SENDING AND RECEIVING: IMMUNITY SOUGHT BY DIPLOMATS COMMITTING CRIMINAL OFFENCES

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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. Consuls and international organizations, although their privileges and immunities are similar to diplomatic personnel, do differ and are regulated by the Vienna Convention on Consular Relations and the United Nations International Immunities respectively. These Conventions have been influenced by past practices and by three theories during different era's namely exterritoriality, personal representation and functional necessity.

The Vienna Convention on Diplomatic Relations further provides certain immunities and privileges to different levels of diplomatic officials, their staff and families. Privileges and immunities will be considered under various main categories, namely the diplomatic mission, the diplomatic official, diplomatic staff, and families. Each category receives privileges and immunities, for example immunities enjoyed by the diplomatic mission include mission correspondence and bags. Diplomatic officials enjoy personal inviolability, immunity from jurisdiction and inviolability of diplomats' residences and property. The staff and families of diplomatic officials too enjoy privileges and immunities. The problem of so many people receiving privileges and immunities is that there is a high likelihood of abuse. Abuses that arise are various crimes committed by diplomats, their staff and families. They are immune from local punishment and appear to be above the local law. Although the Vienna Convention on Diplomatic Relations provides remedies against diplomats, staff and families who abuse their position, it gives the impression that it is not enough.

Various Acts in the United Kingdom, United States and the Republic of South Africa will be analysed in order to ascertain what governments have done to try and curb diplomatic abuses. Each will be considered and found that although they have restricted immunity from previous practices it still places the diplomats' needs above its own citizens. Thus several suggestions have been put forward and argued whether they are successful in

restricting immunity comprehensively. Such suggestions are amending the Vienna Convention on Diplomatic Relations; using the functional necessity theory to further limit immunity; forming bilateral treaties between States as a possible means to restrict or limit; and lastly establishing a Permanent International Diplomatic Criminal Court.

The key question to be answered is whether diplomatic immunity is needed for the efficient functioning of foreign relations between States.

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ABBREVIATIONS

ANC	African National Congress
Consular Convention	Vienna Convention on Consular Relations
Convention of Special Missions	Special Missions Convention
Ed	editor/ edition
et al.	*et alii* (and others)
etc.	*Et cetera*
FAO	Food and Agricultural Organisation
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
J	Judge
J.	Journal
KGB	Committee for State Security Russian: **Комите́т Госуда́рственной Безопа́сности**
Law of Treaties Convention	Vienna Convention on the Law of Treaties
LJ	Lord Justice
No.	Number
OAS	Organisation of American States
Optional Protocol	Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes
NATO	North Atlantic Treaty Organisation
Prevention and Punishment Convention	Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents
UK	United Kingdom
UN	United Nations
UN Convention	Convention on the Privileges and Immunities of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	United States of America
USSR	Union of Soviet Socialist Republics
Vienna Convention	Vienna Convention on Diplomatic Relations
Vol	volume

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Lou Holtz said it best:
"Ability is what you're capable of doing. Motivation determines what you do. Attitude determines how well you do it."

CHAPTER 1

INTRODUCTION

1.1 The Purpose of the Study

Rules that regulate diplomatic relations are one of the earliest expressions of international law.[1] Diplomacy exists to establish and maintain communication between States in order to achieve commercial, political and legal objectives.[2] 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.[3]

The object of this study is to establish whether diplomats, their staff and families need absolute criminal immunity. Possible alternatives to immunity will be discussed and responses by the UK, US and South Africa will be considered. Diplomats ensure that communication between States is made possible. As a consequence they are granted certain immunities and privileges to facilitate this function within the State to which they are accredited.[4] Diplomatic immunity means that foreign diplomats are not subject to the jurisdiction of local courts in respect of their official and, in most instances, their personal acts.[5]

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-16th century: personal representation, exterritoriality

[1]Shaw *International Law* 4ed (1997) 523 and Barker *International Law and International Relations* (2000) 1.

[2]Brownlie *Principles of Public International Law* 5ed (1998) 349.

[3]Hoffman "Reconstructing Diplomacy" (2003) 5 *British Journal of Politics and International Relations* 533.

[4]Shearer *Starke's International Law* 11ed (1994) 384.

[5]Hays "What is Diplomatic Immunity?" (2000) http://www.calea.org/newweb/newsletter/No73/what_is_diplomatic_immunity.htm [Accessed on 20 May 2005]. Immunity can be divided into approximately three categories: state immunity, diplomatic immunity and international organisation immunity.

and functional necessity.[6] The earliest theory, personal representation dictated that a 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 and privileges 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 1963 and the UN International Immunities ("the Vienna Conventions"). Some authors[7] believe that the Vienna Convention of 1961 should be revisited, to prevent abuses by diplomats, their families and their staff of the laws of the receiving State. Particular emphasis is to be placed in this thesis, on the inviolability of diplomatic bags and missions, and thereby clearly distinguishing the nature and scope of official and private functions.

There have been several occasions where local courts have been called upon to apply international law in relation to diplomatic immunity. It is thus necessary for courts to appreciate and be able to apply the tenets of diplomatic law.[8] The continued increase in the numbers of diplomats in foreign countries and the demands of the diplomatic system has led to the development of several Conventions regarding immunities, privileges and the behaviour of diplomats.[9] The United Kingdom and the United States have considered changes in foreign policy and have re-examined privileges and immunities given to foreign diplomats in their countries. Despite these changes and policies, diplomats continue to abuse their rights. These abuses could have dire consequences both for the diplomats and the sending State.[10] The failure of the Vienna Convention and/or other international agreements to provide any suitable sanction fosters an environment for such abuses to continue. This critical aspect will be

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[6]McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 27-34 and Ogdon *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1936) 63-194.

[7]McClanahan *Diplomatic Immunity* 165-178. See also Dixon *Textbook on International Law* 2ed (1990) 164 and Higgins "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience'" (1985) *American Journal of International Law* 65.

[8]Ogdon *Juridical Basis of Diplomatic Immunity* 195.

[9]Frey and Frey *History of Diplomatic Immunity* (1999) 216.

[10]Meerts "The Changing Nature of Diplomatic Negotiation" J Marshall (ed) *Innovation in Diplomatic Practice* (1999) 86.

addressed in this thesis. Justice must be seen to be served by all concerned − the sending State, the receiving State and the victim.[11]

Immunity carries with it an obligation: the duty to respect the laws and regulations of the receiving State.[12] 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?

The purpose of immunity is often misunderstood by citizens in foreign countries and when diplomats abuse their position it is often brought to the public's attention, resulting in numerous debates and problems for enforcement officials whose duties are to protect and honour the law.[13] If absolute criminal immunity continues, diplomatic relations between countries could deteriorate, if not collapse. The international community should comprehensively and finally address this issue. By doing so it will ensure that relations between States are kept intact and thereby promote peace and cooperation.

1.2 Methodology

The primary method of research will be the standard desktop method, which will include an historical and descriptive investigation of diplomatic immunity. When considering Government debates and possible proposals, applicable legislation will be examined, Internet research conducted and respective embassies and foreign affairs offices will be contacted by e-mail. It must be pointed out that modern diplomatic practice can include both male and female diplomats. However, for convenience, the diplomat will be cited in the masculine gender.

1.3 Structure of the Thesis

Chapter 2 considers the historical origins and development of diplomatic immunity. It discusses the three dominant theories of immunity and further lays emphasis on the importance

[11]Dugard *International Law: A South African Perspective* (2000) 204.

[12]Wallace *International Law* 4ed (1997) 131. This is where the concept of reciprocity comes into play as well.

[13]Hays "What is Diplomatic Immunity?" (2000) http://www.calea.org/newweb/newsletter/No73/what_is_diplomati_immunity.htm [Accessed on 20 May 2005].

and need for diplomatic immunity. The development of diplomatic immunity led to the codification of the Vienna Convention and this will be distinguished from the Consular Convention and the UN Convention. Consuls will be examined to clear any confusion between diplomats and consuls and their role in diplomacy. In addition a brief look at what immunities are granted to consuls, their staff and families. Finally, State immunity will be considered to differentiate it from diplomatic immunity and its role in international law.

Chapter 3 examines the different formalities and the various functions of diplomatic missions, diplomats, staff and their families. In so doing the primary areas of abuse will be identified. Diplomatic missions' functions, commencement and termination will be considered and they will be differentiated from special missions that are formed on a temporary basis. The formalities include classification of the head of missions, different types of staff and the commencement and termination of their duties.

Chapter 4 explores the different privileges and immunities accorded by the Vienna Convention to diplomatic missions, diplomats, staff of diplomatic missions and family members. It poses questions about the necessity of immunity and the right of individuals and State to prosecute offenders. Each section will discuss the various immunities and privileges and provide instances where abuse has taken place, indicating areas where there is a need to limit immunities. The Vienna Convention does provide certain remedies against abuse, including declaring diplomats, their family or staff *persona non grata*, asking the sending State to waive immunity and prosecuting in the jurisdiction of the sending State. All of these remedies will be discussed and specific areas of weakness indicated.

Chapter 5 analyses three Governments' responses to the question of diplomatic immunity: the UK, US and the Republic of South Africa. Legislation from these States will be considered with particular reference to the curbing of abuse of immunity. It will then be judged whether certain UK and US mechanisms are successful and could be implemented within a South African setting.

Chapter 6 considers the mechanisms by which abuses may be limited. These suggestions include amending the Vienna Convention, the use of the functional necessity theory, bilateral treaties and a proposal to establish a Permanent International Diplomatic Criminal Court.

Finally, the question of whether diplomatic privileges and immunities can be practically limited is addressed. It is conceivable that by further limiting immunity the number of crimes committed may be decreased and/or the number of successful prosecution increased, whilst still permitting the diplomat to function unimpeded. The international community needs to decide if diplomatic immunity is a necessary evil and, if it is, to make the public aware of what this entails. If, on the other hand, it is decided that immunity can be further limited and possibly removed in some instances, then the International Law Commission ("ILC") must help amend and distribute the amendments to the relevant signatories for comments.

CHAPTER 2

DIPLOMATIC IMMUNITY: ITS ORIGINS, THEORIES AND CODIFICATION

"*Great Men are chosen by fate; the mortal diplomats pass examinations."*

S. Sofer[14]

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.[15] 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.[16] Necessity forced most States to provide envoys with basic protection, both within the State of final destination and in States of transit.[17] 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.[18]

[14]Sofer "Being a 'Pathetic Hero' in International Politics: The Diplomat as a Historical Actor" (2001) 12 *Diplomacy and Statecraft* 110.

[15]Parkhill "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* 568.

[16]Shaw *International Law* 4ed (1997) 523.

[17]Maginnis "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations" (2002-2003) 28 *Brooklyn Journal of International Law* 997.

[18]Shaw *International Law* 523.

With the establishment of permanent missions, sovereigns acknowledged the importance of ambassadors stationed in foreign States in order to negotiate and gather information.[19] 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.[20]

2.2 Where did diplomatic immunity originate?

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 day's battle.[21] Although his speculation cannot be proven, Barker believes it is not an unreasonable thought.[22] It is an interesting theory and possibly the genesis of social interaction between tribes.

The earliest record of organised 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.[23] The Greek city-states and eventually all societies recognised that the practice of protecting foreign diplomatic personnel benefited all concerned. Envoys were

[19]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 569.

[20]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 571.

[21]Elgavish "Did Diplomatic Immunity Exist in the Ancient Near East?" (2000) *Journal of the History of International Law* 73.

[22]Barker *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) 14. Studies on prehistoric man, by analysing graves, settlements and pictographs of that age, established that prehistoric men were organised into communities. They had oral literature, laws and religion among other ideals. They traded and declared war, which indicated that they must have had some sort of relations between the different communities. Even before political institutions began playing a prominent role between people or tribes. it was necessary to treat each other honourably and guarantee security to messengers in order to complete and advance their mutual interests. See McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 18 and Ogdon "The Growth and Purpose in the Law of Diplomatic Immunity" (1937) *American Journal of International Law* 449.

[23]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 568.

accorded absolute immunity.[24] Reciprocity continued throughout the ages and is explained better as "*do unto their representatives as you would have them do unto yours*".[25]

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.[26] In ancient times messengers were able to depend on immunity for fear of the sending States' strength or even their god.[27] If anyone broke the law in the receiving State they were expelled and punished in their own land. This was an immunity based on reciprocal custom. Eventually these customs became rights and were later codified as such in international treaties, like the Vienna Convention[28]

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 who would become Pharaoh of Egypt, and ensuring their children would too, ultimately take the throne.[29] The Hittite king was suspicious and 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.[30]

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[24]Ross "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities" (1989) 4 *American University Journal of International Law & Policy* 176-177.

[25]Frey and Frey *The History of Diplomatic Immunity* (1999) 4.

[26]Barker *The Abuse of Diplomatic Privileges and Immunities* 14.

[27]Elgavish (2000) *Journal of the History of International Law* 84. Homer portrayed ambassadors as the "messengers of Zeus and men." Ogdon (1937) *American Journal of International Law* 450. Eustathius, a noted commentator on Greek early history, stated that the heralds were regarded as divine class or at least middle class between men and gods. Xenophon, an Athenian historian, said that ambassadors were worthy of all their honour. More interesting is that Egyptians clothed the functions of ambassadors with religious character and were said to have possessed a written code upon the subject.

[28]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 997. Frey and Frey *History of Diplomatic Immunity* 4 states that rooted in necessity, immunity was based on religion, sanctioned by culture and fortified reciprocity. As the essential foundations of immunity shifted from religious to legal, what had once become custom became precedent over time. Ultimately, national laws and international treaties codified these privileges.

[29]McClanahan *Diplomatic Immunity* 19-20.

[30]*Ibid*. What is of significance is that the messages sent to the Hittite king resulted in the travelling of the envoy to and from Egypt.

Messengers and envoys were often exposed to harm during their travels. Not only exposed 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.[31] 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.[32]

Protection of envoys was achieved in several ways. Firstly, a specific appeal by the dispatcher to the recipient was sent.[33] 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.[34] In order to protect the messengers, escorts were provided by the receiving State.[35]

According to some authors, there was much political and military diplomacy during biblical times.[36] 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 organise, negotiate and co-ordinate the visit.[37] It may even be argued that Moses, Aaron, Jonas, John the Baptist and even

[31]Elgavish (2000) *Journal of the History of International Law* 77.

[32]Alan *Hostages and Hostage Takers in the Roman Empire* (2006) 64.

[33]Elgavish (2000) *Journal of the History of International Law* 81.

[34]Elgavish (2000) *Journal of the History of International Law* 82-83.

[35]Elgavish (2000) *Journal of the History of International Law* 83.

[36]McClanahan *Diplomatic Immunity* 21 and Frey and Frey *History of Diplomatic Immunity* 18.

[37]McClanahan *Diplomatic Immunity* 21.

Jesus were ambassadors from God, indicating the stature of ambassadors as sacrosanct.[38] 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.[39] Furthermore, Frey and Frey state that envoys could be detained for crimes which they were suspected of committing.[40]

The Ancient Greeks found it useful to receive heralds (*kerykes*) and to grant them immunity.[41] 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.[42] The ancients appreciated the importance of communication between the States and thus took precautionary measures to protect envoys and heralds.[43] Anyone who injured a herald or intervened in his business met with severe punishment.[44] More importantly, 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 alliances. The ambassadors would address the receiving State and be assured of their safety

[38]Frey and Frey *History of Diplomatic Immunity* 18. Moses and the Israelites had to pass through many territories to reach the Promised Land. They were thus open to attack if they entered a foreign territory without permission. Therefore, it was necessary that messengers were sent to foreign kings to negotiate guarantees for protection of their persons and property while crossing the territory.

[39]Elgavish (2000) *Journal of the History of International Law* 75.

[40]Frey and Frey *History of Diplomatic Immunity* 19-20.

[41]Ogdon *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1936) 15. Heralds were messengers of the State. The Greeks regarded heralds as descendants of Hermes, the winged messenger of the gods. The ancients identified Hermes with charm, trickery, cunning, deception, and these traits were transferred to envoys who were still regarded as sacrosanct. They were selected principally on the basis of their oratorical skills, and in most instances were orators such as actors. For instance Demosthenes was an ambassador and advocate and Aeschines was an actor and ambassador for the Athenians.

[42]Frey and Frey *History of Diplomatic Immunity* 16.

[43]Ogdon *Juridical Basis of Diplomatic Immunity* 15.

[44]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.

when returning home.[45] 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.[46]

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).[47] The survival of Rome depended on creating alliances and exchanging representatives with neighbouring States.[48] Rome sent eminent statesmen with senatorial rank as diplomats, known as *nuntii* or *oratores*.[49] These *nuntii* were appointed by and received their credentials from the Senate itself.[50] Diplomatic relations were regulated by an institution known as the College of Fetials, whose practice gave rise to *jus fetiale*.[51] 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, they would deport or surrender him to the wronged State.[52] Modern diplomatic practice follows a similar methodology, in that an offending diplomat can have his immunity waived or be declared *persona non grata*.[53]

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[45]According to Elgavish (2000) *Journal of the History of International Law* 86, there was no diplomatic immunity during peacetime, only during wartime, which is an interesting concept. Surely immunity should also be considered during peacetime to prevent harassment of diplomats while delivering messages or news announcing the arriving of a sovereign into foreign territory. Heralds were dispatched to secure safe-conduct for a delegation to negotiate for peace or obtain permission to recover the dead and wounded from the battlefield. An example in the *Iliad*, is Zeus urging Priam to take a herald to Achilles to recover Hector's body.

[46]Frey and Frey *History of Diplomatic Immunity* 6.

[47]Frey and Frey *History of Diplomatic Immunity* 38 and Barker *Abuse of Diplomatic Privileges and Immunities* 16.

[48]Frey and Frey *History of Diplomatic Immunity* 37.

[49]The main objective of the ambassadors was to be the voice of the Empire and for "Rome …extend her empire to earth's end, her ambition to the skies" as stated by Anchises. Frey and Frey *History of Diplomatic Immunity* 37.

[50]Barker *Abuse of Diplomatic Privileges and Immunities* 16. Any legate who received authority from the Senate was considered inviolable, even if they were dispatched to the provinces, army or to a foreign power.

[51]*Ibid* and Young "The Development of the Law of Diplomatic Relations" (1964) 40 *British Yearbook of International Law* 142.

[52]Frey and Frey *History of Diplomatic Immunity* 39.

[53]Refer to Chapter 4.5.1 and 4.5.2.

Ogdon asserts that the Roman theory of immunity can be found in the writings of classical jurists and commentaries of Code Justinianus. The rights of diplomats were sacred and of universal application.[54] These rights are derived from the *jus naturale* (natural law) and *jus civilis* (civil law).[55] Interestingly, these philosophies were later incorporated during 529 to 534 into codified civil law, the *Corpus Juris Civilis*.[56] 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.[57] According to the *Digest*, any assault on a diplomat of the enemy was deemed an offence against *jus gentium* (law of the nations).[58] Thomas Hobbes in the 17th century clarified the *jus gentium* by confining its application to international relations and equating the law of nations to the law of nature.[59] 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.[60]

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.[61] However, at the same time, the ambassador personified the

[54]What must be noted is it was the Romans who recognised immunity of the whole envoy while the Greeks limited it to heralds.

[55]Frey and Frey *History of Diplomatic Immunity* 6.

[56]Ogdon *Juridical Basis of Diplomatic Immunity* 21.

[57]Young (1964) 40 *British Yearbook of International Law* 143.

[58]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.

[59]Frey and Frey *History of Diplomatic Immunity* 267. For Hobbes there were no legal or moral bonds between States. What prevailed was the state of nature.

[60]Frey and Frey *History of Diplomatic Immunity* 51. During peace time, ambassadors carried messages, returned fugitives and mediated disputes. During wartime, they delivered prisoners, made burial arrangements and concluded peace agreements. In order to ensure that they were recognised by the foreign State, ambassadors wore specific attire identifying them. As a rule, Romans sent multiple ambassadors to ensure that the message would be delivered, even if an ambassador died or became incapacitated en route to his destination.

[61]Frey and Frey *History of Diplomatic Immunity* 6 and 47.

sovereignty of the State and accordingly was treated as a guest of the Senate.[62] Harming the envoy was not only seen as a contravention against the law of the gods, but also of the law of the nations.[63] 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.[64]

It has been stated that the first example of professional diplomacy can be accredited to the Byzantine Empire.[65] 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 department of government dealing not only with external affairs, but also with the organisation and distribution of embassies abroad.[66]

During the Middle Ages, Roman law, barbarian codes and canons of the church recognised the importance of diplomatic immunity.[67] 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.[68] This was due to the notion that Christendom rested in the hands of the Pope, therefore he should govern all of Christendom. The establishment of those diplomatic networks influenced the organisation and the structure of the diplomatic corps.[69] Interestingly, envoys were not answerable for any crimes committed

[62]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.

[63]Frey and Frey *History of Diplomatic Immunity* 57.

[64]Frey and Frey *History of Diplomatic Immunity* 6 and 57 and Young (1964) 40 *British Yearbook of International Law* 143.

[65]Barker *Abuse of Diplomatic Privileges and Immunities* 18.

[66]Frey and Frey *History of Diplomatic Immunity* 77.

[67]Frey and Frey *History of Diplomatic Immunity* 7.

[68]Frey and Frey *History of Diplomatic Immunity* 79.

[69]*Ibid*. Canon law provided heavy penalties for those who harmed a papal representative. The *Decretum*, a synthesis of church law, outlined the inviolability of envoys.

before their mission but were answerable for any crimes committed *during* the embassy.[70] When a crime was committed, they broke the laws of God and man.[71] The laws of God were of primary importance.

China too considered itself a civilised nation but did not recognise the existence of other civilised 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.[72] Frey and Frey observe that it was not only the Chinese who felt they were a dominant culture:[73] 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 the Muslim countries. Japan and China had a common bond of culture.[74] Things began to change when trade by sea between the East and Europe became prominent.[75]

During the 13th and 14th 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.[76] After the decrease of religious tensions around the 15th century, the diplomat's role was enhanced by the growth of State power.[77] The increased role of diplomats made it imperative that their immunity and

[70]Frey and Frey *History of Diplomatic Immunity* 7.

[71]Similarly, Saxon and Gothic law provided for special protection and treatment of envoys and anyone disturbing envoys' immunity was to be punished.

[72]China did have some relations with Korea, Annam, Siam and Burma.

[73]Frey and Frey *History of Diplomatic Immunity* 5 and 22-23. The Japanese, Greeks and Romans can be thought of similarly.

[74]Frey and Frey *History of Diplomatic Immunity* 5. Mill stated that relations with the barbarians would not work in that they did not reciprocate. The Chinese only granted the idea of diplomatic privileges and immunities to other States' representatives around 1860.

[75]McClanahan *Diplomatic Immunity* 24-25.

[76]Frey and Frey *History of Diplomatic Immunity* 8.

[77]Diplomatic immunity became intertwined with the prestige of the dynastic State.

privileges be defined.[78] 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 Franciscus de Victoria in 1532.[79] 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.[80] 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.[81] The ambassador fell under the type of law which was from common consensus and he was considered to be inviolable among all nations.[82]

The basic principle of the naturalist doctrine was that of necessity; to protect ambassadors because of the importance of their functions.[83] 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.[84] 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.[85] Grotius even conceived in *De Jure Belli ac Pacis*[86] that wars would begin out of the maltreatment of envoys.

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[78]Frey and Frey *History of Diplomatic Immunity* 8-9.

[79]Frey and Frey *History of Diplomatic Immunity* 150 and Ogdon (1937) *American Journal of International Law* 455.

[80]Ogdon (1937) *American Journal of International Law* 455 and Ogdon *Juridical Basis of Diplomatic Immunity* 38.

[81]Ogdon (1937) *American Journal of International Law* 455 and Frey and Frey *History of Diplomatic Immunity* 150.

[82]Ogdon (1937) *American Journal of International Law* 455.

[83]Ogdon (1937) *American Journal of International Law* 454 and Ogdon *Juridical Basis of Diplomatic* 38.

[84]Ogdon *Juridical Basis of Diplomatic Immunity* 69.

[85]Ogdon (1937) *American Journal of International Law* 456.

[86]"The Law of War and Peace."

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.[87] 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.[88] 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.[89] 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.[90]

One main rationale of necessity is securing the ambassador's position.[91] Samuel Pufendorf states that ambassadors are necessary in order to preserve peace or win the battle. This is embraced respectably by natural law.[92] 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.[93] 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.

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[87]Ross (1989) 4 *American University Journal of International Law & Policy* 176. See further Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *Hastings Constitutional Law Quarterly* 571 and Farhangi "Insuring Against Abuse of Diplomatic Immunity" (1985-1986) 38 *Stanford Law Review* 1518.

[88]Ogdon *Juridical Basis of Diplomatic Immunity* 40.

[89]Ogdon (1937) *American Journal of International Law* 457. See further Book 2, Ch, XVIII Vol. II 442-443.

[90]Frey and Frey *History of Diplomatic Immunity* 280.

[91]This idea arises from natural law.

[92]Frey and Frey *History of Diplomatic Immunity* 268. For a look into Pufendorf's theories refer to Frey and Frey *History of Diplomatic Immunity* 267-269.

[93]Ogdon (1937) *American Journal of International Law* 457-458.

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

> *"if a foreign Ambassador…committeth 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"*[94]

The most significant of all applications of the Roman doctrine was in the Spanish code system, which stated that any envoys 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.[95] Even though an envoy who visited the country may have owed money to a Spanish individual, he would not be arrested or brought to court.[96] 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.[97] 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 kingdom.[98] Thus a strong precedent had already been set when Gentili and Hotman 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.[99] Gentili stated that the natural law governing ambassadors was not found in theology or philosophy, but in the practice of nations.[100] Although both these theorists did not approve of sending Mendoza back,

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[94]Ogdon (1937) *American Journal of International Law* 460.

[95]Ogdon (1937 *American Journal of International Law* 461.

[96]*Ibid*. See further Law IX, Part VII, Title XXV of *Las Siete Partidas*, an interesting decree which allowed for the debtor to be brought before a court is when he was unwilling to pay for a debt which was contracted in the country.

[97]Frey and Frey *History of Diplomatic Immunity* 174 and Ogdon (1937) *American Journal of International Law* 461.

[98]Ogdon (1937) *American Journal of International Law* 462 and Frey and Frey *History of Diplomatic Immunity* 175-176.

[99]Ogdon (1937) *American Journal of International Law* 461- 462. For an in-depth analysis on the Mendoza case refer to Frey and Frey *History of Diplomatic Immunity* 167-174 and Young (1964) 40 *British Yearbook of International Law* 148-150.

[100]Frey and Frey *History of Diplomatic Immunity* 169.

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.[101]

The period from 1648 to the French Revolution of 1789 witnessed the greatest expansion of diplomatic privilege, but later the most obvious malpractices were restricted. The practice tended to reinforce the idea of privileges as being personal, for example having immunity against criminal jurisdiction. By the 19th century natural law had declined, but it was reintroduced in the 20th century.[102] There was a shift to positive law. 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.[103] He expanded the concept and justified immunity, whether it be from questionable acts or not, in saying that an ambassador acted "*through wine and women, through favors and foul devices.*"[104] 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.[105] 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.*"[106] The first record of a resident ambassador arose in Italy around the mid-15th century.[107] By the 1500s the major powers were already exchanging resident ambassadors

[101]*Ibid*. This concern will be dealt with in Chapter 4.2.1.

[102]Frey and Frey *History of Diplomatic Immunity* 9.

[103]Frey and Frey *History of Diplomatic Immunity* 276.

[104]Frey and Frey *History of Diplomatic Immunity* 277. Other theorists to make contributions to the positivist concepts of diplomacy were Rachel, Textor and de Martens. For a look into positivist theories refer to Frey and Frey *History of Diplomatic Immunity* 274-280.

[105]This was due to more stable political conditions developing in States and to globalisation (interests in commercial and political affairs) that led to States allowing their representatives to remain abroad for longer periods. For instance during the 13th century ambassadors remained in Venice for only three months. In the 15th century they remained for two years and by the 16th century for three years.

[106]This definition was provided by Mattingly in McClanahan *Diplomatic Immunity* 25. Paolo Selmi provides another definition whereby the office "begins to exist when one has the institution of a permanent *officium* of which the ambassador, provided with a general mandate, is the titulary during his assignment" *ibid.*

[107]The head of the first mission was Nicodemus dei Pontramoli, accredited in 1450 by Sforza, Duke of Milan to Cosmio dei Medici in Florence. For an in-depth consideration of at his appointment see Ogdon *Juridical Basis of Diplomatic Immunity* 27-28.

between their courts.[108] It seems that the fear of war stimulated diplomatic activity, which further encouraged the establishment of resident embassies.[109] The establishment of resident embassies made ambassadors a symbol of goodwill and a source of gathering and relaying information in the foreign State.[110] Immunities and privileges of resident ambassadors were an innovation of the 16th and 17th centuries. During this era, the potential limitations of diplomatic immunity was a heated issue[111] and there were several debates, especially with regard to which of the three theories dominated in the international sphere.[112]

Throughout the 19th and early 20th century the "European" law of nations collided with other mutually exclusive, imperial and geopolitical systems.[113] 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.[114] 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.[115] 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

[108]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.

[109]Frey and Frey *History of Diplomatic Immunity* 122.

[110]Frey and Frey *History of Diplomatic Immunity* 123.

[111]McClanahan *Diplomatic Immunity* 27. Frey and Frey stated that the introduction of resident embassies did not initiate a new wave of diplomatic immunity, but rather marked the threshold of the practice.

[112]*Ibid*.

[113]Frey and Frey *History of Diplomatic Immunity* 292.

[114]*Ibid*. The law and practice of diplomatic immunity lends credibility to solidarist and pluralist theories of international law. Solidarism sees international law as exclusively European and becomes universal as other States begin to accept the system. Pluralism emphasis the incorporation of diverse civilizations, culture and legal traditions into international law.

[115]Frey and Frey *History of Diplomatic Immunity* 293.

equality and democracy.[116] Making matters worse for the diplomatic institution were terrorists masquerading as diplomats or even diplomats abusing their power. In the 20th century there were two World Wars and several revolutions that undermined the traditional international society.[117] 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".[118] This means that there was a need to limit and restrict diplomatic immunity.[119] Despite all these negative developments, governments have generally respected diplomatic immunity even through the two World Wars. The Allied forces honoured the rights of the representatives from Nazi Germany and Japan. Similarly, the United States representatives abroad were also immune.[120]

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 civilised settlements. Despite this difficult task ahead of them it was needed in order to put an end to the diverse opinions and customs.[121]

2.3 Theories of Diplomatic Immunity

Since the 16th 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.[122] 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.

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[116] *Ibid*.

[117] *Ibid*.

[118] Frey and Frey *History of Diplomatic Immunity* 294.

[119] Frey and Frey *History of Diplomatic Immunity* 295.

[120] Ross (1989) 4 *American University Journal of International Law & Policy* 177. It must be remembered that immunity during the wars was not absolute: there were exceptions to the general sentiment.

[121] *Ibid*.

[122] McClanahan *Diplomatic Immunity* 27-28.

(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.[123] These representatives received special treatment. When the receiving State honoured them their ruler was pleased and unnecessary conflict was avoided.[124] The representative was treated as though the sovereign of that country was conducting the negotiations, making alliances or refusing requests.[125] The great theorists of the 16th and 17th century like Grotius, Van Bynkershoek,[126] Wicquefort and Vattel supported and encouraged the use of this theory.[127] 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*."[128]

In *The Schooner Exchange v McFaddon*[129] the court held that by regarding the ambassador as the sovereign's representative, it ensured their stature. If they were not accorded exemptions,

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[123]Wilson *Diplomatic Privileges and Immunities* (1967) 2.

[124]McClanahan *Diplomatic Immunity* 28 and Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 571.

[125]McClanahan *Diplomatic Immunity* 28 and Barker *Abuse of Diplomatic Privileges and Immunities* 38. See comments made by Benedek "The Diplomatic Relations Act: The United States Protects Its Own" (1979) 5 *Brooklyn Journal of International Law* 383. The 1708 Act of Anne was formulated around this theory to further soothe the Russian Czar's anger for the insult of his envoy by Britain.

[126]Van Bynkershoek believed that the status of an ambassador is established not by the subject to whom he has been sent but by whom he has been sent. This is reflected by the dictum *Quia imaginem principis sui ubique circumfent* meaning that they are symbols of the sovereigns who have sent them.

[127]Barker *Abuse of Diplomatic Privileges and Immunities* 35. Even the immunity of the family and staff seems to follow the notion that if they were to be detained it would interfere with the freedom of the ambassador.

[128]Przetacznik "The History of the Jurisdictional Immunity of the Diplomatic agents in English Law" (1978) *Anglo-American Law Review* 355. The maxim *sancti habentur legati* gives additional force to the fact that whoever causes any violence to an ambassador tarnishes the dignity and status of the sovereign he represents. Gentili describes an ambassador as someone who is not only sent by the State, but who performs in the name of the State. Stephen portrays an ambassador as the "alter ego" of his ruler and enjoys immunities identical to the ruler in the receiving State.

[129]*The Schooner Exchange v McFaddon* 11 U.S. (7 Cranch) 116 (1812). See further Wilson "Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations" (1984) 7 *Loyola of Los Angeles International & Comparative Law Journal* 115.

every sovereign would cast a shadow on his own dignity when sending an ambassador to a foreign State.[130]

If applied in modern times this theory would be less appropriate, in that it was based mainly on monarchies and not on sovereign States.[131] 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.[132] Second, the decline of the monarchs and the progression of majority vote makes it unclear who the diplomat represents. Last, the immunity does not extend from the consequences of the representatives' private actions.[133] Wright further criticises the theory by placing the diplomat above the law of the receiving sovereign, which is opposite to the principle that all sovereigns are equal.[134] Yet despite its declining popularity, the theory is still used, albeit infrequently. For example, in 1946, a federal court in New York granted a diplomat immunity from service of process under this theory.[135]

(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.[136] 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.[137] This is based

[130]138-139. See further *Magdalena Steam Navigation Co. v Martin* 1859 QB 107, *Taylor v Best* Hilary Term. 17 Victoria (1854), 14 C.B. 487 and *Musurus Bey v Godban* (1894) 2 QB 361.

[131]McClanahan *Diplomatic Immunity* 29 and Wilson (1984) 7 *Loyola of Los Angeles International & Comparative Law Journal* 115.

[132]Ross (1989) 4 *American University Journal of International Law & Policy* 177-178 and Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 573.

[133]*Ibid*. For more detail on this theory refer to Wilson *Diplomatic Privileges and Immunities* 1-5.

[134]Wright "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University International Law Journal* 197.

[135]Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 574.

[136]Przetacznik (1978) *Anglo-American Law Review* 353 and Ogdon *Juridical Basis of Diplomatic Immunity* 63.

[137]Przetacznik (1978) *Anglo-American Law Review* 353.

on the Roman law principle whereby a man took his own land's law with him when he went to another land.[138] 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.[139] 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.[140] 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.[141]

Authors like Emmerich de Vattel (1758) and James Lorimer (1883) emphasised that an ambassador's house and person are not domiciled in the receiving State, but in the sending State. [142] 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.[143] Another example is with reference to political asylum in embassies: Cardinal Mindzenty 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.[144] What can be gathered from this is that asylum in an embassy was and is realised through the concept of exterritoriality.[145] In *The King v Guerchy*[146] in 1765, an English court did not prosecute a French ambassador for an attempt to assassinate another

[138]Przetacznik (1978) *Anglo-American Law Review* 353 and Ogdon *Juridical Basis of Diplomatic Immunity* 68. Grotius also maintained that the diplomatic agent was not subject to the law of the receiving State.

[139]McClanahan *Diplomatic Immunity* 30 and Ogdon *Juridical Basis of Diplomatic Immunity* 63.

[140]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 994 and Benedek (1979) 5 *Brooklyn Journal of International Law* 383.

[141]Przetacznik (1978) *Anglo-American Law Review* 354. The Latin term *extra territorium* was used, although theorists believed this term to be misinterpreted, especially when Grotius, Van Bynkershoek and Vattel referred to it. For an insight into the debate on how Grotius was misinterpreted refer to Barker *Abuse of Diplomatic Privileges and Immunities* (1996) 40-43 and Ogdon *Juridical Basis of Diplomatic Immunity* 74.

[142]McClanahan *Diplomatic Immunity* 30.

[143]McClanahan *Diplomatic Immunity* 30-31.

[144]*Ibid*.

[145]Many scholars and authors confuse the concepts of "exterritoriality" and "extraterritoriality". "Extraterritoriality" refers to the application of municipal law to acts occurring outside the geographical boundaries of a State's jurisdiction.

[146]*The King v Guerchy* 1 Wm. B1, 545; 96 Eng. Rep. 315 (1765).

Frenchman. In *Taylor v Best,*[147] Jervis CJ declared that the basis of privilege is that the ambassador is assumed to be in his own country.[148] The Attorney General in *Magdalena Steam Navigation Co. v Martin*[149] 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.[150] Other reasons stem from the vagueness of the term "exterritoriality" leading to incoherent and politically motivated interpretations.[151] For instance, the term is persistently used to describe not only the mission, but all types of immunities and privileges enjoyed by the personnel, which seems contrary to the original understanding of the term.[152] The courts also found exterritoriality conceptually difficult when finding that the actions of a diplomat were committed on the receiving State's soil rather than domestic soil.[153]

[147]*Taylor v Best* Hilary Term. 17 Victoria (1854), 14 C.B. 487.

[148]The court stated in *Wilson v Blanco* 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 718 (1889) that the theory "*derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin*."

[149]*Magdalena Steam Navigation Co. v Martin* 1859 QB 107. Therefore, if an ambassador is treated as being a resident in the State from which he comes, just as in exterritoriality, his absolute independence would be the result. Thus immunity will extend to his person, family, house and staff.

