of entry is given to the receiving State, even where it suspects or has proof that the inviolability of the mission is being abused.<sup>89</sup> However, Denza remarks that entry without consent as a last resort may be justified in international law by the need to protect human life.<sup>90</sup> If this is the case, then why not allow entry in times of emergencies?

An incident that sparked international outrage concerning the abuse of diplomatic missions was the Libyan shooting in St James’s Square. A group of Libyan protestors opposed to Libyan leader Gaddafi had assembled before the People’s Bureau in London to protest the leader’s treatment of students in Libya.<sup>91</sup> The group was peaceful, when without warning machine gunfire came from the People’s Bureau into the crowd. The gunfire killed a policewoman, Constable Yvonne Fletcher, and injured ten people in the crowd.<sup>92</sup> The police immediately surrounded the embassy to prevent anyone entering or exiting the building. The Home Secretary demanded that Libya allow the police to enter the building to seek suspects and gather evidence. However, the Embassy refused entry.<sup>93</sup> In response to the British action, the Libyan government retaliated by ordering the police to besiege the British embassy in Tripoli.<sup>94</sup> With both countries holding each other’s embassies and their official’s hostage, a stalemate occurred. Britain looked for

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<sup>87</sup> Ibid

<sup>88</sup> Ibid

<sup>89</sup> Brownlie I. op. cit. p. 356.

<sup>90</sup> Denza E. op. cit. p. 126.

<sup>91</sup> Wright S. L., (1987) 5 “*Diplomatic Immunity*: p. 179.

<sup>92</sup> Ibid p. 180.

<sup>93</sup> Ibid

<sup>94</sup> Higgins R. (1985) op. cit. p. 643.

legally acceptable alternatives to resolve the dispute. The British officials decided that in order to capture the gunmen, they had to close the People's Bureau and evaluate each official's immunity under the Vienna Convention.<sup>95</sup> Those not accorded immunity were held back for questioning and possible prosecution. Surprisingly enough, no prosecutions occurred.<sup>96</sup> Despite constant denied requests to enter the embassy, the Libyan government offered to send an investigatory team to London whose work would be followed by prosecutions of any suspects in Libyan courts. Britain declined this offer.<sup>97</sup> Britain guaranteed all occupants safe passage out of Britain and promised not to inspect their bags.<sup>98</sup> The British delegation in Libya were released and returned to Britain. After the occupants of the People's Bureau had left, the police searched the embassy and discovered weapons and spent cartridges of a submachine gun.<sup>99</sup> The person responsible for the death of Constable Fletcher was never punished. The question that arises from the above situation is why the police were not able to enter the embassy. The Vienna Convention confers such immunities and privileges to *bona fide* diplomats and embassies and not to terrorists camouflaged as diplomats.<sup>100</sup> Furthermore, there have been debates that the embassy was in fact not qualified as a *bona fide* embassy since the change of government was not accepted by the UK. If this was the case then the Libyan People's Bureau was not inviolable.<sup>101</sup> Another argument that would justify entry into the embassy is self-defence. Had the firing continued, counter-firing would have been possible. Self-defence was not used as a justifiable reason for entry, but the search done

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<sup>95</sup> Wright S. L., op. cit. p. 643.

<sup>96</sup> Ibid p. 180-181.

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Wright S. L. op. cit p. 643-644.

<sup>100</sup> Goldberg, A. J (1984-1985) "The Shoot-Out at the Libyan Self-Styles People's Bureau: A Case of State-Supported International Terrorism" 30 South Dakota Law Review 2.

<sup>101</sup> Ibid p. 3.

while Libyans exited the Bureau was justified.<sup>102</sup> There have been several theories and suggestions that if the Bureau was a *bona fide* mission, then its status as such was lost by breach of the obligations under Article 41(1) to respect the laws of the receiving State. The purpose of the Vienna Convention is to promote international relations, and not to cause the interruption of negotiations or communication or even worse, promote abuse of diplomatic immunity.<sup>103</sup>

There are several examples where States have entered into a mission despite its inviolability. The Pakistan government told the ambassador of Iraq that it had evidence that arms were being imported into the country through diplomatic cover and stored in the Embassy of Iraq.<sup>104</sup> The Pakistan government requested permission to search the premises, but this was denied by the Iraqi ambassador. However, the government authorized the police to enter and search the premises in the Iraqi ambassador's presence<sup>105</sup> quantities of arms were discovered stored in crates. Although the Iraqi government protested, the Pakistan government declared the ambassador *persona non grata* and recalled their own ambassador.<sup>106</sup>

On the other hand, entry into the embassy without jurisdiction cannot and should not be tolerated. There is a danger of entering the mission premises without consent of the ambassador. An example occurred in 1985 when the South African police entered the mission of the Netherlands and rearrested a Dutch anthropologist, Klaas de Jong, on the grounds of assisting the ANC and escaping from detention.<sup>107</sup> The Dutch protested and a threat to recall the South African ambassador led to the prisoner's release and apologies

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<sup>102</sup> Cameron, I., (1985) 34 "First Report of the Foreign Affairs Committee of the House of Commons" *International & Comparative Law Quarterly* p. 612.

<sup>103</sup> Wright S.L op cit. p. 179-182

<sup>104</sup> Lord Gore-Booth op cit. p. 110.

<sup>105</sup> Ibid

<sup>106</sup> Ibid.

<sup>107</sup> Ibid



for the violation.<sup>108</sup> This incident re-enforced Article 22 and ensured that the mission was protected from intrusion of the receiving State.

In addition, Article 22 places a special duty on the receiving State to take appropriate steps to protect the premises from attack, intrusion and damage or impairment of dignity.<sup>109</sup> The impairment of the dignity of the mission was considered in the Australian case *Minister for Foreign Affairs and Trade and Others v Magno and Another*.<sup>110</sup> Magno and other representatives of the East Timorese community placed 124 white wooden crosses on the grass next to the footpath outside the Indonesian embassy as a symbolic protest against the killings of a number of East Timorese people by the Indonesian military. The Australian Diplomatic Immunities Act of 1967 authorized the removal of the crosses as an appropriate step to prevent the impairment of dignity of the mission.<sup>111</sup> Court held in *R v Rogues* that the impairment of dignity of the mission required abusive or insulting behavior rather than just political demonstrations.<sup>112</sup>

Appropriate steps imply that the extent of the protection provided must be proportionate to the risk or threat imminent to the premises. Accordingly, if the receiving State knows of an impending hostile demonstration or attack, then it is obliged to provide protection proportionate to the threat.<sup>113</sup> In the much cited case of *United States v. Diplomatic and Consular Staff in Tehran*<sup>114</sup> ICJ upheld the principle of the inviolability of the premises of a diplomatic mission and the duty upon the receiving State to protect the premises, documents and archives as well as the obligation to protect the personnel of the

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<sup>108</sup> Ibid

<sup>109</sup> *Minister for Foreign Affairs Trade and Others v Magno and Another* (1992-1993) 112 ALR p. 529.

<sup>110</sup> Ibid

<sup>111</sup> *R v Rogues Judgment 1<sup>st</sup> August 1984, unreported.*

<sup>112</sup> Ibid.