[150]McClanahan *Diplomatic Immunity* 32. For an in-depth discussion of this theory and its decline, refer to Preuss "Capacity for Legation and Theoretical Basis of Diplomatic Immunities" (1932-1933) 10 *New York International Law Quarterly Review* 170.

[151]Ross (1989) 4 *American University Journal of International Law & Policy* 178 and Farahmand "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse" (1989-1990) 16 *Journal of Legislation* 93.

[152]Wilson *Diplomatic Privileges and Immunities* 12. The theory could have dangerous consequences, in that it presupposes a theory of unlimited privileges and immunities to all diplomats, which is not what was actually intended.

[153]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 572. The courts also refused to accept the literal and precise meaning that diplomatic premises are foreign soil. Yet in the media, embassies are always referred to as foreign soil and not part of the receiving State.

(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 privilege and immunities is that it is necessary for him to perform his diplomatic function.[154] 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.[155] Grotius' dictum *omnis coactio abesse a legato debet*[156] stresses that an ambassador must be free from all coercion in order to fulfil his duties.[157] 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.[158] 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.[159] In the 18th century, the Lord Chancellor in *Barbuitt*'s case declared that diplomatic privileges stem from the necessity that nations need to interact with one another.[160] Similarly, in *Parkinson v Potter*[161] 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

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[154]McClanahan *Diplomatic Immunity* 32 and Parkhill (1997-1998) 21 *Hasting International & Comparative Law Review* 572

[155]McClanahan *Diplomatic Immunity* 32. Benedek (1979) 5 *Brooklyn Journal of International Law* 384 succinctly states that the use of this theory protects diplomats from "*the danger of prejudice or bad faith in the national courts…and against baseless actions brought from improper motives*".

[156]Roughly translated as "all force away from embassy that owes".

[157]Przetacznik (1978) *Anglo-American Law Review* 357.

[158]Barker *Abuse of Diplomatic Privileges and Immunities* 46-47.

[159]Barker *Abuse of Diplomatic Privileges and Immunities* 47 and Ogdon *Juridical Basis of Diplomatic Immunity* 171.

[160]*Buvot v Barbuit* (1737) Cas. Temp. Ld. Talb. 281.

[161]*Parkinson v Potter* [1885] 16 QBD 152.

to help perform diplomatic functions, and the increase of international organisations which require immunity to be granted to more people.[162] 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.[163]

The primary advantage of this functional necessity is that it is adaptable and has safeguards against excessive demands for privileges and 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.[164] Generally, diplomats should not commit criminal acts or act in a manner unbefitting 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".[165] 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 recognised in the Vienna Convention, and was deemed practical under the UN Convention.[166]

Current juridical understanding of diplomatic immunity demonstrates that diplomats cannot be prosecuted for criminal or civil acts outside their diplomatic functions.[167] 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.[168] What is reflected in the theory is that diplomats cannot function properly without immunity. The extent of this

[162]Przetacznik (1978) *Anglo-American Law Review* 357- 358 and Southwick (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 88. See further Wilson *Diplomatic Privileges and Immunities* 21.

[163]Ogdon *Juridical Basis of Diplomatic Immunity* 180.

[164]McClanahan *Diplomatic Immunity* 32.

[165]McClanahan *Diplomatic Immunity* 33.

[166]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 996.

[167]This is indicated in the Vienna Convention under Article 31.

[168]Farahmand (1989-1990) 16 *Journal of Legislation* 94 and Wright (1987) 5 *Boston University International Law Journal* 202.

immunity may be understood to mean that diplomats may break the law of the receiving State in order to fulfil their functions.[169]

2.4 Vienna Convention on Diplomatic Relations of 1961

The development of diplomatic immunity over the years let 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.[170] 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 1895 with the Draft Convention of the Institute of International Law.[171] This resolution stipulated that diplomats enjoyed exterritoriality. This exterritoriality was curtailed in 1929.[172] 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 analysed 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.[173] 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.[174] Another important document was the Harvard Research Draft Convention on

[169]Ross (1989) 4 *American University Journal of International Law & Policy* 179.

[170]Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 1.

[171]Frey and Frey *History of Diplomatic Immunity* 480. The Institute of International Law and the American Institute of International Law rejected the fiction of exterritoriality.

[172]Frey and Frey *History of Diplomatic Immunity* 481 and Barker *Abuse of Diplomatic Privileges and Immunities* 29.

[173]*Ibid* and Garretson "The Immunities of Representatives of Foreign States" (1966) 41 *New York University Law Review* 69.

[174]Frey and Frey *History of Diplomatic Immunity* 482.

Diplomatic Privileges and Immunities in 1932 ("the Harvard Convention").[175] McClanahan states that had Harvard been an international organisation 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.[176] The Harvard Convention was one of the first documents that attempted to make a clear distinction between official and non-official acts.[177] 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.[178]

None of the earlier attempts managed to address the field in sufficient detail.[179] In 1957, following the General Assembly Resolution 685, the ILC accepted the task of preparing a draft Convention on Diplomatic Relations.[180] A E F Sandstrom was appointed Special Rapporteur and was responsible for drafting the report which would be later reviewed by the ILC.[181] The ILC later requested information and comments from all governments in order to receive input and draft an efficient document.[182] In 1961 the Vienna Convention, attended by 81 States and several international organisations (as observers) making use of the envoy structure, was held to discuss this draft document.[183] These States were able to reach consensus on many issues.

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[175]The Harvard Draft contains in its introductory comments the declaration that "*the theory of exterritoriality has not been used in formulating this present draft convention*".

[176]McClanahan *Diplomatic Immunity* 41 and Barker *Abuse of Diplomatic Privileges and Immunities* 29-30.

[177]Dinstein "Diplomatic Immunity from Jurisdiction *Rationae Materiae*" (1966) 15 *International & Comparative Law Quarterly* 78. The Harvard Convention draws a line between 'exemption from jurisdiction' and 'non-liability for official acts'. Non-liability means that the receiving State will not impose liability on the diplomat for acts done in the performance of his function; while exemption from jurisdiction refers to both official and private acts.

[178]Refer further to Article 31 of the Vienna Convention and Chapter 4.

[179]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 998.

[180]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 998 and Benedek (1979) 5 *Brooklyn Journal of International Law.* 385.

[181]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 998.

[182]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.

[183]The Vienna Convention came into force on 24 April 1964.

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.[184] The formulation of the Vienna Convention was a reaction to the absolute immunity granted to diplomats throughout the ages.[185] Further, it sought to standardise 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*"[186]. Furthermore, the preamble recognises the theory of functional necessity as the dominant theory.[187] Thus, the focus shifts from the *person* of the diplomat to his *function* in the mission.[188] 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.[189] 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 exterritoriality 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*"[190].

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[184]McClanahan *Diplomatic Immunity* 42 and Van Dervort *International Law and Organization: An Introduction* (1998) 291.

[185]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.

[186]Ross (1989) 4 *American University Journal of International Law & Policy* 181 and Denza *Diplomatic Law* 10.

[187]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.

[188]Garley "Compensation for 'Victims' of Diplomatic Immunity in the United States: A Claims Fund Proposal" (1980-1981) 4 *Fordham International Law Journal* 143.

[189]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.

[190]Frey and Frey *History of Diplomatic Immunity* 483-484 and Barker *Abuse of Diplomatic Privileges and Immunities* 57. The functionalism underlay stipulates that the premises, archives, documents of missions and private residences are inviolable. The receiving State has a duty to protect the above and diplomats are further immune from search, requisition, attachment or execution. Articles 28-38 show an increasingly restrictive approach to immunities.

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.[191] 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.[192] According to Denza, there are six provisions that may be singled out as marking significant developments of previous customary international law principles.[193] 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 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 the minimising 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.[194] 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.[195]

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

[191]The limitations on jurisdictional immunities for diplomats, family and staff reflected a more restrictive position than in customary practices. One of the few instances where a more liberal interpretation succeeded was in Article 40, which grants diplomats inviolability and immunity when in transit to or from their post provided that the third State grants him a passport or visa. This provision is justified by functional necessity, and this can be illustrated by the US and Britain who have long respected the inviolability of envoys to and from posts. However, this concept is not recognised by all countries especially by Latin American countries. See further Frey and Frey *History of Diplomatic Immunity* 485.

[192]Frey and Frey *History of Diplomatic Immunity* 482-483.

[193]Denza *Diplomatic Law* 3.

[194]Denza *Diplomatic Law* 4.

[195]Denza *Diplomatic Law* 5. Although these Articles are an improvement to customary practices abuse still occurs. Is it then necessary to restrict immunities even further?

enjoyed greater status than other envoys.[196] 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.[197]

Although the Vienna Convention successfully codified several practices, not everyone got what they wanted.[198] 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 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.[199] 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.[200] Importantly, it focuses only on permanent envoys and did not deal with ad hoc envoys and international organisations, which are dealt with by other Conventions. It further avoids controversial issues that would have started never-ending

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[196]World War I helped undermine the traditional diplomatic order. Countries even blamed diplomats for the complicated networking of alliances which led to the war.

[197]Frey and Frey *History of Diplomatic Immunity* 432. Although this was the case, many countries, like Germany and Russia during World War II violated diplomatic practice by imprisoning diplomats and refusing them any contact with the outside world. Other countries like Italy, Spain and China wanted absolute immunity for their representatives but gave other stated representatives limited immunity.

[198]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*."

The discussion arising out of this proposal was divided into three schools of thought. The first agreed with the proposal and included delegations of Argentina, Venezuela, Switzerland, Panama and Spain. The second school were in favour of a clear statement of the theoretical basis of diplomatic law but considered the Preamble to be the appropriate place for inclusion. The third school rejected the idea altogether. In the end the second school of thought was considered the best solution. For a full debate on these schools refer to Barker *Abuse of Diplomatic Privileges and Immunities* 58-65.

[199]Frey and Frey *History of Diplomatic Immunity* 487.

[200]*Ibid*.

debates. In addition, its use of the restrictive and functional necessity approach helps restrict privileges and reduce the number of people who enjoyed them.[201]

The Convention contains 53 Articles that govern the behaviour 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.[202] 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.

2.5 Consuls and the Vienna Convention on Consular Relations of 1963

Although this thesis does not deal with immunity of consuls, it is necessary to show their distinction from diplomats and their importance in the field of international law. There is an assumption that diplomats and consuls hold the same office.[203] Although diplomats and consuls do work hand in hand to create foreign relations between States, they are different; not only in function, but in the immunities and privileges they are afforded.

Their primary duty is to protect economic interests and any trade relations between the sending and receiving State. Other consular duties include issuing passports, the registration of birth and the solemnising of marriages, executing notarial acts and exercising disciplinary jurisdiction over the crews of vessels belonging to the sending State.[204] The protection of the sending State's nationals who find themselves in difficulty in the receiving State is an important function and failure of the receiving State to allow right of access to and

[201]Frey and Frey *History of Diplomatic Immunity* 480-481. This became practice among States during this period.

[202]Refer to Chapter 4.

[203] The Supreme Court of Hong Kong in *Juan Ysmael & Co. v S.S. Tasikmalaja* I.L.R. 1952 Case No. 94 stated that some of the functions of a consul are similar to those of diplomats, but these functions do not transform a consul into a diplomat.

[204]Wallace *International Law* 4ed (1997) 132 and O'Connell *International Law Vol. 2* 2ed (1970) 915. See further Van Dervort *International Law* 292. Berridge further states that a consular post may be empowered to engage in diplomatic acts only if there is an agreement with the receiving State. He goes on to say that there is a general integration of the consular and diplomatic service, in that consuls would be able to cope with any diplomatic task given to them. Although this is an interesting notion, it will not be considered in detail. It will further be mentioned in Chapter 4. Refer to Berridge *Diplomacy: Theory and Practice* 3ed (2005) 144.

communication with such nationals may result in action being initiated before the International Court of Justice (ICJ), as did Germany and Paraguay against the US.[205] McClanahan states three provisions with reference to communication and contact with nationals of the sending State. Firstly, that consuls shall be free to communicate and have access to sending State nationals and vice versa; secondly, that consuls are to be informed swiftly by the receiving State authorities of any of their nationals that have been arrested and detained, and the nationals shall be informed of such rights; and thirdly, that consuls have the right to visit the nationals and arrange for their legal representation.[206]

Consuls are frequently stationed in more than one city or district in the sending State (unlike diplomatic missions) and thus differ from diplomatic representatives. In South Africa, foreign embassies are situated in Pretoria and in Cape Town, while consular offices are found in Johannesburg, Durban, Cape Town and Port Elizabeth.[207]

The first attempt to bring about codification of the rights and duties of consuls was made in Havana at the 1928 Inter-American Conference, where American States signed a Convention on Consular Agents.[208] By 1932, the Harvard Research in International Law had completed a comprehensive draft convention with detailed notes on the subject, which led to the study of consular relations by the ILC in 1955. The Special Rapporteur drafted a report on the subject which in turn led to the Vienna Convention in Consular Relations being adopted and signed in 1963.[209] This provided that the Consular Convention would not interfere or affect any other international agreements between parties.

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[205]Wallace *International Law* 132 and Von Glahn *Law Among Nations: An Introduction to Public International Law* 7ed (1996) 448. Cases are *Paraguay v US* (1998) I.C.J. 248 and *Germany v US (Le Grand Case)* 40 I.L.M 1069 (2001).

[206]McClanahan *Diplomatic Immunity* 49.

[207]Dugard *International Law: A South African Perspective* (2000) 199. Consuls seldom have direct communication with the government of the receiving State except where their authority extends over the whole area of the State or where there is no diplomatic mission stationed in the receiving State.

[208]Von Glahn *Law Among Nations* 446.

[209]Brownlie *Principles of Public International Law* 5ed (1998) 365 and Von Glahn *Law Among Nations* 446.

Consular officers are persons designated and are responsible for the exercise of the consular functions.[210] The Convention under Article 5 lists an extensive list of consular functions and further functions, as a result of the Brazilian delegate who had asked for the broadening of the term from "official functions" to "consular functions".[211] In *Arcaya v Paez*[212] a libel action in the US was brought against Paez, a Venezuelan consul-general.[213] Two important questions arose, namely, what is the scope of consular immunity under customary international law and what is the effect of the acquisition of diplomatic status on an action previously brought against a consul?[214] The first issue is settled in the Consular Convention under Article 5, that consuls are entitled to those rights, privileges and immunities necessary to ensure proper performance of their functions. In other words, they have immunity only for official acts.[215] With regard to the second issue, the court found itself bound by the Department of State's statement that Paez was entitled to the privileges and immunities of a diplomat only because he was later appointed the rank of Envoy Extraordinary and Minister Plenipotentiary; therefore he was protected from service of process while holding his position.[216]

Article 9 of the Consular Convention divides the heads of consular posts into four posts:

(a) Consuls-general;

(b) Consuls;

(c) Vice-Consuls; and

(d) Consular agents.

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[210]O'Connell *International Law* 918.

[211]McClanahan *Diplomatic Immunity* 48 and Whomersley "Some Reflections on the Immunity of Individuals for Official Acts" (1992) 41 *International & Comparative Law Quarterly* 854. See further Do Nascimento e Silva "Diplomatic and Consular Relations" M Bedjaoui (ed) (1991) *International Law: Achievements and Prospects* 446. Van Dervort has stated that this form of immunity is frequently referred to as 'functional immunity' where the consul is given protection from criminal prosecution only to the extent as it affects the performance of official functions. Refer to Van Dervort *International Law* 293.

[212]*Arcaya v Paez* 145 F. Supp. 464 (S.N.D.Y 1956) *aff'd* F.2d 958 (2d Cir. 1957) in Lillich "A Case Study in Consular and Diplomatic Immunity" (1960-1961) 12 *Syracuse Law Review* 305.

[213]Lillich (1960-1961) 12 *Syracuse Law Review* 305.

[214]Lillich (1960-1961) 12 *Syracuse Law Review* 309. A third issue was raised, which is not relevant in this section.

[215]Lillich (1960-1961) 12 *Syracuse Law Review* 309-311.

[216]Lillich (1960-1961) 12 *Syracuse Law Review* 311. This was decided from the persuasive authority of *Magdalena Steam Nav. Co, v Martin* 2 El. & El. 94, 121 Eng. Rep. 36 (Q.B. 1859).

Consuls receive fewer immunities and privileges than diplomats. They are not diplomatic agents and are not immune from local jurisdiction, except where a treaty between the two States allows for exceptions, or if the consul acts within his official capacity and within the limits of consular powers under international law.[217] The degree of immunity accorded to consular offices and employees is quite restricted, in that they are only exempted in acts of an official consular function. [218] As a result, they are exempted from jurisdiction of judicial or administrative authorities of the receiving State.[219] In the South African case of *S v Penrose*[220] the question for decision was whether an honorary consul from Colombia was immune from prosecution for negligent driving under the Road Traffic Ordinance No. 26 of 1956. The court held that in international law it was clear that a consul was not a diplomatic representative. Thus the Diplomatic Privileges Act cannot confer immunity on any consul other than those with dual diplomatic-consul status.[221] Similarly, in *Parkinson v Potter,*[222] Wills J stated that the immunity of a consul-general does not arise from diplomatic functions but from his acts performed as a consul-general.

Consuls are divided into two categories: career consular officers who are full-time servants of their government, and honorary consular officers who are non-career officials and who usually perform consular functions on a part-time basis.[223] Where a State has very few interests in another State it may prefer to appoint a local businessperson, who may or may not be a national of the sending State, to represent the State as honorary consular officer.[224] No particular mention is made of honorary consuls and their immunity. Generally, non-career

[217]Shearer *Starke's International Law* 11ed (1994) 202 and Van Dervort *International Law* 292. Articles 40-52 of the Consular Convention deals with the immunities of career consular officers and other members of a consular post.

[218]Whomersley (1992) 41 *International & Comparative Law Quarterly 854*. Refer further to Articles 5 and 43.

[219]Shearer *International Law* 202. If two States have a treaty or agreement and are both parties to the Vienna Convention, the provision which extends the greater immunities will take preference.

[220]*S v Penrose* 1966 (1) SA 5 (N) and in Dugard "Recent Cases: Consular Immunity" (1966) *South African Law Journal* 126.

[221]Dugard (1966) *South African Law Journal* 137. The same concept was applied in *Viveash v Becker* (1814) 3 M. & S. 284.

[222] *Parkinson v Potter* (1885) 16 Q.B.D. 152.

[223]Feltham *Diplomatic Handbook* 7ed (1998) 51.

[224]Dugard *International Law* 199.

consuls do not enjoy the same personal privileges and immunity as their career counterparts.[225] Another important immunity includes the inviolability of consular premises that may not be entered by authorities of the receiving State without consent. The premises must be protected against intrusion or impairment of dignity and this inviolability extends to any archives and documents of the consular mission, even after consular relations have been broken off.[226] In respect of personal immunity, the Consular Convention is more restrictive than its counterpart. Article 40 states with regard to consular officers that they will be treated with due respect by the receiving State and further shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.[227]

The Convention has a strong element of development and reconstruction of the existing law and brings the status of consuls nearer to that of diplomatic agents.[228]

2.6 United Nations International Immunities

'International immunities' refers to the immunity enjoyed by international organisations and their personnel.[229] This thesis will not concentrate on international immunities but it must be briefly mentioned to indicate the relationship with diplomatic immunity.[230] For purposes of simplicity, this thesis will primarily focus on the UN. Many abuses are committed by UN

[225]Thomas "Diplomatic Privileges Act 71 of 1951 as Amended by the Diplomatic Privileges Amendment Act 61 of 1978" (1978) 4 *South African Yearbook of International Law* 160. Certain facilities and immunities granted to career consuls are also granted to honorary consuls. These include freedom of movement and travel of all members of the consular post; freedom and inviolability of communication; the right to levy consular fees and charges and exemption from taxation with exceptions as stated above; more limited protection against intrusion, damage and impairment of dignity by the receiving State; and inviolability of archives and documents at all times. Personal privileges are not extended to the members of their family or of a consular employee employed by the honorary consul.

[226]Feltham *Diplomatic Handbook* 54 and O'Connell *International Law* 920-921. See further Do Nascimento e Silva *International Law* 446 and Van Dervort *International Law* 293.

[227]Article 40 and McClanahan *Diplomatic Immunity* 39. For more information of the privileges and immunities of consuls refer to Von Glahn *Law Among Nations* 450-452.

[228]Brownlie *International Law* 365.

[229]For a comparison between immunities of UN members and diplomatic personnel, refer to Ling "A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents" (1976) 33 *Washington & Lee Law Review* 91.

[230]For an in-depth discussion between international organisation 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.

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 organisations are granted immunity by international treaties and conventions.[231] 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*"[232]. From this definition the following can be established. International officials are not diplomats. They represent an international organisation rather than a State.[233] International organisations have important 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.[234] Examples of international organisations are the UN and its subsidiary bodies, the IMF, the International Bank of Reconstruction and Development, FAO, IAEA, OAS, Council of Europe and NATO, to name a few.

Initially, international organisations 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 organisations only began to increase after the Second World War.[235] 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.[236] When international organisations with a political mandate began to emerge, many officials were granted diplomatic immunity because it was a convenient and stable model. This

[231]Ling (1976) 33 *Washington & Lee Law Review* 127.

[232]Ling (1976) 33 *Washington & Lee Law Review* 128.

[233]Ling (1976) 33 *Washington & Lee Law Review* 128-129.

[234]Brower 41 *Virginia Journal of International Law* (2000-2001) 4-5.

[235]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1010 and McClanahan *Diplomatic Immunity* 76.

[236]Frey and Frey *History of Diplomatic Immunity* 557.

misapplication of immunity caused confusion, because the official represented the organisation and their home State.[237]

The Preparatory Commission of the UN proposed the drafting of the Convention on the Privileges and Immunities of the UN.[238] This Convention was necessary to help implement Article 105 of the UN Charter that allows for immunities and privileges.[239] Immunity is divided into four groups. The first group includes high-level personnel;[240] the second to fourth group include the organisation itself, the officials of the UN and experts on mission.[241] Article 18 of the UN Convention describes the immunity given to officials of the organisations. 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.[242] Under provision 15 of the UN Headquarters Agreement,[243] 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.[244]

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 organisation.[245] In

[237]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1010-1011.

[238] Convention on the Privileges and Immunities of the United Nations, February 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16

[239]Ling (1976) 33 *Washington & Lee Law Review* 97.

[240] The Secretary-General and Assistant Secretaries-General.

[241] Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1013.

[242]Ling (1976) 33 *Washington & Lee Law Review* 95. Permanent representatives are governed by the Headquarters Agreement concluded by the US and UN in 1947, while temporary representatives are governed by the UN Convention.

[243] The Headquarters Agreement with the United Nations 61 Stat. 3416; T.I.A.S. 1676; 11 U.N.T.S 11.

[244] Ling (1976) 33 *Washington & Lee Law Review* 120.

[245]An official act refers to any act performed by UN officials, experts or consultants which directly relates to the mission or project.

Westchester County v Ranollo[246] a chauffer 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.[247] In other words, the functional necessity theory is used to justify their immunity.[248] There are similarities between the immunities of UN officials and diplomatic personnel, especially with regard to personal inviolability, arrest and detention.[249] Further immunities include immunity from criminal jurisdiction only with regard to official functions.[250]

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.[251] Waiver is only granted if it will not cause any prejudice to the interests of the organisation.[252] The second method is where the UN settles with the claimants.[253] The UN makes settlement available to claimants who have been injured by officials who have retained their immunity.[254]

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[246] *Westchester County v Ranollo* 67 N.Y.S.2d 31(1946).

[247] *Supra* at 35.

[248]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1011 and McClanahan *Diplomatic Immunity* 76.

[249]Ling (1976) 33 *Washington & Lee Law Review* 104. Detention can be divided into three categories: firstly, those that appear as small amounts of harassment; secondly, those carrying cameras in "forbidden zones" and lastly, those involved in some espionage activities.

[250]Ling (1976) 33 *Washington & Lee Law Review* 135. Another Convention to take cognisance of is the Vienna Convention of the Representation of States in their Relations with International Organizations of a Universal Character 1975, which deals with the status, privileges and immunities of permanent missions to international organisations and of delegations. The Convention lays down rules on matters such as the establishment and size of missions, inviolability of premises, personal immunity of representatives and the rights and obligations of the host States and sending States, with regard to the representation of the sending State to an international organisation. However, it was commented by Ling that this Convention was a regrettable failure.

[251] Articles 20.

[252] Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1018.

[253] Article 29.

[254] Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1021.

2.7 State Immunity in International Law

State and sovereign immunity applies to the State as an entity, to a person officially representing a State such as a foreign head of state, or to the State's material interest.[255] Diplomatic immunity, by contrast, refers only to the immunities enjoyed by a State's official representatives.[256] Before concentrating on diplomatic immunity with specific reference to criminal jurisdiction, it is necessary to briefly mention state immunity and recognise its importance in international law, since it falls within international immunity.

A basic principle of international law is that one sovereign State does not adjudicate the conduct of another sovereign State.[257] The irony of this statement has become apparent in recent years in that the US has been actively doing quite the opposite in countries like Afghanistan, Iraq and Iran. By permission, agents of one State may enter another State and act in their official capacity. With that, the agents had accompanying privileges, which allowed for immunity from the jurisdictions of the local courts and law enforcement. It is a consequence of the equality and independence of States that local courts accept the validity of the acts of foreign States and their agents.[258]

The granting of immunity was said to be the result of a desire to promote international cooperation and avoid unnecessary disputes between States. The maxim *par in parem non habit imperium*[259] dictates that all States are equal and no State may exercise jurisdiction over another State without consent. As a matter of principle, sovereignty includes the right of States to "*freely determine, without external interference, their political status and to pursue their*

[255]Levi *Contemporary International Law: A Concise Introduction* 2ed (1991) 89.

[256]Wallace *International Law* 121.

[257]Opara "Sovereign and Diplomatic Immunity as Customary International Law: Beyond *R v Bow Street Metropolitan Stipendiary Magistrate and Other, Ex Parte Pinochet Ugarte*" (2003) 21 *Wisconsin International Law Journal* 263 and Levi *International Law* 81and 89.

[258]Brownlie *International Law* 325.

[259]"One cannot exercise authority over an equal." Levi looks into the definition and the debate of equality between sovereign States extensively in Levi *International Law* 82-84.

economic, social and cultural development".[260] In *Buck v A-G* [261] it was claimed by Diplock LJ that

> "*the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. For the English Court to pronounce upon the validity of law of a foreign sovereign State within its own territory, would be to assert jurisdiction over the internal affairs of that State. That would be a breach of the rules of comity*."[262]

The principle that is accentuated is that there is a non-intervention policy in the internal affairs of other States.[263] However, ideological changes and the expansion of trade after the First World War caused an increase in the State's direct involvement in commercial trade and the doctrine of absolute immunity became a high price to pay in maintaining the theoretical equality of States. In addition, it became counter-productive as a decline in world trade share began.[264] Belgian and Italian courts drew a distinction through doctrinal documents. These documents distinguished between private acts (*jure gestionis*) and public acts (*jure imperii*), whereby immunity was granted in respect of *jure imperii*.[265] Despite this, not all States abandoned the absolute immunity doctrine. In some States there was absolute immunity with regard to commercial activities while in other States there was not.[266] The US issued the "Tate-letter" whereby a State acting as a private individual was no longer in the position of receiving immunity and was equally liable as any company or private individual in the same

[260]Opara (2003) 21 *Wisconsin International Law Journal* 264. This is also known as "statism" and protects States against foreign interference that aims to change internal structures.

[261]*Buck v A-G* [1965] Ch 745.

[262]*Buck v A-G* [1965] Ch 770-771.

[263]Brownlie *International Law* 329. Levi mentions three classifications of non-intervention: intervention by right, for example if a treaty between States allows for intervention; permissible intervention, also known as self-defence; and lastly subversive intervention, which brings about changes in government or social order in another State. Refer to Levi *International Law* 86-87.

[264]Dixon *Textbook on International Law* (1993) 146.

[265]Wallace *International Law* 121 and Brownlie *International Law* 330. To see how the two acts are distinguished refer to *I Congresso del Partido* [1981] 2 All ER 1064 or to Dixon *International Law* 149 for an extensive examination of the case. See further Malanczuk *Akehurst's Modern Introduction to International Law* 7ed (1997) 119 and Opara (2003) 21 *Wisconsin International Law Journal* 265. Some States base the distinction on the nature of the act, which is an objective test, while others base it on the purpose of the act, which is a subjective test.

[266]Wallace *International Law* 121. The courts of a few European States handed judicial decisions curtailing the scope of immunity owing to growing concern over the privileged position enjoyed by foreign governments.

situation.[267] This use of the 'Tate-letter' in 1952 indicated a willingness by the US Department of State to move toward a restrictive approach of immunity.[268] There are several instances where immunity is not granted and these include waiver, commercial transactions,[269] contracts of employment, personal injury and damage to property, patents or trade marks, arbitration and sales tax.[270]

Thus, the current legal position shows a trend in the practice of States towards restrictive immunity.[271] Margo J in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique*[272] made it clear that "*there is an abundance of South African judicial authority…in support of the absolute doctrine…there is good reason to believe that the rule of sovereign immunity has undergone an important change, and that the old doctrine of absolute immunity has yielded to the restrictive doctrine*."[273] The justification for

[267]Van Dervort *International Law and Organization* 307. However, immunity was granted if it fell within one of these categories: (a) internal administrative acts such as expulsion of an alien; (b) legislative acts such as nationalisation; (c) acts concerning armed forces; (d) acts concerning diplomatic activity and (e) public loans. This restrictive approach is verified in the American Foreign Sovereign Immunities Act 90 Stat. 2891; P.L. 94-583 (1976). The Act provides for service of process on a foreign sovereign, permits execution of judgment and denies a right of withdrawal of waivers. It also denies the right of trial by jury in such civil legal actions which conflict with the Seventh Amendment. See further Wallace *International Law* 121 and Malanczuk *Akehurst's Modern Introduction to International Law* 118. Soon approximately 31 States followed suit and restricted immunity. For example, Canada, Pakistan and South Africa enacted legislation on the basis of the restrictive theory.

[268] *Ibid.*

[269]Section 4 of the Act defines the term "commercial transaction". In order to determine whether the act is a commercial transaction it is necessary to look into the nature of the act and not its purpose.

[270]Brownlie *International Law* 332. However, before this many States agreed, by treaty, to waive immunity with regard to shipping and other commercial activities. One of these treaties is the 1926 Brussels Convention on Immunity of State-owned Ships, which compelled vessels engaged in trade owned or operated by foreign states to submit to the local jurisdiction as if it were a private person. Other treaties include the Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas signed at Geneva in 1958. Refer to Sections 3-12. Further reading is also available in Dugard *International Law* 184-188.

[271]Dugard *International Law* 182. In reality, problems emerge which cannot categorized as "absolute" or "restrictive" immunity. As an example of how the courts restricted immunity refer to *Amoco Overseas Oil Company v Compagnie Nationale Algerienne de Navigation (CNAN)* 1979 ILM 109 and Van Wyk "Immunity" (1979) *South African Yearbook of International Law* 159.

[272]*Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique* 1980 (2) SA 111 (T).

[273]*Inter-Science Research and Development Services(Pty) Ltd v Republica Popular de Mozambique* 1980 (2) SA 119B-C and 120 C. See also Dugard *International Law* 182.

the restrictive approach is that it has the advantage of providing a remedy for aggrieved parties while at the same time it encourages the growth of trade.[274]

Can State Immunity be equated with and related to the Vienna Convention? The case *Intpro Properties v Sauvel*[275] might be able to assist. Residential property was leased by the government of France and occupied by a diplomatic agent at the French Embassy in London. Under the State Immunity Act, courts have jurisdiction to hear the claim for damages for breach of a lease. However, the Diplomatic Privileges Act (which is based on the Vienna Convention) simultaneously applied, whereby the residence enjoyed inviolability and the diplomatic agent could not have been compelled to permit the landlord or his agents to enter the premises. This clearly indicates a situation where two conflicting immunities could apply. It should be emphasised that when a situation such as the above occurs and an act is performed by an official of a foreign State in his official functions, it does not mean that the State will be immune under the State Immunity Act.[276]

2.8 Conclusion

Diplomatic immunity has long been accepted as a basic element of international law. It was considered to be absolutely necessary that the diplomat receive the necessary freedoms in order to fulfil his functions.[277] It was necessary for primitive tribes, and later, States to communicate and negotiate with one another, so envoys were created. Their social significance is relevant to both sending and receiving States.[278] Diplomatic immunity was once a divine right but changed into a "*secular rationale for the idea of diplomatic immunity*" in civil law, as it is known in modern practices.[279] The resulting of resident missions produced a huge increase in

[274]Dixon *International Law* 147.

[275]*Intpro Properties v Sauvel* [1983] QB 1019.

[276]See further Whomersley (1992) 41 *International & Comparative Law Quarterly* 852.

[277]Dulmage "Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations" (1978) *Case Western Reserve Journal of International Law* 827 and Von Glahn *Law Among Nations* 414.

[278]Barnes "Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice" (1960) 43 *Department State Bulletin.* 173.

[279]Frey and Frey *History of Diplomatic Immunity* 64-65.

the amount of diplomatic activity within Europe in the 16th century.[280] This increase led to a parallel rise in academic studies on the subject of diplomacy, diplomatic law and, more importantly, diplomatic immunity.[281]

Even if the unique position of diplomats was developed due to the influence of history and respect for the sending State, the ruling theory that forms the foundation of diplomatic immunity in this modern age is based on their functions being necessary.[282] Questions that arise are: Is there a need for immunity? What functions of a diplomat require immunity? Would diplomats or the embassy be able to function without absolute immunity? In the following chapter, before examining diplomatic immunities and their abuses, it is necessary to examine the diplomats, their staff, families and the embassy in definition, function and role in the international sector which entitles them to their given immunities.

[280]Barker *Abuse of Diplomatic Privileges and Immunities* 22.

[281]*Ibid*.

[282]Preuss (1932-1933) 10 *New York International Law Quarterly Review* 182.

CHAPTER 3

DIPLOMATIC AGENTS, MISSIONS AND CONSULS

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.[283] 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.[284] 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.[285] Furthermore, its significance is accompanied by the notion of reducing immunity of staff in certain circumstances as opposed to having blanket immunity.[286]

3.2 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

[283]Shearer *Starke's International Law* 11ed (1994) 383.

[284]Benedek "The Diplomatic Relations Act: The United States Protects its Own" (1979) 5 *Brooklyn Journal of International Law* 386 and O'Neil "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978" (1979-1980) 54 *Tulane Law Review* 682. See further Jones Jr "Diplomatic Immunity: Recent Developments in Law and Practice" (1991) 85 *American Society of International Law Proceedings* 261.

[285]Young "The Development of the Law of Diplomatic Relations" (1964) 40 *British Yearbook of International Law* 170.

[286]*Ibid*. The different forms of immunity will be discussed in length in Chapter 4.

staff.[287] In 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 organised. The only time the receiving State enquired into the organisation of the mission was if it believed that the sending State was abusing the system.[288]

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 the person who is sent by the State to act in that capacity.[289] The 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.[290]

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.[291] Article 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.*

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[287]Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 13-14. The US and UK differentiation was not of great legal importance, since all classes were accorded the same degree of immunity.

[288]Denza *Diplomatic Law* 15-16.

[289]Brown "Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations" (1988) 37 *International & Comparative Law Quarterly* 55 and Benedek (1979) 5 *Brooklyn Journal of International Law*. 386.

[290]Brown (1988) 37*International & Comparative Law Quarterly* 58. The main purpose for these documents is to distinguish a diplomat from normal citizens of the receiving State or travellers.

[291]Lawrence *The Principles of International Law* 6ed (1910) 297-298 and Von Glahn *Law Among Nations: An Introduction to Public International Law* 7ed (1996) 422. The codification of the classification of diplomatic representatives and the order of precedence was known as the Regulations of Vienna. There were eight signatories to the regulations: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden. For more information on the application of the Regulations, refer to Lord Gore-Booth (ed) *Satow's Guide to Diplomatic Practice* 5ed (1979) 83.

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.[292] 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.[293] 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 just to two classes. When the change was proposed it was rejected primarily by the major powers.[294] 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.[295] 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.[296] Technology now ensures instantaneous contact between the missions and the sending State.

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[292]Denza *Diplomatic Law* 91. Canon law distinguished between three kinds of legates: the apostolic nuncio (*legatus missus*), the *legatus a latere* and the *legatus natus*. The *legatus a latere* is responsible for a legation in the former Papal States or a special mission. The *legatus natus* is associated with a particular See where the legate might hold an archbishopric. The functions of the *doyen* range from questions of ceremony and protocol to those concerning day-to-day relations between the diplomatic body and the receiving State. When Christianity was the majority belief system of most countries, the *doyen* was the defender of privileges and immunities from injuries or abuse. The wife of the *doyen* was known as the *doyenne* and she too had a wide range of duties to perform.

[293]Feltham *Diplomatic Handbook* 7ed (1998) 4 and Shearer *International Law* 384.

[294]Denza *Diplomatic Law* 92. Eleven of the 27 States opposed the change and they included States like the UK, France, Germany and the US.

[295]Feltham *Diplomatic Handbook* 12

[296]Feltham *Diplomatic Handbook* 16-17. The head of mission's priority is to
(a) formulate diplomatic policy;
(b) convey views of his own government in important matters of common interest and act as a channel of communication between the two States;
(c) report to his ministry on matters of political and economic significance;

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.[297] The head of mission may also act on behalf of his State for any international organisation.[298]

The category diplomats fall into determines the degree of privileges and immunities to which they may be entitled.[299] 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.[300] The 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*".[301]

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.[302] The list is regularly revised and printed to ensure the right of the

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(d) take note of people of influence and sources of national power in the State in which they are residing; and
(e) conduct himself in an official and personal behaviour to bring acknowledgment to his own country.

The formulation of foreign policy is the head of mission's most important responsibility. This is a product of political judgment, sense and wisdom based on an immense knowledge and understanding of the people and government of the two states involved.

[297]See Chapter 4.

[298]Feltham *Diplomatic Handbook* 16-17.

[299]Brown (1988) 37*International & Comparative Law Quarterly* 55.

[300]Brown (1988) 37*International & Comparative Law Quarterly* 56. See further *Vulcan Iron Works Inc. v Polish American Machinery Corporation* 479 F. Supp. 1060 (1979) 1067.

[301]*Ibid*.

[302]McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 86-91 and Denza *International Law* 72.

diplomat's status and immunity.[303] 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.[304]

No differentiation may be made between heads of mission on account of their standing between missions except in matters of precedence and protocol.[305] 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.[306] 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.[307]

Should the head of mission be temporarily vacant, absent or unable to fulfil his functions, the next member of the diplomatic staff with seniority will fill the post as *chargé d'affaires ad interim*.[308] In order for this charge to be formalised, 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.[309] If 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

[303]*Ibid*.

[304]Denza *International Law* 72-74.

[305]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.

[306]Denza *Diplomatic Law* 97-98.

[307]*Ibid*.

[308]Denza *Diplomatic Law* 101 and Lord Gore-Booth (ed) *Satow's Guide* 87.

[309]Denza *Diplomatic Law* 101.

available, a member of the administrative or technical staff *may* be appointed, but only if this has been approved by the receiving State.[310]

3.3 Appointment

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.[311] 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.[312] Article 4 of the Vienna Convention provides for the sending State to make certain that the *agrément* has been given by the receiving State for the representative it proposes to accredit as the head of the mission.[313] The receiving State has the power to refuse acceptance and is not obliged to give reasons for its decision to the sending State.[314] 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 *agrément* it expected reasons to be given for refusals.[315] 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

[310]Feltham *Diplomatic Handbook* 22. It is very unusual for the receiving State to insist on an interim appointment against the wishes of the sending State.

[311]Preuss "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities" (1932-1933) 10 *New York University Quarterly Review* 175.

[312]Brownlie *Principles of Public International Law* 5ed (1998) 353. For earlier practice refer to Lawrence *International Law* 306, where a letter of credence was sent to the sovereign stating the name of the diplomatic agent and the general object of his mission.

[313]Brownlie *International Law* 353 and Lord Gore-Booth (ed) *Satow's Guide* 89.

[314]Brownlie *International Law* 353 and Preuss (1932-1933) 10 *New York University Quarterly Review* 174. Refer further to Lord Gore-Booth (ed) *Satow's Guide* 90.

[315]Denza *Diplomatic Law* 39 and Do Nascimento e Silva "Diplomatic and Consular Relations" M Bedjaoui (ed) (1991) *International Law: Achievements and Prospects* 440. See further Von Glahn *Law Among Nations*. 417.

the sensitivity of the appointment of a head of mission and the need for acceptance by both States to ensure effective diplomacy.[316]

The *agrément* 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.[317] 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.[318] The *agrément* 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.[319] Preuss states that it is as much the right of the State that requests an *agrément* as it is for the State refusing it that an envoy who is personally declared *persona non grata* before arrival should not enter into the State and perform any functions.[320] An example of a withdrawal was in 1968 when King Faisal of Saudi Arabia withdrew the *agrément* 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.[321]

Since the receiving State is not required to give reasons for the refusal of the *agrément*, there are no legal constraints on its discretion.[322] Suspicion of criminal activity or serious violation

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[316] Denza *Diplomatic Law* 40.

[317] Feltham *Diplomatic Handbook* 5 and Van Dervort *International Law and Organization: An Introduction* (1998) 291.

[318]Feltham *Diplomatic Handbook* 5.

[319]Denza *Diplomatic Law* 41-42 and Preuss (1932-1933) 10 *New York University Quarterly Review* 175. This principle was even implemented before the Vienna Convention as Lawrence *International Law* 302 mentions it and provides an example whereby France refused to accept the Duke of Buckingham as an ambassador extraordinary from Charles I of England, because on a previous visit to France he had posed as an ardent lover of the Queen. Refer further to Lord Gore-Booth (ed) *Satow's Guide* 89.

[320]Preuss (1932-1933) 10 *New York University Quarterly Review* 175 and Do Nascimento e Silva *International Law* 440.

[321]Denza *Diplomatic Law* 41-42.

[322]Denza *Diplomatic Law* 42-43.

of human rights would be a sufficient reason to refuse an *agrément* in democratic States.[323] 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.[324] 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.[325] 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.[326] 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.[327] Once *agrément* is obtained, the accrediting State can proceed with the formal appointment of its representative.[328]

3.4 Reception and Termination

Article 10 requires that the Ministry for Foreign Affairs of the receiving State be notified of the appointment of members of the mission, their day and place of arrival and their final departure or the termination of their functions with the mission.[329] In practice, as part of the notification process, some States have required that a great number of details be submitted.[330] 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

[323]*Ibid.*

[324]*Ibid.*

[325]Shearer *International Law* 385.

[326]Preuss (1932-1933) 10 *New York University Quarterly Review* 175.

[327]Preuss (1932-1933) 10 *New York University Quarterly Review* 176.

[328]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.

[329]This includes notification in advance of the date, place and time of arrival or departure of any member of the staff or families.

[330]Brown (1988) 37*International & Comparative Law Quarterly* 55-56.

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.[331]

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.[332] Should the head of mission hold the rank of *chargé d' affaires en titre* 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.[333]

When 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.[334] 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.[335] What occurs in practice is the successor of the diplomat being recalled while delivering his credentials will also hand his predecessor's letter of recall to the Minister of Foreign Affairs of the receiving State.[336]

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.[337] 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

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[331]Brown (1988) 37*International & Comparative Law Quarterly* 57.

[332]Requesting an audience with the Minister of Foreign Affairs and presenting his credentials signifies the formal assumption of his duties.

[333]Feltham *Diplomatic Handbook* 24 and Lord Gore-Booth (ed) *Satow's Guide* 96.

[334]Feltham *Diplomatic Handbook* 25 and Von Glahn *Law Among Nations* 419.

[335]*Ibid*. This procedure was similar in earlier practice, as stated in Lawrence *International Law* 308.

[336]Lord Gore-Booth (ed) *Satow's Guide* 100 and 174.

[337]Denza *Diplomatic Law* 385.

time at which a diplomatic agent is regarded as having terminating his functions.[338] The Conference was aware of this problem, but due to time constraints they did not clarify the text.[339] Denza states that there are four possible ways to terminate the functions of a diplomatic agent:[340] 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;[341] or by disappearance of the sending or the receiving sovereign.[342]

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.[343] An ideal example is that of the Libyan shooting in the UK, which will be discussed in detail in Chapter 4.

3.5 Staff

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

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[338]*Ibid.*

[339]*Ibid.*

[340]Denza *Diplomatic Law* 386 and Von Glahn *Law Among Nations* 418-419.

[341]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.

[342]This may occur because the head of state of either State dies, abdicates or is deposed, or the State has been annexed or merged with another State. In these circumstances, fresh credentials are normally required by the heads of missions who continue in their posts. Where a change of government takes place through unconstitutional means in the receiving State, it is up to the new government to determine whether it wishes to remain in diplomatic relations with all those states which are present. This occurred in 1917 with the overthrowing of the Russian government. The US ambassador to Russia had to present his credentials to the new Government before being able to continue with his functions. See further Lord Gore-Booth (ed) *Satow's Guide* 70 and 177.

[343]Denza *Diplomatic Law* 389.

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.[344] 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.[345]

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.[346]

Article 7 allows for the sending State to freely appoint members of staff subject to certain exceptions.[347] 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*[348] that Article 7 was qualified by Article 10[349] 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

[344]Feltham *Diplomatic Handbook* 16 and Lord Gore-Booth (ed) *Satow's Guide* 90. Until recently, there was a clear definition between a career diplomat and attachés whose interests were limited to a particular field. Career diplomats are members of the ministry and the State who sent him. Attachés are members of different government departments and serve the interest of their own department. With the growing number of specialist personnel needed, the distinction has lessened.

[345]Further stated in Brownlie *International Law* 352. Feltham *Diplomatic Handbook* 17-20 lists various types of staff and their function.

[346]Brown (1988) 37 *International & Comparative Law Quarterly* 56.

[347]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.

[348]*R v Lambeth Justices, ex parte Yusufu* [1985] TLR 114 DC and Brownlie *International Law* 354.

[349]Article 10 provides for notification of staff appointments and movements.

rejection of any particular representation.[350] 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.[351] 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.[352]

It 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.*"[353]

Governments then can investigate the matter after notification and then answer the questions relating to nationality, residence and family status.[354] The duration of any appointment depends on various factors like the number of staff, their importance, 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

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[350]Denza *Diplomatic Law* 51-52 and Brownlie *International Law* 354.

[351]Denza *Diplomatic Law* 53-54.

[352]Article 10.1

[353]Higgins "UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report" (1986) 80 *American Journal of International Law* 138. See further CMD. 9497, Misc. No. 5 (1985), also known as the White Paper at para. 21.

[354] *Ibid*

culture; and the need to make personal contacts and save on travel and costs of transfer expenses for the government.[355] 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.[356]

3.6 Family

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*".[357] The 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.[358] Examples of these occurrences will be considered in more detail in Chapter 4.

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*."[359]

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[355]Feltham *Diplomatic Handbook* 12.

[356]*Ibid.*

[357]Higgins (1986) 80 *American Journal of International Law* 138.

[358]Brown (1988) 37 *International & Comparative Law Quarterly* 63.

[359]Brown (1988) 37 *International & Comparative Law Quarterly* 65. See further the Circular Note No. XDC-3660. Countries like Australia and New Zealand closely followed the Canadian policy.

Courts have not had any difficulty in finding that minor children form part of the "*members of the family*".[360] 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.[361]

The US Secretary of State issued a policy to all the heads of missions in 1986 that recognised 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*".[362]

Thus, as Brown states, the term "*member of the family*" should not be interpreted narrowly, for it can in certain circumstances include extended family.[363]

3.7 Diplomatic Missions

The establishment of diplomatic missions is through mutual consent and understanding of the functions that will be undertaken by the mission and its representatives.[364] 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

[360]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.

[361]Higgins (1986) 80 *American Journal of International Law* 138.

[362]Brown (1988) 37 *International & Comparative Law Quarterly* 66.

[363]*Ibid.* For an extensive look into how countries tried to define persons belonging to the household, refer to O'Keefe "Privileges and Immunities of the Diplomatic Family" (1976) 25 *International & Comparative Law Quarterly* 329, especially from 332.

[364]Feltham *Diplomatic Handbook* 3 and Lord Gore-Booth (ed) *Satow's Guide* 67.

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.[365]

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.[366] 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.[367] 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.[368] 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.[369] 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 the size of missions it would be a breach of the provision.[370] Yet limiting the size of a mission could possibly aid in reducing abuses of immunities. This will be discussed in Chapter 5.

3.8 Special Missions

Special *ad hoc* missions are sent by the sending State to fulfil a specific purpose. Such missions may be accredited irrespective of whether there are permanent diplomatic and

[365]Berridge *Diplomacy: Theory and Practice* 3ed (2005) 16. For the list of functions, refer to Article 3. Another informal function of a mission is the use of an embassy for the administration of foreign aid in a developing nation. A reason for this is that bigger powers have various agencies involved in foreign aid and an embassy is the perfect vehicle for the facilitation of the agencies' efforts.

[366]Feltham *Diplomatic Handbook* 8 and McClanahan *Diplomatic Immunity* 48.

[367]Feltham *Diplomatic Handbook* 7 and Do Nascimento e Silva *International Law* 437-438. An example is in the Netherlands, where the diplomatic capital is in Den Haag and not in the state capital of Amsterdam. In South Africa, on the other hand, the diplomatic capital is situated in the state capital of Tshwane.

[368]Department of Foreign Affairs, South Africa *Foreign Representation in South Africa* http://www.dfa.gov.za/foreign/forrep/forf.htm [Accessed on 28 June 2006].

[369]Feltham *Diplomatic Handbook* 7 and Kerley "Some Aspects of the Vienna Conference on Diplomatic Intercourses and Immunities" (1962) 56 *American Journal of International Law* 97.

[370]Brownlie *International Law* 354 and Article 11. See also Kerley (1962) 56 *American Journal of International Law 97*.

consular missions and relations.[371] The Convention on Special Missions in 1969[372] 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.[373] The Special Missions Convention was drafted only after the conclusion of the Vienna Convention.[374] 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.[375] 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.[376]

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 privileges granted to special missions.[377] As with most conventions, Article 1 contains a list of definitions which lays down the necessary condition a mission must fulfil in order to be regarded as a special

[371]A special mission can be defined as a "temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task". See Do Nascimento e Silva *International Law* 439 and Article 1 of the Special Missions Convention.

[372]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].

[373]Wallace *International Law* 4ed (1997) 133 and Lord Gore-Booth (ed) *Satow's Guide* 157. Bartõs as Special Rapporteur prepared Draft Articles on Special Missions, based on the Vienna Convention. Frey and Frey state that the Convention was a failure in some part because it did not make a distinction between the different types of staff as done in the Vienna Convention.

[374]Frey and Frey *The History of Diplomatic Immunity* (1999) 500 and Levi *Contemporary International Law: A Concise Introduction* 2ed (1991) 100.

[375]Brownlie *International Law* 367 and Lord Gore-Booth (ed) *Satow's Guide* 157. Another example of a special mission is where a mission is dispatched to negotiate access for a landlocked State to a port in a foreign State.

[376]McClanahan *Diplomatic Immunity* 72. This mission was then accorded the same inviolability of premises as is given to permanent diplomatic missions. Other immunities were also accorded to the members of the special mission.

[377]Refer to the preamble of the Convention on Special Missions. Shearer *International Law* 393 and O'Connell *International Law* 2ed (1970) Vol. 2 913.

mission.[378] 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.[379] 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.[380]

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.[381] 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.[382] 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.[383]

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 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

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[378]Article 1 and International Law Commission "Draft Articles on Special Missions with Commentaries" (1967) vol. 2 *Yearbook of the International Law Commission* 348.

[379]Article 2 and International Law Commission (1967) *Yearbook of the International Law Commission* 349.

[380]*Ibid*. Article 3.

[381]Article 6. International Law Commission *(*1967) *Yearbook of the International Law Commission* 350 and Wallace *International Law* 133.

[382]Article 7 and International Law Commission (1967) *Yearbook of the International Law Commission* 350.

[383]Article 8. *Ibid*. This allows the receiving State to raise objections concerning members and even declare a member *persona non grata* before his arrival.

is mutually agreed upon between the States and its office is established near the place where it performs its functions.[384]

As with permanent missions, special missions enjoy inviolability of their premises, archives and documents, and freedom of communication.[385] 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 emphasised 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.[386] Privileges and immunities are granted to members of special missions to an extent similar to that accorded to permanent diplomatic missions.[387] 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.[388] This is extended to members' families.[389] 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.[390] Members of the service staff and private staff only

[384]International Law Commission (1967) *Yearbook of the International Law Commission 3*56. If it is in the capital, then the offices will be in the permanent diplomatic mission. If it is somewhere other than the capital, the seat of the special mission will be placed in an area where it is efficient to perform the task.

[385]Article 25, 26 and 28. Refer to Lord Gore-Booth (ed) *Satow's Guide* 159.

[386]Article 27 and International Law Commission (1967) *Yearbook of the International Law Commission.* 360.

[387]Shearer *International Law* 393 and International Law Commission (1967) *Yearbook of the International Law Commission*. 361. Other inviolability and privileges include inviolability of private accommodation, which includes hotel rooms or rented apartments; exemption from social security legislation; exemption from dues and taxes; exemption from personal services and exemption from customs and inspection. The duration of the privileges and immunities is found in Article 44 and state that such privileges and immunities cease at the moment the member leaves the country or on expiry of a reasonable period. Furthermore, with respect to acts performed in exercise of the member's function, that immunity will continue to subsist.

[388]Article 31 and International Law Commission (1967) *Yearbook of the International Law Commission* 362. For a discussion of the immunities from jurisdiction refer to the International Law Commission "Summary record of the 917th meeting" (1967) vol. 1 *Yearbook of the International Law Commission* 121 to 127. This summary provides a debate whereby some members of the ILC considered that immunity should be limited to official acts in all respects as is the case with the Consular Convention. Refer further to Lord Gore-Booth (ed) *Satow's Guide* 159-160 with regard to staff immunities and privileges.

[389]Article 39.

[390]Article 36. This is also extended to the members of their families.

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.[391] Nationals of the receiving State receive immunities only with regard to the official acts performed by them.[392] 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.[393] 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.[394]

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.[395] The sending State also has the right to waive the member's immunity, expressly to allow for prosecution.[396]

3.9 Termination of Missions

A diplomatic mission can be terminated in various ways.[397] 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.[398] A letter of recall is handed to the Head of State or the Minister of Foreign Affairs and the envoy in turn receives a

[391]Article 37 ad 38.

[392]Article 41 and International Law Commission (1967) *Yearbook of the International Law Commission* 365.

[393]Article 43. Shearer *International Law* 393 and International Law Commission (1967) *Yearbook of the International Law Commission* 365.

[394]Article 48 and International Law Commission (1967) *Yearbook of the International Law Commission* 367.

[395]Article 12 and International Law Commission (1967) *Yearbook of the International Law Commission* 353.

[396]Article 41. This provision is similar to Article 32 of the Vienna Convention. Special missions have no immunity with respect to claims arising from an accident caused by a vehicle used outside the official functions of the person involved.

[397]Lord Gore-Booth (ed) *Satow's Guide* 174. Satow lists three main ways, namely: (1) the expiry of the period for which it was appointed, (2) the return or arrival of the permanent head of mission, and (3) the ending of the appointment of head or member of special mission.

[398]Feltham *Diplomatic Handbook* 9. Termination of the functions in a special mission can occur in various ways, namely by agreement, by completion of the task set out, the expiry of the duration period assigned unless expressly extended, notification by the sending State for the recalling of the special mission, or notification by the receiving State that it considers the special mission terminated.

Lettre de Récréance acknowledging the recall. Another method is where the sending State notifies the receiving State that the mission's function has come to an end.[399]

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.[400] A 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.[401] 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.[402] 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 privileges and 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.[403]

3.10 Conclusion

Diplomatic agents require specialist knowledge in order to represent their country, fulfil their functions and report back on any information needed to promote relations. The classification of heads of missions is important in order to know what their functions are and to ensure they receive the necessary privileges and immunities.

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[399]As regulated by Article 43 of the Vienna Convention.

[400]Shearer *International Law* 389.

[401]Shearer *International Law* 390.

[402]Feltham *Diplomatic Handbook* 9.

[403]*Ibid.*

The staff form part of the mission and in some cases have diplomatic rank, which allows for the existence of immunity. Family members of diplomats and staff also play an important role and immunity is accorded to them. Diplomatic missions are the face of the sending State in the receiving State and the staff must be familiar with their functions in order to determine not only the mission's inviolability, but also to protect everyone working and any items stored in the mission from local jurisdiction.

Understanding the basic functions, requirements and classification of diplomats and the diplomatic staff provides a way of formulating a possible solution to curbing abuse of diplomatic immunity within the realm of criminal jurisdiction.

CHAPTER 4

PRIVILEGES AND IMMUNITIES OF MISSIONS, DIPLOMATIC AGENTS AND THEIR FAMILIES AND ITS ABUSES

"Words are one thing, actions another. Good words are a mask for concealment of bad deeds. Sincere diplomacy is no more possible than dry water or wooden iron."

L. C. Green[404]

4.1 Introduction

The doctrine of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions.[405] It is considered to be the exception to the general rule of territorial jurisdiction.[406] There is little distinction between immunity and a privilege and in many cases these have been used interchangeably. Various authors like Verdross, Morton, Stefko and Makowski have tried to distinguish between the meanings. Although each writer defined the concepts in his own words, they essentially have a common thread. "Privileges" can be defined as a benefit or right to do something that others have no right to do, while "immunities" can be defined as the exemption from local jurisdiction.[407] Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a legal basis, while only some privileges are based on law and others are a matter of courtesy.[408]

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

[404]Green "Trends in the Law Concerning Diplomats" (1981) 19 *Canadian Yearbook of International Law* 155.

[405]Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *Hastings Constitutional Law Quarterly* 567.

[406]Higgins "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience'" (1985) *American Journal of International Law* 641.

[407]Przetacznik "The History of the Jurisdictional Immunity of the Diplomatic agents in English Law" (1978) *Anglo-American Law Review* 351-352.

[408]Barker *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) 67.

their embassies in the receiving State.[409] 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.[410]

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.[411] Inviolability is the foundation of diplomatic privileges and immunities.[412] 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.[413] 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.[414]

[409]Farahmand "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses" (1989-1990) 16 *Journal of Legislation* 97. Another major abuse of diplomatic privileges and immunities is traffic violations. Keaton provides four reasons for the abuse of diplomatic immunity: the opportunity is provided by the Vienna Convention and national Acts: the lack of enforcement of diplomatic laws by the receiving State, the lack of cooperation by the sending State, and the increase in diplomatic agents and missions. For a discussion of each reason see Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 583-586.

[410]In 1977, over 250 000 unpaid parking tickets to the value of $5 million were attributed to officials of the United Nations in New York City. In 1974-1984, there were 546 occasions on which persons avoided arrest or prosecution for alleged serious offences because of diplomatic immunity. In 1993 there were 29 occasions on which persons claimed diplomatic immunity for serious offences.

[411]Barker *Abuse of Diplomatic Privileges and Immunities* 71.

[412]Fauchille and the ICJ have stated this concept.

[413]Barker *Abuse of Diplomatic Privileges and Immunities* 67. Diplomatic inviolability can be justified under all three theories of diplomatic law; however, it is best explained today in terms of the functional necessity theory.

[414]Barker *Abuse of Diplomatic Privileges and Immunities* 76-77 and Belotsky Jnr "The Effect of the Diplomatic Relations Act" (1981) 11 *California Western International Law Journal* 354.

4.2 Diplomatic Missions

4.2.1 Inviolability of Missions

The inviolability of mission premises was generally established in customary law by the 18th century. It is now considered one of the most important immunities.[415] 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 a writ of *habeas corpus*.[416] 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.[417]

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 exterritoriality theory.[418] 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.[419] 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.[420]

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[415]Berridge *Diplomacy: Theory and Practice* 3ed (2005) 116 and Lord Gore-Booth (ed) *Satow's Guide to Diplomatic Practice* 5ed (1979) 110.

[416]Lord Gore-Booth (ed) *Satow's Guide* 110 and Harris *Cases and Materials on International Law* 5ed (1998) 350.

[417]Lord Gore-Booth (ed) *Satow's Guide* 110 and see further Shaw *International Law* 4ed (1997) 526. Grotius stated that established practice prohibited arrest of members of the embassy or the execution of embassy premises.

[418]Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 113.

[419]Article 22.

[420]Lord Gore-Booth (ed) *Satow's Guide* 110 and McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 50.

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.[421] 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.[422] 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 emergency.[423] 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.[424] 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.[425] However, Denza remarks that entry without consent as a last resort may be justified in international law by the need to protect human life.[426] 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 Qaddafi had assembled before the People's Bureau in London to protest the leader's treatment of students in Libya.[427] The group was peaceful, when without warning machine

[421]Denza *Diplomatic Law* 120-121.

[422]Denza *Diplomatic Law* 120-121 and Kerley "Some Aspects of the Vienna Convention on Diplomatic Intercourse and Immunities" (1962) 56 *American Journal of International Law* 102. There have been instances where the head of mission has refused entry even when fire or yellow fever was raging.

[423]*Ibid.*

[424]*Ibid.*

[425]Brownlie *Principles of Public International Law* 5ed (1998) 356. See further Wallace *International Law* 4ed (1997) 127 and Feltham *Diplomatic Handbook* 7ed (1998) 38-39. The mission premises include the surrounding land.

[426]Denza *Diplomatic Law* 126.

[427]Wright "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University International Law Journal* 179. In Ashman and Trescott *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes!* (1987) 128 a whole chapter indicates in great detail of the Fletcher incident and how the incident was handled by the UK authorities and the response of

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.[428] 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.[429] In response to the British action, the Libyan government retaliated by ordering the police to besiege the British embassy in Tripoli.[430] With both countries holding each other's embassies and their officials hostage, a stalemate occurred. Britain looked for 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.[431] Those not accorded immunity were held back for questioning and possible prosecution. Surprisingly enough, no prosecutions occurred.[432] 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.[433] Britain guaranteed all occupants safe passage out of Britain and promised not to inspect their bags.[434] The British delegation in Libya were released and returned to Britain. After the

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the Libyan government. Also refer to Sutton "Diplomatic Immunity and the Siege of the Libyan People's Bureau" (1985) *Public Law* 193 which also discusses the use of a diplomatic mission and the diplomatic bag.

[428]Wright (1987) 5 *Boston University International Law Journal* 180.

[429]Wright (1987) 5 *Boston University International Law Journal* 180 and Higgins (1985) *American Journal of International Law* 643.

[430]Higgins (1985) *American Journal of International Law* 643.

[431]Wright (1987) 5 *Boston University International Law Journal* 180 and Higgins (1985) *American Journal of International Law* 643.

[432]Wright (1987) 5 *Boston University International Law Journal* 180-181.

[433]*Ibid*. Since no progress occurred, Britain severed diplomatic ties with Libya and ordered the occupants to leave Britain in seven days.

[434]In the H.C. Foreign Affairs Committee, First Report, The Abuse of Diplomatic Immunities and Privileges Report with an Annex Document under paragraph 75 indicated the proposal and refusal of the conditions of the breaking of ties with Libya:

(1) "The occupants of the Bureau and all other Libyan diplomatic staff in the country should have safe conduct out of the country…
(2) Our own Libyans were to leave Libya in safety.
(3) *…should be satisfied that all weapons and explosives were removed from the Bureau and that it could no longer be used for terrorist acts.*"

Thereafter there was a bomb blast in Heathrow airport and the Libyans were notified that they were to leave by midnight 29 April.

occupants of the People's Bureau had left, the police searched the embassy and discovered weapons and spent cartridges of a submachine gun.[435] 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.[436] 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.[437] 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 while Libyans exited the Bureau was justified.[438] 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. [439]

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.[440] The Pakistan government requested permission to search the premises, but this was denied by the Iraqi ambassador. However, the government authorised the police to enter and search the

[435]Wright (1987) 5 *Boston University International Law Journal* 179-182 and Higgins (1985) *American Journal of International Law* 643-644.

[436]Goldberg "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* 2.

[437]Goldberg (1984-1985) 30 *South Dakota Law Review* 3. Article 41 (3) of the Vienna Convention states that the mission must not be used in any manner incompatible with the functions of the mission.

[438]Cameron "First Report of the Foreign Affairs Committee of the House of Commons" (1985) 34 *International & Comparative Law Quarterly* 612.

[439]Wright (1987) 5 *Boston University International Law Journal* 179-182 and Higgins (1985) *American Journal of International Law* 643-644.

[440]Lord Gore-Booth (ed) *Satow's Guide* 110.

premises in the Iraqi ambassador's presence.[441] Large 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.[442]

On the other hand, entry into the embassy without justification 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 Jonge, on the grounds of assisting the ANC and escaping from detention.[443] The Dutch protested and a threat to recall the South African ambassador led to the prisoner's release and apologies for the violation.[444] 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.[445] 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*.[446] 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 killing of a number of East Timorese people by the Indonesian military. The Australian Diplomatic Privileges and Immunities Act of 1967 authorised the removal of the crosses as an appropriate step to prevent the impairment of dignity of the mission.[447] The court held in *R v Roques*[448]

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[441]*Ibid*.

[442]*Ibid*. Another instance is in 1990 the Albanian police entered the Greek embassy and arrested an Albanian seeking asylum.

[443]*Ibid*.

[444]*Ibid*

[445]Vattel and van Bynkershoek believed that the duty of protection was incumbent upon the receiving State as a result of the representative character of the diplomatic envoy. In relation to mission premises paragraphs 1 and 3 spell out the first duty of abstention and paragraph 2 spells out the positive duty of protection.

[446]*Minister for Foreign Affairs and Trade and Others v Magno and Another* (1192-3) 112 ALR 529.

[447]*Supra*.

[448]*R v Roques* Judgment 1 August 1984, unreported.

that the impairment of dignity of the mission required abusive or insulting behaviour rather than just political demonstrations.[449]

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.[450] In the much cited case of *United States Diplomatic and Consular Staff in Tehran*[451] the 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 mission.[452] 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[453] 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.[454] 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*".[455]

The facts of the case were that in November 1979 a strong militant group of Iranians stormed into the US Embassy of Tehran, seized buildings, entered the Chancery, destroyed documents

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[449]*Ibid.*

[450]Lord Gore-Booth (ed) *Satow's Guide* 111. This is also entrenched in Article 17 of the Harvard Research Draft.

[451]*United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep. 3.

[452]Shearer *Starke's International Law* 11ed (1994) 386-387 and Dixon and McCorquodale *Cases and Materials on International Law* (1991) 327.

[453]Statute of the International Court of Justice, 24 Oct. 1945, 59 Stat. 1031, UNTS 993.

[454]Botha "International Court of Justice: United States Application Against Iran" (1979) *South African Yearbook of International Law* 154. Other treaties and conventions affirming the court's jurisdiction are the Treat of Amity, Economic Relations and Consular Rights and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats.

[455]Article 1 Optional Protocol Concerning the Compulsory Settlement of Disputes, 8 December 1969 UNTS 1400.

and archives, gained control of the main vault, and also held 52 diplomatic, consular and other persons hostage.[456] 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.[457] 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 a violation of the Charter of the UN and of the Universal Declaration of Human Rights.[458] Iran did not comply with the Court's judgment immediately. The matter was settled through negotiations between the two parties in the Algiers Accord.[459]

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

[456]Shearer *International Law* 386-387 and Dixon and McCorquodale *Cases and Materials on International Law* 327. The US Government reported that the Government of Iran gave support to the group who took over the Tehran embassy. Furthermore, Iran kept ignoring the repeated requests by the US government for the release of the hostages.

[457]Shearer *International Law* 386-387. The court concluded that the Iranian authorities:
(a) were fully aware of their obligations under the Convention to take appropriate steps to the protect premises of the United States Embassy and its staff from attack and any infringement of their inviolability;
(b) were fully aware of the urgent need for action on their part;
(c) had the means at their disposal to perform their obligations;
(d) completely failed to comply with these obligations.
Interesting to note is that while the US staff were held hostage, other diplomatic missions in Tehran were almost entirely spared from harassment or violence.

[458]Harris *Cases and Material on International Law* 360 and Dixon and McCorquodale *Cases and Materials on International Law* 328. The decision by the Iranian authorities not to assist the Embassy gave rise to multiple breaches of the provisions of the Vienna Convention. For a full discussion on the ICJ's decision, refer to Botha "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 to 143. Other violations are Articles 28, 31, 33, 36 and 40 of the Consular Convention; Article 4 and 7 of the Prevention and Punishment Convention; Articles II(4) and XIX, XIII and XVIII of the Treaty of Amity, Economic Relations and Consular Rights and Articles 2(3), 2(4) and 33 of the UN Charter.

[459]Van Dervort *International Law and Organization: An Introduction* (1998) 299 and Grzybowski "The Regime of Diplomacy and the Tehran Hostages" (1981) 30 *International & Comparative Law Quarterly* 30. For more examples on attacks on embassies, refer to Lord Gore-Booth (ed) *Satow's Guide* from 192-194. Another attack on premises was when protesters ran through the Iranian Embassy in Canberra, breaking windows, set fire to documents, destroyed furniture and vandalised the Embassy. The Australian government assured Iran that appropriate steps would be taken to prosecute the perpetrators. 1980 was the year of embassy sieges. In that year it was estimated that 26 embassies and consulates had been occupied by revolutionaries or protesters.

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.[460] What is of concern is that the blanket mandate of immunity covers the most serious crime against a government i.e. espionage.[461] This threat to national security is entwined within the diplomatic structure, resulting in embassies sometimes being involved in the business of spying.[462]

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.[463] 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.[464] Diplomatic personnel remain immune from prosecution in order to perform their functions, yet in instances it indirectly encourages this illegal act and results in his protective status becoming contradictory.[465]

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.[466] Between March and the end of October in 1986, there was a series of expulsions of

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[460]Denza *Diplomatic Law* 379.

[461]McClanahan *Diplomatic Immunity* 161.

[462]McClanahan *Diplomatic Immunity* 161 and Ward "Espionage and the Forfeiture of Diplomatic Immunity" (1977) 11 *International Lawyer* 658. Edmondson states that in espionage there is the use of an "*employment of disguise or false pretence*" to obtain political or military information. Edmondson "Espionage in Transnational Law" (1971-1972) 5 *Vanderbilt Journal of Transnational Law* 434 sets out the concept, characteristics and change of espionage throughout the years. For more information on treason, sedition and espionage, read Garcia-Mora "Treason, Sedition and Espionage as Political Offences Under the Law of Extradition" (1964-1965) 26 *University of Pittsburgh Law Review* 65. With regard to espionage only read from 79.

[463]Ward (1977) 11 *International Lawyer* 664.

[464]Edmondson (1971-1972) 5 *Vanderbilt Journal of Transnational Law* 453.

[465]Ward (1977) 11 *International Lawyer* 664. When a diplomat is assigned to conduct espionage out of the mission he is assigned to perform his functions from the mission. With this form of disguise, the diplomat reports to mission daily, using its offices and staff. He plans and conducts the collection of information, retreats to the mission and uses the security of the mission for storage of the information. This information thus becomes part of the archives and are inviolable and for the sole use of the sending State.

[466]Ward (1977) 11 *International Lawyer* 658-659 and 664. Ward goes on to say that the receiving State can justify the eliminating of privileges and immunities for espionage as a protective measure to safeguard information vital for national security. This can be done because the receiving State has the power to amend its domestic Acts and also make use of treaties.

US and Soviet diplomats on charges of spying and intelligence activities.[467] 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.[468]

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 sought 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.[469] 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.[470] 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 and governments that this practice has been extended.[471] 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 of this nature constitutes a violation of the sanctity of the embassy premises.[472] 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.[473]

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[467]McClanahan *Diplomatic Immunity* 162-163. During the 1970s Soviet diplomats were expelled from Australia, New Zealand, Belgium, Denmark, France, UK, Holland, Norway, Spain, Switzerland, West Germany, China, Japan, Equatorial Africa, Ivory Coast, Kenya, Tunis, Zaire, US, Colombia and Mexico to name a few.

[468]Edmondson (1971-1972) 5 *Vanderbilt Journal of Transnational Law* 445. For more examples of espionage throughout the years refer, to Grzybowski (1981) 30 *International & Comparative Law Quarterly* 42.

[469]Shaw *International Law* 528 and Green (1981) 19 *Canadian Yearbook of International Law*143.

[470]Brownlie *International Law* 357. There is a qualified right to asylum stated in Article 6 of the Havana Convention on Asylum of 1928. It was suggested by Fitzmaurice to allow asylum only by local usage or to save a life. However this was rejected by François and most members of the ILC.

[471]*Ibid.*

[472]Carpenter "Extradition, Extraterritorial Capture and Embassy Premises" (1987-1988) *South African Yearbook of International Law* 148.

[473] Harris *Cases and Materials on International Law* 353.

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.[474] 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.[475]

Embassy cars, furnishings and other property, including embassy bank accounts in the mission, are also protected from search, requisition, attachment or execution.[476] 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.[477] There was a lengthy debate around 1984 in the UK as to whether the attachment of bank accounts of a diplomatic mission were permitted. The court in *Alcom Ltd. v Republic of Colombia*[478] accepted that the bank accounts were primarily used for the running of the embassy and not for commercial purposes, resulting in immunity from attachment.[479]

4.2.2 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.[480] The term "archives" is not

[474]Lord Gore-Booth (ed) *Satow's Guide* 113-114 and van Dervort *International Law and Organization* 300.

[475]McClanahan *Diplomatic Immunity* 54.

[476]Denza *Diplomatic Law* 134.

[477]Lord Gore-Booth (ed) *Satow's Guide* 110. In the US a tougher policy was made effective in 1994 permitting the towing away of mission vehicles parked in a morning or afternoon rush hour in a no parking zone, in a loading zone, in an emergency no parking zone, obstructing an intersection, in front of a fire hydrant, on a sidewalk, in a bus zone, in a zone reserved for handicapped people or blocking a crosswalk.

[478]*Alcom Ltd. V Republic of Colombia* [1984] 2 W.L.R 750.

[479]For an extensive look into the *Alcom* case please refer to Fox "Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity" (1985) 34 *International & Comparative Law Quarterly* 115. For a historical look into immunity of property of diplomatic envoys, refer to Lyons '"Immunities Other Than Jurisdictional of the Property of Diplomatic Envoys" (1953) 30 *British Yearbook of International Law* 116.

[480]See further Wiebalck "Abuse of the Immunity of Diplomatic Mail" (1984) *South African Yearbook of International Law* 176. The first writer to suggest inviolability of the ambassador's papers was Vattel, who said

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.[481]

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.[482] 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.[483] 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.[484]

4.2.3 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

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that without such protection the ambassador was unable to perform his functions with security. State practice supported Vattel's view, for example in 1718 Count Cellamare, the Spanish ambassador to France, was discovered by interception of his dispatches to be conspiring against the French King. The disregard of inviolability in this instant contrasted with the respect which was shown towards the ambassador who was expelled.

[481]Lord Gore-Booth (ed) *Satow's Guide* 116. The Consular Convention under Article 1 defines consular archives include all "*papers, correspondence, books, films, tapes and registers of consular post, together with ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe-keeping*".

[482]Denza *Diplomatic Law* 158.