<sup>113</sup> *Lord Gore-Booth, op.cit*

<sup>114</sup> *United States v. Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep. p. 3.

mission.<sup>115</sup> Before looking at the facts and infringements of this case, there were concerns over the ICJ's jurisdiction in the hearing of the case. Article 36(1) of the Statute of the International Court of Justice<sup>116</sup> states that the court may hear all cases that are referred to it and all matters provided for in the Charter of the UN or in treaties and conventions. The US's claim to the court's jurisdiction was based on the Vienna Convention and its Optional Protocol and the Consular Convention and its Optional Protocol.<sup>117</sup> Article 1 of both the Optional Protocols states: *Disputes arising out of the interpretation of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court*".<sup>118</sup>

The facts of the case were that in November 1979 a strong militant group of Iranians stormed into the US Embassy in Tehran, seized buildings, entered the Chancery, destroyed documents and archives, gained control of the main vault, and also held 52 diplomatic, consular and other persons hostage.<sup>119</sup> On the facts the ICJ held that it was satisfied that the Iranian Government had failed to take appropriate steps within the meaning of Article 22 and 29 towards ensuring the safety of the embassy and the consulates at Tabriz and Shiraz. Other infringed Articles included Article 25, imposing a duty on the receiving State to provide facilities for a mission to perform its functions, Article 26, allowing freedom of movement and travel for diplomats, and Article 27, imposing a duty to permit and protect free communication for official purposes.<sup>120</sup> Furthermore, it was wrongful to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship. The infringements also constituted

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<sup>115</sup> Shearer I. A., (1994) *Starke's International Law* 11ed Butterworths: London p. 386-387

<sup>116</sup> Statute of the International Court of Justice, 24 Oct. 1945, 59 Stat. 1031, UNTS 993.

<sup>117</sup> *Ibid*

<sup>118</sup> Article 1 Optional Protocol Concerning the Compulsory Settlement of Disputes, 8 December 1969 UNTS 1400.

<sup>119</sup> Shearer I. A. op. cit. p. 386-387

<sup>120</sup> *Ibid*

a violation of the Charter of the UN and of the Universal Declaration of Human Rights.<sup>121</sup> Iran did not comply with the Court's judgment immediately. The matter was settled through negotiations between the two parties in the Algiers Accord.<sup>122</sup>

The mission must not be misused. Article 41 imposes a duty regarding the use of mission premises. They cannot be used in any manner that is incompatible with the functions of a mission in a diplomatic meaning. Members of a mission may not use the premises to plot the removal of the government or the political system of the receiving State.<sup>123</sup> What is of concern is that the blanket mandate of immunity covers the most serious crime against a government i.e. espionage.<sup>124</sup> This threat to national security is entwined within the diplomatic structure, resulting in embassies sometimes being involved in the business of spying.<sup>125</sup>

A career diplomat cannot be a professional "spy" or information collector because the nature of a diplomat is to be visible to the public eye, while "spies" should be unknown to the public.<sup>126</sup> Edmondson states that the motive for committing espionage is irrelevant. The most important element is that information is collected, whether injurious to the receiving State or not. A crime is committed, even if the receiving State is an ally.<sup>127</sup> Diplomatic personnel remain immune from prosecution in order to perform their functions, yet in instances it indirectly encourages this illegal act and results in protective status becoming contradictory.<sup>128</sup>

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<sup>121</sup> Harris L. J., op. cit. p. 360

<sup>122</sup> Van Dervort T. R., Op. cit. p. 299

<sup>123</sup> Denza E., op cit p. 379.

<sup>124</sup> McClanahan G. V., op. cit p. 161.

<sup>125</sup> Ibid p. 79.

<sup>126</sup> Ward N. P., (1997) "Espionage and the Forfeiture of Diplomatic Immunity" (1997) 11 *International Lawyer* p. 664.

<sup>127</sup> Edmondson L. S., (1971-1972) 5 "Espionage in Transnational Law" p. 453.

<sup>128</sup> Ward op. cit. p664

Many intelligence agencies have used their immunities to assist their work. When an operative is arrested it is routine to invoke immunity, and the only recourse for the receiving State is declaring the operative *persona non grata* and directing his immediate removal from the country.<sup>129</sup> March and the end of October in 1986, there was a series of expulsions of US and Soviet diplomats on charges of spying and intelligence activities.<sup>130</sup> There has been no consistency over the years in dealing with the discovery of espionage, but the expulsion or recall of the accused diplomat has been considered normal practice.<sup>131</sup>

Whether a right or recognition to diplomatic asylum for either political reasons or other offences exists within general international law is doubtful. There is no express mention of it in the Vienna Convention. Although in principle refugees should be returned to the authorities of the receiving State in the absence of a treaty or bilateral agreement to the contrary, this does not always happen in practice.<sup>132</sup> The reason for the omission in the Vienna Convention is simple; it was deliberately excluded because most governments shared the view that the Vienna Convention was not the place to formulate rules on the controversial and sensitive question of granting asylum.<sup>133</sup> Diplomatic asylum has been considered a matter of humanitarian practice rather than a legal right. In other words, humanitarian, political or other motives may lead to the granting of asylum. It is therefore only in war and violent revolutions that this practice has been extended.<sup>134</sup> Although this is the general sentiment among countries, it still prohibits receiving State police officials from entering the embassy and forcibly removing the asylum seeker. The incident of a Dutch fugitive, Klaas de Jonge mentioned above, confirms this. A removal

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<sup>129</sup> Ibid pp. 658-659 and 664.

<sup>130</sup> McClanahan G. V., op cit

<sup>131</sup> Edmondson L. S., op. cit p. 445.

<sup>132</sup> Shaw M. N. op. cit . p. 143.

<sup>133</sup> Brownlie I. Op. cit

<sup>134</sup> Ibid

of this nature constitutes a violation of the sanctity of the embassy premises.<sup>135</sup> Similarly, when Liberian soldiers entered the French Embassy in Monrovia in 1980 and arrested the son of the former Liberian President who had been granted asylum. France protested against the unacceptable violation of the status of the mission.<sup>136</sup>

Among Latin American countries, the right of diplomatic asylum has been used and is accepted. The reason for this practice is that international agreements were concluded by those countries allowing for this right.<sup>137</sup> Furthermore, there is a Convention on Diplomatic Asylum that was drafted in 1954 in Venezuela. The procedure under this Convention allows asylum seekers to remain in the mission long enough to be guaranteed safe passage from the country. In the event there is an overflow of asylum seekers additional premises can be created and they too will be inviolable.<sup>138</sup>

Embassy cars, furnishings and other property, including embassy bank accounts in the mission, are also protected from search, requisition, attachment or execution.<sup>139</sup> In some cities, due to serious congestion of motor vehicles and limited parking spaces, an embassy car may be towed away if the driver cannot be found.<sup>140</sup> There was a lengthy debate around 1984 in the UK as to whether the attachment of bank accounts of a diplomatic mission was permitted. The court in *Alcom Ltd. v Republic of Colombia*<sup>141</sup> accepted that the bank accounts were primarily used for the running of the embassy and not for commercial purposes, resulting in immunity from attachment.<sup>142</sup>

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<sup>135</sup> Carpenter G. (1987-1988) "Extradition, Extraterritorial Capture and Embassy Premises" South African Yearbook of International Law p. 148.

<sup>136</sup> *Harris Cases and Materials on International Law* p. 353.

<sup>137</sup> Lord Gore-Booth op. cit p. 113-114

<sup>138</sup> McClanahan, G.V op. cit p.54.

<sup>139</sup> Denza, E, op. cit p.134.

<sup>140</sup> Lord Gore-Booth op cit p. 110.