[483]Denza *Diplomatic Law* 160. Even when archives fall into the hands of the receiving State after being lost or stolen they must therefore be returned and may not be used in legal proceedings. In an earlier decision of *Rose v The King* 2 Can. C. R. 107m 3 D.L R. 618 (1948) a Canadian court held that documents which had been stolen from the Embassy of the Soviet Union were admissible as evidence. However, should this case be decided today, the courts would most likely declare the documents inviolable as per the Vienna Convention.

[484]Wiebalck (1984) *South African Yearbook of International Law* 176.

international law.[485] A mission is entitled to communicate for official purposes and to have access to every facility for this in the receiving State.[486] 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.[487] 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.[488] The inviolability of official correspondence is twofold: 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.[489]

The receiving State is obliged to permit and protect free communication for all official purposes.[490] 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 recognised 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 authorisation of the codes.[491] In 1973, France discovered that its new chancery building in Warsaw had been equipped with a network of 42 microphones.[492] It was common understanding between parties that the bugging of embassies occurred as happened. As

[485]McClanahan *Diplomatic Immunity* 64 and Denza *Diplomatic Law* 173. Article 27.

[486]Feltham *Diplomatic Handbook* 39 and Von Glahn *Law Among Nations: An Introduction to Public International Law* 7ed (1996) 431. Official correspondence means correspondence from the mission sent to the mission from the chancellery or the sending State and correspondence between the mission and consulates in the receiving State.

[487]Denza *Diplomatic Law* 174-175 and Berridge *Diplomacy* 92-93. It must be made known that the sending State is not obliged to supply telephone or other communication services without payment. Free communication means that there is an absence of restriction, not exemption of appropriate charges. If a mission fails to pay its accounts, the telephone lines can be disconnected, but out of courtesy, incoming calls will still be permitted.

[488]Dixon *Textbook on International Law* (1993) 163.

[489]Dixon *International Law* 163 and Denza *Diplomatic Law* 183-184.

[490]Denza *Diplomatic Law* 181.

[491] The development of eavesdropping devices began in the 17th century.

[492]Lord Gore-Booth (ed) *Satow's Guide* 116.

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.[493] During the Cold War there were numerous occasions where listening devices were discovered in missions.[494]

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.[495] 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.[496] Although the Vienna Convention succeeded in adding Article 27, it is the responsibility of the sending State to observe international telecommunications regulations.[497]

4.2.4 Diplomatic Bag and Diplomatic Couriers

The diplomatic bag is given more absolute protection under the Vienna Convention than was given under customary law.[498] Previously, the receiving State had a right to challenge a bag that was suspected to contain unauthorised items. If this occurred, the sending State could either return the bag unopened, or open it in the presence of the authorities of the receiving State.[499] 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.[500] The US required the consent of both the Ministry of Foreign Affairs of the receiving

[493] For several years the building remained unused while the US decided what to do.

[494] In 1989, the USSR complained of the discovery of listening devices in its embassy in London. The temptation for States to intercept communications has always been strong and the possibility of doing so while escaping detection has increased with the growth of sophisticated technology.

[495] Lord Gore-Booth (ed) *Satow's Guide* 116-117.

[496] Kerley (1962) 56 *American Journal of International Law* 112. It was also argued that the use of wireless communication was based on the theory of functional necessity and was practical.

[497] Lord Gore-Booth (ed) *Satow's Guide* 116-117.

[498] Lord Gore-Booth (ed) *Satow's Guide* 117.

[499] *Ibid.*

[500] Barker *Abuse of Diplomatic Privileges and Immunities* 90.

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.[501] 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. [502] 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.[503] 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.[504] The crates found within the lorry were accepted as diplomatic bags and thus not opened.[505] 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 bag usually falls into one of two categories, accompanied or unaccompanied, depending on the importance of its contents.[506] 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.[507] A

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[501] *Ibid*

[502] *Ibid.* Items such as photocopy machines, cipher equipment, computers, building materials, metals, films, books, drink, clothing, etc. intended for official use may be sent through the diplomatic bag.

[503] McClanahan *Diplomatic Immunity* 144.

[504] McClanahan *Diplomatic Immunity* 144 and Ashman and Trescott *Diplomatic Crime* 191.

[505] Shaw *International Law* 529-530 at footnote 240.

[506] Denza suggests that an unaccompanied bag is more secure than official correspondence sent through the public postal system.

[507] The Conference devoted little attention to the question of couriers.

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.[508] 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.[509]

A common arrangement, especially for small posts or developing countries, is to "deputise" the captain of an aircraft.[510] 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 captain.[511] 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.[512] There are several instances where the bag has been used to smuggle drugs, explosives, weapons, art, diamonds, money, radioactive materials and even people.[513] Despite this, the diplomatic bag may not be opened or detained. There have been

[508]Feltham *Diplomatic Handbook* 39-40 and Denza *Diplomatic Law* 205.

[509]Barker *Abuse of Diplomatic Privileges and Immunities* 86 and Denza *Diplomatic Law* 206.

[510]McClanahan *Diplomatic Immunity* 65.

[511]*Ibid*.

[512]Denza *Diplomatic Law* 185.

[513]Denza *Diplomatic Law* 185 and Ashman and Trescott *Diplomatic Crime* 190-223. It is considered that diplomats will smuggle anything that is for profit in a diplomatic bag. Further examples are pianos, whiskey and cigarettes depending on what is in demand. In 1980, a crate destined for the Moroccan Embassy in London spilt open and revealed £500 000 worth of cannabis.

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.[514]

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.[515] 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.[516] Britain took the view that electronic scanning is not unlawful under the Convention. However, some countries believe it to be "constructive opening".[517] 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 the bag, which is prohibited by the Convention.[518] 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.[519]

The most cited incident of the abuse of diplomatic bags occurred in July 1984, when Umaru Dikko, a former minister of the deposed Shangeri Government of Nigeria, wanted by the new Nigerian government on charges of embezzlement of government funds, was abducted.[520] 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

[514]Dixon *International Law* 163.

[515]Sniffer dogs and X-ray machines can be used to detect items.

[516]Denza *Diplomatic Law* 194-195. It has been said that modern X-ray technology is capable of damaging certain contents of bags, particularly film and can also elicit information that might not only compromise equipment, but might even decipher the contents of documents.

[517]Higgins (1985) *American Journal of International Law* 647.

[518]*Ibid*.

[519]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.

[520]Higgins (1985) *American Journal of International Law* 645.

aircraft.[521] 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.[522] One of the crates contained the unconscious Dikko and another man who had 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.[523] 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 borne markings, the concern of protecting life was more important than immunity.[524] In that situation, the use of scanning or dogs would have assisted in the discovery.

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.[525] Article 1 looks at the scope of present articles and to whom they apply and Article 28 deals with the protection of the diplomatic bag.[526] 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

[521]Cameron (1985) 34 *International & Comparative Law Quarterly* 614.

[522]Higgins (1985) *American Journal of International Law* 645.

[523]Cameron (1985) 34 *International & Comparatice Law Quarterly* 614. Another incident in 1964 was where an Israeli was found bound and drugged in a crate marked 'diplomatic mail' at Rome Airport. As a result, the Italian government declared one Egyptian official *persona non grata* and expelled two others.

[524]Higgins (1985) *American Journal of International Law* 645 and Cameron (1985) 34 *International & Comparative Law Quarterly* 614. See further Denza *Diplomatic Law* 190 and Akinsanya "The Dikko Affair and Anglo-Nigerian Relations" (1985) 34 *International & Comparative Law Quarterly* 602 and 606.

[525]Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Couriers (1986) ILC YbK, vol. II, part II, 24.

[526]These being the diplomatic courier and the diplomatic bag employed for the official communication of the sending State. Article 4 restates that there is freedom of communication; Article 5 emphasises the duty to respect the laws and regulations of the receiving State and third States; Article 24 indicates that the diplomatic bag must be identifiable by external markings; Article 25 states what contents are permissible in the diplomatic bag. The only items listed are official correspondence and documents or articles intended for official use.

does not satisfy the authorities, the bag may be opened in the presence of an authorised representative of the sending State.[527] 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 interests of the sending State in ensuring the safety and confidentiality of the contents of the bag, and the security interests of the receiving State.[528] It would appear that this provision is however 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 the ILC dealt with larger "bags", and the Vienna Convention does not limit the size of the bag.

Although the ILC and Conference debated the issue of diplomatic bags, it seems that States gave inadequate weight to the need for protection against abuse. With the increase of abuse it is prudent to apply the Vienna Convention protections 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.

4.2.5 Commencement and Termination of Mission Immunities

The Vienna Convention has clear provisions regarding commencement and termination of privileges and immunities with regard to diplomats, but it does not inform on the mission or its property.[529] In the Harvard Draft Convention inviolability is contingent on a notification to the receiving State that the premises are occupied by diplomatic agents. Several members of the ILC addressed the problem when drafting the Convention, but each provided a different answer. Ago says that it was practice to notify the receiving State that premises were acquired to be used as a mission and that inviolability begins on such notice.[530] Fitzmaurice suggests that inviolability of premises begins from the time they are put at the disposal of the mission.

[527]Article 28.

[528]Dixon and McCorquodale *Cases and Materials on International Law* 336.

[529]Denza *Diplomatic Law* 146.

[530]*Ibid*.

Bartos says that it was customary to claim inviolability when they reached the stage of interior installation and decoration.[531]

It is noted that ownership of the mission rests with the sending State and although the intention is to use it for diplomatic purposes, it does not make it inviolable. However, when the receiving State has notified the sending State of the acquisition of the premises to be used as an embassy and the necessary paperwork is completed, then the premises will be regarded as inviolable.[532] Where the mission has vacated its buildings, inviolability is continued for a reasonable period. On the other hand, where diplomatic relations have been severed or the mission has been recalled, the premises lose their diplomatic character and inviolability, as in the Fletcher incident.[533]

McClanahan considers the inviolability of abandoned premises and concludes that as a result of the Vienna Convention's failure to deal with the subject, State practice will take precedence.[534]

4.3 Diplomatic Agents' Privileges and Immunities

4.3.1 Personal Inviolability

Diplomats are accorded the highest degree of privileges and immunities. Five privileges established in the Vienna Convention are exemption from taxation,[535] custom duties and baggage inspection,[536] exemption from social security obligation,[537] from personal and public

[531]*Ibid*. There seems to be some support for Bartos's suggestion.

[532]Lord Gore-Booth (ed) *Satow's Guide* 112.

[533]*Ibid*. In Britain, the premises are inviolable from the time they are at the disposal of the mission, provided that planning consent had been secured and the intention was to use the premises as a mission as soon as building and decorating had been completed. When they were no longer used as a mission, a reasonable time is allowed before they can be entered.

[534]McClanahan *Diplomatic Immunity* 51. For instance, in London, the government passed an Act which permitted the Foreign Office to take abandoned diplomatic and consul buildings if the buildings cause damage to pedestrians and neighbouring buildings because of their neglect, to sell them and to use the proceeds to pay off outstanding debts.

[535]Article 28.

[536]Article 36.

[537]Article 33.

services,[538] and exemption from giving evidence.[539] Except for the exemption from baggage inspection, the other privileges fall under the realm of private law and will not be considered.

Prior to the Vienna Convention, diplomats received the greatest degree of immunity. They could not be arrested unless they were actually engaged in plotting against the State they were accredited to, and even in such extreme circumstances an application for their recall was implemented.[540] In 1717 the Swedish ambassador to England was a prime suspect in a conspiracy to overthrow George I.[541] The British government obtained evidence by intercepting some letters. The ambassador was expelled from Britain.[542]

The Vienna Convention, as mentioned in Chapter 2, adopted the functional necessity theory to justify the diplomat's privileges and immunities.[543] These privileges and 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 protests from the diplomatic corps in its own capital, but also retaliation against its own representatives in a foreign State.[544]

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

[538]Article 35.

[539]Article 31 paragraph 2. Owing to the fact that these privileges are of civil and administrative nature they will not be discussed in detail.

[540]Lawrence *The Principles of International Law* 6ed (1910) 310-311. It must be noted that exemption from criminal jurisdiction was firmly established in the 17th century. For the next 200 years absolute immunity from arrest or prosecution for criminal offences was firmly planted in the reciprocal independence and respect of sovereign States for each other. Vattel, the great author of *Le Droit des Gens*, established in the 18th century the broad outlines of customary international law regarding the privileges and immunities of diplomats. See Lord Gore-Booth (ed) *Satow's Guide* 106.

[541]Lawrence *International Law* 311.

[542]*Ibid*. The expulsion of the Swedish ambassador was due to the arrest of the English ambassador in Sweden, as a form of retaliation.

[543]Hurst states the privileges and immunities are founded on the necessities of the maintenance of international relations. In no other way would a foreign representative be able to fulfil the tasks given to him.

[544]Lord Gore-Booth (ed) *Satow's Guide* 107 and Ogdon *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1936) 29.

take appropriate steps against attack.[545] 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 laws.[546]

In the past 25 years diplomats have been in more physical danger than ever before. These attacks have shown the dark side of their "special, official, privileged status".[547] McClanahan succinctly points out that it is ironic that people involved in diplomatic work are often criticised 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.[548]

A spate of kidnappings of senior diplomats occurred in the late 1960s and early 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 fulfil the demand leads to the refusing government being held responsible for his death.[549] As a consequence of the high incidence of political acts of violence directed against diplomats and other officials,[550] the General Assembly of the UN adopted a Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents.[551] The foreseen offences are primarily murder, kidnapping, attacks upon the person, violent attacks upon

[545]Lord Gore-Booth (ed) *Satow's Guide* 121 and Von Glahn *Law Among Nations* 424-425.

[546]Ogdon *Juridical Basis of Diplomatic Immunity* 216 and Berridge *Diplomacy* 117.

[547]McClanahan *Diplomatic Immunity* 148.

[548]McClanahan *Diplomatic Immunity* 149. It is a sad thing that diplomats whose functions are to resolve conflicts through negotiations and promote peace are the targets of political violence and attacks. There are many examples of such attacks. Refer to Ogdon *Juridical Basis of Diplomatic Immunity* 217 at footnote 51 and 52 with regard to disturbances in China in 1900 and Germany in 1914.

[549]Lord Gore-Booth (ed) *Satow's Guide* 199.

[550]Article 1 of the Convention includes in the list of protected persons heads of states and their families, diplomats and their families and agents of international organisations of an intergovernmental character.

[551]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 & Comparative Law Quarterly* 344. A list of diplomats who have been killed since 1947 can be found in Wilson *Diplomatic Privileges and Immunities* (1967) 52-53.

official and private premises, and any threats or attempts to commit any of the above offences.[552] 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.[553] The draft text was prepared with the outmost 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 a mob attack or kidnapping, the receiving State should provide special protection, like an armed guard or bodyguards.[554]

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-town street.[555] 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.[556] Another incident involving the same members of the organisation that tried to kidnap Mein was when the Federal German ambassador was forced from his car and held captive.[557] 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. The Guatemalan government refused to set convicted prisoners free and the body of the ambassador was found with a bullet in his head.[558]

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[552]Article 2.

[553]Brownlie *International Law* 367-368. See further Shearer *International Law* 387-389. Articles 3 states parties are to take measures to establish jurisdiction over the crimes stated in Article 2. Articles 4 to 6 and 10 provide for cooperation and various measures of collaboration in the apprehension of offenders. Article 7 deals with prosecution, when extradition does not take place, of offenders in accordance with local laws which must be done so without "*undue delay*." Article 8 deals with extradition.

[554]Lord Gore-Booth (ed) *Satow's Guide* 122, McClanahan *Diplomatic Immunity* 149-50. See further Dixon and McCorquodale *Cases and Materials on International Law* 337.

[555]Lord Gore-Booth (ed) *Satow's Guide* 199.

[556]*Ibid*.

[557]Lord Gore-Booth (ed) *Satow's Guide* 199-200.

[558]*Ibid*. In September 1968, the US ambassador in Brazil was forced out of his car and a note was left demanding the publication of a manifesto and the release of fifteen political prisoners. The Brazilian government agreed to the demands and the ambassador was released. Other examples include the kidnapping and murder of the Minister of Labour of Quebec in 1970, the kidnapping of the British Trade Commissioner in Montreal in 1970, the kidnapping of the British ambassador in Uruguay in 1971, and the kidnapping and murder of the Israeli Consul-General in Istanbul in 1971. Satow declares that more than 25 kidnappings or attempted kidnappings occurred between the years 1968 to 1973. Even children of the diplomats are vulnerable to kidnapping or attacks. In

Where a government is aware of a possible kidnapping, or diplomats situated in countries such as in South America or in the Middle East[559] where diplomats are vulnerable to terrorist attacks, extra measures should be taken in the tightening of their security and the protection of these diplomats.[560] Although the Vienna Convention does place a duty on the receiving State to protect diplomats, the receiving State would reasonably expect that missions and diplomats would take measures to protect themselves.[561] In addition, Barker points 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 the event of war or internal tension involving the two States, the receiving State is under a duty to reinforce the means of protection to missions or diplomats who have become vulnerable.[562]

4.3.2 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.[563] The distinction is well summarised in *Dickinson v Del Solar*[564] where it was emphasised that diplomatic immunity does not signify immunity from legal liability, but rather imports exemption from local court jurisdiction. This extends to all jurisdictions whether civil, administrative or criminal.[565] Thus, a diplomatic agent who commits an illegal act in the

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Warsaw three Russian teenagers were attacked and mugged by a mob shouting anti-Russian slogans. For more examples of diplomat kidnappings and murders, refer to McClanahan *Diplomatic Immunity* 147-148.

[559]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.

[560]Lord Gore-Booth (ed) *Satow's Guide* 202.

[561]*Ibid*.

[562]Barker *Abuse of Diplomatic Privileges and Immunities* 74 and Dixon and McCorquodale *Cases and Materials on International Law* 329.

[563]This principle has been well established since the sixteenth and seventeenth centuries. During that period no ambassador was ever put to death or subjected to any extended imprisonment for crimes committed. Although this was the case, many writers doubted whether diplomats were still allowed to retain their immunity for criminal acts. For example, Gentilis advised Queen Elizabeth I of England that the Bishop of Ross had forfeited his immunity by conspiring against the sovereign. However, the Queen did not follow the advice and expelled the Bishop of Ross. See Barker *Abuse of Diplomatic Privileges and Immunities* 77.

[564]*Dickinson v Del Solar* (1930) 1 KB 376.

[565]However, with regard to civil and administrative jurisdiction immunity there are three exceptions: (1) a real action relating to private immovable property situated in the receiving State, unless it is used for the purpose of

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*".[566]

The rationale behind criminal jurisdiction is to prosecute and punish those who commit illegal acts or offences.[567] 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 very ethos of the rule of law and justice.[568]

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 regard to diplomats' drunk and negligent driving. Ambassador Kiatro Abisinito was driving his car whilst intoxicated and crashed into the rear of a parked car in which two people were sitting. The ambassador was travelling at such a speed that his car hit two empty cars on the opposite side 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.[569] The police charged the ambassador with failing to pay attention to driving, which could lead to fines of up to

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the mission; (2) an action relating to succession in which the diplomat is an executor, administrator, heir or legatee; (3) an action relating to any professional or commercial activity exercised in the receiving State outside his or her official functions. These three limitations, according to Garretson, are significant developments but indicate the great influence of the theory of functional necessity.

[566]Przetacznik (1978) *Anglo-American Law Review* 351. However, during the sixteenth and seventeenth centuries the receiving State could use the concept of self-defence where an ambassador was found to be involved in a criminal conspiracy or treason against the receiving State. In *Hanauer v Doane* 79 U.S. (12 Wall.) 342. 347 (1870) Justice Bradley remarked that there is no greater crime than treason. It is a political offence and should a diplomat be found committing treason, it could destroy relations between the two States.

[567]Przetacznik (1978) *Anglo-American Law Review* 358.

[568]*Ibid.*

[569]Larschan "The Abisnito Affair: A Restrictive Theory of Diplomatic Immunity?" (1987-1988) 26 *Columbia Journal of Transnational Law* 283

$100 000. The police and the State Department agreed that owing to his status, he could not be prosecuted. What makes this incident important is 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 in the event that one of the people hit by Abisinito were to die.[570] While the ambassador could not be prosecuted at the time, a criminal charge against him would bar his later re-entry into the US. This served as a warning to diplomats to obey the law.[571]

Another incident 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.[572] The accident rendered Brown a quadriplegic, while Rosenbaum escaped unharmed. Diplomatic immunity prevented any charges or suit being laid against the Panamanian.[573] 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.[574] Brown's life would 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.

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[570]Larschan (1987-1988) 26 *Columbia Journal of Transnational Law* 284-285.

[571]McClanahan *Diplomatic Immunity* 132-133 and Pecoraro "Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity" (1988) 29 *Harvard International Law Journal* 533. This was when the US introduced a restrictive interpretation to Article 39 (2). For a detailed look at the Abisinito Affair refer to Larschan (1987-1988) 26 *Columbia Journal of Transnational Law* 283 and the response by Donoghue "Perpetual Immunity for Former Diplomats? A Response to "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity" (1988-1989) 27 *Columbia Journal of Transnational Law* 615. The restrictive theory will be discussed in Chapter 5.

[572]Southwick "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms" (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 90 and Ashman and Trescott *Diplomatic Crime* 306-308.

[573]*Ibid.*

[574]Ashman and Trescott *Diplomatic Crime* 308-309. Another example is where a diplomat accredited to the embassy of Upper Volta crashed his car into a restaurant in Ottawa while drunk. Police arrested the diplomat and charged him with reckless driving and driving under the influence of alcohol. Yet once it was established he was a diplomat, the charges were dropped and he was released.

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

Article 31 lays down no procedure as to when or how immunity should be pleaded or established. These issues are usually left to the law of each State.[575] 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.[576] 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 in both States. This suggestion seems appropriate and reasonable, but it was criticised as being too extreme.[577] Even though the same act may be recognised as an offence under both jurisdictions, the potential 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 *ratione materiae*, and not his *ratione personae.*[578] 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,[579] meaning that *ratione personae* expires at the end of an assignment while *ratione materiae* continues.[580]

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

[575]Denza *Diplomatic Law* 253.

[576]Denza *Diplomatic Law* 256.

[577]Kerley (1962) 56 *American Journal of International Law* 124.

[578]Dinstein "Diplomatic Immunity from Jurisdiction *Ratione Materiae*" (1966) 15 *International & Comparative Law Quarterly* 78.

[579]Dinstein (1966) 15 *International & Comparative Law Quarterly* 80.

[580]Dinstein (1966) 15 *International & Comparative Law Quarterly* 81.

appliance store from driving into a woman over a dispute over a parking space.[581] He was not prosecuted.[582] The question to be asked is how does not punishing him for hurting someone over a parking space protect his ability to fulfil his functions? Diplomats have been caught saying "T*he safety of citizens isn't as important as the meeting I'm going to*",[583] or "*If I choose to leave my car in the middle…it would be none of your damned business*".[584] Is it too extreme to prosecute a diplomat who does not respect local laws, the citizens of the receiving State and even their own employees?[585]

A further issue that arises is whether a diplomat may claim immunity in a third state for alleged criminal offences. During the 16th and 17th 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 19th and early 20th centuries, controls on travel became general and restrictive measures were implemented, i.e. diplomats had to obtain a prior visa if necessary.[586] 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 recognised by the third state.[587] This is

[581]Goodman "Reciprocation 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* 404.

[582]*Ibid*.

[583]Ashman and Trescott *Diplomatic Crime* 323.

[584]Ashman and Trescott *Diplomatic Crime* 325.

[585] See *Ahmed v Hoque* 2002 WL 1964806 (S.D.N.Y. Aug 23, 2002).

[586]Lord Gore-Booth (ed) *Satow's Guide* 151-152. Even if the diplomat is making a transit stop, whether for the purpose of changing aircraft or not, there was still a requirement of a transit visa or a passport inspection.

[587]In *R v Guildhall Magistrates Court, ex Parte Jarrett-Thorpe* Times Law Report 6 October 1977 the husband of a counsellor 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. Lawson J interpreted Article 40 literally stating firstly, the member must be passing through the third State; secondly, he must have the necessary passport visa and thirdly, he must be engaged in one of three activities, either accompanying the diplomatic agent or travelling separately to join the diplomatic agent in post or travelling separately to return to the diplomatic agent's own State. He thus concluded that Jarrett-Thorpe was in the course of travelling separately to join his wife, a diplomatic agent, in the post she was

also extended to his family members who are accompanying him or travelling separately to join him.[588] Civil proceedings may be brought against them, provided that it does not involve arrest.[589]

This is illustrated in *R v Governor of Pentonville Prison, ex parte Teja.*[590] Teja was arrested on leaving Heathrow Airport bound for Geneva following a warrant, charging him with a 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.[591] 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.[592]

4.3.3 Inviolability of Diplomat's Residence and Property

Previously 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.[593]

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already accredited to, indicating that Article 40 would not apply. See further Brown (1988) 37*International & Comparative Law Quarterly* 61.

[588]They do not enjoy exemption from baggage inspection.

[589]Lord Gore-Booth (ed) *Satow's Guide* 152-154 and McClanahan *Diplomatic Immunity* 68-69. See further Koffler "A Passing Glimpse at Diplomatic Immunity" (1965-1966) 54 *Kentucky Law Journal* 266-267.

[590]*R v Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274 (CA). See further Brown (1988) 37*International & Comparative Law Quarterly* 60.

[591]*Supra.*

[592]*Supra.*

[593] Lord Gore-Booth (ed) *Satow's Guide* 122-123. Ogdon and Grotius believed that the house of an ambassador cannot be entered or searched, nor may any goods found in his dwelling be detained by the local authorities. Article 30 provides for the inviolability of a diplomat's residence and property.

Many States enacted legislation conferring inviolability on the residence of the diplomat and later express provision was made for inviolability in the Havana Convention.[594] 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.[595] A second residence, such as a holiday home or a hotel room away from the capital would also have inviolability, but if the diplomat began living in it, it might lead to the loss of inviolability of the principal residence.[596] The papers and correspondence of a diplomat under customary law were not accorded inviolability. However, the Vienna Convention goes beyond customary practice and confers inviolability on all papers and correspondence that may be private in character.[597] The inviolability of a diplomat's property does not mean that he is exempt from the law and regulations of the receiving State.[598] The diplomat's property included movable and immovable property, ranging from houses and furniture to motor vehicles and lawn-mowers.

A scenario like this arose in *Agbor v Metropolitan Police Commissioner*[599] where a Nigerian diplomat moved out of his flat for "redecoration". 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 that the diplomat had moved out permanently and it had thus lost its inviolability.[600]

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[594]Denza *Diplomatic Law* 221.

[595]Denza *Diplomatic Law* 221-222.

[596]Denza *Diplomatic Law* 222.

[597]Denza *Diplomatic Law* 224.

[598]This goes back to Article 41, where diplomats must respect the laws and not interfere in internal politics of the receiving State.

[599]*Agbor v Metropolitan Police Commissioner* [1969] 2 All ER 707.

[600]*Supra*.

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.[601] Possessing a diplomatic passport means that personal luggage is seldom subjected to inspection.[602] However, possessing a diplomatic passport does not necessarily mean immunity from criminal jurisdiction. For instance, in *US v Noriega and Others*[603] General Noriega was charged with narcotic offences. The court held that a diplomatic passport might secure certain courtesies in international travel, but was without significance in law.[604] Most drug traffickers who are caught receive severe penalties, but for diplomats the worst that can happen is a loss of face and possible expulsion from the country's diplomatic service. Therefore, most diplomats seem ready to take the risk because of the potential rewards.[605]

In the event that there are grounds of suspicion, the bags may be inspected in the presence of the diplomatic agent or his or her authorised representative. Some airports routinely allow the luggage to be sniffed by dogs to check for drugs. If the dogs sense drugs, the diplomat is normally requested to open the suspicious bag.[606] If the diplomat does not allow his baggage to be inspected or tested by agents of the aircraft carrier, the carrier is under no obligation to carry him.[607] 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

[601]McClanahan *Diplomatic Immunity* 157.

[602]Denza *Diplomatic Law* 255 and Ashman and Trescott *Diplomatic Crime* 171.

[603]*US v Noriega and Others* US District Court, Southern District of Florida, 8 June 1990, 99 ILR 143 and Denza *Diplomatic Law* 255.

[604]Denza *Diplomatic Law* 255. Especially if he is not accredited to the receiving State.

[605]Farahmand (1989-1990) 16 *Journal of Legislation* 99.

[606]*Ibid*. This seems to be the practice, especially at JFK Airport in New York.

[607]Article 36 and Lord Gore-Booth (ed) *Satow's Guide* 140.

machines. However, Britain and the US have resisted this practice, except on specific occasions.[608]

4.3.4 Commencement and Termination of Privileges and Immunities

The importance of knowing when privileges and immunities commence and terminate ensures proper protection for those who are immune from criminal jurisdiction. Article 39 lays down that personal privileges and immunities begin when the person entitled enters the receiving State on his way to take up his post.[609] If the diplomat is in the territory when he is appointed, the said privileges and immunities begin when his appointment is notified to the Ministry of Foreign Affairs. Privileges and immunities attached to diplomatic status continue during the entire period for which the status is recognised by the receiving State.[610] This provision ended a long debate concerning the uncertainty of State practices as to whether the critical date for the beginning of immunities was the date of notification of appointment, the date of the formal presentation of his credentials, or the date of his arrival in the territory.[611]

Under Article 39(2) there is continuing immunity with regard to official acts. It follows the formulation that immunity would not continue for a person leaving the receiving State for any act which was performed outside the exercise of his function as a member of the mission even though he was immune at that time.[612] What is considered an official act? The definition for official acts is not self-evident, according to Brownlie. The concept presumably extends to matters which are essentially "*in the course of official duties*".[613]

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[608]McClanahan *Diplomatic Immunity* 63.

[609]Advanced notification of the appointment of a diplomat entering the receiving State will ensure that the personal luggage and privileges of the diplomat are not violated, searched or detained.

[610]Lord Gore-Booth (ed) *Satow's Guide* 129.

[611]Article 39 and Lord Gore-Booth (ed) *Satow's Guide* 129-130. See further Feltham *Diplomatic Handbook* 41-42 and McClanahan *Diplomatic Immunity* 67-68. There were three views as to when privileges and immunities commenced: (1) when the *agrément* to the receiving State was granted, as claimed by Hurst and Salmon; (2) on formal presentation of credentials; and (3) when entering the territory, as stated by Vattel.

[612]Shaw *International Law* 535.

[613]*Ibid.*

It is possible that a distinction must be made between official acts which are open to the local law and those which cannot be prosecuted. The former category would deal with dangerous driving in an official car, i.e. having an accident while on official business, while an example of the latter would be a contractual promise made in negotiations for a concession with a legal person in private law.[614] However, attention has been drawn to this provision since the restrictive theory was implemented. This theory was brought about by the US Department of State in a circular to all Missions in 1984.[615] This circular stated that diplomats suspected of crimes would be expelled from the US and their immunities would cease at that point. Further, there is a right to prosecute such persons if they returned to the US unless the acts occurred in the exercise of their official function.[616] A recalled official cannot expect immunity if he returns to the receiving State in an unofficial capacity and whether he remains in the diplomatic service in his own country is immaterial.[617]

Article 39(2) further allows ambassadors a reasonable period to wind up their affairs and leave the country. Previously, customary practice in the UK and US was that diplomats retained their immunity from local jurisdiction during the period necessary for them to wind up their affairs and to depart to their own State.[618] Even in cases of expulsion, the diplomat's person remains inviolable.[619] This is clearly indicated and established in *Musurus Bey v Gadban.*[620] It is impossible to set precise limits upon time necessary for a

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[614]Brownlie *International Law* 361-362 and Dinstein (1966) 15 *International & Comparative Law Quarterly* 83.

[615]Barker *Abuse of Diplomatic Privileges and Immunities* 131.

[616]Barker Abuse *of Diplomatic Privileges and Immunities* 131-132. During the commenting of the Vienna Convention, a member of the ILC asked the Special Rapporteur to replace the words "*in the exercise of his functions*" to "*during the exercise of his function*". This suggestion was rejected by the Rapporteur and stated that immunity should only subsist with regard to acts performed in the exercise of a diplomat's functions. This will be considered in detail in Chapter 5.

[617]Jones "Termination of Diplomatic Immunity" (1948) 25 *British Yearbook of International Law* 274.
[618]Jones (1948) 25 *British Yearbook of International Law* 262.

[619]*Ibid.* This was further established in two leading English cases: *Musurus Bey v Gadban* [1884] 2 QB 361 (CA) and *In re Suarez* [1917] 2 Ch 131.

[620]*Musurus Bey v Gadban* [1884] 2 QB 361 (CA).

person to complete his preparations of departure.[621] There are very few provisions in national legislation formulating a precise time frame, and those that do, vary.[622] For example, when the US and Turkey broke diplomatic relations in 1917, the Turkish *chargé d'affaires* in Washington requested to remain in the United States temporarily because of his health, and the US made no objection. There have been cases where a diplomat may be granted an unusually short period in which to leave the country, for instance Libyan diplomats had to leave Britain in 1984 within seven days, and in 1991 an Iraqi diplomat was given 48 hours to leave Germany. So it appears that the receiving State can determine the length of the period of grace.[623]

A difficulty arises with regard to the commencement and duration of immunity of diplomats where their governments have undergone a change that is not in accordance with the sending State laws or Constitution. Koffler suggests that as long as the receiving State continues to recognise the status quo, the mission and the diplomats will continue to have immunity. [624]

4.4 Members of Family and Staff Privileges and Immunities

4.4.1 Members of Family

The members of the diplomatic agent's family forming part of his household[625] enjoy a range of privileges and immunities. Privileges and rights include personal inviolability, inviolability of residence, immunity against criminal and civil jurisdiction, exemption

[621]Jones (1948) 25 *British Yearbook of International Law* 266.

[622]Switzerland allows for six months while in Venezuela, the UK and US it is only one month.

[623]Jones (1948) 25 *British Yearbook of International Law* 266. It seems that by 1948, Austria was the only country which set an approximate limit of one year. Members of a diplomat's family are not entitled to a "reasonable period" of extension, and their privileges and immunities terminate with immediate effect when they lose their status as family members, whether by divorce or separation.

[624]Koffler (1965-1966) 54 *Kentucky Law Journal* 261.

[625]As defined in Chapter 3 para 3.6.

from social security provisions, exemption from taxation, exemption from personal services and exemption from customs duties and inspection. [626]

Previously, there were some instances where family members committing crimes were released[627] and in others they were arrested, prosecuted and found guilty. A well-known early cited case involved Dom Pataleone de Sá e Meneses (hereinafter referred to as Sá). This case indicates how members of a family invoked immunity to avoid prosecution. Sá travelled to England with his brother, Dom João Rodriguez Sá e Meneses, the Portuguese ambassador. While his brother negotiated, Sá did nothing.[628] In November 1653, Sá became enraged when he was insulted by a Colonel Gerard and attacked and wounded the Colonel.[629]A bystander, Anthuser, intervened and stopped the fight. Sá retreated but came back that evening with 20 armed attendants and went to find Anthuser. Mistaking a Colonel Mayo for Anthuser, they attacked him and inflicted several wounds. The commotion attracted a Greenway and when he came out to 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.[630]

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.[631] The issue facing the courts was whether Sá and his attendants could be

[626]Ranging from Article 29 to 36. Similar to that of a diplomatic agent.

[627]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 a brawl at a local brothel and killed an Englishman. He too was released.

[628]Sá's brother was sent to negotiate an alliance with England.

[629]The Colonel overheard Sá 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.

[630]Frey and Frey "The Bounds of Immunity: The Sá Case. Politics, Law, and Diplomacy in Commonwealth England" (1990) *Canadian Journal of History* 41-42 and Young "The Development of the Law of Diplomatic Relations" (1964) 40 *British Yearbook of International Law* 154.

[631]What fuelled this even more, were rumours that explosives 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.

prosecuted in English courts for murder. Justice Atkyns contended that Sá had forfeited his privileges by his actions. Even attendants are allowed extraordinary immunities, but when they break the law of nations they are liable.[632] At his trial, Sá contended that he was immune from prosecution, first because he was the brother of the ambassador and secondly, that he was authorised 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 Sá's arguments and the court found him and four of his attendants guilty of murder and they were sentenced to be hanged.[633] Although diplomatic immunity did not protect Sá, the Vienna Convention would now cloak him with immunity.

With the establishment of permanent missions it became accepted that the family would accompany the diplomat.[634] The ILC debated very little over extending full privileges and immunities to the family of a diplomat. The question which puzzled most States was who 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.[635] 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*.[636]

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

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[632] Frey and Frey (1990) *Canadian Journal of History* 47-48.

[633]Frey and Frey (1990) *Canadian Journal of History* 49-50. See further Lawrence *International Law* 312-313.

[634]Denza *Diplomatic Law* 323. For an in-depth discussion on the definition of a diplomat's "family" refer to Chapter 3 under 3.6.

[635]Denza *Diplomatic Law* 321.

[636]*The Magdalena Steam Navigation Co. v Martin* 1859 QB 107.

of the third attaché to the Ghanaian delegation committed rape, sodomy, assault and other crimes in New York City.[637] 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 paperwork for prosecution.[638] After being identified as the son of the Ghanaian diplomat he was released and all charges dropped, owing to his diplomatic immunity.[639] The State Department's only remedy was to declare him *persona non grata* and expel him from the US. 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*"[640]. The question here is how did this incident affect a diplomat's function?

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 privileges and immunities and is it not necessary.

4.4.2 Mission Staff

Before the Vienna Convention, the question of the privileges and immunities towards staff was inconsistent among States. For example, the UK, US, Germany, Austria and Japan extended all the privileges and immunities of diplomatic immunities to all staff, including domestic and private servants, while other States, like Switzerland, France,

[637]Ashman and Trescott *Diplomatic Crime* 22.

[638]Farahmand (1989-1990) 16 *Journal of Legislation.*99.