<sup>141</sup> [1984] 2 W.L.R 750.

<sup>142</sup> *ibid.*

#### 4.4 Limitation to Inviolability of Archives and Documents

Article 24 provides for the archives and the documents of the mission to be inviolable at all times and wherever they may be. This means that no archives may be seized, detained or be produced as evidence in any legal proceedings in that state.<sup>143</sup> The term “archives” is not defined in the Vienna Convention, but it is clear that it was intended to cover a wide definition, including any form of storage of information or records in words, pictures and in our modern society in the forms of tapes, sounds, recordings, film and digital data.<sup>144</sup>

The Harvard Research in 1930 accorded limited protection to archives and required that their confidential character be protected, provided that notification of their location has been given to the receiving State.<sup>145</sup> The ILC extended the protection of archives in three ways. The first was by using the expression “*inviolable*”. This expression provides for two implications: the receiving State abstains from any interference by its authorities, and that a duty of protection of the archives is necessary. The second is by adding the words “*at any time*” to clarify that inviolability continues without interruption, even when ties are broken; and lastly, by adding the words “*wherever they may be*” confirms that archives do not have to remain in the mission to be inviolable.<sup>146</sup> The rationale behind this is to enable the mission to carry out two important functions of negotiating with the government of the receiving State and reporting to the sending State on the conditions and developments within the receiving State.<sup>147</sup>

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<sup>143</sup> Wiebalck A. (1984) “Abuse of the Immunity of Diplomatic Mail” (1984) *South African Yearbook of International Law* p 176.

<sup>144</sup> Lord Gore-Booth op. cit p. 116.

<sup>145</sup> Denza E. op. cit p. 158.

<sup>146</sup> Ibid p. 160.

<sup>147</sup> Wiebalck A. op cit. p. 176.

#### **4.5 Limitation to Freedom of Communication and the Inviolability of Official Correspondence**

Protection of the freedom (and secrecy) of official communications of missions with their own government is possibly the most important of all privileges and immunities given in international law.<sup>148</sup> A mission is entitled to communicate for official purposes and to have access to every facility for this in the receiving State.<sup>149</sup> Telecommunication is considered as any mode of communication over a long distance and can be in written form and delivered by couriers, telephone services, fax, electronic mail, wireless transmitters and the like.<sup>150</sup> There is no clear, established rule in customary law concerning the inviolability of correspondence to or from a mission sent through the public postal system. Letters to the mission would become archives or documents on delivery, but not before then.<sup>151</sup> The inviolability of official correspondence is two fold: it makes it unlawful for the correspondence to be opened by the receiving State, and it prevents the correspondence from being used as evidence in a court proceeding.<sup>152</sup>

The receiving State is obliged to permit and protect free communication for all official purposes.<sup>153</sup> In the past, it was difficult to maintain freedom of communication during wartime. For example, in the UK missions were prohibited from sending telegrams in cipher during the First World War. International practice has recognized the right to secure communications, as indicated in Article 27. However, the practice was far from ideal. On rare occasions, messages were intercepted, codes detected, and complained made because there was no authorization of the codes.<sup>154</sup> In 1973, France discovered that its new chancery building in Warsaw had been equipped with a network of 42

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<sup>148</sup> McClanahan, G. V op cit p. 64

<sup>149</sup> Feltham R. G., op cit p. 39.

<sup>150</sup> Denza E. pp. 174-175

<sup>151</sup> Dixon M op cit p. 163.

<sup>152</sup> Ibid

<sup>153</sup> Denza E. p. 81.

<sup>154</sup> Ibid

microphones.<sup>155</sup> It was common understanding between parties that the bugging of embassies occurred as happened. As recently as 1985 the half-completed new US embassy in the USSR was discovered to be equipped with listening devices, presumably planted by Soviet authorities.<sup>156</sup> During the Cold War there were numerous occasions where listening devices were discovered in missions.<sup>157</sup>

A wireless transmitter may be used only where consent has been granted by the receiving State. More secure communication has been facilitated through improvements in methods of cipher and the development of facilities for transmitting wireless messages.<sup>158</sup> The disadvantage is that only richer States can afford to install them, and in some cases they do not request consent from the receiving State to make use of such devices, so less developed States have a fear that they cannot control the use of the transmitters.<sup>159</sup> Although the Vienna Convention succeeded in adding Article 27, it is the responsibility of the sending State to observe international telecommunications regulations.<sup>160</sup>

#### **4.6 Limitation to Diplomatic bag and Diplomatic Couriers**

The diplomatic bag is given more absolute protection under the Vienna Convention than was given under customary law.<sup>161</sup> Previously, the receiving State had a right to challenge a bag that was suspected to contain unauthorized items. If this occurred, the sending State could either return the bag unopened, or opens it in the presence of the

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<sup>155</sup> Lord Gore-Booth op cit p. 116.

<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> Ibid p. 116-117.

<sup>159</sup> Kerley E. L., op. cit p. 112.

<sup>160</sup> Lord Gore-Booth op. cit.

<sup>161</sup> Ibid



authorities of the receiving State.<sup>162</sup> France allowed the Ministry of Foreign Affairs to compel the opening of the bag in the presence of the representative of the mission where there was serious reason to suspect abuse.<sup>163</sup> The US required the consent of both the Ministry of Foreign Affairs of the receiving State and the mission to open the bag. The United Arab Republic allowed the receiving State to require the sending State to withdraw the bag.<sup>164</sup> The Conference tried several times to limit the absolute protection of the diplomatic bag. Today Article 27 determines that no diplomatic bag may be opened or detained.

The Vienna Convention does not provide a requirement as to what a diplomatic bag is. Normal practice is that the bag resembles a sack; however, the bag may vary in size from an aircraft full of crates to a small pouch, as long as there is clear, visible, external marking indicating that it is part of the foreign embassy, or it bears an official seal ensuring its protection.<sup>165</sup> The Soviet Union attempted to stretch the definition of a diplomatic bag. In July 1984, the Soviet government sent a nine-ton Mercedes tractor-trailer into Switzerland, sealed against custom inspection.<sup>166</sup> When entering Germany, the German government claimed that this was extreme and that the “diplomatic bag” was motorised and capable of its own movement. This was not what the Vienna Convention intended and it was not considered a diplomatic bag and thus not inviolable.<sup>167</sup> The crates found within the lorry were accepted as diplomatic bags and thus not opened.<sup>168</sup> A solution could be to limit the size of bags to certain standard sizes. For instance, one could be a size to hold documents and another a size to accommodate office equipment. To limit it further, it could be mandatory to limit it to one item per bag. A diplomatic

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<sup>162</sup> Ibid

<sup>163</sup> Barker J. C. op cit. p. 90.

<sup>164</sup> Ibid

<sup>165</sup> Ibid.

<sup>166</sup> McClanahan G. V op cit p. 144.

<sup>167</sup> Ibid

<sup>168</sup> Shaw M. S. op. cit p. 240.

bag usually falls into one of two categories, accompanied or unaccompanied, depending on the importance of its contents.<sup>169</sup> The main function of a courier is to supervise the bag that he accompanies and to ensure that the rules of international law are adhered to. The ILC distinguished between three types of couriers, namely, permanent diplomatic couriers, *ad hoc* couriers and captains of commercial aircrafts entrusted with a diplomatic bag.<sup>170</sup> A diplomatic bag may be carried by a diplomatic courier who is entitled to the protection of the visiting State, enjoys personal inviolability and is not liable for arrest or detention. A diplomatic courier is a full-time employee of a Ministry of Foreign Affairs and on every journey he must be provided with a document indicating his status and the number of packages constituting the diplomatic bag.<sup>171</sup> The sending State or mission may also designate *ad hoc* diplomatic couriers. They are used primarily by smaller States lacking resources to employ professional couriers, but larger States use them for urgent deliveries of documents where a normal courier service would be too slow. An example of an *ad hoc* courier is a businessman on his way to the receiving State, escorting the bag while he is there. *Ad hoc* couriers are protected by the receiving State and enjoy personal inviolability. They are not subject to any arrest or detention until they have delivered the diplomatic bag to the mission concerned.<sup>172</sup>

A common arrangement, especially for small posts or developing countries, is to “deputise” the captain of an aircraft.<sup>173</sup> Though he is not considered a courier, and thus has no immunity, the diplomatic bag retains its inviolability. The mission receiving the bag sends one of its members to take possession of the bag directly and freely from the

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<sup>169</sup> Denza E., *op cit.*

<sup>170</sup> The Conference devoted little attention to the question of couriers.

<sup>171</sup> Feltham R. G., p. 39-40

<sup>172</sup> Barker J. C., *op cit.* p. 89

<sup>173</sup> McClanahan G. V. *op cit* p. 65.

captain.<sup>174</sup> The limited immunities for *ad hoc* couriers and captains are to enable those persons to complete their functions.

There have been concerns regarding the use of the diplomatic bag. Denza claims that there is a continuing need to balance the need for confidentiality of diplomatic bags with the need for safeguards against abuse.<sup>175</sup> There are several instances where the bag has been used to smuggle drugs, explosives, weapons, art, diamonds, money, radioactive materials and even people.<sup>176</sup> Despite this, the diplomatic bag may not be opened or detained. There have been requests for permission to open the bag in the presence of an official of the mission. If this request is denied, the only recourse available to the receiving State is to deny entry of the bag into the country.<sup>177</sup>

Article 27, paragraph 3, does not confer inviolability on the diplomatic bag, but only that it cannot be opened or detained. There is no indication that representatives at the Conference considered the possibility of tests on the bag without opening it to reveal or confirm whether the bag contained illegal items.<sup>178</sup> With the introduction of scanning of baggage by airlines in the 1970s, some governments took the view that scanning did not equal opening bags. However, the general practice among States has been not to scan bags unless deemed necessary.<sup>179</sup> Britain took the view that electronic scanning is not unlawful under the Convention. However, some countries believe it to be “constructive opening”.<sup>180</sup> Despite this, the British government did not scan and expressed its doubts on technical grounds about the advantage gained by doing so. For example, when scanning the diplomatic bag and weapons are shown, the result would lead to opening

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<sup>174</sup> Ibid

<sup>175</sup> Denza E. op cit. p. 185.

<sup>176</sup> Ibid

<sup>177</sup> Dixon M. op cit. p. 163.

<sup>178</sup> Sniffer dogs and X-ray machines can be used to detect items.

<sup>179</sup> Denza E., op cit. p. 194-195.

<sup>180</sup> Higgins R. op cit p. 647.

the bag, which is prohibited by the Convention.<sup>181</sup> Another form of testing a bag is through the use of dogs specifically trained for such purposes. This is particularly useful in the smuggling of narcotics, explosives and possibly humans.<sup>182</sup>

The most cited incident of the abuse of diplomatic bags occurred in July 1984, when Umaru Dikko, a former minister of the deposed Shagari Government of Nigeria, wanted by the new Nigerian government on charges of embezzlement of government funds, was abducted.<sup>183</sup> He was kidnapped outside his home in London and after being heavily drugged was placed in a crate. Two large crates arrived at Stansted airport to be loaded on to a Nigerian Airways aircraft.<sup>184</sup> The crates were handled by a member of the Nigerian Government service, who held a diplomatic passport but was not a member of the mission in Britain and did not have any diplomatic status in the country. He made no protest when he was asked to be open the crates.<sup>185</sup> One of the crates contained the unconscious Dikko and another man who has in his possession drugs and syringes. The other crate contained two other men. Both were conscious. A total of 27 people, including the three persons other than Dikko who were found in the crates, were arrested.<sup>186</sup> The main reason for the crates being opened without objection was that there were no clear visible markings indicating it was a diplomatic bag. The Foreign Secretary made it clear that even if the crates had bold markings, the concern of protecting Life was more important than immunity.<sup>187</sup> In that situation, the use of scanning or dogs would have assisted in the discovery.

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<sup>181</sup> Ibid

<sup>182</sup> The use of dogs could be used, as it is unlikely for a dog to be educated enough to read the contents of the bag.

<sup>183</sup> Higgins R. op. cit p. 645.

<sup>184</sup> Cameron I. op. cit p. 614.

<sup>185</sup> Higgins R. op. cit p. 645

<sup>186</sup> Cameron I. op cit p. 34

<sup>187</sup> Higgins R. (1985) op cit p. 614.

As a result of the increasing disquiet over the use of diplomatic bags, the General Assembly of the UN directed the ILC to consider the status of the bag and couriers. This led to the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Couriers.<sup>188</sup> Article I look at the scope of present articles and to whom they apply And Article 28 deals with the protection of the diplomatic bag.<sup>189</sup> It states that the bag shall not be opened or detained, as in the Vienna Convention. Furthermore, the bag shall be exempt from examination directly or through electronic or other technical devices. However, if the authorities of the receiving State believe that the bag contains something other than the items listed in Article 25, they may request the bag to be examined or scanned. If such examination does not satisfy the authorities, the bag may be opened in the presence of an authorized representative of the sending state. If this request is denied, the bag may be returned to its place of origin. This provision was introduced to show the balance between the interest of the sending State in ensuring the safety and confidentiality of the contents of the bag, and the security interest of the receiving State.<sup>190</sup> It would appear that this provision however is ineffective and inadequate. Examination and scanning is permitted in circumstances where the bag contains items not listed in Article 25. This makes sense for small bags and pouches. It does not seem that ILC dealt with “larger” bags, and the Vienna Convention does not limit the size of the bag. Article 24 indicates that the diplomatic bag must be identifiable by external markings; Article 25 states what content are permissible in the diplomatic bag. The only items listed are official correspondence and documents or articles intended for official use.<sup>191</sup>

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<sup>188</sup> *Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Couriers* (1986) ILC York, vol. II, part II, 24.

<sup>189</sup>; Article 5, Vienna convention 1961

<sup>190</sup> Dixon M., (1991)*Cases and Materials on International Law* Blackstone Press Limited: London p. 336

<sup>191</sup> Article 28, Vienna convention 1961

Although the ILC and Conference debated the issue of diplomatic bags, it seems the States gave inadequate weight to the need for protection against abuse. With the increase of abuse it is prudent to apply the Vienna Convention protection to diplomatic bags, or are there salient political and legal reasons which mitigate in favour of restrictions? The simplest limitation to implement would be by means of the size of diplomatic bags, and in so doing prevent the smuggling of people, artworks and even heavy machinery.

#### **4.7 Limitation to Members of Family and staff Privileges and Immunities**

##### **4.7.1 Members of Family**

The members of the diplomatic agent's family forming part of his household<sup>192</sup> enjoy a range of immunities. Rights include personal inviolability, inviolability of residence, immunity against criminal and civil jurisdiction.