[639]Ashman and Trescott *Diplomatic Crime* 24.

[640]Farahmand (1989-1990) 16 *Journal of Legislation* 99. See for full details Ashman and Trescott *Diplomatic Crime* 22-51. A high school sophomore was raped by two of her classmates who were sons of a Saudi Arabian diplomat and an Egyptian official at the World Bank. Both boys evaded prosecution because of diplomatic immunity. The cases *Friendenbverg v Santa Cruz* 193 Misc 599, 86 N.Y.S.2d 369 (1949) and *People v Von Otter* 202 Misc. 901, 114 N.Y.S.2d 295 (1952) involved suits by negligent operation of motor vehicles against wives of diplomats. The wives invoked immunity as a defence and the courts held for the defendants by extending the husbands' immunities.

Argentina, Chile, Greece and Italy, restricted immunities of minor diplomatic staff.[641] In some areas, before privileges and 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 his immunities.[642]

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 a uniform rule.[643] Even the drafting and discussion of the ILC and Conference felt that this was one of the most controversial issues to be dealt with.[644] The ILC was originally in favour of the extension of full diplomatic immunities and privileges to administrative and technical staff and their families. The rationale was that it is occasionally difficult to distinguish between diplomatic agents and technical and administrative staff and their functions.[645] 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 privileges and immunities.[646] 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 privileges and immunities.[647]

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[641]Lord Gore-Booth (ed) *Satow's Guide* 144 and Wilson *Diplomatic Privileges and Immunities* 157.

[642]Brookfield "Immunity of Subordinate Personnel" (1938) 19 *British Yearbook of International Law* 155.

[643]Denza *Diplomatic Law* 329-330.

[644]Barker *Abuse of Diplomatic Privileges and Immunities* 81.

[645]Barker *Abuse of Diplomatic Privileges and Immunities* 81-82 and Wilson *Diplomatic Privileges and Immunities* 159. The functions performed by technical and administrative staff had formerly been performed by diplomatic staff and only because the latter could not cope with the workload had it been necessary to get assistance from the former. The function itself, however, still remained diplomatic.

[646]Wilson *Diplomatic Privileges and Immunities* 159.

[647]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

Once it was decided to grant limited 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.[648] Members of the administrative and technical staff and members of their families, unless they are nationals or permanent resident of the receiving State, enjoy the same privileges and 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.[649] 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.[650]

Service-staff differ from private servants. Service-staff receive immunity for their official acts. Privileges include exemption from tax on their emoluments and exemption from social security provisions. These limited privileges and immunities may be supplemented by the receiving State through bilateral agreements.[651] In *Ministère Public and Republic of Mali v Keita*[652] the Appeal Court in Brussels had to determine whether the murder of the ambassador of Mali by a chauffeur, who was a member of the service staff, was an act performed in the course of his duties.[653] 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.[654] From this it seems that

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jurisdiction. Further during the debate of the Vienna Convention, three States, Egypt, the Khmer Republic and Morocco, entered reservations to the effect of Article 37 (2), but this was later objected to by eight States.

[648]Lord Gore-Booth (ed) *Satow's Guide* 145 and Feltham *Diplomatic Handbook* 47.

[649]*Ibid*.

[650]Wilson *Diplomatic Privileges and Immunities* 159.

[651]Lord Gore-Booth (ed) *Satow's Guide* 146-147.

[652]*Ministére Public and Republic of Mali v Keita* 1977 ILR 410.

[653]*Supra*.

[654]Wilson *Diplomatic Privileges and Immunities* 166.

immunity can only be claimed on the basis of a *bona fide* service. Therefore, immunity will not be recognised for a cook of an ambassador who has no kitchen, nor for a Christian chaplain employed by a Muslim ambassador.[655]

Private servants have the fewest privileges and immunities accorded to them. They are exempt from tax on emoluments and, provided that they are register for social security in purposes in their Sending State they will be exempt therefrom in the receiving State.[656] However, the Vienna Convention provides that jurisdiction over private servants must be exercised in a way that does not interfere unduly with the functions of the mission.[657] 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*[658] 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 it on behalf of the servant. The ambassador did no such thing and the defendant was subsequently convicted.[659]

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.[660] It should be emphasised that diplomats and members of staff who are nationals or permanent residents of the receiving State are entitled to immunity from jurisdiction only for official functions performed and the

[655] *Ibid.*

[656] Lord Gore-Booth (ed) *Satow's Guide* 147.

[657] Lord Gore-Booth (ed) *Satow's Guide* 147-148 and Feltham *Diplomatic Handbook* 48.

[658] *United States v Ruiz* No. 10150-65 (D.C. 1965).

[659] In *United States v Santizo* No. C-971-63 (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.

[660] Barker *Abuse of Diplomatic Privileges and Immunities* 85.

receiving State grants and extends only privileges and immunities which it considers appropriate.[661]

4.5 Deterrent Measures

International law does not offer unrestrained licence to individuals with immunity. An element of granting immunity is the obligation to obey local laws.[662] Hill considers and explains Sir Cecil Hurst's outline of procedure to be followed in diplomatic channels.[663] 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 of the mission.[664] If the head of the mission agrees to the charge, the necessary arrangements of settlement or waiver will be organised. In the event that the head of mission does not take any action, the receiving State may appeal to the sending State.[665] Ways in which abuse 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.

4.5.1 *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

[661] Feltham *Diplomatic Handbook* 48 and McClanahan *Diplomatic Immunity* 58. See further Koffler (1965-1966) 54 *Kentucky Law Journal* 263-264.

[662] Article 41.

[663] Hill "Sanctions Constraining Diplomatic Representatives to Abide by the Local Law" (1931) 25 *American Journal of International Law* 254. Although this is an old text the procedure is similar in modern practice.

[664] *Ibid.*

[665] *Ibid.*

not to accept individuals before appointment and also to expel diplomats after their appointment as a result of their wrongful acts.

The fundamental rationale of this Article allows for the receiving State to expel a diplomat who has behaved unacceptably.[666] This 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 recognise the person as a member of the mission, resulting in him being liable to prosecution.[667] 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 is a reasonable period. Interestingly, 48 hours has been the shortest time span justified as a "reasonable period".[668]

One of the most common reasons for declaring a person *persona non grata* is for espionage.[669] 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*.[670] Another reason for declaring a diplomat *persona non grata* is involvement in a conspiracy against the receiving State.[671]

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[666]Denza *Diplomatic Law* 59 and 62. McClanahan *Diplomatic Immunity* 128 and Hill (1931) 25 *American Journal of International Law* 256. Before, the use of expulsion was generally limited to offences committed against the receiving State such as conspiracy, infraction of neutrality laws or interference with the internal affairs of the receiving State.

[667]Southwick (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 92-93 and Hill (1931) 25 *American Journal of International Law* 256.

[668]Denza *Diplomatic Law* 71. This practice has also existed from the earliest period of diplomatic relations. For instance, Don Bernardino de Mendoza, the Spanish ambassador to England, was ordered to leave within fifteen days when investigations showed his involvement in a plot to overthrow Queen Elizabeth I and replace her with Mary Queen of Scots.

[669]Denza *Diplomatic Law* 63.

[670]*Ibid*. Other Western States found it necessary to declare a number of Soviet diplomats *persona non grata*. Bolivia expelled 119 members in 1972, Canada 13 in1978, France 47 in 1983 and further 25 in 1985.

[671]Denza *Diplomatic Law* 65.

This has, today, largely fallen into disuse. In 1976, the Libyan ambassador to Egypt was expelled after being found distributing anti-President Sadat leaflets.[672]

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 and 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.[673]

Article 41 has made it clear that diplomats should not interfere in the internal affairs of the receiving State.[674] So in 1988, the government of Singapore asked for the 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.[675]

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.[676] There is no need to give reasons 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.[677] 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

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[672]*Ibid.*

[673]Denza *Diplomatic Law* 65-66. In 1989, the French intelligence service discovered a plot between South African officials and Ulster Loyalists to exchange arms and surface-to-air missile secrets. Three South African diplomats in Paris were required to leave.

[674]This is related to personal comments or activities by diplomats that were not made on instruction by the sending State.

[675]Denza *Diplomatic Law* 67.

[676]Barker *Abuse of Diplomatic Privileges and Immunities* 111.

[677]Barker *International Law and International Relation* (2000) 168.

offender.[678] 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.

4.5.2 Waiver of Immunity

The waiver of immunity, empowered by Article 32, is the "*act by which the sending State renounces that immunity with regard to the person concerned*".[679] Once waiver occurs, the local courts in the receiving State will have jurisdiction to prosecute and punish the offender.[680] 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.[681]

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.[682] 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 a formal decision by the sending State. The view that the head of mission could waive immunity was rejected by the majority of the ILC.[683] 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*[684] 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*[685] that jurisdictional immunity is not personal to the diplomatic agent but

[678]Hill (1931) 25 *American Journal of International Law* 257.

[679]Przetacznik (1978) *Anglo-American Law Review* 384.

[680]Przetacznik (1978) *Anglo-American Law Review* 386.

[681]*Ibid*.

[682]In criminal cases immunity could only be waived by a formal decision of the sending State, while in civil cases it could be waived by the diplomatic agent himself.

[683]Barker *Abuse of Diplomatic Privileges and Immunities* 120.

[684]*Empson v Smith* 1965 [2] All ER 887.

[685]*Fayed v Al-Tajir* [1987] 2 All ER 396.

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.[686]

In terms of paragraph 2 of the Vienna Convention, waiver must always be express and irrevocable.[687] In recent years there has been an increase of rigorous requests for waiver. In the UK it is standard practice to press for waiver in cases 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.[688] Negotiation for waiver seldom occurs because the sending State has no obligation to waive immunity.[689]

However, there are instances where waiver has occurred, such as in 1997 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.[690] The diplomat was driving at 80 miles an hour in a 25 mile zone. A blood test was taken and it was established that the diplomat's blood alcohol was twice the legal limit.[691] 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.[692]

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[686]Przetacznik (1978) *Anglo-American Law Review* 384. Satow contends that immunity is the substance belonging to the sending State and thus must only be waived by that State. See further for the debate in Denza *Diplomatic Law* 273-274. In *R v Kent* [1941] 1 KB 454 the court held "*that the privilege be claimed by the appellant is a privilege which is derived from, and in law is the privilege of the ambassador and ultimately the State which sends the ambassador*". This was further stated in a US memorandum entitled "Department of State Guidance for Law Enforcement Officers with Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel."

[687]In civil cases it can be express 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*".

[688]Denza *Diplomatic Law* 267 and 286.

[689]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law 1002*.

[690]Schmidt "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. See enclosed CD.

[691]*Ibid*.

[692]Wallace *International Law* 130 and Schmidt "Testing the Limits of Diplomatic Immunity" (1998), Maggi, Waltrick "Family Settles Georgian Case; McQueen Case still Pending" (1998) from an e-mail

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.[693] 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.[694] The occupant claimed immunity as a third secretary of the Zambian mission. When confirmation was made of the man's identity, they stopped their search and withdrew.[695] 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 of the third secretary.[696] 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.[697]

There have even 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 DC, admitted to the murders of Egan, a gay airline reservations clerk, and Simons, a gay cab driver.[698] The Belgian government waived his

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received from the US mission in South Africa. In 1987, James Ingley, a clergyman whose wife was a diplomat at the American embassy in Britain, was charged with gross indecency with a minor girl under thirteen. This crime in Britain is punishable up to five years' imprisonment. The American Embassy denied the rape allegations and refused to waive immunity of the clergyman and both he and his wife left the country. The US government said the refusal was due to consideration of the case together with long-standing policy in the US.

[693]McClanahan *Diplomatic Immunity* 156.

[694]*Ibid.*

[695]*Ibid.*

[696]*Ibid.*

[697]*Ibid.* For more of the letter look at Ashman and Trescott *Outrage: The Abuse of Diplomatic Immunity* (1986) 56.

[698]Farahmand (1989-1990) 16 *Journal of Legislation* 100.

immunity only on condition that he did not receive the death penalty as a possible sentence.[699]

Despite the fact that the above examples show that some States do waive immunity of diplomats, family or staff, waiver is seldom granted.[700] 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.[701] Waiver is a good remedy if States are willing to grant it. A possible solution is for States 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.

4.5.3 Jurisdiction of the Sending State

Another deterrent is for a diplomat to face the jurisdiction of his own national courts for crimes committed in the receiving State.[702] 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 offence was committed.[703] 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.[704] It further allows victims to pursue the diplomat in the sending State, especially with regard to civil suits.[705] A major drawback is that while there is a threat to respect the laws of the

[699]*Ibid.*

[700]Barker *International Law and International Relations* (2000) 170.

[701]*Ibid* .

[702]Article 31(4). This provision does no 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.

[703]Barker *Abuse of Diplomatic Privileges and Immunities* 118.

[704]Hill (1931) 25 *Am. J. Int'l L.* 255 and Barker *Abuse of Diplomatic Privileges and Immunities* 112. Bringing suit in the sending State enjoys the advantage of not changing the current international law.

[705]Barker *Abuse of Diplomatic Privileges and Immunities* 112.

receiving State for fear of being prosecuted at home, the sending State is not obliged to prosecute its diplomatic personnel.[706] 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.[707] 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.[708] Nonetheless, not being able to bring suit against diplomats in the receiving State does not mean that the diplomat is relieved of liability.[709] Denza explains that it is difficult to use this remedy in criminal cases. The diplomat cannot be extradited so he is able to be physically present to stand trial in the sending State. Furthermore, witnesses in the receiving State could not be compelled to travel in order to testify.[710] In most instances, where a government is ready to allow criminal proceedings to take place it would be logistically simpler and more cons-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.[711] 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.[712] Skeen then pursued Silviera as he

[706]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1004 and McClanahan *Diplomatic Immunity* 136.

[707]Do Nascimento e Silva "Diplomatic and Consular Relations" M Bedjaoui (ed) (1991) *International Law: Achievements and Prospects* 444.

[708]Barker *Abuse of Diplomatic Privileges and Immunities* 117. Denza claims that there are three drawbacks of to pursuing civil claims: (1) it is difficult to serve the diplomat: (2) it can get expensive, and (3) the sending State may lack jurisdiction over the subject matter.

[709]Farhangi "Insuring Against Abuse of Diplomatic Immunity" (1985-1986) 38 *Stanford Law Review* 1532.

[710]Denza *Diplomatic Law* 166.

[711]*Skeen v Federatice Republic of Brazil* 566 Supp. 1414 (DDC 1983) and Goodman (1988-1989) 11 *Houston Journal International Law* 404.

[712]Ashman and Trescott *Diplomatic Crime* 72.

fled from the club. Silveira fired five times and Skeen was hit three times.[713] Skeen tried to claim medical costs, but failed.[714]

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.[715] The Russian ambassador assured the Canadian Government that the diplomat would be prosecuted in Russia and serve a sentence of five years in prison. Yet Russian law professors believed that he would only receive a suspended sentence.[716] Unfortunately, no information could be obtained to compare the predicted or actual outcome. With regard to traffic violations, the Israeli government in 1979 recommended that Israeli diplomats in foreign States pay their parking violation fines or else face being penalised in Israel.[717] This concept can be adapted to apply in more serious offences.

4.5.4 Reciprocity

Reciprocity stands as the keystone in the construction of diplomatic privilege.[718] 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.[719] Furthermore, it forms a constant and effective sanction for the adherence to the Vienna Convention. Every State is both the receiving and sending State. The basic concept arising out of

[713]Goodman (1988-1989) 11 *Houston Journal International Law* 404 and Ashman and Trescott *Diplomatic Crime* 72-82. Skeen reportedly stated that it *"really made me mad, for him to hurt me like that and then simply walk away. It wouldn't have mattered if I lived or died. The police eliminated all records of the incident. If my own country won't back me up when I'm right, you know, who will? Who can I turn to?"*

[714]Ashman and Trescott *Diplomatic Crime* 83.

[715]Betrame *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].

[716]*Ibid.*

[717]Benedek "The Diplomatic Relations Act: The United States Protects Its Own" (1979) 5 *Brooklyn Journal of International Law* 392.

[718]Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 575.

[719]Levi *Contemporary International Law: A Concise Introduction* 2ed (1991) 20.

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.[720]

Reciprocity has been stated by Southwick to be the "*truest sanction*" provided by diplomatic law.[721] This was shown in *Salm v Frazier*[722] 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 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.[723]

In 1957, Australia submitted comments on the Draft Articles of 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 restrictions on missions in their territory.[724] 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 globalisation and the development of technology making interaction between States inevitable.[725] The disadvantage of reciprocity is that a series of aggressive or subtle reciprocity actions can eventually result in the official degeneration of relations between nations.[726] It is in a State's interest to respect diplomatic immunity in order to ensure the safety and respect of its diplomats.

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[720]Denza *Diplomatic Law* 1.

[721]Southwick (1988-1989) 15 *Syracuse Journal International Law & Commerce* 89.

[722]*Salm v Frazier* court of Appeals Rouen 1933, translated in 28 *A.J.I.L.* (1934) 382.

[723]Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 575.

[724]Leyser "Diplomatic and Consular Immunities and Privileges" O'Connell (ed) *International Law in Australia* (1965) 448.

[725] Barker *International Law and International Relations* (2000) 31.

[726]Southwick (1988-1989) 15 *Syracuse Journal International Law & Commerce* 89.

However, even 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.[727] When used negatively, as it was in this instance, reciprocity has the effect of tit-for-tat.

4.5.5 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 1793, 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.[728]

In some instances it is a measure used as the only remaining option to stop serious abuses. Qaddafi's regime in Libya came into power after a military coup in 1969. He renamed the embassies People's Bureaus and has continually abused and exploited diplomatic immunities, hiding terrorist weapons in their missions and communicating plots of terrorist 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.[729] Even in the Libyan shooting in London where Constable Fletcher was killed, Britain broke diplomatic ties as a last resort, because no other remedy had worked.[730]

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[727]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.

[728]Lawrence *International Law* 301-302.

[729]McClanahan *Diplomatic Immunity* 146.

[730]Denza *Diplomatic Law* 65. In 1989 Burundi broke ties with Libya and expelled all their nationals residing in Burundi because Libyan diplomats and nationals had been participating in activities of destabilisation and putting peace and general security of Burundi in danger.

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 the two countries do not negotiate or converse at all.[731] A group of diplomats of the State will work under the flag of another State. This is known as an "interests" 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 interests section of Iraq was attached to the Embassy of Jordan in the UK. The Embassy of Jordan is known as the protecting power who allows Iraq to conduct diplomatic relations in their embassy.[732] Interests sections can also be established as a step towards reconciliation between diengaged 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 interests in the economic sphere of gold and diamond marketing, and the domestic changes in South Africa by the 1980s, interests sections were opened under the protection of the Austrian embassies in Moscow and Pretoria.[733]

4.5.6 Settlement of Disputes

The Vienna Convention provides the Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes.[734] 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.[735] The disputes heard are over the interpretation or application of the Vienna Convention that cannot be resolved by arbitration or by judicial

[731]Berridge *Diplomacy* 138.

[732]*Ibid* and Kear "Diplomatic Innovation: Nasser and the Origins of the Interests Section" (2001) Vol. 12 No. 3 *Diplomacy and Statecraft* 66-67.

[733]Berridge *Diplomacy* 140-141. For an in-depth look at the disadvantages of interests sections refer to 138-143. Furthermore, refer to Kear (2001) Vol. 12 No. 3 *Diplomacy and Statecraft* 68-80.

[734]Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes Apr. 18, 1961, 23 U.S.T. 3374, 500 U.N.T.S. 241 [hereinafter referred to as the Optional Protocol].

[735]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1005.

settlement.[736] 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.[737] The disadvantage is that it does not provide a settlement alternative for individuals who are injured as a result of diplomatic misconduct.[738] Furthermore, not many States make use of this Optional Protocol, which makes this form of remedy ineffective.

4.6 Conclusion

Immunities and privileges of diplomats and their family and staff can be summarised as follows:

Immunities:

Diplomats and family	Administrative and technical staff and family	Service staff and private servants	Nationals
Full criminal	Full criminal	Limited for official acts	No immunity
Full civil	Limited for official acts	Limited for official acts	No immunity

Privileges:

Diplomats and family	Administrative and technical staff	Service Staff and Private Servants
Exemption from tax	Exemption from tax	Exemption from tax on emoluments
Exemption from custom duties and baggage inspection	Exemption from custom duties and baggage inspection	On condition they are covered by social security in another state, they are exempt from social security provisions
Exemption from giving evidence	Exemption from giving evidence	
Exemption from personal	Exemption from personal	

[736]Most matters are resolved by the Ministry of Foreign Affairs.

[737]Denza *Diplomatic Law* 421.

[738]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1005.

and public services	and public services	
Exemption from social security obligations	Exemption from social security obligations	

Every State with representatives abroad needs protection for its diplomats, the embassy, documents and bags.[739] Any act committed by a diplomat that is unlawful has no effect on the functioning of the mission and thus the offender should be punished accordingly. Furthermore, police and legal officials are then trapped between the international obligations of their respective countries on not prosecuting protected offenders for their crimes and their oath to their country and citizens to uphold the law.[740] There is no justification for refraining from prosecution a diplomat who rapes, smuggles, kills or commits any other serious crime. Further, there is an even less convincing rationale for families and staff of diplomats to be treated with the same immunity. [741] What if Lee Harvey Oswald or Charles Manson were sons of diplomats? Would they not be prosecuted for their horrendous crimes?

As the breach of trust by diplomats becomes more obvious, the use of diplomatic privileges and immunities, although essential to the efficient operation of relations of States, has increasingly become endangered.[742] The Vienna Convention simply places the diplomats beyond the laws of the receiving State and in most cases creates an environment of impunity. As a result, some diplomats, their families and staff will continue to use their status to abuse their immunity in order to gain considerable profits or just carry out violent, immoral or illegal behaviour.[743] Berridge states that the inviolability of diplomatic agents is somewhat less sacrosanct than the inviolability of the

[739]Higgins (1985) *American Journal of International Law* 641. See further Shapiro "Foreign Relations Law: Modern Developments in Diplomatic Immunity" (1989) *Annual Survey of American Law* 294.

[740]Ross "Rethinking Diplomatic Immunity? A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities" (1989) 4 *American University Journal of International Law & Policy* 187.

[741]Ashman and Trescott *Diplomatic Crime* 347.

[742]Southwick (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 84.

[743]Farahmand (1989-1990) 16 *Journal of Legislation* 100.

mission because the constraints on a diplomat endanger the performance less than the constraints of the mission premises.[744] If this is the case, then absolute immunity from prosecution is not necessary.

All the above abuses indicate that although the Vienna Convention is a good codification of customary practice- something is missing: the absence of deterrence against criminal acts. The number of diplomats who abuse their position is relatively low. For instance, in 2002 British diplomats abroad escaped criminal prosecution on 21 occasions, by as they were effectively cloaked by immunity.[745] The threat of prosecution could help deter any unlawful behaviour by diplomats, staff and their families. Since declaring offenders *persona non grata*, and other forms of deterrent measures do not seem to be effective, immunity should be restricted by alternative means.

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 the victims.[746] Even Hollywood films portray diplomats committing offences and hiding behind the diplomatic immunity, as in *Lethal Weapon 2* starring Mel Gibson and Danny Glover. In this film South African diplomats smuggle drugs and money and commit murder.[747] Is this a fair reflection? In some instances, it can be answered in the affirmative. If this is the case, what have governments done to change this perception?

[744]Berridge *Diplomacy* 118.

[745]Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 1008.

[746]Farhangi (1985-1986) 38 *Stanford Law Review* 1517.

[747]Zaid "Diplomatic Immunity: To Have Or Not To Have, That is the Question" (1998) *ILSA Journal of International & Comparative Law* 632.

CHAPTER 5

SPECIFIC GOVERNMENT LEGISLATION AND RESPONSE TO DIPLOMATIC ABUSES

5.1 Introduction

Diplomats have frequently been a cause of public criticism and misunderstanding, especially with regard to invoking their immunity to protect themselves for acts which, if committed by ordinary citizens, would result in criminal prosecution.[748] Throughout history, Governments have recognised and applied the international law of diplomatic immunity to diplomats in their country and have sought reciprocal treatment for their own agents in foreign nations. The primary reason for this recognition was stated by the 1906 US Secretary of State Elihu Root:

> "*There are many and various reasons why diplomatic agents…should be exempt from the operation of the municipal law at this country. The first and fundamental reason…diplomatic officers are universally exempt by well recognized usage incorporated into the Common Law of nations…The reason of the immunity ...is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable…it is proper to request his recall; if the request be not honored he may be…escorted to the boundary and thus removed from the country*."[749]

The question of whether diplomats should be fully immune from criminal prosecution, no matter what the alleged crime, is not new.[750] As a matter of international and domestic law, the source of the immunity and its extent is quite clear. But with each new offence that occurs, the public debate over diplomatic immunity rears its head again.[751]

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[748]Barnes "Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice" (1960) 43 *Department State Bulletin* 173.

[749]Barnes (1960) 43 *Department State Bulletin* 177.

[750]Zaid "Diplomatic Immunity: To Have or not to Have, that is the Question" (1998) 4 *ILSA Journal of International & Comparative Law* 623.

[751]*Ibid.*

The world of sovereign nations requires almost complete respect and there needs to be a strict distinction between municipal and international affairs. With regard to municipal affairs the rule of law and constitutionalism prevail, while under international affairs the equality of sovereign states is paramount.[752] The rule that the State controls the international protection of individuals is often confirmed by municipal law by granting of diplomatic immunity.[753]

5.2 United Kingdom

As early as the reign of Edward I, English procurators were established at the French court on a permanent basis and vice versa.[754] Diplomatic activity in England did not become pronounced until the end of the 15th century. The practice of resident ambassadors gradually grew in England but its growth gave rise to a problem; their position with regard to the English law.[755] At the beginning of the 16th century, the theorists were doubtful whether diplomatic immunity existed against criminal prosecution and if so, to what extent. Theorists like Dolet believed that personal inviolability should exist, while Brunus modified the absolute view and said that they were protected if they behaved properly and did not act beyond their functions.[756] As far as immunity from criminal prosecution is concerned, Hurst and Coke stated that ambassadors should be inviolable.[757]

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[752]Erasmus and Davidson "Do South Africans have a Right to Diplomatic Protection?" (2000) 25 *South African Yearbook of International Law* 117. The traditional view on the legal basis of diplomatic protection flows from the sovereignty of a State. With this, the State must have the freedom to protect nationals and, more importantly, must respect the rules of international law.

[753]Erasmus and Davidson (2000) 25 *South African Yearbook of International Law* 115.

[754]Buckley "Origins of Diplomatic Immunity in England" (1966-1967) 21 *University of Miami Law Review* 350.

[755]*Ibid.* In the early years it was based on personal representation theory and later it developed into exterritoriality.

[756]Buckley (1966-1967) 21 *University of Miami Law Review* 351.

[757]Buckley (1966-1967) 21 *University of Miami Law Review* 353-355.

The English doctrine of immunity from criminal jurisdiction begins with the Three Books on Embassies by Gentili.[758] He follows Roman and medieval precedents and applies them to diplomatic agents.[759] Many abuses in England were based mainly on plots against the Crown.[760] The basic principle in cases of conspiracy by a diplomatic agent during that period was that they ought not to be executed, but rather sent home, thus preserving the safety of the sovereign.[761] On the other hand, Coke divided offences into two groups: those against the law of nations such as murder, treason, etc., for which diplomatic agents could be condemned to death; or those acts violating acts of parliament, common and customary law, from which diplomats were immune to being punished.[762] However, Britain opted to follow Gentili's theories.[763] With regard to family and staff, the denial of immunity is closely connected to the Sá incident, but it must be noted that the English practice before the Act of Anne was not consistent.[764]

The Crown enacted The Diplomatic Privileges Act of 1708[765] after the incident in 1707 concerning the arrest of Mathveof, the Russian ambassador, for an outstanding debt. He was released and left Britain with great resentment despite apologies by the Queen.[766] The Czar of Russia was highly offended and demanded that those responsible be punished. Therefore, it was decided to enact this Act as an apology to the Czar and its

[758]Przetacznik "The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law" (1978) 7 *Anglo-American Law Review* 362.

[759]Przetacznik (1978) 7 *Anglo-American Law Review* 363.

[760]Incidents such as Noaillis, a French ambassador in England, being implicated in a plot against Queen Mary in 1556. A violation of the diplomatic agent's immunity would be a sound cause for France to declare war on England. Another example is the Bishop of Ross who plotted against Queen Elizabeth. Similarly with Mendoza the Spanish ambassador plotting against Queen Elizabeth I. He was not convicted, but sent out of the country.

[761]Przetacznik (1978) 7 *Anglo-American Law Review* 363.

[762]Przetacznik (1978) 7 *Anglo-American Law Review* 364.

[763] Przetacznik (1978) 7 *Anglo-American Law Review* 389.

[764]*Ibid*. For facts of Sá refer to Chapter 4.

[765]The Diplomatic Privileges Act 7 Anne ch.12. More commonly known as the Act of Anne. The exterritoriality theory became the dominant theory and formed the basis of the Act.

[766]Przetacznik (1978) 7 *Anglo-American Law Review* 366.

preamble states its reasons for its existence: to protect the rights and privileges of ambassadors and keep their persons sacred and inviolable.[767]

The core of the Act was Section 3, which laid out that all writs and process against any ambassador or his servants would be quashed and consequently could result in the arrest and imprisonment of those bringing suit.[768] The jurisdictional immunity of the staff was recognised in cases like *Taylor v Best*[769]and *Parkinson v Potter*.[770] Section 6 of the Act provided for the registration of diplomatic staff names with the Secretary of the State, and this list is given to the Sheriffs of London and Middlesex.[771]

The passing of this Act created a trend which led to a problem[772] whether the interpretation of the Act of Anne was common law or new law.[773] Goddard LJ[774] proclaimed that the Act was declaratory of the common law. Professor Berriedale Keith was of the opinion that the Act was passed not because punishment could not be inflicted on the offenders at common law, but because no punishment would have been sufficient to appease the Czar.[775] However, Buckley asserted that although the Act was believed to

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[767]O'Connell *International Law Volume 2* 2ed (1970) 890-891. In *Trequet v Bath* 3 Burr. 1480 (1764) Lord Mansfield stated that privileges of foreign representatives were based on the law of nations. All that the Act added was the summary jurisdiction against those who brought cases against diplomats. See further Lyons "Personal Immunities of Diplomatic Agents" (1954) 31 *British Yearbook of International Law* 301.

[768]Section 4.

[769]*Taylor v Best* (1954) 14 C.B. 487.

[770]*Parkinson v Potter* (1885) 16 Q.B.D. 157.

[771]Przetacznik (1978) 7 *Anglo-American Law Review* 391.

[772]It did not specify the particular kinds of immunity it gives. Some authors believed that the Act was not clear and argued that it only applied to civil jurisdiction; however, the phrase "*all writs and processes*" clearly and logically meant that it included criminal jurisdiction too. Other problems were that the Act did not deal with the inviolability of mission, what privileges and immunities diplomatic staff are to receive, or when immunity begins and ceases.

[773]Buckley (1966-1967) 21 *University of Miami Law Review* 357.

[774] In the case of *The Amazone* [1940] P. 40.

[775]Buckley (1966-1967) 21 *University of Miami Law Review* 359. The Act was passed to ensure punishment in the future and evidence is found in the letter from Queen Anne to the Czar in which she said that that anyone violating an ambassador's privilege will be liable to the most severe penalties and punishment.

be declaratory of the common law, it in fact introduced the principle of international law into common law.[776]

While diplomatic agents received immunity granted by the Act of Anne, countries colonised by the Crown were not treated equally. With the establishment of the Dominions Office, representatives of the dominion countries were separated from diplomats who dealt with the Foreign Office.[777] Representatives of the dominion countries were known as high commissioners did not have to present letters of credence and were not members of the diplomatic corps or entitled to any rights and privileges given with diplomatic status.[778] After the First World War, the dominions were propelled into the world of diplomacy and thus needed to establish diplomatic machinery in countries even before seeking their independence from Britain. Their missions were tiny and were not considered as non-foreign, especially in Britain.[779] By 1947, a small, high level committee of officials had provided British ministers with a report recommending that high commissioners should not formally be granted immunity as it was deemed unnecessary.[780] After further pressures during 1949 and the early 1950s there was an official granting of diplomatic privileges and immunities to the Commonwealth representatives equal to those of their British counterparts.[781] It must be emphasised that although they were equal, Britain continued to distinguish between ambassadors and high

[776]Buckley (1966-1967) 21 *University of Miami Law Review* 365 and Young "The Development of the Law of Diplomatic Relations" (1964) 40 *British Yearbook of International Law* 159.

[777]Lloyd ''What's in the a Name?' The Curious Tale of the Office of High Commissioner" (2000) 11 *Diplomacy and Statecraft* 52-53.

[778]Lloyd (2000) 11 *Diplomacy and Statecraft* 53.

[779]*Ibid*. Until the Second World War dominion-to-dominion representation was limited to non-diplomatic trade commissioners. South Africa's Prime Minister Hertzog pushed for their representatives to be given diplomatic status.

[780]Lloyd (2000) 11 *Diplomacy and Statecraft* 62.

[781]Lloyd (2000) 11 *Diplomacy and Statecraft* 66.

commissioners and even tried to preserve the distinction by placing it in the Vienna Convention.[782] Today, they are treated equally in the diplomatic community.

In 1952 the UK government received a report from the Inter-Departmental Committee on Diplomatic Immunity on whether the law or practice of the UK afforded to persons pressing for diplomatic immunity is wider than is needed as per international law.[783] In 1955 the UK adopted a reciprocity formula for the conferring of diplomatic immunity through the Diplomatic Restriction Act.[784] This Act enabled the Crown to authorise the withdrawal of personal immunities where it appeared that these would exceed the immunities granted to UK diplomats in countries where they are accredited.[785] The Diplomatic Immunities Act of 1961 extended the same immunities as were accorded to other accredited representatives of foreign States to representatives of Commonwealth countries and Ireland situated in London. The staff was also included and a list of all those to whom the Act applies was published in the official *Gazettes*.[786]

The Act of Anne was repealed and replaced by the Diplomatic Privileges Act which amended the law on diplomatic privileges and immunities and gave effect to the relevant provisions of the Vienna Convention.[787] This Act ensured full immunity from criminal jurisdiction but limited civil jurisdiction as per the Vienna Convention.[788] It classified immunity into categories of the diplomatic agent, administrative and technical staff, service staff, private servants, nationals of the receiving State and members of the family,

[782]Lloyd (2000) 11 *Diplomacy and Statecraft* 68. During the next decade after the Convention, the distinction disappeared and the Foreign Office and Commonwealth office merged into a common diplomatic serve as the Foreign and Commonwealth Office.

[783]O'Connell *International Law* 892.

[784]Diplomatic Restriction Act 4 Eliz. 2, c. 21.

[785]O'Connell *International Law* 892.

[786]O'Connell *International Law* 892. A distinction respecting the degree of immunity was drawn between representatives and staffs who were citizens of the UK.

[787]Przetacznik (1978) 7 *Anglo-American Law Review* 369. Section 1 repeals the Act of Anne.

[788]Przetacznik (1978) 7 *Anglo-American Law Review* 370.

and further extended immunity to them accordingly.[789] This classification made it easier to distinguish who received immunity and what the boundary is.[790] The Act also provides for a certificate that must be issued by the Secretary of State, stating whether there is immunity in proceedings when such a question arises.[791] When abuse does occur, the Act states that express waiver must be requested by the sending State, or if waiver for a person of lesser rank, by the head of the mission.[792] Termination of immunity is as indicated by the Vienna Convention and further the Act states that this extension of immunity does not apply to a person whose immunity has been waived.[793]

The Fletcher and Dikko incident in 1984 sparked a UK Parliamentary Review of the Vienna Convention with special emphasis on the abuse of diplomatic privileges and immunities.[794] The Review involved a report by the Foreign Affairs Committee of the House of Commons which was presented to Parliament in April 1985.[795] The Foreign Affairs Committee and the Government took the view that amending the Vienna Convention was not a feasible option, thus they decided to concentrate on strengthening the operation and enforcement of the Vienna Convention.[796] The Committee considered that a firmer policy of enforcing already existing safeguards from the Vienna Convention ought to be adopted by the Government. It also recommended that the Foreign and Commonwealth Office should in future be empowered to take all steps to be informed of

[789]Shearer *Starke's International Law* 11ed (1994) 200 and O'Connell *International Law* 892-893.

[790]Przetacznik (1978) 7 *Anglo-American Law Review* 393.

[791]Section 4. See further Shearer *International Law* 199.

[792]Shearer *International Law* 200.

[793]Shearer *International Law* 201.

[794] Barker *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) 135.

[795]Barker *Abuse of Diplomatic Privileges and Immunities* 135-136. The review was entitled "The Abuse of Diplomatic Immunities and Privileges", and led to a report by the UK Government.

[796]Barker *Abuse of Diplomatic Privileges and Immunities* 136-137. See further Cameron "First Report of the Foreign Affairs Committee of the House of Commons" (1985) *International & Comparative Law Quarterly* 615. The Foreign Affairs Committee and the Government agreed that attempts to renegotiate the Vienna Convention would lead to more problems than it would ultimately solve. In the conclusion of the Foreign Affairs Committee report it states: "*Given the difficulties in…restrictive amendment to the Convention…,it would be wrong to regard amendment of the Vienna Convention as the solution to the problem…the Government is right not to concentrate on amendment of the Convention as a major element in the new policies to restrict abuse of immunities*."

new diplomatic personnel arrivals, which is not contrary to Article 7 of the Vienna Convention.[797]

There was consideration into ways of protecting diplomatic missions as provided by the Vienna Convention, but the Committee saw no need for the introduction of special legislation to protect diplomatic missions.[798] The most important recommendation the Committee made was that diplomatic bags could and should be electronically scanned where the need arises. Despite the failures associated with scanning, the Committee appeared to consider that the mere existence of screening capability might deter a potential wrongdoer.[799] The Committee also recommended that records should be kept of the size, shape and frequency of bags entering the country. Such a stance would deter massive traffic in prohibited items, but it is unlikely to yield much useful information on the normal pattern of traffic.[800] With such steps in place, it does provide some form of deterrence that warns diplomats that they are scrutinised and no longer able to abuse their immunity as easily as it was in the past.