Previously, there were some instances where family members committing crimes were released<sup>193</sup> and in others they were arrested, prosecuted and found guilty. a well-known early cited case involved Dom Pateleone *de Sa Menese* (hereinafter referred to as Sa).

This case indicates how members of a family invoked immunity to avoid prosecution. Sa travelled to England with his brother, Dom Joao Rodriguez *Sa e Meneses*, the Portuguese ambassador. While his brother negotiated, Sa did nothing.<sup>194</sup> In November 1653, Sa became enraged when he was insulted by a Colonel Gerard and attacked and wounded the Colonel.<sup>195</sup> A bystander, Anthuser, intervened and stopped the fight. Sa retreated but came back that evening with 20 armed attendants and went to find Anthuser. Mistaking a

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<sup>192</sup> As defined in Chapter 3 para. 3.6

<sup>193</sup> The nephew of the French ambassador had been directly implicated in the murder of a number Spaniards; he was arrested and eventually released. A relative of the French ambassador in England became involved in the brawl at a local brothel and killed an Englishman. He too was released.

<sup>194</sup> Sa's brother was sent to negotiate an alliance with England

<sup>195</sup> The Colonel overheard Sa speaking in French about English politics and challenged their version of certain events. Eventually, the conversation took a violent turn. See further Lawrence International Law 312.

Colonel Mayo for Anthuser, they attacked him and inflicted several wounds. The commotion attracted a Greenway and when he came out so see what the commotion was about, a servant shot him in the head, killing him. When the guards came, the Portuguese party fled to the embassy.<sup>196</sup>

The ambassador initially refused to surrender the men, but gave in when the guards threatened to use force. The ambassador complained to the English government about the violation of his residence and thought that the men would be released. However, this did not occur.<sup>197</sup> The issue facing the courts was whether Sa and his attendants could be prosecuted in English courts for murder. Justice Atkyns contended that Sa had forfeited his privileges by his actions. Even attendants are allowed extraordinary immunities, but when they break the law of nations they are liable.<sup>198</sup> At his trial, Sa contended that he was immune from prosecution, first because he was the brother of the ambassador and secondly, that he was authorized to act as an ambassador in his brother's absence, as shown by letters provided by the King of Portugal. He relied exclusively on the second reason, but it was found that he had no official function and only accompanied his brother out of curiosity. The court rejected Sa arguments and the court found him and four of his attendants guilty of murder and they were sentenced to be hanged.<sup>199</sup> Although diplomatic immunity did not respect Sa the Vienna Convention would now cloak him with immunity.

With the establishment of permanent diplomatic missions it became accepted that the family would accompany the diplomat.<sup>200</sup> The ILC debated very little over extending full immunity to the family of a diplomat. The question which puzzled most States was who

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<sup>196</sup> Frey L and Frey M., op cit pp. 41-42

<sup>197</sup> What fueled this even more, were rumours that explosive were discovered in the coaches and also the brother's escape from prison. His freedom did not last long, as he was captured and guarded more closely.

<sup>198</sup> Frey L. and Frey M., (1990) pp. 47-48

<sup>199</sup> Ibid pp. 312-313

<sup>200</sup> Denza E., p. 323.

was regarded as family. The majority of States did not define exactly which members of the family were entitled to immunities, but preferred some flexibility to settle disputes between the individual mission and the national government.<sup>201</sup> Families are regarded as an extension of the person of the diplomat. The protection of the family has therefore been regarded as necessary to ensure the diplomat's independence and ability to carry on his functions, as held in *The Magdalena Steam Navigation Co. v Martin*.<sup>202</sup>

Although the reasons for the family of a diplomat accompanying him into the receiving State can be understood, they should not be entitled to full immunity in criminal jurisdiction. For instance, during the years 1980 to 1981, Manuel Ayree, 19 year-old son of the third attaché to the Ghanaian delegation committed rape, sodomy, assault and other crimes in New York City.<sup>203</sup> After Holmes (one of his victims) and her boyfriend identified Ayree while walking in the street months after her rape, the investigating officer, Pete Christiansen, arrested Ayree. Jane Doe (another victim) further identified him in a line-up and the police began the paper work for prosecution.<sup>204</sup> After being identified as the son of the Ghanaian diplomat he was released and all charges dropped, owing to his diplomatic immunity.<sup>205</sup> The State Department's only remedy was to declare him *persona non grata* and expel him from the United State. Holmes was reported as saying "*A man raped me and he got away with it, because he is not a citizen and because he is a relative of a diplomat. He claimed he has the right to rape me and I, as an American citizen, am not given the right to get justice.*"<sup>206</sup> The question here is how did this incident affect a diplomat's function?

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<sup>201</sup> Ibid p. 321

<sup>202</sup> *The Magdalena Steam Navigation Co. v Martin* 1859 QB 107

<sup>203</sup> Ashman C and Trescott P. op. cit p. 22.

<sup>204</sup> Farahmand A. M., op. cit. p. 99.

<sup>205</sup> Ashman C. and Trescott P. op. cit. p. 24.

<sup>206</sup> Farahmand A. M., op. cit. p. 99.



Family members who do not respect local laws and commit unlawful acts knowing that they can be protected against prosecution should not be entitled to such immunities it is not necessary.

#### **4.7.2 Mission Staff**

Before the Vienna Convention, the question of the immunities towards staff was inconsistent among states. For example, the UK, US, Germany, Austria and Japan extended all the diplomatic immunities to all staff, including domestic and private servant, while other States, like Switzerland, France, Argentina, Chile, Greece and Italy, restricted immunities of minor diplomatic staff.<sup>207</sup> In some areas, before immunities were awarded to personnel, three conditions had to be fulfilled. Firstly, that the personnel's proposed functions are concerned with the relations between nation and nation; secondly, that the proposed functions must not interfere with the internal affairs of the country accredited to; and finally, the venue, which implies that a diplomat must be part of the mission in order to receive immunities.<sup>208</sup>

Since the mission staff constitute the larger portion of the total number of persons connected with a diplomatic mission, and they are most likely to commit offences in the receiving State. There was a need to create uniform rule.<sup>209</sup> Even the drafting and discussion of the ILC and Conference felt that this one was one of the most controversial issues to be dealt with.<sup>210</sup> The ILC was originally in favour of the extension of full diplomatic immunities to administrative and technical staff and their families. The rationale was that it is occasionally difficult to distinguish between diplomatic agents and

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<sup>207</sup> Lord Gore-Booth op. cit p. 144

<sup>208</sup> Brookfield S. H. (1938) 19 "Immunity of Subordinate Personnel" *British Yearbook of International Law* p. 155.

<sup>209</sup> Denza E. op cit. pp. 329-330

<sup>210</sup> Barker J. C., op cit. p. 81

technical and administrative staff and their functions.<sup>211</sup> However, as a result of the growing numbers of missions and their staff there was a need to limit the number of persons entitled to diplomatic immunities.<sup>212</sup> It was suggested that private servants only receive immunity with regard to official acts. In the end, Article 37 was the result entitling administrative and technical staff and private servants to limited immunities.<sup>213</sup> Once it was decided to grant immunity, there was also a need to distinguish between the different types of staff immunity. There are no precise rules in the Vienna Convention about the tasks performed by the administrative and technical staff.<sup>214</sup>

Members of the administrative and technical staff and members of their families, unless they are national or permanent resident of the receiving State, enjoy the same immunities as diplomatic agents, except that they enjoy civil and administrative immunity for official acts only. Therefore they cannot be prosecuted in any circumstances, unless their immunity has been waived by the sending State.<sup>215</sup> It was even mentioned by Wilson that some staff in the mission are more important than diplomatic personnel because of the nature of the information that they manage.<sup>216</sup>

Service-staff differ from servants. Service-staff receive immunity for their official acts. These limited immunities may be supplemented by receiving State through bi-lateral agreements.<sup>217</sup> In *Ministere Public and Republic of Mali v Keita*<sup>218</sup> the Appeal Court in Brussels had to determine whether the murder of the ambassador of Mali by chauffeur,

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<sup>211</sup> Ibid.