In response, the UK government in 1984 highlighted five areas in which tightening of the Vienna Convention could be implemented.[801] The first area is notification of staff. The Government recognised the potential for abuse which existed through the terminology used in Article 7 of the Vienna Convention, which allows the sending State freely to appoint the members of staff of the diplomatic mission.[802] The main problem identified in this Article is the manner in which staff members are identified and classified: whether

[797]Cameron (1985) *International & Comparative Law Quarterly* 615. The section provides that the sending State may freely appoint its representatives, and where necessary ask for curricula vitae for new appointees either prior to arrival or on arrival.

[798]Cameron (1985) *International & Comparative Law Quarterly* 617.

[799]*Ibid.*

[800]Cameron (1985) *International & Comparative Law Quarterly 617*-618.

[801]Barker *Abuse of Diplomatic Privileges and Immunities* 137 and Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 74.

[802]*Ibid.*

they are proper diplomatic, administrative or technical staff.[803] Further there is a vague or unsuitable definition of the members of the family forming part of the household.[804] The Government noted that the *agrément* was only required for the head of the mission, while only notification of new appointments is required of other staff.[805] This method of appointment places doubts on the true official status of the new appointees. Even though the receiving State has the authority to exercise the *persona non grata* provision before arrival where it has a good reason to suspect that a person is likely to engage in any unlawful activity, the Government did not regard this as a foolproof method of eliminating potential abuse.[806] Three possible solutions were suggested by the Government. First, by asking the mission to specify which person the new arrival is replacing.[807] Secondly, special regard must be taken to the notification of a family member who is not a spouse or minor child of the member of the mission. Finally, there must be a strict policy on the status of locally engaged staff who are permanent residents and whose diplomatic privileges and immunities are limited.[808]

The second area is the size of diplomatic missions. As a result of globalisation and modern diplomacy there has been a steady increase in the size of missions over the years.[809] Thus, a stricter application of Article 11 would be the best contributor, the Government believed, to the reduction of abuse. The receiving State has the authority, through Article 11, to decide what a reasonable and normal size of a diplomatic mission

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[803]*Ibid.*

[804]The missions have failed to reclassify members of diplomatic, administrative or technical staff or their dependents who have become UK nationals or permanent residents.

[805]Article 10 (1). See Higgins "UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report" (1986) 80 *American Journal of International Law* 135. The Government found that while notification is required, it is by no means adequate.

[806]Barker *Abuse of Diplomatic Privileges and Immunities* 139, Higgins (1986) 80 *American Journal of International Law* 135 and Denza *Diplomatic Law* 76.

[807]If there is no person, the mission must explain the function of the new appointment.

[808]Barker *Abuse of Diplomatic Privileges and Immunities* 139, Higgins (1986) 80 *American Journal of International Law* 135 and Denza *Diplomatic Law* 76.

[809]Higgins (1986) 80 *American Journal of International Law* 139 and Denza *Diplomatic Law* 80.

is.[810] The Government indicated two potential results of controlling the size of missions. The first was to impose ceilings on all diplomatic missions.[811] However, this is not a viable option. Such a policy would go against the meaning of the Article because the receiving State would not take full account of the needs of particular missions.[812] Each mission has a different relationship with the UK. Some have more interest in the country than others. Setting a ceiling on all diplomatic missions could negatively affect negotiations between the two countries. The second proposed measure was to limit the size of individual missions to levels the Government regarded as appropriate to its relations with the foreign State in question.[813] This is a better measure, for it takes into account the needs of the missions that have more interest in the UK, while limiting others and hopefully decreasing diplomatic offences.[814] The criteria for deciding what a reasonable and normal size of a mission is and which mission will be downsized include matters like involvement in espionage and terrorism, patterns of behaviour by mission and their governments, the size of the UK mission in the other country, and so on.[815] Another option proposed by the Government is that the international community should consider isolating States whose diplomats are causing the abuse.[816] What is of importance is that the international community must support isolation and thus all must agree on a common action. However, this suggestion was rejected and considered to be unsuccessful, as it does not change the offender's behaviour.[817] A problem with this criterion is the possible discrimination of countries. For instance, ever since of the bombing the Twin Towers on 9/11 in New York, Muslims are victimised and regarded as

[810]*Ibid.*

[811]Barker *Abuse of Diplomatic Privileges and Immunities* 140.

[812]*Ibid.*

[813]Denza *Diplomatic Law* 280.

[814]*Ibid.*

[815]Barker *Abuse of Diplomatic Privileges and Immunities* 141.

[816]Farhangi "Insuring Against Abuse of Diplomatic Immunity" (1985-1986) 38 *Stanford Law Review* 1529 and Shapiro "Foreign Relations Law: Modern Developments in Diplomatic Immunity" (1989) *Annual Survey of American Law* 299-300.

[817]*Ibid.*

potential terrorists.[818] This has the effect that all Muslim countries, especially Middle Eastern countries, are considered terrorist countries which leads to the limiting of their missions when possibly they have nothing to do with terrorism. Would this type of downsizing strengthen diplomatic relations? It does not appear so.

Thirdly the diplomatic premises were considered. The Government identified a number of problems with regard to diplomatic missions in London. These problems included compliance with building laws and regulations and problems with the use of the premises.[819] Measures to solve these problems should be through appropriate administrative action in the event of abuse or even suspected abuse. This can be by withdrawing diplomatic status from the premises where they are not used for legitimate functions of the mission.[820] Further measures suggested were tightening of procedures of notification of addresses and the occupiers of the premises, withdrawing diplomatic status from the premises where no governmental function is being exercised, and enacting new measures to limit demonstrations outside the diplomatic premises in order to fulfill the obligations placed on the UK by Article 22.[821] The Diplomatic and Consular Premises Act of 1987[822] provides for the acquisition and disposal of both diplomatic and consular premises.[823] The Act does not, however, include within its scope the private residences of either diplomatic or consular staff. The Act allows the Secretary of State to have regard to the safety of the public, national security and country planning when consenting to or withdrawing the status of diplomatic and consular land.[824] The effect of this Act was to tighten the UK's control of the acquisition and disposal of diplomatic and consular

[818]Harcourt "Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does it Violate the Right to be Free from Discrimination?" (2006) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893905 [Accessed on 20 October 2006].

[819]Higgins (1986) 80 *American Journal of International Law* 139.

[820]*Ibid.*

[821]Barker *Abuse of Diplomatic Privileges and Immunities* 142.

[822]Diplomatic and Consular Premises Act 1987 No. 1022 (C.26).

[823]Barker *Abuse of Diplomatic Privileges and Immunities* 144.

[824]*Ibid.*

premises. This in turn will hopefully minimise the potential abuse of premises and will protect the interests of the UK.[825]

The fourth area of consideration was with regard to diplomatic bags. There is considerable abuse by diplomats of the diplomatic bag and this has caused great concern. The Government took the view that the way forward was a restrictive revision of the existing laws.[826] The suggested revision could be along the lines of the Consular Convention which allows for the supervised inspection of consular bags where abuse is suspected.[827] Possible interpretations of the phrase "*articles intended for official use*" in Article 27(3) poses a fundamental problem promoting the abuse of a diplomatic bag.[828] For example, some diplomats may claim the importation of firearms for personal protection as legitimate and within the scope of the provision while in the UK it is illegal to own a gun.[829] The Government suggested a restriction that would exclude specific limited items which unauthorised import or export does not conform to local laws and regulations, regardless of any claim that they might be intended for official use.[830] This system would allow customs officials to insist that suspected bags be either opened or returned to their place of origin. However, this system is laden with difficulties. For example, with the possibility of reciprocal enforcement against the receiving State's own bags abroad might lead to a reduction in its own freedom of communication.[831] An amendment to restrict the Vienna Convention with regard to diplomatic bags would pose difficulties. However, the ILC Draft Articles on the status of the diplomatic couriers and bags presented an opportunity for such a restrictive amendment.[832] The Government

[825]*Ibid.* On a general note, the enactment of the Diplomatic and Consular Premises Act of 1987 is welcomed by Government.

[826]*Ibid.*

[827]*Ibid.*

[828]Higgins (1986) 80 *American Journal of International Law* 137.

[829]*Ibid.*

[830]Barker *Abuse of Diplomatic Privileges and Immunities* 145 and Higgins (1986) 80 *American Journal of International Law* 137. Items like narcotics, explosives and personal firearms.

[831]Barker *Abuse of Diplomatic Privileges and Immunities* 145.

[832]*Ibid.*

examined the wording of Article 27(3), which allows for the scanning of diplomatic bags. The Government did not regard scanning of the bags as illegal, but it realised the potential value of scanning as a deterrent against abuse, although it did note the possible detrimental effects on the security of its own bags. Despite this, the Government indicated its readiness to scan diplomatic bags where there are strong grounds for suspicion.[833]

The last area to be dealt with was immunity from jurisdiction. Both the Foreign Affairs Committee and the Government did not regard the figures provided by the Foreign and Commonwealth Office on the extent of abuse of diplomatic privileges and immunities in the UK as problematic.[834] The Government was not concerned with the number or gravity of offences but rather with the reliance on immunity when such offences are committed.[835] This might be a valid point, yet the issue that needs to be considered is that although the number of offences committed by diplomats is small, the victims or families of victims will still have no sense of justice.[836] The only options the Government has in normal situations is to do nothing, to request the sending State to waive immunity, or to declare the offending diplomat *persona non grata*. The Government considered entering into agreements to waive immunity in all cases except where the offence was committed in the course of an official function.[837] This was not supported within the European Community or anywhere else. In the event that they do introduce such agreements there is a great chance of retaliatory response against British diplomats abroad.[838] The only realistic approach was to tighten measures that were already available to them through the Vienna Convention and to extend warnings to missions and diplomats. In other words once several warnings have been given and still

[833]Barker *Abuse of Diplomatic Privileges and Immunities* 146.

[834]*Ibid.*

[835]The Government stated that "*The main abuse lies…in the reliance on immunity to protect individuals for offences without any obvious connection to the efficient performance of the functions of a diplomatic mission.*"

[836]Denza *Diplomatic Law* 252.

[837]*Ibid.*

[838]Barker *Abuse of Diplomatic Privileges and Immunities* 148.

there is non adherence of the local laws persist, the State can exercise its power of *persona non grata*.[839] With regard to parking offences, which is a serious problem, all heads of missions were notified in the 1980s by the Foreign and Commonwealth Office that persistent failure by diplomats to respect parking regulations and pay their fines would result in their presence in the missions being questioned. This puts pressure on both the individual diplomats and their families and on the diplomatic mission to ensure obedience of the local laws, especially traffic laws.[840]

The above highlighted areas are common problems in many, if not, all countries. The fact that the UK Government has taken steps to curb abuses indicates that although diplomats, their staff and families are protected under the Vienna Convention and domestic Acts they are not protected from scrutiny by citizens and Governments when they commit crimes. The response to such abuses, although not perfect, has put the UK one step ahead in the fight for justice.[841]

5.3 United States of America

In the latter part of the 18th century, the US Supreme Court in *Republica v De Longchamps*[842] embraced the concept of complete diplomatic immunity.[843] Chief Justice M'Kean stated that the person of diplomatic officials is inviolable and sacred.[844] By

[839]Barker *Abuse of Diplomatic Privileges and Immunities* 149.

[840]*Ibid*. This proved to be successful where in 1992 a document entitled "Diplomatic Privileges and Immunities Memorandum describing the practice of Her Majesty's Government in the United Kingdom" indicated that between 1986 to 1990 there was a dramatic decrease in the number of unpaid parking tickets (from 22 331 to around 6 282) over that period. Furthermore, figures reveal that 40 alleged serious offences drew attention in 1991, the majority of them involving drinking and driving and shoplifting.

[841]For further information on English Law and diplomatic immunity refer to Greig *International Law* 2ed (1976) 230-240. Although it is an old source it still depicts the stance diplomatic immunity in English law.

[842]*Republica v De Longchamps* 1 U.S. (1 Dall.) 111 (1784). The International Organization Immunities Act Title 22 U.S.C. section 288 grants privileges and immunities to international organisations in the US.

[843]A Pennsylvanian citizen committed battery against the Secretary of the French Legation. The Secretary in turn severely beat the man. The Pennsylvania Attorney General promptly instituted charges for violating the law of nations. See further O'Connell *International Law* 893.

[844]*Republica v De Longchamps* 1 U.S. (1 Dall.) 111 (1784).

prosecuting the Secretary it takes the Secretary's freedom of conducting any business of his sovereign. This led to the enactment of the Crimes Act of 1790[845] as the controlling law governing diplomatic privileges and immunities. This statute was designed to give the principle of diplomatic immunity local application in the US.[846] This statute adopted the rule of *De Longchamps* that immunity of diplomats is virtually absolute.[847] Thus it granted absolute civil and criminal immunity to diplomats and their families.[848]

The effect of the Act was that diplomats were not subject to arrest, detention or any form of harassment.[849] Furthermore, under the Crimes Act any suit against a diplomat or a member of his household constituted a criminal offence.[850] The punishment for such a violation was a fine and a three-year sentence of imprisonment. The State Department supported this view by further expanding immunity to staff and private servants of diplomats.[851] The privilege was not that of the servant himself, but of the ambassador. An arrest of the servant might interfere with the comfort or state of the ambassador.[852] Even though the Act does not specifically cite immunity for such personnel, the Department considered them covered under the term "domestic" in the statute.[853] The

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[845]This statute was modelled after the Act of Anne.

[846]Roye "Reforming the Laws and Practice of Diplomatic Immunity" (1978-1979) 12 *University of Michigan Journal of Law Reform* 94.

[847]O'Neil "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978" (1979-1980) 54 *Tulane Law Review* 665. See further *Carrera v Carrera* 174 F. 2nd 496 (D.C. Cir. 1949).

[848]Marmon Jnr "The Diplomatic Relations Act of 1978 and its Consequences" (1978-1979) 19 *Virginia Journal of International Law* 134. Found under section 25.

[849]Barnes (1960) 43 *Department State Bulletin* 179. Other things considered in the Act were the exemption of diplomats from giving testimony and the inviolability of the mission, archives and residence except in cases of public emergency such as fire or disaster. Diplomatic couriers are also immune from local jurisdiction when travelling through foreign countries and the pouches that they carry when bearing the official seal were not permitted to be opened or searched.

[850]Benedek "The Diplomatic Relations Act: The United States Protects Its Own" (1979) 5 *Brooklyn Journal of International Law* 382. See further O'Neil (1979-1980) 54 *Tulane Law Review* 665. Section 26 of the Act.

[851]*Ibid*.

[852]*Ibid*. See further O'Neil (1979-1980) 54 *Tulane Law Review* 666. Also see Barnes (1960) 43 *Department State Bulletin* 176.

[853]O'Neil (1979-1980) 54 *Tulane Law Review* 665.

exception to this rule is that American citizens or legal residents who are in the service of a foreign mission are not immune from suit when they commit any crime or delict.[854] The Act further prohibits any displays within 500 feet of any embassy, legation or consular premises used for official purposes by a foreign government, without a permit.[855] No form of placard, or device used to intimidate or ridicule the foreign government or its members was permitted.[856] Only the Supreme Court had original and exclusive jurisdiction with regard to any proceedings against ambassadors or other public ministers of foreign States. However, the Court had original but not exclusive jurisdiction in all actions or proceedings brought by ambassadors or public ministers of foreign States.[857]

In the courts, this statute was accepted as "a rational principle of international law" and further it was largely based in the theory of functional necessity.[858] In *The Schooner Exchange v McFaddon*[859] Chief Justice Marshall declared that a diplomat could not function as a representative of his home State if he were forced to appear in the receiving State's court.[860] This did not mean that the US had no recourse against offenders. As is standard today, diplomats could be recalled, declared *persona non grata* or the US could ask for the diplomat's immunity to be waived by the sending State.[861]

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[854]Barnes (1960) 43 *Department State Bulletin* 176.

[855]Barnes (1960) 43 *Department State Bulletin* 177.

[856]*Ibid.*

[857]*Ibid.*

[858]O'Neil (1979-1980) 54 *Tulane Law Review* 666.

[859]*The Schooner Exchange v McFaddon* 11 U.S. (7 Cranch) 116 (1812).

[860]In *Hellenic Lines, Ltd v Moore* 345 F. 2d 978 (D.C. Cir, 1965) the State Department informed the court that service of process would prejudice the US foreign relations and would impair the performance of diplomatic functions.

[861]Barnes (1960) 43 *Department State Bulletin* 179. See further Roye (1978-1979) 12 *University of Michigan Journal of Law Reform* 95.

The Senate approved the Vienna Convention only in 1965 and it entered into force in 1972.[862] However, the Congress did not repeal the 1790 statute which granted a broader diplomatic immunity than the Vienna Convention.[863] As a result, the Department of Justice asserted that the Vienna Convention provisions did not supersede the provisions of the Crimes Act of 1790 because Article 47(2)(b) of the Vienna Convention allows States to grant more favourable treatment than the Convention requires.[864] Notably, the immunity provisions of the Crimes Act and the Vienna Convention conflicted; the Crimes Act did not classify personnel for the purposes of granting immunity.[865] In addition, the Crimes Act did not distinguish between private and official acts, while under the Vienna Convention even diplomats could be sued for private acts. Moreover, the Crimes Act provided immunity for a diplomat's family regardless of their citizenship, while under the Convention, family members who are citizens of the host country receive no immunity.[866] It must be remembered that the 1790 statute was designed to meet the conditions of diplomacy in the 18th century where there was a small number of diplomats in the country, but it was no longer appropriate during the 1970s.[867]

The State Department did not want to create a dual system of immunities and further discriminate against parties of the Convention.[868] Belotsky Jnr states that the necessity for new legislation was prompted by four components: first, the dual system of immunity;

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[862]There was a widespread sentiment in the international community that there was a need to modernise the practice of diplomacy. This led to the protecting of the function of the diplomatic mission rather than the person of the diplomat. The question behind this is whether the Vienna Convention allows for the protection of only the functioning of the diplomatic mission. It would seem that other Articles in the Vienna Convention counter this statement.

[863]O'Neil (1979-1980) 54 *Tulane Law Review* 690 and Dulmage "Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations" (1978) 10 *Case Western Reserve Journal of International Law* 828.

[864]*Ibid*. As a result of the fact that the 1790 statute was more favourable to diplomatic personnel, the State Department's view was that the statute remains in force until repealed by Congress.

[865]Thus the ambassador's chef enjoyed the same immunity as the ambassador under the Crimes Act, while under the Vienna Convention the chef would receive virtually no immunity.

[866]Marmon Jnr (1978-1979) 19 *Virginia Journal of International Law* 139.

[867]Roye (1978-1979) 12 *U. Michigan Journal of Law Reform* 95.

[868]Belotsky Jnr "The Effect of the Diplomatic Relations Act" (1981) 11 *California Western International Law Journal* 356.

second, to decrease the number of diplomats entitled to claim diplomatic immunity in the US; third, hostilities towards diplomats by US citizens and fourth, the lack of adequate recourse under prior laws for suitable civil action against diplomats, especially with regard to traffic offences.[869]

Consequently, within six years of acceding to the Vienna Convention, the US passed the Diplomatic Relations Act[870] in September 1978.[871] This Act corrected these differences and put an end to the unilateral, favourable treatment given to foreign diplomats. The present Act repealed the Crimes Act of 1790.[872] This Act has brought the US law of diplomatic immunity into the 20th century and ended an era of absolute immunity in the US, after a 200-year immunity regime.[873] The Diplomatic Relations Act not only codifies the Vienna Convention,[874] it also allows for all foreign emissaries, including nations which have not signed the Vienna Convention, to enjoy privileges and immunities specified in the Convention.[875] The Act follows the theory of functional necessity by granting immunity in proportion to their rank in the mission.[876] Congress attempted to improve some of the pitfalls for plaintiffs it considered in need of

[869]Belotsky Jnr (1981) 11 *California Western International Law Journal* 357.

[870]Diplomatic Relations Act Pub. L. No. 95-393, 92 Stat. 808 (1978) codified as 22 U.S.C.A (Supp.1979).

[871] The Diplomatic Relations Act became effective at the end of the ninety-day period beginning on September 30, 1978. To ensure reciprocal accord of privileges and immunities for US diplomats abroad, the US has entered into treaties and agreements with other foreign States.

[872]Crimes Act of Apr. 30, 1790, ch. 9, 1 Stat. 117 codified as 22 U.S.C (1790). The first three sections of the Act repeal the 1790 Act:

- Section 1 deals with the official name of the new Act, which corresponds with the Vienna Convention even though the Act does not deal with the full range of diplomatic relations included in the Convention.
- Section 2 deals with the definitions.
- Section 3 officially repeals the 1790 Crimes Act.

[873]Marmon Jnr (1978-1979) 19 *Virginia Journal of International Law* 136.

[874]The Vienna Convention was a multilateral treaty which eliminated much of the excess of diplomatic immunity while retaining the protection for diplomats which is only necessary for their functions.

[875]Benedek (1979) 5 *Brooklyn Journal of International Law* 388 and O'Neil (1979-1980) 54 *Tulane Law Review* 661. See further Dulmage (1978) 10 *Case Western Reserve Journal of International Law* 828-829.

[876]Belotsky Jnr (1981) 11 *California Western International Law Journal* 359 and Valdez "Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978" (1981) 15 *International Law* 412. The implementation of the Act reduced the number of people with immunity from 18 880 to 8 000.

compensation. Thus the Act compels diplomatic agents, members of missions and their families to obtain liability insurance when operating motor vehicles, vessels or aircraft in the US.[877]

Although this scheme will not eliminate the abuse, it will provide a remedy for the injustices in the eyes of the public. The basic concept of this scheme is to require insurance cover for embassies as a prerequisite to the maintaining of diplomatic relations with the receiving State.[878] In order to open an embassy or continue operating one, proof of insurance cover is required. In addition to this mandatory insurance, the Act further allows for direct action by an injured person involved in a motor vehicle accident to sue the insurance company as opposed to suing the diplomat, thus not infringing the diplomat's right to privileges and immunities.[879] Without this allowance of direct action, the mandatory insurance would prove meaningless because the diplomat would invoke his or her immunity and thus bar any suit against the diplomat or the insurance company.[880]

In *Dickinson v Del Solar*[881] it was held that an insurance company cannot rely on the privileges and immunities of a diplomat in order to escape legal liability. The State Department requires all mission personnel to obtain liability insurance covering bodily injury, including death, property damage and any additional liability insurance. Furthermore, the State Department recommended minimum coverage to ensure proper

[877]Section 6 or 254e. See further O'Neil (1979-1980) 54 *Tulane Law Review* 662. In Europe, approximately 15 nations are parties to the European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles, which requires each signatory to enact insurance laws permitting direct claims against the insurer.

[878]O'Neil (1979-1980) 54 *Tulane Law Review* 691.

[879]*Ibid.*

[880] Section 7. O'Neil (1979-1980) 54 *Tulane Law Review* 692. Without this concept the Act would have provided nothing more than a windfall for insurance companies. They would collect premiums with the comforting knowledge that in a large number of cases no judgment could ever be taken against the diplomat.

[881]*Dickson v Del Solar* [1930] 1 KB 376.

adherence to the Act.[882] It provides encouragement for law-abiding behaviour and a means of compensation for victims of diplomatic abuse.[883]

The obvious problem is enforcement. Diplomatic personnel are immune from all administrative process. Neither the Vienna Convention nor the Diplomatic Relations Act establishes whether ownership of a motor vehicle should be considered to be within the course of official duties.[884] The State Department withholds diplomatic licence plates and waiver of motor vehicle registration fees only if the diplomat does not possess liability insurance.[885] Even if a diplomat took out insurance, once he receives his licence plates, there is nothing to stop him from allowing the policy to lapse or even cancelling it.[886] It has been suggested if this occurs the State Department should declare the diplomat *persona non grata*.

Another problem is the notion of minimum liability.[887] Most diplomats reside in three areas: New York, Maryland or Virginia. In each of these federal states the minimum acceptable insurance level is different.[888] It was found that these areas do not even require one-quarter of the value of insurance in accordance with the State Department's of recommendation.[889] Another issue of importance is that a mandatory insurance

[882]O'Neil (1979-1980) 54 *Tulane Law Review* 193-194. The levels are $100 000 per person, $300 000 for bodily injury and $50 000 for property damage.

[883]Barker *Abuse of Diplomatic Privileges and Immunities* 155. This proposal is not a new idea in diplomatic law and many States already require diplomats to take out third party insurance, particularly in relation to motor vehicles.

[884]O'Neil (1979-1980) 54 *Tulane Law Review* 694.

[885]O'Neil (1979-1980) 54 *Tulane Law Review* 695.

[886]Garley "Compensation for 'Victims' of Diplomatic Immunity in the United Sates: A Claims Fund Proposal" (1980-1981) 4 *Fordham International Law Journal* 148.

[887]O'Neil (1979-1980) 54 *Tulane Law Review* 693

[888]*Ibid.*

[889] For instance, in Virginia the minimum is $25 000 per person, $50 000 for bodily injury and $10 000 for property damage. In Maryland it is $20 000 per person, $40 000 for bodily injury and $10 000 for property damage. In New York it is $20 000 per person, $100 000 for bodily injury and $5 000 for property damage. A further problem with the mandatory insurance is that it is not retrospective and some victims of past accidents remain uncompensated. Refer to *Abdulaziz v Metropolitan Dade County* 741 F.2d 1328 (11th Cir. 1984), where it was stated that making it retroactive could potentially strain international relations.

scheme is the way forward for industrialised States, which have the necessary sophisticated private insurance sector and infrastructure, but would not be as effective in developing and under-developed States.[890] The fundamental key for such a scheme to succeed is for a private insurance company to participate and charge variable premiums, issue pooled policies and impose a maximum limit on its liability.[891] The Act shows yet another weakness in that although this is a suitable solution for civil and administrative claims, it does not address criminal abuse by diplomats.

Section 4 of the Act grants the President authority, on the basis of reciprocity, to increase or decrease the privileges and immunities provided in the Vienna Convention.[892] Diplomatic immunity, according to Zaid, protects Americans more that it can harm them. The fact is that the US has one of the highest numbers of diplomats stationed all around the world.[893] In exchange for protecting US personnel, foreign diplomats are afforded the same privileges and immunities. Zaid believes that it is a fair exchange when looking at the statistics.[894]

Another change provided in the Act is that it is no longer a crime for private citizens to bring a suit against a diplomat.[895] The 1978 Act further amended the original jurisdiction of the US Supreme Court. The Act still allows the US Supreme Court to have original

[890]Barker *Abuse of Diplomatic Privileges and Immunities* 156-157.

[891]Barker *Abuse of Diplomatic Privileges and Immunities* 154-155 and Goodman "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* 400. The scheme would be monitored by the government of the receiving State to ensure non-harassment of diplomats and the charging of equitable premiums. The concept of having pooled insurance is to spread the risk of insuring countries likely to cause abuse, and placing a maximum liability amount protects insurance companies from unlimited liability.

[892]See further Benedek (1979) 5 *Brooklyn Journal of International Law* 388 and Harris "Diplomatic Privileges and Immunities: A New Regime is soon to be Adopted by the United States" (1968) 62 *American Journal of International Law* 101. Also codified as section 254 (c).

[893]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 626-627. It has been mentioned that some States, especially during the Cold War, would not hesitate to arrange for an 'accident' to harass western diplomatic personnel. Charging a diplomat with a crime served as a convenient way to force diplomats to leave the receiving State.

[894]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 627.

[895]Benedek (1979) 5 *Brooklyn Journal of International Law* 388.

but not exclusive jurisdiction.[896] This means that the federal courts' jurisdiction has been increased and extended to include diplomats.[897] A court under the new Act must dismiss any action or proceeding brought against an individual entitled to immunity. However, the diplomat must assert immunity in court either personally or through counsel.[898]

The Act completes the transition in the US from absolute immunity to the more limited as articulated by the Vienna Convention. Despite the fact that diplomats still enjoy absolute criminal immunity, they are now subject to civil suit in their private capacity in an action involving real property, succession or any professional or commercial activity.[899] Administrative and technical staff are not only immune for their official acts, but have total immunity from criminal prosecution.[900] With regard to service staff they are immune from civil and criminal jurisdiction only for their official acts. Private servants will only enjoy immunity which the US may grant.[901] Thus classification is divided between two lists, namely the Blue list, which names diplomatic officers and their families, and the White list, which records administrative and service personnel who are non-diplomatic employees of embassies and legations.[902]

Does the enactment of the Diplomatic Relations Act succeed in curbing abuses? Although the Act has rectified many problems, it has not completely eliminated the misuse of privileges and immunities. Zaid claims that there are over 18 000 individuals in the US who hold diplomatic immunity; furthermore they rarely commit serious crimes The State Department has attempted to react aggressively to diplomatic incidents,

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[896]*Ibid.*

[897]*Ibid.* The jurisdiction of federal district courts has been enlarged from consuls and vice-consuls to also include members of the mission and their families.

[898]Section 5. This concept departs from the Crimes Act where no action may be brought against diplomats under any circumstances.

[899]Benedek (1979) 5 *Brooklyn Journal of International Law* 388-389.

[900]*Ibid.*

[901]*Ibid.*

[902]Benedek (1979) 5 *Brooklyn Journal of International Law* 390 and Harris (1968) 62 *American Journal of International Law* 107.

particularly against alcohol-related crimes. Between 1993 and 1996 37 licences of diplomats were suspended.[903] Yet, Belotsky claims that the major areas of continuing abuse are exemption, the on-duty exemption, enforcement, the traffic and parking dilemma, and reciprocity.[904]

With regard to exemption from prosecution, the Act reduced the overall number of persons entitled to claim immunity.[905] However, high-ranking diplomats and their families still retain complete immunity. So in the event that a US citizen is injured by a high-ranking diplomat or his family they would have no judicial recourse, unless it involves a civil claim that is covered by the insurers.[906] Administrative, technical and service staff are exempt from civil liability with regard to official acts. The problem is how one determines whether the act complained of was an official, and accordingly immune, act.[907] The lives of the personnel revolve around the mission and it can be argued that they are considered on duty 24 hours a day. As stated, the Act does not provide a distinction between official and private acts, thus creating loopholes for abuse.[908]

The success of this Act depends on its enforcement. The way in which this is achieved is by implementing the concept of *persona non grata*. However, there has been reluctance to use this measure; as a result it suggests the Act's ineffectiveness.[909] Another method is

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[903]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 627.

[904]Belotsky Jnr (1981) 11 *California Western International Law Journal* 360. Other areas also include traffic accidents and insurance requirements (already discussed above), other legal injuries with regard to contracts and lease (not relevant with regard to this discussion) and special considerations (the President's right to grant more or less immunities has already been discussed).

[905]*Ibid.*

[906]*Ibid.* See further Garley (1980-1981) 4 *Fordham International Law Journal* 146-147. A bill was introduced to further limit privileges and immunities but was not accepted at Congress.

[907]Belotsky Jnr (1981) 11 *California Western International Law Journal* 361.

[908]Belotsky Jnr (1981) 11 *California Western International Law Journal* 362. See further Garley (1980-1981) 4 *Fordham International Law Journal* 146-147.

[909]*Ibid* and Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *Hastings Constitutional Law Quarterly* 584.

through the assistance of other nations in policing the legislation.[910] For example, asking foreign Governments to penalise their diplomats for non-adherence to the Act. Assistance is fundamental, because it will take all concerned nations to eradicate the misuse of privileges and immunities.[911] However, this is not always possible.

Traffic violations, such as speeding and not paying parking fines, are the most common areas of abuse. This abuse constantly plagued the US government.[912] Under the Act diplomats continue to escape liability for parking tickets and traffic violations because they are considered criminal offences. A possible solution is to reclassify these violations as civil offences, leaving only the diplomats who enjoy complete immunity unaffected.[913]

Another weakness of the Act is that it does not provide for compensation for injury resulting from abuses of diplomatic immunity other than those involving the use of motor vehicles, aircrafts or vessels.[914] During the hearings promulgating the Act a proposal was suggested to establish a claims fund administered by the State Department which would compensate victims in the US for all personal injuries and property damage cause by the wrongful conduct of a diplomat.[915] Garley believes that the Act is inadequate to protect the rights of citizens for two reasons: firstly, there remain many situations under the Act in which a citizen cannot get compensation for delictual or criminal acts of a diplomat, and secondly, there are problems encountered in enforcing and administering the liability insurance and direct provisions of the Act.[916] It was intended that the fund would provide

[910]Belotsky Jnr (1981) 11 *California Western International Law Journal* 363.

[911]*Ibid.* The State Department has set up a call centre where police may phone at any time and verify immunity of a person and determine the boundaries of that immunity. The increased responsibility by the sending State for the acts of its diplomats would aid towards reducing abuse.

[912]Belotsky Jnr (1981) 11 *California Western International Law Journal* 371.

[913]*Ibid.*

[914]Roye (1978-1979) 12 *University of Michigan Journal Law Reform* 106.

[915]Garley (1980-1981) 4 *Fordham International Law Journal* 136-137 and Goodman (1988-1989) 11 *Houston Journal of International Law* 410.

[916]Garley (1980-1981) 4 *Fordham International Law Journal* 146.

a remedy of last resort for those whose claims for compensation were prevented through immunity being invoked.

The proposal was limited in its scope to compensate only for damages arising as a result of motor vehicle accidents.[917] Solarz, a New York Congress representative, expanded the claims fund idea to fill the gaps in the Act.[918] He proposed the establishment of a Bureau of Claims awarding full compensation to victims and reimbursing local governments for revenues lost because of non-payment of fines by diplomats.[919] The benefit of this fund is that the rights of the citizens could be protected without interfering with the diplomat's ability to carry on his functions.[920] There were other suggestions in this bill. One was to require the State Department to report on crimes committed in the US annually.[921] Furthermore, it indicated a need to educate the police on the extent of the Vienna Convention and thus allow for investigation and possible prosecution under the Convention.[922] However, for this to be possible, the State Department has to formulate procedures and inform the foreign missions of these procedures. Although this seems like a reasonable suggestion, the Solarz bill died in the committee stage.[923] The concern of this bill was the question of who should bear the financial onus of sustaining the fund. The proposal contended that it should rest with the US government, i.e. US taxpayers.[924] After settling with the victims, the State Department would then seek reimbursement

[917]Garley (1980-1981) 4 *Fordham International Law Journal* 149-150.

[918]Goodman (1988-1989) 11 *Houston Journal of International Law* 409 and McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 167. The bill was known as H.R. 3036. Solarz envisaged the scope of the bill to provide a remedy for private citizens injured by any wrongful acts of a diplomats

[919]Garley (1980-1981) 4 *Fordham International Law Journal* 157.

[920]*Ibid*.

[921] McClanahan *Diplomatic Immunity* (1989) 168.

[922]*Ibid*.

[923]Garley (1980-1981) 4 *Fordham International Law Journal* 150.

[924]Garley (1980-1981) 4 *Fordham International Law Journal* 154.

from the mission.[925] The idea of full compensation financed by the US Government to injured parties was found to be unreasonable.[926]

In 1988 the Senate Foreign Relations Committee voted to allow the Senate Bill No. S.1437 for consideration by a full Senate.[927] The basic concept behind the bill was to withhold immunity from criminal jurisdiction to diplomats or consuls in the US for crimes of violence such as drug trafficking, reckless driving or driving while intoxicated.[928] This bill, interpreted narrowly, would remove immunity from criminal jurisdiction for all diplomatic and consular personnel not classified as diplomatic agents or as consular officers and their families, thus making them liable to arrest and prosecution.[929] The argument for the bill is that there is no real justification for criminal immunity. Hickey Jnr and Fisch state this argument rests on the wrong assumption that the sole justification for immunity is to assure that personnel function effectively.[930]

The argument has two main problems: namely, that immunity is not based solely on the functional necessity theory but on a number of theories, each of which is contravened if the immunity is removed; and unilateral removal of immunity from criminal jurisdiction

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[925]Ross "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities"' (1989) 4 *American University Journal of International Law & Policy* 193.

[926]Goodman (1988-1989) 11 *Houston Journal of International Law* 410. Goodman believes that the claims fund should be reconsidered since there are no other adequate means of compensating injured citizens for wrongful conduct of diplomats. An amendment to the proposal is to introduce the proposal as a *limited* compensation fund.

[927]Hickey Jnr and Fisch "The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States" (1989-1990) 41 *Hastings L. J.* 351 and Goodman (1988-1989) 11 *Houston Journal of International Law* 196. Senator Helms introduced the bill. The bill shifts the onus of proof from the receiving State to the sending State. See further McClanahan *Diplomatic Immunity* 167.

[928]Shapiro (1989) *Annual Survey of American Law* 304.

[929]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal* 352. Some legal scholars and commentators like Goldberg believe that it is time to call for the arrest and prosecution of immune personnel.