<sup>212</sup> Wilson C. E., (1967) *Diplomatic Privileges and Immunities* The University of Arizona Press: Tucson p. 159.

<sup>213</sup> At the Conference the proposals of the private servants and service staff was accepted. However, there was a debate with regard to administrative and technical staff. The UK proposed a compromise whereby the administrative and technical staff would enjoy full criminal immunity but limited immunity in civil jurisdiction. Further during the debate of the Vienna Convention, three State, Egypt, the Khmer Republic and Morocco, entered reservations to the effect of Article 37 (2), but this was later objected to by eight States.

<sup>214</sup> Lord Gore-Booth op. cit pp. 145

<sup>215</sup> Ibid

<sup>216</sup> Wilson C. E., op cit p. 159

<sup>217</sup> Lord Gore-Booth op cit. p. 146-147

<sup>218</sup> *Ministere Public and Republic of Mali v Keita* 1977 ILR 410.

who was a member of the service staff, was an act performed in the course of his duties.<sup>219</sup> It was agreed that the crime was committed during his hours of service and on the premises of the embassy, but the court found that the act occurred as a result of a personal dispute between the ambassador and the chauffeur, who was not immune from criminal jurisdiction.<sup>220</sup> From this it seems that immunity can only be claimed on the basis of a bona fide service. Therefore, immunity will not be recognized for a cook of an ambassador who has no kitchen, or for a Christian chaplain employed by a Muslim ambassador.<sup>221</sup>

Private servants have the fewest immunities accorded to them. However, the Vienna Convention provides that jurisdiction over private servant must be exercised in a way that does not interfere unduly with the functions in the mission.<sup>222</sup> For example, the ambassador's cook cannot be arrested for criminal charges on the day the ambassador is hosting an important dinner party. In *United States v Ruiz*,<sup>223</sup> the defendant was charged with larceny. The court held that a servant would have been entitled to immunity had his employer, the Peruvian ambassador, asserted on his behalf of his servant.

The ambassador did no such thing and the defendant was subsequently convicted.<sup>224</sup>

The position of staff who are nationals or permanent residents was a further concern for the ILC. It was argued that a national of the receiving State entitled to full diplomatic immunity could commit murder and not be subjected to criminal jurisdiction either in the receiving State or the sending State.<sup>225</sup> It should be emphasized that diplomats and members of staff who are nationals or permanent residents of the receiving State are

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<sup>219</sup> Supra

<sup>220</sup> Wilson C. E. op cit. p. 166

<sup>221</sup> Ibid

<sup>222</sup> Ibid p. 48

<sup>223</sup> *United States v Ruiz* No. 10150-65 (D.C 1965)

<sup>224</sup> In *United States v Santizo* No. C-9671-63 (D.C 1963) the defendant attempted to shield herself from criminal liability by invoking the immunity of her diplomatic employer. The defendant was convicted of criminal abortion as it did not fall within the scope of her duties.

<sup>225</sup> Barker J. C. op cit p. 85

entitled to immunity from jurisdiction only for official functions performed and the receiving state grants and extends only immunities which it considers appropriate.<sup>226</sup>

The fundamental rationale of this Article allows for the receiving State to expel a diplomat who has behaved unacceptably.<sup>227</sup> The Article essentially means that declaring a diplomat, staff or his family persona non grata forces the sending State to take one of two actions: either recalling the diplomat to his home country or terminating his functions with the sending State's mission. Should the sending State refuse to remove the individual from his duties then the receiving State may refuse to recognize the person as a member of the mission, resulting in him liable for prosecution.<sup>228</sup> The time frame in which he has to leave will depend on the circumstances of the incident. It is not possible to come to a conclusion as to what a reasonable period. Interestingly, 48 hours has been the shortest time span justified as a "reasonable period".<sup>229</sup>

**In conclusion,** one of the most common reasons for declaring a person a persona non grata is for espionage.<sup>230</sup> In 1971, the British government repeatedly warned the Soviet Union to reduce the number of KGB agents in diplomatic and trade establishments. As a result, 105 Soviet officials were declared persona non grata.<sup>231</sup> Another reason for declaring a diplomat persona non grata is involvement in a conspiracy against the receiving State<sup>232</sup> receiving State grants and extends only immunities which it considers appropriate.<sup>233</sup>

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<sup>226</sup> Felltham, *Diplomatic Handbook*, p. 48

<sup>227</sup> Denza *op. cit.* E. pp. 59 and 62

<sup>228</sup> Southwick J. T *op. cit.* p. 15

<sup>229</sup> Denza E. *op. cit.* p. 71.

<sup>230</sup> *Ibid.* p. 63

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.* p. 65.

<sup>233</sup> Feltham R. G. *op. cit.* p. 48

## CHAPTER FIVE

### SUMMARY AND CONCLUSION

#### 5.1 Summary

Diplomatic immunity is one of the oldest elements of foreign relations, dating back as far as ancient Greece and Rome. Today it is a principle that has been codified into the Viennan Convention on Diplomatic Relations of 1961 regulating past customs and practices of Diplomats. This Convention has been influenced by three theories during different eras namely: personal representation, *Exterritorility*, and functional necessity. The Convention further provides certain immunities to different levels of diplomatic officials, their staff and families. This research;

1. Analyzed diplomatic immunity.
2. Appraised deterrent measures provided by the Vienna convention.
3. Assessed the extent of diplomatic immunity abuses by diplomat, staff and their families.
4. Pointed out possible measures to curb diplomatic immunity abuses.

Although the Vienna Convention provided deterrent measures against erring diplomats, but it seems that is not enough. Diplomats continue to abuse their immunities.

Diplomatic immunity rational is not only based on theoretical dominance, but rather on political motives and courtesy. Thus the functional necessity theory will remain a strong case for the existence of immunity.

Although the statistics indicate that diplomatic crime is high, there is no justification for a diplomat, staff and his family to commit any form of crime or be above the law. Not even presidents are above the law, so how can it be justified that the diplomat's status is so immuned? Their criminal behavior cannot be ignored or accepted as part of their official acts. A crime is a crime, whether you are an ordinary citizen, a president or a

diplomat. If a diplomat does not obey local laws he is not performing his functions and thus cannot be considered a *bona fide* diplomat; thus he should be punished like any common criminal.

### **5.3 Findings**

In the light of the above, the following findings were made in this research:

1. The deterrent measures provided by the Vienna convention were inadequate, outdated and therefore ineffective. As a result, diplomats continue to abuse their immunity and occasioned grave injustice to the victims.
2. The convention did not provide means of settlement of individuals who were injured as a result of diplomatic misconduct.
3. Commissions of civil wrong by diplomats were not serious as criminal offences.

### **5.4 Recommendations**

From the foregoing discussions, the following recommendations were made:

1. Criminal Immunity of a diplomat should be removed, so that where a diplomat commits any of the following crimes should be punished in the receiving state where such crime was committed. For example, murder, rape, smuggling of weapons, explosives, human beings, hard drugs, espionage and other heinous crimes.
2. Expansion of the International Court of Justice (ICJ) Jurisdiction on Diplomatic Criminal offences committed by diplomat, staff and their families.

The expansion should foresee a court with compulsory jurisdiction over alleged criminal offences committed by individual diplomats, staff and their families. It would provide an acceptable means of adjudicating offences arising under the

scope of diplomatic immunity. For example, offences involving homicide, rape spying, assault, battery etc. The court would have the power to impose fines and imprison diplomats.

3. Immunity from civil wrong be accorded to diplomats. Although, this should be accompanied with stringent measures before entering into any transactions. For example, contracts, torts, commercial transactions, services, etcetera.

## BIBLIOGRAPHY

### BOOKS

- Alan J., *Hostages and Hostage Takers in the Roman Empire* (2006) Cambridge University Press: Cambridge
- Ashman C., and Trescott P., *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes!* (1987) Acropolis Books Ltd: Washington D.C.
- Ashman C., and Trescott P., *Outrage: The Abuse of Diplomatic Immunity* (1986) W.H. Allen: London
- Barker J C., *International Law and International Relations* (2000) Continuum: London
- Barker J C., *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) Dartmouth: Aldershot
- Bekou O., and Cryer R., *The International Criminal Court* (2004) Dartmouth: Aldershot
- Berridge G., *Diplomacy: Theory and Practice* 3ed (2005) Macmillan: New York
- Berridge G., *Talking to the Enemy: How States Without "Diplomatic Relations" Communicate* (1994) St Martin's Press: New York
- Brownlie I., *Principles of Public International Law* 5ed (1998) Oxford University Press: Oxford
- Davidson S., *The Law of Treaties* (2004) Dartmouth: Aldershot
- De Waal J., *et al The Bill of Rights Handbook* 4ed (2001) Juta & Co Ltd: Lansdowne 191
- Denza E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) Clarendon Press: Oxford
- Devenish G E., *Commentary on the South African Constitution* (1998) Butterworths: Durban
- Dixon M., and R McCorquodale *Cases and Materials on International Law* (1991) Blackstone Press Limited: London
- Dugard J., *International Law: A South African Perspective* (2000) Juta: Kenwyn
- Feltham R G., *Diplomatic Handbook* 7ed (1998) Longman: London
- Frey L S., and Frey M L., *The History of Diplomatic Immunity* (1999) Ohio State University Press: Columbus
- Greig D W., *International Law* 2ed (1976) Butterworths: London
- Harris D J., *Cases and Materials on International Law* 5ed (1998) Sweet & Maxwell: London



Hingorani, R.C., *Modern International Law*, oxford and IBH publisher, new Delhi Pp. 184-205

Ladan, M.T., *Materials and Cases on Public International Law*

Lord Gore-Booth (ed) *Satow's Guide to Diplomatic Practice* 5ed (1979) Longman: London

Malanczuk P., *Akehurst's Modern Introduction to International Law* 7ed (1997) Routledge: London

McClanahan G.V., *Diplomatic Immunity: Principles, Practices, Problems* (1989) Hurst: London

Schulte C., *Compliance with Decisions of the International Court of Justice* (2004) Oxford University Press: Oxford

Shaw M. N., *International Law* 4ed (1997) Cambridge University Press: New York

Shearer I. A., *Starke's International Law* 11ed (1994) Butterworths: London

Van Dervort T. R., *International Law and Organization: An Introduction* (1998) Sage Publication: London

Von Glahn G., *Law Among Nations: An Introduction to Public International Law* 7ed (1996) The Macmillan Company: London 193

Wallace R. M. M., *International Law* 4ed (1997) Sweet & Maxwell: London

Wilson C. E., *Diplomatic Privileges and Immunities* (1967) The University of Arizona Press: Tucson

## **JOURNAL ARTICLES**

Akinsanya A., "The Dikko Affair and Anglo-Nigerian Relations" (1985) 34 *International & Comparative Law Quarterly* 602

Barnes W., "Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice" (1960) 43 *Department State Bulletin* 173

Belotsky V. P., Jnr "The Effect of the Diplomatic Relations Act" (1981) 11 *California Western International Law Journal* 354

Benedek M. L., "The Diplomatic Relations Act: The United States Protects Its Own" (1979) 5 *Brooklyn Journal of International Law* 379

Botha N., "International Court of Justice – *United States of America v Iran* Order in Request for Provisional Measures: Judgment in the Case Concerning United States.

- Diplomatic and Consular Staff in Tehran” (1980) *South African Yearbook of International Law* 137
- Botha N., “International Court of Justice: United States Application Against Iran” (1979) *South African Yearbook of International Law* 153
- Brower C. H., “International Immunities: Some Dissident View on the Role of Municipal Courts” 41 *Virginia Journal of International Law* (2000-2001) 1
- Brown J., “Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations” (1988) 37 *International & Comparative Law Quarterly* 53 195
- Buckley M., “Origins of Diplomatic Immunity in England” (1966-1967) 21 *University of Miami Law Review* 349
- Davidson S., *et al* “Treatise, Extradition and Diplomatic Immunity: Some Recent Developments” (1986) 35 *International & Comparative Law Quarterly* 425
- Donoghue J. E., “Perpetual Immunity for Former Diplomats? A response to “The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity” (1988-1989) *Columbia Journal of Transnational Law* 615
- Dugard J., “Recent Cases: Consular Immunity” (1966) *South African Law Journal* 126
- Dulmage C. H., “Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations” (1978) *Case Western Reserve Journal of International Law* 827
- Edmondson L. S., “Espionage in Transnational Law” (1971-1972) 5 *Vanderbilt Journal of Transnational Law* 434 196
- Elgavish D., “Did Diplomatic Immunity Exist in the Ancient Near East?” (2000) *Journal of the History of International Law* 73
- Farahmand A. M., “Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse” (1989-1990) 16 *Journal of Legislation* 89
- Farhangi L. S., “Insuring Against Abuse of Diplomatic Immunity” (1985-1986) 38 *Stanford Law Review* 1517
- Frey L., and Frey M., “The Bounds of Immunity: The Sá Case. Politics, Law, and Diplomacy in Commonwealth England” (1990) *Canadian Journal of History* 41
- Garcia-Mora M. R., “Treason, Sediton and Espionage as Political Offences Under the Law of Extradition” (1964-1965) 26 *University of Pittsburgh Law Review* 65
- Garley R. S., “Compensation for ‘Victims’ of Diplomatic Immunity in the United Sates: A Claims Fund Proposal” (1980-1981) 4 *Fordham International Law Journal* 135