[930]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal* 357. This argument then can be turned to say that criminal behaviour is not part of the proper functioning of diplomatic personnel.

does in fact hinder effective functioning of diplomatic personnel.[931] Interpreted broadly, it would lend support to growing criticism that in recent times the US just disregards its international obligations.[932] Such removal would also go against the Vienna Convention, which the US assented to, bilateral agreements conferring immunity from jurisdiction and more importantly customary practice which dates from antiquity.[933] Passing this bill could have led to a reciprocal reaction against US diplomats, consuls and personnel abroad. Furthermore, the bill would have threatened the entire spirit of privileges and immunity by introducing uncertainty to diplomatic relations.[934]

How should the US respond to issue of diplomatic immunity? A proposal is that the US needs to "play hardball" to reduce abuse.[935] According to this proposal the US should retaliate against the abuse of diplomatic privileges and immunities in one of three ways. First, the State Department could expel foreign diplomats more readily; second, the US could refuse to waive immunity more often; and lastly, the US diplomats can abuse their immunity in foreign States more frequently.[936] The last suggestion, is for obvious reasons, not acceptable. With regard to the second option, its effect is to send the message to all foreign States that the US will not tolerate diplomatic abuse in the US.[937] However, the shortfall of this suggestion is that it favours stronger States like the US. It

[931]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal* 357-538. Immunity from local jurisdiction reflects both the preservation of the sovereign equality of the sending and receiving States and the importance of reciprocity. Thus sovereign equality will be affected if the immunity from criminal jurisdiction was disturbed.

[932]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal* 353. By this the US will be violating at least two fundamental precepts of the law of treaties, namely: the obligation of states entering into international agreements to perform in terms of the treaty and in good faith. Further, the US Constitution provides that all treaties made under the authority of the US shall be the supreme law of the land.

[933]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal* 363 and 366.

[934]Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal.* 380. See further Shapiro (1989) *Annual Survey of American Law* 304-305. It would further pose a problem for international organisations like the UN and OAS. Although the Senate approved the bill, the House of Representatives rejected it. Any attempt in Congress to restrict diplomatic immunity has failed.

[935]Barker *Abuse of Diplomatic Privileges and Immunities* 157 and Goodman (1988-1989) 11 *Houston Journal of International Law* 412.

[936]Barker *Abuse of Diplomatic Privileges and Immunities* 157.

[937]Barker *Abuse of Diplomatic Privileges and Immunities* 158

proposes that abuse of diplomatic privileges and immunities by American diplomats abroad would serve only to encourage abuse within the US territory and would encourage action being taken against American citizens and diplomats at home and abroad.[938] Retaliation would cause a continuous spiral of abuse instead of providing a solution to the problem.[939]

The diplomatic bag was also a popular debating topic in the US Government. Ross mentions two ways in which to prevent the unlawful use of the diplomatic pouch while at the same time ensuring the confidentiality of diplomatic correspondence.[940] The first method is to pass all diplomatic bags through a magnetometer, an X-ray machine that detects weapons without breaching the confidentiality of the diplomatic bag.[941] The second method is the use of narcotics sniffing dogs for detection of any contraband substance.[942] The problem with these suggestions is that they were made over 20 years ago and no new modern methods have been developed.

How did the Government react to the apparent increase in violations of local laws by diplomats and their families? In 1984 the Secretary of State, declaring his intention to introduce a restrictive theory of diplomatic immunity, sent a Circular Note to all Chiefs of Missions in Washington.[943] This Circular Note depends upon the interpretation of

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[938]*Ibid.*

[939]*Ibid.*

[940]Goodman (1988-1989) 11 *Houston Journal of International Law* 199-200.

[941]Goodman (1988-1989) 11 *Houston Journal of International Law* 199-200 and McClanahan *Diplomatic Immunity* (1989) 172.

[942]Goodman (1988-1989) 11 *Houston Journal of International Law* 199-200.

[943]Barker *Abuse of Diplomatic Privileges and Immunities* 159. See further Jones Jnr "Diplomatic Immunity: Recent Developments in Law and Practice" (1991) 85 *American Society of International Law Proceedings* 264 and Brown "Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations" (1988) 37*International & Comparative Law Quarterly* 82-83. Part of the Note reads:

> "*On the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain a matter of record. If a person formerly entitled to privileges and immunities returned to this county and continued to be suspected of a crime, no bar would exist to arresting or prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to the exercise of official functions, or the statute of limitations for the crime had not imposed a permanent bar to prosecution.*"

Article 39(2) of the Vienna Convention dealing with termination of diplomatic privileges and immunities.[944] The Second Foreign Relations Restatement distinguished between a State's prescriptive and enforcement jurisdiction.[945] The Restatement takes the position that a diplomat should have absolute immunity from criminal jurisdiction for official acts, but should not have such luxury with regard to unofficial acts once his accreditation has been terminated. Barker states that this interpretation of Article 39(2) is within the ambit of customary international law and more importantly, the Vienna Convention.[946] The first sentence of Article 39(2) states that all privileges and immunities will cease when the diplomat departs or after he has had a reasonable time in which to depart, but will continue until that time. In the second sentence an exception is formed with the use of the word "however". This impresses that the acts performed during the exercise of his function will remain immune.[947] Donoghue believes that this exception qualifies the basic proposition of the first sentence, in that immunity ends when the assignment ends but immunity for official acts never ends.[948]

The Abisinito affair caused the US to implement the restrictive theory.[949] Hours after the incident the Department of State Office of Foreign Missions brought the incident to the

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[944]It states that immunity continues after the termination of the diplomatic function only for activities performed with regard to official functions.

[945]The Restatement observed that immunity from the exercise of jurisdiction to enforce a rule of law does not mean that a diplomat will be given immunity from the exercise of jurisdiction to prescribe the rule.

[946]Barker *Abuse of Diplomatic Privileges and Immunities* 160. There are no reported international or municipal cases in which an ambassador has been made to face a criminal action after he has lost accreditation for an act while accredited to a State without waiver of immunity by his Government, even if a number of instances warranted prosecution.

[947]Donoghue "Perpetual Immunity for Former Diplomats? A Response to "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?" (1988-1989) 27 *Columbia Journal of Transnational Law* 623.

[948]*Ibid.*

[949] Refer to Chapter 4 on page 91. See Larschan (1987-1988) 36 *Columbia Journal of Transnational Law* 285 and 293 and Pecoraro "Diplomatic Immunity Application of the Restrictive Theory of Diplomatic Immunity - *The Abisinito Affair"* (1988) 29 *Harvard International Law Journal* 536. The Abisinito affair and the attempt by the Department of State to implement a restrictive theory of diplomatic immunity still sparks debates over the obligations owed by a receiving State under international law. For instance, it has been argued that Article 39 refers to immunity for acts committed during the diplomat's termination period. Further, it does not deny continuing immunity for any acts committed during his accreditation. The possible meaning is that earlier acts remain immune forever.

attention of the US Attorney for the District of Columbia for investigation and possible criminal prosecution.[950] The US Attorney began to proceed with the indictment. This is the first occasion on which the US or any other nation has attempted to try an ambassador.[951] The day after Abisinito was recalled, he met with the State Department expressing his regret and that of his Government. After the US Attorney had convened a grand jury to consider an indictment of Abisinito, the Embassy of Papua New Guinea sent a Diplomatic Note requesting assurances that any criminal investigation or indictment would be quashed.[952] Subsequent meetings with the US Attorney indicated that the US intended to continue with the indictment, even though it remained unclear whether the State Department supported this decision. The State Department's response to the Embassy agreed to Abisinito's immunity at the time of the accident, but at the same time his accreditation was withdrawn, potentially turning the tables. Pecoraro believes that the reciprocal use of the restrictive theory in other States would not disadvantage US diplomats as a result of the notion that the theory only applies to crimes committed during non-official acts.[953]

Another reaction was from the Office of Foreign Missions to implement a point system to record moving traffic violations. The Office maintains records on everyone possessing diplomatic licences. Anyone receiving fines is expected to either pay the fine or contest the ticket.[954] An accumulation of eight points in a period of two years causes a review and possibly administrative action. Twelve points within a two-year period would result in the suspension of all licence and driving privileges. Habitual violations result in the revocation of these privileges.[955] The Foreign Operations Bill concept was introduced to reduce the country's foreign aid package by whatever amount a country owes in unpaid

[950]Larschan (1987-1988) 36 *Columbia Journal of Transnational Law.* 284.

[951]Larschan (1987-1988) 36 *Columbia Journal of Transnational Law* 284-285.

[952]Larschan (1987-1988) 36 *Columbia Journal of Transnational Law L.* 290.

[953]Pecoraro (1988) 29 *Harvard International Law Journal* 540.

[954]Brown (1988) 37 *International & Comparative Law Quarterly* 82.

[955]Brown (1988) 37 *International & Comparative Law Quarterly Law* 82-83. See further Department of State "Parking Program for Diplomatic Vehicles" http://www.state.gov/ofm/resource/22839.htm [Accessed on 23 September 2005].

New York parking tickets plus an additional 10% penalty.[956] The bill was passed into law in the Consolidated Appropriation Act of 2004. However, it went further to extend this concept to include Washington DC.[957]

In 2005 a bill was introduced by the State Department to compel different federal states in the US to report any diplomatic abuses to the State Department. This was approved by the Legislature and has become law. The new law gives police five days to report traffic violations and any more serious offences to the different Federal State Public Safety Department who will notify the State Department of the US.[958]

As a result of the Abisinito affair, the incident of the death of Wagner, and increasing dissention between officials and missions over parking disputes, the American public was drawn into the debate around diplomatic immunity. The opinion polls showed that the public were unaware of why diplomatic immunity was necessary and why it supersedes US laws.[959] A citizen of New York believed that there is a need for immunity except with regard to murder, manslaughter, child molestation and rape:[960] a person committing such offences is a criminal and should be dealt accordingly. Another response was that immunity should only be extended to ambassadors and consuls-general. Other

[956]L Neary (anchor) "Senator Hillary Rodham Clinton discusses the Senate proposal to collect nearly $21 million from thousands of unpaid parking tickets by foreign diplomats" *Weekend Edition Saturday* a *National Public Radio Broadcast*, November 1, 2003. Transcript made available from the United States Embassy. See enclosed CD.

[957]*Ibid.*

[958]Foy "Huntsman Signs Measure Tracking Law-Breaking Foreign Diplomats" in *The Association Press State and Local Wire*, April 25, 2005. Provided by American Embassy in South Africa. See enclosed CD. Senator Walker of Salt Lake City who lived in Washington DC for eight years, said diplomatic abuse occurs mainly in New York and Washington DC. He said: "*We used to tell our kids when they were learning to drive to avoid diplomats. They are the world's worst drivers…*"

[959]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 624. The survey in 1997 asked people whether diplomats should have immunity or not, revealed that 5% said yes, 53% said no and 42% were mixed. Responses like "*diplomatic immunity should be a matter of international law…immunity protects American diplomats abroad as much as it might allow certain diplomats crimes here" and "for the protection of our diplomats we should keep diplomatic immunity, if a local law is violated they should be immediately deported to their country*."

[960]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 625.

employees are simply civil servants and should not be entitled to immunity.[961] The debate is ongoing and will take many more attempts and bills in Senate to completely eliminate this problem.

5.4 Republic of South Africa

As a result of the fact that South Africa was colonised by Britain for many years, its representatives abroad did not have diplomatic status.[962] Even when asserting its will to be independent it was backward in trying to establish recognised diplomatic missions. Such "missions" were considered British and in most cases only existed for trade issues.[963]

In 1932 the Diplomatic Immunities Act[964] was passed to provide and define the immunities of diplomatic agents at that time. It stated that no diplomatic agent was to be subjected to civil or criminal jurisdiction in the Union and such writs or proceedings would be deemed void.[965] This immunity was extended to the diplomat's family, and to staff and their families and servants, provided they were not nationals of the Union.[966] Section 4 of the Act compelled the Minister of External Affairs to keep a register of all the members of the diplomatic entourage who are entitled to immunity and during January of every year a copy of the register was to be published in the *Gazette*. Section 10 of the Act made bringing writs or proceedings against representatives with immunity a criminal offence carrying a fine not exceeding £500 and/or to imprisonment for a period not exceeding three years. In 1934 an amendment to the Act was made to change the

[961]Zaid (1998) 4 *ILSA Journal of International & Comparative Law* 625-626. For more information on diplomatic immunity in the US refer to Greig *International Law* 254-263.

[962]Lloyd (2000) 11 *Diplomacy and Statecraft* 53.
[963]*Ibid*.

[964]Diplomatic Immunities Act 9 of 1932.

[965]Section 1.

[966]Section 2.

definition of counsellors and diplomatic agents.[967] Most of these sections are similar to the Act of Anne of the UK and the Crime Act of the US. This clearly indicates customary practices that have been incorporated into law.

By 1951, the Executive introduced The Diplomatic Privileges Act[968] to consolidate and amend the laws relating to the immunities and privileges of diplomatic representatives and certain international organisations.[969] It repealed the Diplomatic Immunities Act of 1932 and the Diplomatic Immunities Amendment Act of 1934. Section 1 of the latter Act provides, *inter alia*, definitions of agents, family and staff. The Act enabled heads of state, diplomatic envoys, special envoys, any public organisations, representatives of any government attending an international conference and any other person recognised by the Minister to have immunity against civil and criminal jurisdiction.[970] The immunity of these people and organisations extended to the diplomat's staff and family. Immunity did not apply in circumstances where any liability was incurred by tax on personal incomes from the State or a provincial administration or with any transaction which he entered into in a private capacity.[971] As with the previous Acts, the Minister had to keep a Register of the names of all the persons entitled to immunity and every year a complete list was published in the G*azette*.[972] The Governor-General had to further place a notice in the *Gazette* recognising the buildings occupied by the diplomatic representatives for the purpose of conducting official functions. The immunities and privileges granted by this Act were applicable only to foreign citizens and not to South African citizens.[973] The Act again prohibited any suit against a diplomat and made it a criminal offence. Upon

[967]Diplomatic Immunities Amendment Act 19 of 1934.

[968]The Diplomatic Privileges Act 71 of 1951.

[969]Refer to the Long Title.

[970]Section 2 (1).

[971]Section 3.

[972]Section 4.

[973]Section 10. If immunity is wanted by a citizen, they would have to apply for such immunity from the Minister.

conviction, the person bringing suit would be liable to a fine not exceeding £500 and/or to imprisonment not exceeding three years.[974]

In 1978, the Executive amended the Diplomatic Privileges Act of 1951 to define the organisations and institutions in respect of what immunities they enjoyed. This Act was known as the Diplomatic Privileges Amendment Act of 1978.[975] By 1985 another amendment was made to the Diplomatic Privileges Act of 1951, granting immunity and privileges to consuls and consular missions. It was also brought about to regulate the acquisition and occupation of immovable property used by consuls and consular missions.[976] It is evident how constant the Acts are, and they only developed in areas necessary to ensure immunity. In *Nduli v Minister of Justice*[977] Rumpff CJ declared that although international law is obviously part of South African law it must be stressed that South African law originated from Roman-Dutch law and that South Africa's concept of international law is based upon the acceptance of sovereignty of independent States.[978]

The Diplomatic Immunities and Privileges Act of 1989[979] contained a number of provisions dealing with matters not covered by the Vienna Convention. The key part of the Act comprised of two schedules incorporating sections of the Vienna Conventions on immunities into South African municipal law.[980] Furthermore, Section 2(1) consented to the application of the Vienna Convention in South Africa. The Act further repealed the Diplomatic Privileges Act of 1951, the Diplomatic Privileges Amendment Act of 1978

[974]Section 11.

[975]Diplomatic Privileges Amendment Act 61 of 1978. See Dugard *International Law: A South African Perspective* (2000) 192. Although the Legislature made the amendments, Thomas believes that it was doubtful that they introduced material changes to the legal position.

[976]Diplomatic Privileges Amendment Act 39 of 1985.

[977]*Nduli v Minister of Justice* 1978 (1) SA 893 (A).

[978]In *S v Ebrahim* 1991 (2) SA 553 (A) it was held that the fundamental principles of international law, such as promotion of human rights, foreign relations and a healthy legal process, forms part of the common law.

[979]Diplomatic Immunities and Privileges Act 74 of 1989.

[980]Dugard *International Law* 192-193. With regard to the Vienna Convention, Articles 1, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 apply in South Africa.

and 1985. Section 3 laid down immunities and privileges of heads of states, organisations, special envoys and any other persons contemplated by the Vienna Conventions.[981] It also provided for immunity against civil and criminal jurisdiction in South Africa. Section 3(5) provided privileges and immunity from civil and criminal jurisdiction of the courts to members and their staff and families only if the Minister had approved for the extension and there was agreement between the Republic and the foreign State to allow such extension.[982] However, the Department of Foreign Affairs stated that children of diplomats will no longer qualify for privileges and immunities upon reaching 21 years when they were not undertaking any form of studies, or on reaching the age of 23 if studying.[983] This Act also enabled the President to confer immunities and privileges through agreements or by other means which he deemed fit.[984]

This Act further ensured that the Minister of Foreign Affairs keep a register of those entitled to immunity and a complete list must be published at least once a year in the *Government Gazette*.[985] Immunity for the head of mission may be waived by the sending State or, if waiver is sought for a diplomat of a lesser rank, the head of the mission may approve it. It should be noted that waiver must be made expressly.[986] In the event of a question as to one's status with regard to immunity, a certificate must be issued by the Director-General giving the status. The Minister may restrict immunities and privileges when it appears that these immunities and privileges accorded to a mission or person are less than those conferred on South African missions or persons abroad.[987] Interestingly,

[981]According to section 3(4) on the other hand diplomatic agents, members or any delegate or permanent representative of a foreign State or Government and international organisations were exempt from civil and criminal jurisdiction only if they were recognised by the Minister of Foreign Affairs.

[982]Section 3(5).

[983] Department of Foreign Affairs "Members of Family: Cessation of Diplomatic Privileges and Immunities" http://www.dfa.gov.za/department.prot1.htm#intro [Accessed on 16 February 2006]. The rest of their stay will be regulated by the Department of Home Affairs in terms of the Aliens Control Act 96 of 1991.

[984]Section 4.

[985]Section 7.

[986]Section 3(a) and (d).

[987]Section 10.

this Act introduced liability insurance requirements to be met by diplomatic representatives with regard to risks arising out of the use of any motor vehicle, vessel or aircraft in South Africa[988] clearly as a lesson learned from the US. This Act still made it a criminal offence to bring a suit against a diplomat and a person could be liable to a fine not exceeding R12 000 and/or imprisonment for a period not exceeding three years.[989] In 1992, an amendment was made to this Act to delete the provision which regulated the exemption from the restrictions on the acquisition and occupation of immovable property and to allow property to be acquired outside of Cape Town and Pretoria.[990]

With the enactment of the Constitution (which codifies that international law is law in the Republic), South Africa had to update the 1989 Act, which was done by implementing the Diplomatic Immunities and Privileges Act[991] and repealing the 1989 Act and 1992 Amendment Act. This 2001 Act brings into effect the Vienna Conventions and Consular Convention in South Africa,[992] but also the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialised Agencies.[993] It further provides a definition for the members of the family,[994] and grants civil and criminal immunity as per the Vienna Convention to members of the diplomatic corps. Conferment of such immunities and privileges must be published in the *Gazette*. Thus the Minister needs to keep a register of all persons entitled to immunity and a certificate is granted by the Director-General where any question arises regarding

[988]Section 15.

[989]Labuschagne "Diplomatic Immunity as Criminal Defence: An Anthropo-Legal Anachronism" (1997) 22 *South African Yearbook on International Law* 36-37. See further Protocol of foreign diplomats in South Africa at the Department of Foreign Affairs website, particularly http://www.dfa.gov.za/department.prot1.htm#intro.

[990]Diplomatic Immunities and Privileges Amendment Act 56 of 1992. It repealed section 13 of the 1989 Act, amended sections 14, 16 and Schedule 1 by adding Article 38 and Schedule 2 by adding Article 71.

[991]Diplomatic Immunities and Privileges Act 37 of 2001.

[992]Only subject to some provisions. Refer to Schedules 1 and 2 of the Act.

[993]Section 2.

[994]It includes the spouse, any unmarried child under the age of 21 years, any unmarried child between the ages of 21 and 23 years who is undertaking of full time studies, and any other unmarried child or other family member recognised as a dependent member of the family.

immunity.[995] The Minister is further given power to restrict immunity in circumstances where South African diplomats abroad receive a lesser degree of immunity. Where there is any abuse, the Act provides for the sending State to expressly waive immunity of the offender.[996] The Minister must also prescribe by regulation liability insurance requirements that have to be met in order to enjoy privileges and immunities under this Act and the Conventions.[997] Once again, the Act makes it a criminal offence to bring suit intentionally or without reasonable care against a person who enjoys immunity. Upon conviction, a fine and/or not more than three years of imprisonment may be imposed.[998] South Africa is now better equipped in its legislation to ensure that diplomats and other international organisations receive the necessary privileges and immunities. However, there is nothing in legislation or Government reviews that further limits immunities, unlike the US and the UK that have tried to deal with the problem internally.

Diplomatic immunity and foreign policy are closely related and in most cases involves sensitive political considerations.[999] The former South African dispensation entailed certain prerogative powers of the executive that were in most cases non-reviewable, including the power to conduct foreign affairs. This was only made possible because of the absence of a Bill of Rights and the sovereignty of parliament.[1000] However, there are no reported instances whereby the South African Government has tried to curb abuses of diplomats and their families in South Africa. Could this possibly mean that diplomats respect the law, or is South Africa following the same path as the UK and US?[1001]

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[995]Section 9.

[996]Section 8.

[997]Section 13.

[998]Section 15.

[999]Erasmus and Davidson "Do South Africans have a Right to Diplomatic Protection?" (2000) 25 *South African Yearbook of International Law* 128.

[1000]Erasmus and Davidson (2000) 25 *South African Yearbook of International Law* 128.

[1001]Attempts to find examples of South African diplomats abusing their immunities abroad or foreign diplomats abusing their immunities in South Africa have not been successful.

5.5 Conclusion

These various Acts have not comprehensively restricted diplomatic immunity. It can be argued, however, that they have provided greater protection of private citizens by limiting the classes of personnel entitled to immunity, and also allowing for civil suit against diplomatic staff.[1002] The abuse of immunity, even if it is rare, is as old as the concept of immunity itself. Similarly, the tools receiving States employ to address such abuses are not new.[1003] To solve problems of abuse in any country, one must weigh the safety of a nation's diplomats against the desirability of holding foreign diplomats responsible for their criminal and civil acts.[1004] Justice must not simply be done, but seen to be done. Yet the benefits of improved international relations are derived from the granting of immunity and must be balanced against the obligation of the receiving State to protect the interests of its citizens.[1005]

The US State Department's decision to adopt a restrictive theory appears to be a response to public opinion and popular beliefs that diplomats and their families abuse their status. To take it a step further, the efforts to implement the restrictive theory are also inferred from a legal perspective.[1006] The UK, to a large degree, and South Africa, have also tried to limit immunity. Despite all the efforts, none of the countries achieved any lasting results for fear of reciprocity in foreign countries.

The final pressure to narrow the scope of diplomatic immunity was its erosion abroad. Even before the Vienna Convention, some countries were already questioning absolute immunity. Countries like Italy[1007] and France[1008] restricted absolute immunity from

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[1002]Benedek (1979) 5 *Brooklyn Journal of International Law* 392.

[1003]Donoghue (1988-1989) 27 *Columbia Journal of Transnational Law.* 628.

[1004]Shapiro (1989) *Annual Survey of American Law* 294.

[1005]Roye (1978-1979) 12 *University of Michigan Journal of Law Reform* 96.

[1006]Larschan (1987-1988) 26 *Columbia Journal of Transnational Law.* 294.

[1007]In the *Typaldos v Lunatic Asylum of Aversa* 9 I.L.R. 423 (1940).

private suit. Diplomatic immunity depends for its validity upon uniform application of the rule in most or all sovereign States. As more States began to adopt a narrower view of diplomatic immunity it became apparent that immunity could no longer be considered absolute.[1009]

A long-term view of diplomatic immunity, from the earliest writings to today's debates, reveals an ongoing movement to narrow the scope of immunity granted to diplomats. The invoking of immunity can violate constitutional values and will lead to emotional responses. This means immunity will continue to be criticised and eroded until it achieves a rational and constitutionally acceptable basis.[1010] Until then, traditional diplomatic immunity is not the only instrument for protection, but as long as States adhere to this, diplomatic protection remains indispensable.[1011] However, it may ultimately prove to the global community's peril to fail to heed the call for other measures in attempting to curb abuses.

[1008]In the *Freeborn v Fou Pei Kouo* 16 Ann. Dig. 286.

[1009]O'Neil (1979-1980) 54 *Tulane Law Review* 680.

[1010]Labuschagne (1997) 22 *South African Yearbook of International Law* 44.

[1011]Erasmus and Davidson (2000) 25 *South African Yearbook of International Law* 119.

CHAPTER 6

ARE PAST PRACTICES ENOUGH? OTHER POSSIBLE SOLUTIONS TO CURB ABUSES

6.1 Introduction

International politics has influenced need for the changing rules of diplomatic privileges and immunities since 1945.[1012] There are a number of reasons for the restriction of immunities. One was the Cold War, which was continuously plagued by a tit-for-tat attitude. Secondly there was a greater emphasis placed on national security in a nuclear age.[1013] The increased complexity of international affairs and the expansion in size and number of missions was also a factor influencing change. Finally, change was necessitated through the abuse of diplomatic and non-diplomatic personnel privileges and immunities.[1014]

By the 1960s, hundreds of diplomats were directly involved in legal actions and various incidents raised questions about diplomatic immunity.[1015] When alarming diplomatic abuses occur it is only natural to react by calling for the amendment of the Vienna Convention. The Tehran embassy hostages and the death of WPC Fletcher raised the question of diplomatic immunity time and time again.[1016] As has already been discussed, governments have attempted to resolve this problem with little success.

The rationale for change in the nature and scope of immunity in the 1960s was provided by the theory of functional necessity. The theory managed to decrease some of the

[1012]Wilson *Diplomatic Privileges and Immunities* (1967) 277.

[1013]*Ibid.* One could argue change was influenced by the Cold War.

[1014]Wilson *Diplomatic Privileges and Immunities* 277-278.

[1015]Wilson *Diplomatic Privileges and Immunities* 272.

[1016]McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 165.

problems by adding new categories of immunity and expanding on old categories of immunity.[1017] A number of attempts have been made to deal with the question of abuse, yet these attempts have not found a universally acceptable and viably enforceable solution to the problem. Would it note be prudent to remove the cloak of immunity in its entirety and substitute the principle with detailed guidelines on the functional necessity theory?[1018] By means of the *pacta sunt servanda* principle of the non-controversial law of treaties States would be in a position to agree on the nature, cause and effect of the functional necessity theory on a multilateral basis.

The establishment of a Permanent International Diplomatic Criminal Court with mandatory jurisdiction over diplomats accused of committing crimes with its own penal system has been a debated subject since the late 1980s.[1019] Nothing has come of it, but it could provide a fair way of adjudicating disputes between the victim and the accused diplomat.[1020]

6.2 Amendment of the Vienna Convention on Diplomatic Relations

The aim of possibly amending the Vienna Convention was to reduce the scope of diplomatic immunity for criminal conduct, which poses a problem in receiving States. The areas of amendment can be divided into three categories, namely the criminal acts of diplomats, the abuse of the diplomatic bag, and the use of the mission.[1021] With regard to the criminal acts of diplomats, the amendment is intended to limit the criminal immunity of diplomats. To achieve this there needs to be international agreement on a list of

[1017]Wilson *Diplomatic Privileges and Immunities* 273.

[1018]Barker *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) 220.

[1019]Ross "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities" (1989) 4 *American University Journal of International Law & Policy* 195.

[1020]*Ibid.*

[1021]Farahmand "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse" (1989-1990) 16 *Journal of Legislation* 102. Alistair Brett proposed the amendments of Articles 22 and 27.

criminal acts that all nations would exempt from the rules of diplomatic immunity, called a universal crime list.[1022] This list could include any violent behaviour against another person, such as murder, assault, battery and one of the most problematic offences, driving while under the influence of intoxicating substances.[1023] Even offences against property, like forcible entry into a premises, vandalism and conversion of property by using of physical violence, could be included in the list. Once a diplomat commits a crime that is on the universal crime list, the receiving State would have jurisdiction to prosecute according to local law.[1024] A problem with this type of amendment is that it could lead the receiving State harassing diplomatic guests within its borders. Fabricated charges against diplomats could be made in order to arrest and prosecute diplomats, or expel unwanted representatives entering the receiving State's borders, thus gaining leverage over the sending State.[1025] However, it could be argued that reciprocity should provide a means to restrict this type of harassment. Hopefully, all States have a common interest in interaction that would keep the tit-for-tat reprisals at bay.[1026]

The diplomatic bag has been a controversial topic for many decades. The amendment should firstly limit the diplomatic bag to a standard size, which should be large enough to allow diplomats to carry their confidential and official documents without interference from the receiving State.[1027] Before bringing bigger bags containing embassy equipment

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[1022]Farahmand (1989-1990) 16 *Journal of Legislation* 103 and Wright "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University of International Law Journal* 184.

[1023]*Ibid*. Acts in self-defence would obviously not be included in this list. It has been recommended that property crimes should also be included in the universal crime list.

[1024]This amendment allows the scope of the immunity of diplomats to be restricted. The restricting of immunity would not only be for diplomats, but would also be extended to the family. Such an extension and restriction could decrease the number of and the type of persons holding immunity, which would eventually decrease the abuse substantially.

[1025]Parkhill "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* 588. An example where this occurred was in 1996 in Cuba, when a US human rights officer was accused of "subversive activities" and expelled from Cuba. Without immunity, she could have been arrested and tried in Cuba.

[1026]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 589.

[1027]Farahmand (1989-1990) 16 *Journal of Legislation.* 103 and McClanahan *Diplomatic Immunity*182-183.

or similar items, special arrangements with the receiving State should be made. Furthermore, the amendment would allow for electronic scanning, discreet examination by equipment or the use of specially trained dogs.[1028] If the receiving State has strong suspicions concerning the contents of the bag, they should be able to request that the bag be searched in the presence of an official representative of the sending State. If there is a diplomat who abuses the use of the diplomatic bag, the receiving State should have jurisdiction to prosecute the diplomat to the full extent of the law.[1029]

Original drafters of the Vienna Convention felt that the inviolability of the mission had to be absolute to prevent abuses by the receiving State.[1030] However, the increasing use of embassy premises for terrorist acts and different forms of espionage has led to suggestions of amending Article 22.[1031] Ward has suggested that there is a need to re-evaluate the receiving State's domestic procedure and amend the Vienna Convention to restrict immunity for espionage.[1032] However, this is not possible on its own. This could be solved through bilateral agreements.[1033] Brett has suggested a further amendment to give power to the ICJ to suspend from the UN any State that does not comply with the Vienna Convention.[1034] A necessary amendment in the Article is to allow the mission to be searched when the alleged crime concerned is a crime on the universal crime list.

[1028]Farahmand (1989-1990) 16 *Journal of Legislation* 104.

[1029]*Ibid*. For further information with regard to electronic scanning, refer to Chapter 4 of this thesis and Chapter 7 of Barker *Abuse of Diplomatic Privileges and Immunities* 220. See further Farhangi "Insuring Against Abuse of Diplomatic Immunity" (1985-1986) 38 *Stanford Law Review* 1536.

[1030]Farahmand (1989-1990) 16 *Journal of Legislation* 104.

[1031]Ward "Espionage and the Forfeiture of Diplomatic Immunity" (1997) 11 *International Lawyer* 667.

[1032]*Ibid*. This would clearly indicate to the diplomatic community and foreign States that espionage is not a proper diplomatic function. Abolishing immunity for espionage in the receiving State could effectively put a stop to espionage by foreign officials but at the same time could eliminate one of its modes of intelligence collection.

[1033]Refer to 6.4 of this Chapter.

[1034]Farhangi (1985-1986) 38 *Stanford Law Review* 1536.

However, in order for the receiving State to enter the mission premises, it must show reasonable cause as to the questionable conduct within the embassy.[1035]

The Vienna Convention contains no provision for its amendment; however, Article 39 of the Vienna Convention on the Law of Treaties[1036] creates as a general rule that treaties may be amended by agreement by the parties. In order for the amendments to be valid and effective, all signatory nations to the Vienna Convention must unite and agree to the amendments.[1037] It may be extremely difficult to amend the Vienna Convention from a logistic perspective, but in the event that the interests of the various States are aligned it should not prove impossible, even in circumstances of the super-powers' general reluctance to agree on any amendments to the Vienna Convention.[1038]

6.3 Use of the Functional Necessity Theory

Barker believes that privileges and immunities are founded primarily on a functional foundation; however, the privileges and immunities are inextricably linked to the representative character of the State, i.e. the use of the personal representative theory.[1039] In other words, the extent of the privileges and immunities granted to diplomatic agents who are representatives of the receiving States must be limited to those same privileges and immunities which are granted to the sending State, unless they can be justified with

[1035]Farahmand (1989-1990) 16 *Journal of Legislation* 104. If these requirements are met, the receiving State's officials, accompanied by selected representatives of other signatory nations, must be allowed to search the mission premises.

[1036]Vienna Convention on the Law of Treaties 23 May 1969, 455 U.N.T.S. 331 (1980) [hereinafter referred to as Law of Treaties Convention].

[1037]Farahmand (1989-1990) 16 *Journal of Legislation* 102 and Wallace *International Law* 242-243. If the US acted unilaterally it would send a negative message to both signatory and non-signatory nations and would lead to retaliatory action against American diplomats abroad. The possibility of retaliation is very real, especially in countries like Belgium, France, Luxemburg and the Netherlands, where treaties prevail over inconsistent statutes.

[1038]*Ibid* and Davidson *et al* "Treatise, Extradition and Diplomatic Immunity: Some Recent Developments" (1986) 35 *International & Comparative Law Quarterly* 433.

[1039]Barker *Abuse of Diplomatic Privileges and Immunities* 190 and Hickey Jnr and Fisch "The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States" (1989-1990) 41 *Hastings Law Journal* 358.

the use of the functional necessity theory.[1040] Furthermore, the privileges and immunities of diplomatic agents are made possible through the principles of sovereignty, independence, equality and dignity.[1041]

Although it may be argued that all theories are intertwined into diplomatic immunity, functional necessity is the dominant theory.[1042] The preamble of the Vienna Convention shows intent for the use of the functional necessity theory as a basis. However, it also deviates from this theory significantly by stating diplomatic immunity in terms of individuals instead of in terms of their conduct, as dictated by the theory.[1043] The result is that diplomats' and their families' unlawful actions, violent or not, are universally shielded by immunity.[1044] Drafters and signatories of the Vienna Convention lost sight of the true basis of the theory; namely, that it is the efficient functioning of the process and not the agent.[1045]

The use of this theory allows for the undisrupted, efficient functioning of diplomats. Their purpose is to promote international discourse, which is essential for peace; a noble goal.[1046] The need to ensure the freedom and independence of the diplomatic agent was and still is a priority for those who formulated the Vienna Convention. Thus the fundamental justification for granting exemptions from local law is to limit interference

[1040]Barker *Abuse of Diplomatic Privileges and Immunities* 190.

[1041]Barker *Abuse of Diplomatic Privileges and Immunities* 191. These four principles are referred to interchangeably in explanation of sovereign immunity, diplomatic immunity, armed forces and State immunity. For the origin of the use of these principles, refer to Barker *Abuse of Diplomatic Privileges and Immunities* 195-196.

[1042]Wright (1987) 5 *Boston University International Law Journal* 203.
[1043]McClanahan *Diplomatic Immunity* 176.

[1044]Wright (1987) 5 *Boston University International Law Journal* 203 and McClanahan *Diplomatic Immunity* 176.

[1045]Barker *Abuse of Diplomatic Privileges and Immunities* 225.

[1046]O'Neil "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978" (1979-1980) 54 *Tulane Law Review* 667.

with the diplomatic mission and to ensure its independence.[1047] The argument that family members also perform official functions is weak and the reason behind the granting of privileges and immunities is to secure the independence and freedom of the diplomatic agent.[1048]

It has been stated that legal actions against the diplomat would cause disruptions in the diplomatic process. His status and stance as an international spokesperson for his country would be affected when prosecuted for a crime.[1049] The diplomat's attention would be diverted from his political duties, to trying to defend himself and his family.[1050] Lines of communication between the countries would be affected and the entire process of international dealings would be at risk.[1051] Diplomatic immunity aims to avoid such problems and further decrease any reprisal, by promoting an orderly and responsible manner of conducting international affairs.[1052] This concept gives rise to the belief that in order to function efficiently the diplomat must engage in criminal offences that harm or violate the citizens of the receiving State.[1053] It hardly makes any sense that the Vienna Convention allows for the bringing of civil suits in certain circumstances and not the prosecution of criminal acts. Which could cause a bigger international problem between States? It is argued by O'Neil and Barker that bringing a civil suit does not harass a diplomat or affect the process of his functions, because the plaintiff has no personal

[1047]Barker *Abuse of Diplomatic Privileges and Immunities* 225 and Southwick "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms" (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 88.

[1048]Barker *Abuse of Diplomatic Privileges and Immunities* 225.

[1049]O'Neil (1979-1980) 54 *Tulane Law Review* 668. A country could institute action against an employee of an embassy in order to alter the embassy's position in some international issue.

[1050]The extension of diplomatic privileges and immunities to members of the family of a diplomatic agent is legally justifiable in terms of the functional necessity theory to ensure the efficient functioning of the diplomatic mission.

[1051]O'Neil (1979-1980) 54 *Tulane Law Review* 668. Refer to Vattel in Barker *Abuse of Diplomatic Privileges and Immunities* 224 and cases *Republica v De Longchamps* (1784) 1 Dallas 111, *The Schooner Exchange v McFaddon* (1812) 7 Cranch 116 and *Hellenic Lines Ltd v Moore* 345 F.2d 978 (D.C.Cir.1965).

[1052]O'Neil (1979-1980) 54 *Tulane Law Review* 669.

[1053]O'Neil (1979-1980) 54 *Tulane Law Review* 669-670. Furthermore, the protection of diplomats from civil suit is not supported by the functional necessity theory for under the theory only suits that impede the diplomatic process should be prohibited.

influence on the diplomatic process, while prosecution could affect diplomatic relations between States, whether it was intended or not.[1054] This point of view cannot be accepted in its entirety. It can be argued that in both civil suits and criminal prosecutions, the plaintiff and complainant are not harassing the diplomat but seeking justice for the harm suffered.