- Goldberg A. J., “The Shoot-Out at the Libyan Self-Styled People’s Bureau: A Case of State-Supported International Terrorism” (1984-1985) 30 *South Dakota Law Review* 197
- Goodman D.H., “Reciprocity as a Means of Curtailing Diplomatic Immunity Abuse in the United States: The United States Needs to Play Hardball” (1988-1989) 11 *Houston Journal of International Law* 393
- Green L. C., “Trends in the Law Concerning Diplomats” (1981) 19 *Canadian Yearbook of International Law* 132
- Grzybowski K., “The Regime of Diplomacy and the Tehran Hostages” (1981) 30 *International & Comparative Law Quarterly* 42
- Gardiner, R.K., ‘*International Law*,’ Pearson Longman London (2003), pp. 339-387
- Harris L. J., “Diplomatic Immunities: A New Regime is soon to be adopted by the United States” (1968) 62 *American Journal of International Law* 98
- Higgins R., “The Abuse of Diplomatic Immunities: Recent United Kingdom Experience” (1985) *American Journal of International Law* 641
- Higgins R., “UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities: Government Response and Report” (1986) 80 *American Journal of International Law* 135
- Hill C., “Sanctions Constraining Diplomatic Representatives to Abide by the Local Law” (1931) 25 *American Journal of International Law* 252
- Hoffman J., “Reconstructing Diplomacy” (2003) 5 *British Journal of Politics and International Relations* 525
- Hurst C. J. B., (Sir) “Diplomatic Immunities – Modern Developments” (1929) 10 *British Yearbook of International Law* 1198
- International Law Commission “Draft Articles on Special Missions with Commentaries” (1967) vol. 2 *Yearbook of the International Law Commission* 347
- International Law Commission “Summary record of the 917<sup>th</sup> meeting” (1967) vol. 1 *Yearbook of the International Law Commission* 121
- Jones Jr D. A., “Diplomatic Immunity: Recent Developments in Law and Practice” (1991) 85 *American Society of International Law Proceedings* 261
- Jones R. G., “Termination of Diplomatic Immunity” (1948) 25 *British Yearbook of International Law* 262
- Kear S., “Diplomatic Innovation: Nasser and the Origins of the Interests Section” (2001) Vol. 12 No. 3 *Diplomacy and Statecraft* 65

- Keaton J. J., "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *Hastings Constitutional Law Quarterly* 567
- Kingsbury B., "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1998-1999) 31 *New York University Journal of International Law & Politics* 679
- Koffler W. W., "A Passing Glimpse at Diplomatic Immunity" (1965-1966) 54 *Kentucky Law Journal* 259
- Labuschagne J. M. T., "Diplomatic Immunity as Criminal Defence: An Anthro-legal Anachronism" (1997) 22 *South African Yearbook of International Law* 32 199
- Larschan B., "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?" (1987-1988) 26 *Columbia Journal of Transnational Law* 283
- Lillich R. B., "A Case Study in Consular and Diplomatic Immunity" (1960-1961) 12 *Syracuse Law Review* 305
- Lloyd L., "What's in the Name? The Curious Tale of the Office of High Commissioner" (2000) 11 *Diplomacy and Statecraft* 47
- Lyons A. B., "Immunities Other Than Jurisdictional of the Property of Diplomatic Envoys" (1953) 30 *British Yearbook of International Law* 116
- Lyons A. B., "Personal Immunities of Diplomatic Agents" (1954) 31 *British Yearbook of International Law* 299
- Maginnis V. L., "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations" (2002-2003) *Brooklyn Journal of International Law* 989
- Marmon Jnr W. F., "The Diplomatic Relations Act of 1978 and its Consequence" (1978-1979) 19 *Virginia Journal of International Law* 131
- O'Neil T. A., "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978" (1979-1980) 54 *Tulane Law Review* 661 200
- Ogdon M., "The Growth and Purpose in the Law of Diplomatic Immunity" (1937) *American Journal of International Law* 449
- Parkhill J. S., "Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communication" (1997-1998) 21 *Hastings International & Comparative Law Review* 565
- Pecoraro T. W., "Diplomatic Immunity Application of the Restrictive Theory of Diplomatic Immunity – *The Abisinito Affair*" (1988) 29 *Harvard International Law Journal* 533

- Preuss L., "Capacity for Legation and Theoretical Basis of Diplomatic Immunities" (1932-1933) 10 *New York International Law Quarterly Review* 170
- Przetacznik F., "The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law" (1978) *Anglo-American Law Review* 348
- Ross M.S., "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities" (1989) *American University Journal of International Law & Policy* 173
- Starke, J.G., 'Introduction to International Law', 8<sup>th</sup> ed Butterworth.(1977) Pp. 440-448
- Sofer S., "Being a 'Pathetic Hero' in International Politics: The Diplomat as a Historical Actor" (2001) 12 *Diplomacy and Statecraft* 107
- Southwick J. T., "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms" (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 83
- Sutton S., "Diplomatic Immunity and the Siege of the Libyan People's Bureau" (1985) *Public Law* 193
- Valdez A. L., "Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978" (1981) 15 *International Law* 411
- Van Wyk D. H., "Immunity" (1979) *South African Yearbook on International Law* 159
- Ward N. P., "Espionage and the Forfeiture of Diplomatic Immunity" (1997) 11 *International Lawyer* 657
- Whomersley C.A., "Some Reflections on the Immunity of Individuals for Official Acts" (1992) 41 *International & Comparative Law Quarterly* 848
- Wiebalck A., "Abuse of the Immunity of Diplomatic Mail" (1984) *South African Yearbook of International Law* 175
- Wilson R. A., "Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations" (1984) 7 *Loyola of Los Angeles International & Comparative Law Journal* 113 202
- Wright S.L., "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University International Law Journal* 177
- Young E., "The Development of the Law of Diplomatic Relations" (1964) 40 *British University of International Law* 141
- Zaid M. S., "Diplomatic Immunity: To Have or not to Have, that is the Question" (1998) 4 *ILSA Journal of International & Comparative Law* 623 203

## INTERNET RESOURCES

Betrame J., *et al* "Drinking with Immunity: A Russian diplomat's behaviour results in tragedy" (2001) <http://www.macleans.ca/topstories/world/article.jsp?content=46435> [Accessed on 28 February 2005]

Foy P., 'Huntsman Sign Measure Tracking Law-Breaking Foreign Diplomats' in *The Association Press Sate and Local Wire*, April 25, 2005. From an e-mail received from the US mission in South Africa.

Hopkins K., 'International Law in South African Courts' (2001) <http://www.derebus.org.za/nxt/gateway.dll/bsxha/szjba/tzjba/6hnba/upqga> [Accessed on 23 October 2006]

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=893905](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893905) [Accessed on 20 October 2006] Hays "What is Diplomatic Immunity?" (2000)

[http://www.calea.org/newweb/newsletter/No73/what\\_is\\_diplomati\\_immunity.htm](http://www.calea.org/newweb/newsletter/No73/what_is_diplomati_immunity.htm) [Accessed on 20 May 2005]

<http://www.state.gov/ofm/resource/22839.htm> [Accessed on 23 September 2005]

Members of Family: Cessation of Diplomatic Privileges and Immunities' <http://www.dfa.gov.za/departement.prot1.htm#intro> [Accessed on 16 February 2006] US Department of State "Parking Program for Diplomatic Vehicles"

Neary L., (anchor) "Senator Hillary Rodham Clinton discusses the Senate proposal to collect nearly \$21 million from thousands of unpaid parking tickets by foreign diplomats"

Schmidt R., "Testing the Limits of Diplomatic Immunity" (1998), Maggi, Waltrick "Family Settles Georgian Case; McQueen Case still Pending" (1998) from an e-mail received from the US mission in South Africa.

[www.washingtontimes.com/news/2012/dec/13.workersabusedbyimmunediplomat?pagea11](http://www.washingtontimes.com/news/2012/dec/13.workersabusedbyimmunediplomat?pagea11)