There are three reasons for relying on this theory. First, a diplomatic agent should be free to perform the duties of his State. This has two aspects, the degree of immunity given and the immunity necessary for the performance of his diplomatic function.[1055] Second, it permits the diplomat to perform *bona fide* functions in complete freedom and independence. However, would this theory still be valid if he committed crimes?[1056] And lastly, limiting diplomats' immunity to official functions has the effect of repudiating diplomatic immunity.[1057] These categories were formulated in the 1930s. Times have changed since then and although the first and last category, with reference to service and domestic staff, still apply today, there are diplomats who do not perform *bona fide* functions.[1058] Furthermore, the last category might promote the maintenance of the receiving State's internal public safety but at the cost of stripping away diplomatic immunity, even if it is only for private acts, which does not conform to State or international practice.[1059] Practice thus indicates the adequacy and reasonableness of immunity measured in what is necessary for the independent performance of the agent. In other words, it serves a useful purpose.[1060]

[1054]Barker *Abuse of Diplomatic Privileges and Immunities* 226-227 and O'Neil (1979-1980) 54 *Tulane Law Review* 671.

[1055]Ogdon *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1936) 176 -181. Refer to Barker *Abuse of Diplomatic Privileges and Immunities* 222.

[1056]Ogdon states that the test is not whether the acts were public, private or professional, but whether the exercise of jurisdiction over the agent would interfere with the performance of his official functions. If this is the case, then it places diplomats above any local law.

[1057]Ogdon *Juridical Basis of Diplomatic* 176 -181. Refer to Barker *Abuse of Diplomatic Privileges and Immunities* 222-223.

[1058]Barker *Abuse of Diplomatic Privileges and Immunities* 223.

[1059]*Ibid*.

[1060]*Ibid*.

What is a receiving State to do when a diplomat engages in activities that go beyond his functions? The only recourse under the Vienna Convention is to request the recall of the diplomat, to declare him *person non grata*, to request waiver of immunity, and as a last resort to end relations between the receiving and sending States.[1061] It can be argued that these methods in themselves can affect the diplomatic process, especially ending the diplomatic process between States.[1062] So why not limit privileges and immunities of offenders so they can be dealt with and thus preserve the diplomatic process? This argument is obvious, in that these privileges and immunities are to benefit the diplomatic process and not the individual, and committing crimes and violent acts does not promote friendly relations between States.[1063] It has further been mentioned that the immunity granted is for the protection of diplomatic agents and the premises. The question to be asked is whether the protection granted is for violence against diplomats or protection against prosecution?[1064]

Regardless of the differences between the reasons for immunity, it has been accepted that the functional theory is important in order to avoid war and injury. Vattel said that it is a "necessary instrument" in order to accomplish their objectives and perform their duties safely, freely, faithfully and successfully.[1065] This necessity has led States to be willing

[1061]Barker *Abuse of Diplomatic Privileges and Immunities* 228.

[1062]*Ibid*.

[1063]Even Article 3 of the Vienna Convention states that *"(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law" and "(d) ascertaining by all lawful means, conditions and developments in the receiving State*." Article 41 even goes on to state that a diplomat must respect all the laws and regulations of the receiving State. Accordingly, where a diplomat abuses his privileges and immunities, he is not entitled to the benefit of immunity from prosecution in the receiving State; and in effect he has forfeited his rights to immunity.

[1064]Over the last couple of decades there has been an increased move to greater protection of internationally protected persons, including diplomats, as indicated by the International Terrorism: The Protection of Diplomatic Premises and Personnel, Organisation of American States' Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, European Convention on the Suppression of Terrorism and the United Nations Vienna Convention on the Representation of States in Their Relations with International Organisations.

[1065]Ogdon *Juridical Basis of Diplomatic Immunity* 170-171.

to accept limitations of jurisdiction upon their own territory, which has been done for many decades: this is the reason diplomatic immunity has been sanctified by usage.[1066]

6.4 Bilateral Treaties

Treaties fulfil a broad range of functions in international law and cover a variety of subject matters. A treaty can be defined as "*an international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*".[1067] They range from bilateral treaties whereby two States secure reciprocal rights and obligations to multilateral treaties, which act as legislation in the international system.[1068] Bilateral treaties can help with the expanding of the Vienna Convention. The Law of Treaties Convention is a multilateral treaty of a blend of codification and progressive development that guides States on the law of treaties.[1069] It is interesting to note that although a State is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts that would defeat the object and purpose of such a treaty until it has made it clear that its intention is not to be bound by the treaty.[1070]

Article 2 of the Convention allows for agreements whereby two or more States can seek to establish a relationship amongst themselves governed by international law, and as long as it is agreed upon, there will be a legal relationship.[1071] A treaty is the main instrument

[1066]At the same time, States are sovereign enough not to have to accept a diplomat from another State.

[1067]Article 2(1)(a). A few comments must be made on the definition of a treaty. First, it not only applies to agreements between States, but also between States and international organisations. Secondly, oral agreements between state representatives may create legal obligations for States, but they do not qualify as treaties. Thirdly, treaties go by many names, such as convention, declaration, charter, covenant, pact, protocol, act, statute, concordat, exchange of notes and memorandum of agreements. Industrial and economic developments cause States to interact with one another, international communications become more intimate, and the relations between States grow in size and become more complex.

[1068]Davidson *Law of Treaties* (2004) xi.

[1069]Dugard *International Law* 328 and Shearer *Starke's International Law* 11ed (1994) 397.

[1070]*Ibid*.

[1071]Shearer *International Law* 397.

the international community possesses for the purpose of developing international cooperation, as contracts, leases and settlements govern national law. The object of treaties is to impose binding obligations on the States who are parties to them.[1072]

It should be borne in mind that a series of treaties laying down a similar rule may produce a principle of customary international law to the same effect.[1073] Treaties include diplomatic acts, state laws, state juridical decisions, and the practice of international organs. An example is bilateral extradition treaties concluded during the 19th century, from which general rules have emerged, such as that persons accused or convicted of political offences are not extraditable. Another example is bilateral agreements between States with regard to consular privileges and immunities.[1074] In addition, a rule in a treaty originally concluded between a limited number of parties only may be generalised by independent acceptance.[1075] Lastly, a treaty may hold significant evidentiary value as to the existence of a rule, which has law by an independent process of development.[1076] So, if many States start to conclude treaties that are similar to one another, perhaps combining all of the treaties into a multilateral treaty would be advisable.

The concept of "bilateralisation of multilateral conventions" is a novel one, where the general rules of a multilateral convention are formed into bilateral agreements confirming

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[1072]Shearer *International Law* 399. The binding force of a treaty is the principle of *pacta sunt servanda* to carry out the terms of the contract in good faith. However, although this principle is of great importance, nations sometimes do not hold true to their agreements in the international sphere. Francisco de Victoria in Ogdon *Juridical Basis of Diplomatic Immunity* 168 footnote 7 said that "*for he who enters into a pact of his own free will, is nevertheless bound thereby. From all that has been said, a corollary may be inferred, namely: that international law has not only the force of a pact and agreement among men, but also the force of law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law*."

[1073]Shearer *International Law* 40.

[1074]*Ibid*.

[1075]*Ibid*.

[1076]*Ibid*. In order for treaties to have the ability to be brought before UN organs, the treaty needs to be registered according to article 102 of the UN Charter. The treaty enters into force in the manner and date as the treaty provides for or as the parties have negotiated. For instance in multilateral treaties it would come into force following the receipt of a stipulated a number of ratifications or accessions.

or amplifying the rules of the Convention.[1077] Both the Vienna Convention and the Consular Convention contain provisions that permit States to conclude agreements between themselves to supplement, extend or limit provisions in the Conventions.[1078] This means that both Conventions have established a set of minimum standards for the treatment of diplomatic and consular personnel. Thus, States are free to enter into other agreements.[1079] An example of a bilateral treaty is the treaty between the US and China signed in 1981 extending full criminal immunity to members of consulates and their families. Another example is between the US and Canada, signed in 1993, extending full immunity to administrative and technical embassy staff.[1080] Even before this, in 1924, a treaty was signed by Czechoslovakia and Italy with regard to diplomatic immunity.[1081] By using this approach and executing agreements between themselves, those who fear diplomatic persecution can continue using the articles in the Vienna Convention, but more importantly, functional necessity will blossom into a rule of customary international law, whereby all States will be bound to respect agreements and functional immunity.[1082] It must be noted that any bilateral agreements entered into by States will supersede the Articles stated in the Vienna Convention. Furthermore, the treaty remains the best, most versatile means to regulate the conduct of States.[1083] Therefore, a receiving and a sending State can enter into a bilateral treaty stating terms as to when automatic waiver can take place or whether a diplomat, staff and their families can be prosecuted.

[1077]Shearer *International Law* 56 at footnote 6.

[1078]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 576. Refer to Article 47(2)(b) of the Vienna Convention and Article 73(2) of the Consular Convention.

[1079]*Ibid*.

[1080]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 576-577.

[1081]Ogdon *Juridical Basis of Diplomatic Immunity* 200.

[1082]Maginnis "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations" (2002-2003) 28 *Brooklyn Journal of International Law* 1022. In addition, this concept will allow States to choose how their personnel will be treated and how foreign representatives will be treated within their borders.

[1083]Davidson *Law of Treaties* xi. Treaties have been described as the "*cement that holds the world community together*".

There have been no disagreements among the international community members on the use of bilateral treaties with regard to consular immunities. If this is the case, why do they not use these treaties to restrict diplomatic privileges and immunities? For instance, the US, UK and South Africa could have bilateral treaties with countries they know have abused their immunity and go even further by limiting the size of those countries' mission.

6.5. Proposal for a Permanent International Diplomatic Criminal Court

The proposal for a Permanent International Diplomatic Criminal Court foresaw a court with compulsory jurisdiction over alleged criminal acts committed by individual diplomats.[1084] It would provide an acceptable means of adjudicating offences arising under the scope of diplomatic immunity.[1085] It would be formed through an amendment to the Vienna Convention allowing its creation. The court would have the power to impose fines and imprison diplomats. With the adoption of the Court, through a staff of attorneys attached to the Court to play both prosecutor and accused, the likelihood of the receiving State obstructing discovery is diminished.[1086] The Court's members would consist of legal experts from States party to the amendment and will be selected in a manner that avoids geographical or cultural bias.[1087] Furthermore, members would not sit on any case involving suspects with whom the members share citizenship, and likewise with members of the offended State. A staff of investigators attached to the Court would

[1084]Compulsory jurisdiction is needed to prevent the Court from becoming a political instrument of States. Anything less would render the Court redundant.

[1085]Wright (1987) 5 *Boston University International Law Journal* 185.

[1086]Wright (1987) 5 *Boston University International Law Journal* 186. This will preserve the neutrality of the Court and the prosecutorial staff would possess discretion to dismiss charges against the suspected diplomat if there was insufficient evidence.

[1087]*Ibid*. There may even be the use of juries to contribute to fair adjudication and help offset possible conflict of interest.

conduct discovery of evidence, thereby reducing any conflict between the sending and receiving States.[1088]

In addition, the Court would be responsible for the administration of its own penal facilities.[1089] This means that the Court will have the discretion to impose monetary fines as sentences. Each State would be obliged to create and replenish individual accounts. Judgments would then be executed against the defendant's State account and transferred into the victim's State account.[1090] The Court would also possess the power to imprison diplomats. Threat of imprisonment generally deters criminal acts.[1091] The Court would administer and own its own system of penal facilities, which would be accorded international organisation status similar to that of UN agencies.[1092] The initial arrest of a diplomat would be made by the police force in the receiving State under the watchful eye of an impartial third State. This would further ensure that the receiving State does not abuse its privilege to enter the embassy while being inviolable. Custody of the accused diplomat would be given to officials of the Court's penal system as soon as possible.[1093] Rules of discovery, procedure and evidence would be formed before the start of the Court operation using common regulations between the various States' civil and penal codes. The Anglo-American concept of "beyond a reasonable doubt" would be adopted as the standard onus of proof, to ensure a fair inquisitorial procedure.[1094]

[1088]Wright (1987) 5 *Boston University International Law Journal* 186 and Ross (1989) 4 *American University Journal of International Law & Policy* 195. These staff will be accorded immunity from the receiving State's jurisdiction to the extent of their official capacity.

[1089]Barker *Abuse of Diplomatic Privileges and Immunities* 153 and Goodman "Reciprocity as a Means of Curtailing Diplomatic Immunity Abuse in the United States: The United States Needs to Play Hardball" (1988-1989) 11 H*ouston Journal of International Law* 195.

[1090]Wright (1987) 5 *Boston University International Law Journal* 187. This notion provides for compensation without interfering in the economy of the State. The use of accounts, furthermore, eliminates enforcement difficulties arising out of legal judgments against individuals whose assets might be beyond the reach of attachment in the receiving State.

[1091]*Ibid*.

[1092]Wright (1987) 5 *Boston University International Law Journal* 187-188. Such facilities would lighten fears of biased treatment of inmates and avoid disputes between States over place of imprisonment.

[1093]Wright (1987) 5 *Boston University International Law Journal* 188.

[1094]Wright (1987) 5 *Boston University International Law Journal* 186, at footnote 54.

The advantages of such a Court are twofold. Firstly, the Court would operate free from potential bias of local proceedings and secondly, the use of a court outside of a bilateral agreement excludes the possible termination of diplomatic relations between the two nations in extreme cases.[1095] While this notion seems like an attractive option, it has been considered to be unworkable, as a result of the difficulty of obtaining evidence and ensuring the securing of witnesses and costs. More importantly, it would undermine the rationale of diplomatic privileges and immunities.[1096] A practical difficulty relates to the method of bringing a case before the court. The Court would initiate process against an individual diplomat only upon receipt of a complaint from the receiving State, which would be required to be filed simultaneously with the arrest of the individual.[1097] This means that the officials of the receiving State must make an arrest, and by doing so, it would constitute a clear infringement of the inviolability of the person of the diplomatic agent.[1098] Finally, the Permanent International Diplomatic Criminal Court would only be a court with criminal jurisdiction, thus ignoring the aspect of civil and administrative law abuses.[1099] A further problem with this proposal is that even though there is an element of deterrence present in prosecuting diplomats who commit crimes, there are instances when this form of deterrence will not succeed, especially when a diplomat is so intent on carrying out a violent crime that he is willing to sacrifice his own life.[1100]

[1095]Goodman (1988-1989) 11 H*ouston Journal of International Law* 195-196 and Ross (1989) 4 *American University Journal of International Law & Policy* 195.

[1096]Barker *Abuse of Diplomatic Privileges and Immunities* 155. It could also be argued that although the ICC and ICJ are independent and considered successful, not many States adhere to their rulings and decisions. They are considered courts without teeth. One proponent of the Court has however suggested that it would have been possible under such a system to have arrested and prosecuted the diplomat responsible for the shooting of WPC Fletcher. What is not addressed is the difficulty of identifying the diplomat who carried out the shooting. To identify the shooter would depend on testimonies of those persons inside the Libyan People Bureau and the probability of those persons identifying the gunman is not strong. In addition, even if identified, obtaining a conviction against him would be difficult.

[1097]Barker *Abuse of Diplomatic Privileges and Immunities* 154.

[1098]*Ibid*.

[1099]*Ibid*.

[1100]Wright (1987) 5 *Boston University International Law Journal* 189. This proposal would have worked in the Fletcher shooting incident. The Libyan's People Bureau might have thought twice before firing into the crowd of demonstrators if they knew they could be prosecuted. Even if they did fire, the British police would have been able to apply for a warrant and search the Bureau and arrest the diplomats in the presence of a third party State. The diplomat would have appeared in the Permanent International Diplomatic

Another problem is with reference to the accounts.[1101] It is a good idea to have such a system in place, but what would be the result if States do not cooperate by paying money into the accounts? It could result in whichever State pays more money controlling the Court. Further, who or what would be the watchdog over the Court and review its rulings, and would it be free to decide on everything? Where will the penal facility be situated and with what system? All these questions could pose major problems.[1102] Another problem with this Court relates to what and whose substantive law would apply.[1103] For instance, a crime committed in the US might not be a crime in Iraq. A single body of international law would be reasonable but not possible or practical. The same standard of proof and punishment would have to be given to all diplomats committing crimes.[1104]

It has been suggested that the International Criminal Court (ICC) should have jurisdiction over diplomatic criminal jurisdiction and not be limited to genocide, crimes against humanity and serious violations of the laws and customs applicable to armed conflict. However, the problem with this suggestion is that the ICC deals with large-scale conflicts and acts, like the incidents in Rwanda and Yugoslavia, rather than acts committed by diplomats.[1105] Wirth states that the practice of granting immunity is necessary to ensure the maintenance of international peace. He further asserts that they should even be granted immunity against "*core crime prosecution*" unless waived.[1106] Thus, the court

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Criminal Court and if found guilty would have been sentenced to prison and the Fletcher family would have felt a sense of justice for the death of their daughter.

[1101]*Ibid*.

[1102] See Shapiro "Foreign Relations Law: Modern Developments in Diplomatic Immunity" (1989) *Annual Survey of American Law* 297.

[1103]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 593.

[1104]*Ibid*.

[1105]Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 593 and Bekou and Cryer *The International Criminal Court* (2004) xvi. It can be argued that Ayree's serial rapes could constitute acts against humanity but would not interest the court. It has also been suggested that the ICJ be used as a possibility to adjudicate cases. However, the ICJ was created to decide on civil cases and not criminal disputes.

[1106]Wirth "Immunities, Related Problems, and Article 98 of the *Rome Statute*" O Bekou and R Cryer (ed) *The International Criminal Court* (2004) 348.

cannot be successful if no evidence can be used in court or the diplomat cannot be brought before court. The ICC will then be viewed as 'a giant without arms and legs' and hence not effective.[1107]

In order to predict the success of the Permanent International Diplomatic Criminal Court, the success of the ICJ should be considered. The enforcement mechanisms for ICJ decisions are important in considering compliance with ICJ decisions. The availability of effective enforcement mechanisms will generally be a circumstance inducing compliance and in international law, adjudication is frequently described as weak for its lack of enforcement mechanisms.[1108] The ICJ has a special role to play in unifying the international legal system, yet budgetary constraints by the UN have weakened the ICJ.[1109]

A good example of the ICJ's success is the Tehran Hostage incident. In the Tehran case, Iran was invited to participate in the Security Council's discussions and initially indicated that it would accept the invitation, but when the matter was debated, the Iranian representative was absent.[1110] Even when the matter appeared before the ICJ, Iran was not present to defend their case. Furthermore, approximately eight months after the judgment of the ICJ the hostages were not released.[1111] With this in mind, if a party is not present to resolve the dispute, then how would the Permanent International Diplomatic Criminal Court be successful? Even when the hostages were released, it has been argued that they were not released as a result of the ICJ judgment, but rather that

[1107]Bekou and Cryer *International Criminal Court* xviii.

[1108]Schulte *Compliance with Decisions of the International Court of Justice* (2004) 36-37.

[1109]Charney "The Impact of the International Legal System of the Growth of International Courts and Tribunals" (1998-1999) 31 *New York University Journal of International Law & Politics*703 and Kingsbury "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1998-1999) 31 *New York University Journal of International Law & Politics* 693.

[1110]Schulte *Compliance with Decisions of the International Court of Justice* 164-165. Article 94(2) of the UN Charter states that if any party does not comply with ICJ decisions, it may seek recourse from the Security Council, which can make recommendations or decide upon measures to be taken to give effect to the judgment.

[1111]Schulte *Compliance with Decisions of the International Court of Justice* 169.

negotiations were conducted and were successful.[1112] There have been several instances of non-compliance with ICJ judgments and as a result of the superiority of the court it has little to say on the success of the proposed Diplomatic Court.[1113]

For the last two decades, a variety of tribunals and courts have come into existence in order to deal with various international problems.[1114] With so many courts and tribunals available, some problems have arisen. One problem is that there are inevitably different outcomes in different forums.[1115] The very essence of law is that like cases must be treated alike and, should there be too many courts, the legitimacy of international law could be at risk.[1116] Furthermore, it could lead to overlapping jurisdiction. So, for instance, the ICJ has already dealt with the Tehran hostage case and thus is a valid court to try international disputes. With the formation of the Permanent International Diplomatic Criminal Court there will be two courts having jurisdiction to resolve diplomatic disputes.[1117] The range of problems arising from this is large and somewhat chaotic and thus could lead to injustice.[1118] Another problem is that the connection between international courts and tribunals and national law and their institutions will be affected, which in turn will impact on State sovereignty and divide nations even further.[1119] A strength of having many international courts or tribunals is that it allows

[1112]Schulte *Compliance with Decisions of the International Court of Justice* 171.

[1113]Other non-compliance judgments refer to the Nicaragua case, where not even the Security Council dealt with the matter and the *LaGrand* case where Walter LaGrand was executed despite the ICJ allowing for a stay in execution. For more on the judgments refer to Schulte *Compliance with Decisions of the International Court of Justice* 184 and 253. It must be stated, though, that even though compliance has occurred in several instances it does not mean that the ICJ is a complete failure. The problem occurs due to the nature and importance of the cases that have not been complied with.

[1114]These include the World Trade Organization system, International Tribunal for the Law of the Sea, UN Compensation Committee, World Bank Inspectional Panel and its Asian and Inter-American Development Bank counterparts, North American Free Trade Agreement, Aredean and Mercosur System, the ICC, African Court of Human and Peoples Rights, to name a few.

[1115]Kingsbury (1998-1999) 31 *New York University Journal of International Law & Politics* 682.

[1116]Charney (1998-1999) 31 *New York University Journal of International Law & Politics* 699.

[1117]For examples of overlapping of jurisdictions refer to Kingsbury (1998-1999) 31 *New York University Journal of International Law & Politics.* 683.

[1118]Kingsbury (1998-1999) 31 *New York University Journal of International Law & Politics* 683 and 685.

[1119]Kingsbury (1998-1999) 31 *New York University Journal of International Law & Politics* 694-695.

for a degree of experimentation and exploration, which in turn could lead to the improvement of international law.[1120]

6.6 Conclusion

The various methods suggested do not completely solve the problem of abuse, but could help reduce the frequency of abuse. Reduction of diplomatic immunity does not interfere with the diplomatic process, nor does it affect the concept of functional necessity. The main weakness of the Vienna Convention is its failure to provide an adequate deterrent against violent conduct,[1121] as a result of the wide scope of immunity given to diplomats and the erroneous application of the functional necessity theory. The primary difficulty in amending the Vienna Convention would be procuring the parties' agreement to the amendments and giving effect to them.[1122] Even super powers like the US and the UK have expressed reservations and they are the countries that are mostly affected by diplomatic abuse.[1123]

As long as there are independent sovereign States, there will always be a need for a strong functional dependence on diplomatic privileges and immunities.[1124] These immunities have enabled diplomats to work abroad with peace of mind when performing difficult tasks in sometimes hostile States.[1125] The law of diplomatic privileges and immunities is required to balance the risk that diplomats will be able to hide behind the cloak of diplomatic immunity against the risk that the receiving State will harass and oppress such personnel.[1126] Functional necessity aims not only at allowing the individual

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[1120]Charney (1998-1999) 31 *New York University Journal of International Law & Politics* 700.

[1121]*Ibid*.

[1122]Shearer *International Law* 426.

[1123]Wright (1987) 5 *Boston University International Law Journal* 210.

[1124]McClanahan *Diplomatic Immunity* 184.

[1125]*Ibid*.

[1126]Barker *Abuse of Diplomatic Privileges and Immunities* 241.

diplomat to function freely and effectively, but also ensuring the efficient functioning of the diplomatic process as a whole, which requires the fullest protection be given to every individual, even if he goes beyond his function.[1127] Thus the only remedies made available by the Vienna Convention are adequate enough to deal with the present problems of abuse.[1128]

Although there are few instances of Conventions which limit diplomatic immunity, there is nothing in the law of nations preventing States from entering into bilateral treaties to restrict immunity prescribed by international law.[1129] Bilateral treaties are the better option and should be applied by countries in order to find suitable degrees of immunity between diplomatic personnel and their families. Furthermore, it would be open to the States to form written agreements that suit their diplomatic needs and adhere to them. The Permanent International Diplomatic Criminal Court promises to be a good initiative. However, it could have the effect of the ICC and ICJ where Court rulings and findings will not be taken seriously and powerful States can just ignore them. Furthermore, it requires an amendment to the Vienna Convention, which, as already indicated above, is problematic.

The law of diplomatic immunity must conform to standards which society approves of otherwise people cannot be expected to obey it.[1130] However, it seems that States are not willing to take that leap into further limiting immunity. For instance, if diplomatic immunity is not abused, public opinion may support the privileges, but this would not be the case if diplomats constantly abuse their rights and position. It thus all depends upon the ability of each State to respect the interests of others. In addition, all these proposals and solutions to curb abuses have the danger of negative reciprocity, thus hindering the

[1127]Barker *Abuse of Diplomatic Privileges and Immunities* 242.

[1128]McClanahan *Diplomatic Immunity* 176 and Hickey Jnr and Fisch (1989-1990) 41 *Hastings Law Journal 374*-375 and 379-380.

[1129]Ogdon *Juridical Basis of Diplomatic Immunity* 199.

[1130]Ogdon *Juridical Basis of Diplomatic Immunity* 212. Even theorists like Aquinas, Kant, Savigny and Vinogradoff agree with this comment.

diplomatic process.[1131] The State that wants to curtail immunity to the extent that it no longer protects diplomats and their functions must be prepared to destroy the freedom of intercourse between two friendly nations.[1132]

[1131]Shapiro (1989) *Annual Survey of American Law* 294.

[1132]Ogdon *Juridical Basis of Diplomatic Immunity* 208.

CHAPTER 7

CONCLUSION

"As states are notional rather than flesh-and-blood persons, they cannot communicate in the manner of individuals, but must do so through representative human persons."

J Hoffman[1133]

Diplomatic immunity is one of the earliest principles of international law, dating back to antiquity. Its development was due to various social functions and bonds between States. The main bonds ensuring immunity and privileges were religion, culture and language. The Roman ideas and habits of immunity have been firmly established and have formed the basis of modern practices. Immunity was based on natural law making diplomats sacred and, as Alciati said "*Time and seasons, come and go, but the Roman system remains in all its splendour and greatness – as the ancients said, it is a work of the eternal gods*".[1134] By the Middle Ages, immunity for all diplomats existed in most countries, but unlike today they were not immune for acts committed during their mission.

The establishment of resident embassies was the genesis of modern diplomacy and crystallised three theories that influenced the rationale for diplomatic immunity. These theories are exterritoriality, personal representation and functional necessity. Exterritoriality worked around the concept that the embassy was not part of the receiving State but was the property of the sending State. Any crimes committed against or by the members of that embassy could not be lawfully prosecuted in the receiving State. This theory soon developed and included not only the embassy, but the residence of the ambassador, and was then extended to his staff and family. The personal representation theory was a favourite theory in the early development of diplomatic immunity. The basis of this theory was that diplomats received immunity as if they were the foreign sovereign. This was out of respect and avoided any form of conflict. The last and most

[1133]Hoffman "Reconstructing Diplomacy" (2003) 5 *British Journal of Politics and International Relations* 526.

[1134]Frey and Frey *The History of Diplomatic Immunity* (1999) 120.

important theory is based on the idea that immunity is necessary and recognised for the efficient functioning of the diplomat. This theory is incorporated in to the Vienna Convention as the dominant theory. However, due to the position and status of the diplomat, the personal representation theory is also reflected, although not so obviously. Diplomats have been given a unique international legal status so they can represent their country without fear of intimidation, interference and reprisal.

There have been several attempts to codify customary practice of diplomatic immunity; however the Vienna Convention in 1961 finally managed to gain over 150 signatories to agree to 55 Articles on Diplomatic Relations. This Convention ensured only that the functional necessity theory is prominent and that immunity would be granted in order to protect the functions of the diplomat and ensure he could perform them free from interference. Furthermore, it limited absolute immunity, especially with regard to civil matters and classified diplomats according to their official functions. These changes helped decrease immunity for civil jurisdiction, but left it absolute for criminal jurisdiction.

Although the Vienna Convention can be considered a good source of international law it is evident that there are still practical difficulties in implementing it. The embassy is protected against entry by the receiving State and is the perfect instrument to harbour terrorists and criminal offenders. Diplomatic bags are one of the main areas of abuse. Since there is nothing in the Vienna Convention to regulate the use of diplomatic bags, diplomats smuggle anything, from drugs to people, in them. Personal inviolability of diplomats has two aspects, one in that they cannot be detained or arrested; and the other that they cannot be prosecuted in a court of law. With this type of immunity, diplomats, staff and families can murder, rape, assault or commit traffic offences and in most cases not be punished at all, leaving the victim or the victim's family with no sense of justice. It seems that the Vienna Convention allows for unrestrained licence for diplomats, staff and their families to do what they want without consequences. This has been evident in the numerous examples provided.

The Vienna Convention does offer some remedies to States. The main remedies are to waive immunity, to declare an offender *persona non grata*, to prosecute the diplomat in the Sending State, and to break diplomatic ties with the offending country. These remedies have not been successful in limiting or deterring abuse. Waiver is hardly used, and when it is used, it is due to some political reasons. States also rarely declare offenders *person non grata* and when they do, it is due to the fact that waiver was not granted. Trying to prosecute the offender in the sending State is difficult and expensive. Furthermore, this type of remedy is more effective in civil cases rather than in criminal ones. One of the reasons is that a crime in one country might not be a crime in another. Breaking diplomatic ties is effective in ensuring members from the receiving State never break the law again, but this is a drastic measure and will complicate and strain future relations between States even further.

Diplomatic immunity is primarily dependent on reciprocity. Every State has a right to send and receive representatives. No State is obliged to send or receive diplomats, although it is natural to do so, resulting in establishing a reciprocal duty of respect. At the same time, the sending State has a duty to the receiving State to employ credible people to represent their country. It must ensure that the family members strictly adhere to local laws. Reciprocity is self-enforcing, in that States will think before acting against diplomats because their own representatives will be vulnerable in the foreign State. The unilateral removal of criminal immunity puts diplomats at risk. Nevertheless, this does not stop foreign representatives and their families from abusing their immunity.

The UK and US have attempted to provide a solution to the abuses. The UK has the Diplomatic Privileges Act, the US has the Diplomatic Relations Act and South Africa has the Diplomatic Immunities and Privileges Act. All these laws give effect to the Vienna Convention and compel diplomats to have insurance. Although this is a possible measure of ensuring some form of liability, there is still concern as to whether or not diplomats allow their insurance to lapse, leaving no recourse. In addition, this measure applies in most cases only to civil suits.

The UK identified five areas of the Vienna Convention where a stricter policy should apply. Firstly, diplomats and staff should be classified into the appropriate categories and there needs to be clarity about who falls into the definition of 'family', in order to determine what immunity they are entitled to. This is essential in order for the receiving State to know whether they can prosecute an offender or adhere to the Vienna Convention. Secondly, two proposals were considered in order to limit the size of the mission. The first, which was not viable, was to impose ceilings on the size of all missions. The second option, which is more practical, is to limit missions according to their relations to the sending State. The expansion of diplomatic networks meant an increase in staff, thus leading to more people with immunity, which in turn means more possibilities of abuse. Within this technological age, the size of a mission can be questioned. Governments have a right to limit the size of a mission as in accordance with Article 11. The use of communication is designed to augment information flows between governments and not to displace it.[1135] The flow of information discharges responsibilities more quickly, more securely and more cheaply.[1136] The telephone is personal and affords immediate response.[1137] While there is a disadvantage in that there is an absence of human contact, this can be easily overcome through the use of the Internet and video conferencing. This method is a sophisticated and mostly secure method of presenting visual images and audio responses.[1138] So with these forms of telecommunications, why not limit the size of a mission to the most important diplomats and staff? This, in turn, lowers the number of persons with immunity, including their families. Thirdly, diplomatic bags, which are one of the major areas of abuse, can be scanned or searched by specially trained dogs in order to identify illegal items that are being smuggled. Bags that are not permitted to be opened in the presence of a representative will be sent back to the sending State. Adding the extra measures further

[1135]Meerts "The Changing Nature of Diplomatic Negotiation" J Marshall (ed) *Innovation in Diplomatic Practice* (1999) 144.

[1136]Berridge *Diplomacy: Theory and Practice* (2005) 93.

[1137]*Ibid*. Unlike written messages that are usually drafted by someone else. For the use of the telephone as a superior form of communication, refer to Berridge *Diplomacy* 93 on The White House-10 Downing Street 'hot line': the Turkish invasion of Cyprus in 1974, and the Reagan-Assad exchange to name a few.

[1138]Berridge *Diplomacy: Theory and Practice* (2005) 99 and 103. In this way, one can ascertain a person's facial expression, tone of voice and body language.

provides a form of deterrence against smuggling of items into the receiving State that eventually could lead to a breakdown in State interaction. Finally, immunity from jurisdiction was resolved by stating that the Vienna Convention should be strictly applied and the remedies be implemented more. Despite this, it is unclear as to how this would be successfully implemented.

The US, on the other hand, proposed a form of compensation for damages resulting from motor vehicle accidents with the Solarz Bill. However, the proposed fund had too many difficulties in implementation and enforcement, which resulted in its ultimate rejection. A suggestion to prosecute diplomats when committing serious criminal acts was considered in the Senate Bill No. S.1437. However, it was not adopted as a result of the nature of removing immunity unilaterally, which could negatively affect US diplomats abroad. A more successful endeavour was the implementation of the restrictive theory after the Abisinito affair, which would not impact on US diplomats in foreign countries. It would be interesting to see if the US would use this method again when the need arises, since there has not been another incident where it was used. Other suggestions concerned traffic violations, and the point system was introduced to prevent diplomats, staff and their families from driving while under the influenc or driving recklessly. The US, though, has not provided any other suggestions to deal with other criminal abuses.

South Africa has various laws dating from 1932 that deal with diplomatic immunity and privileges. It appears that South Africa has not dealt with immunity in depth, leading to the assumption that foreign diplomats and South African diplomats obey the applicable local law. However, with the new democratic dispensation, international law features more prominently in national law and judicial decisions, which is an important start. Yet, South African legislation protects diplomats from any form of suit or prosecution. Allowing for such protection impliedly consents to any behaviour by the diplomat. This, in turn is, problematic.

In the attempt to combat diplomatic abuses there have been attempts by legal scholars and legislators to solve the problem; however, it has been stated that much of the

discussion is purely academic.[1139] For instance, if the Vienna Convention is amended, it could limit criminal jurisdiction as it does civil jurisdiction. It can further limit immunity to official acts only and gives the power to the court to decide what an official function is and what it is not. If it can be decided in normal vicarious liability suits, then why not in diplomatic cases? It is a well-established concept that immunity is not for the personal benefit of the individual, but for the efficient function. Diplomatic bags can be limited to standard sizes and even a list of items can be presented of what may be imported in a bag. There should be no difficulty in limiting immunity. In order to solve the problem of abuse, the international community must weigh the safety of diplomats against the desire to hold offending diplomats, staff and families responsible for their criminal acts. Once this has been done, a final decision must be made and adhered to. However, amending the Vienna Convention would be difficult, primarily because assembling all signatories would be daunting, which does not seem a good enough reason. If abuse of diplomatic immunity is a big problem as it appears to be, then States need to take the leap of amending the Vienna Convention.

Since necessity compelled the recognition of diplomatic immunity, it cannot be seen as a temporary phenomenon. It will always exist, whenever and wherever States wish to communicate with each other. As long as independent States exist, the necessity for diplomatic immunity will continue to exist. Additionally, diplomats have a special position. Some work in extreme conditions and some diplomats, their families and embassies are constant targets terrorism and violent attacks. When incidents like these occur it reinforces the need to hold privileges and immunities and prevent such attacks. Immunity together with reciprocity ensures that various diplomats, staff and their families are protected in the receiving and sending States. The fact that States have continued to recognise such privileges and immunities indicates that their protection and necessity to perform is superior to the national law of the receiving State. However, this should not be the case. Diplomatic immunity rationale is not only based on theoretical dominance, but rather on political motives and courtesy. Thus the functional necessity theory will remain and provides a strong case for the existence of immunity.

[1139]Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *Hastings Constitutional Law Quarterly* 569.

The use of bilateral treaties is a safe option for limiting immunities with the consent of both States. Since the UK and US have a high degree of abuse, a bilateral treaty could be implemented between States that have a tendency to abuse their immunities. The disadvantage is that UK and US diplomats abroad would also have limited immunity and could be subject to harassment. The proposal for a Permanent Diplomatic Criminal Court is a solution but also has many problems. The main issues are bringing a diplomat before the court and enforcing the court's decision. Other international courts and tribunals experience problems with enforcement, which leads to the question of enforceability of this diplomatic court. A further problem is that the Vienna Convention is not a legal system, but merely a set of rules. In all legal systems, legal rules can only be successful in their application, and it could be challenging for the court as to which law, convention, treaty or practice to apply.

Although the statistics indicate that diplomatic crime is not very 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 privileged? Their criminal behaviour 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. The law on diplomatic immunity is a product of past customary practices, and although past practices cannot be changed, the present statesmen can help determine future practices.

Removing the cloak of immunity is not the solution to the problem of abuse. It must be remembered that a State is both a sending and a receiving State. As a sending State it would want its representatives to be protected and have broad privileges and immunities, but as a receiving State it would be more inclined to limit privileges and immunities. There is a need to limit the criminal immunity of diplomats, staff and their families. They should not be above the law and the international community must acknowledge this, decide on the best method of reducing their immunity, take decisive measures and firmly implement them. The international community should take a firm stance against

“protected” individuals who flaunt their rights and civil liberties to those around them. However, realistically, some diplomatic immunity and protection against prosecution for crimes committed will probably remain.

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