

Diplomatic Immunity: An Argument for Re-evaluation

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Abstract

Diplomacy is an ancient concept known to man as far back as the ancient Greeks and Romans. Through the passing of time the concept of diplomacy has continuously been developed. The evolution of this concept has followed with the great civilisations of this world. Most notable are the advancements in Europe from the medieval era to the industrial revolution. Diplomacy was first codified in 1815 by the Congress of Vienna. The 1961 Vienna Convention currently regulates the immunities and privileges of the modern diplomat. The immunities range from official acts to the conducting of personal affairs. These immunities protect the diplomat from the foreign state. The extent of these immunities has led to a range of abusive behaviour resulting in controversy.

This dissertation sets out a brief historic overview of diplomacy and theories dealing with the discourse of immunities in light of the Vienna Convention on Diplomatic Relations of 1961. A closer look is taken on the privileges and immunities a diplomat enjoys in his personal capacity, his property and his family. Furthermore the development of diplomacy in England and South Africa are discussed. Lastly the Vienna Convention sets out a number of remedies that are able to deter diplomatic agents from abusing their station. However, such remedies alone have proved to be inefficient without the immunities being limited in order to make diplomats accountable for their misconduct.

In light of the severity of misconduct by diplomats, a suggestion has been offered for such privileges to be curtailed in order for diplomats to be held accountable for severe crimes committed. As it stands now, diplomats escape liability for heinous crimes such as rape, murder and human trafficking. It is submitted that a re-evaluation of the principles is required.

Chapter One Introduction

1.1 Introduction

Immunity granted to diplomats by the Vienna Convention on Diplomatic Relations of 1961 is a privilege given by independent states who allow diplomats from foreign states to enter their own territory. However, this privilege has been abused by various diplomats in a foreign country ranging from traffic fines to serious offences such as human trafficking and attempted murder. In this dissertation, the freedoms given to a diplomat will be critically analysed and it will be shown abuse is possible and thus creating problems for the receiving state which is faced with an offending foreign diplomat.

These problems are due to the fact that only the sending state exerts power over the diplomat, including the right to recall its representative.

The diplomat, his family members and his staff all receive immunity to avoid confrontation with the local laws during their stay. Customary international law has crystallised into the Vienna Convention and its regulations control all foreign diplomats in the world today. There have been numerous instances where diplomatic immunity has been invoked in the courts by diplomats that have violated the local laws of the receiving country.

The purpose of this dissertation is to examine the diplomatic immunities that diplomats enjoy as representatives of their country in a receiving state. Furthermore, it will highlight whether diplomats and their entourage should have full immunity or whether curbing such privileges would be in the interest of all states involved. In addition, it attempts to provide insight as to whether the immunity granted to the diplomat is justifiable or whether too much immunity is given.

The questions that this dissertation hopes to answer are as follows: Why can diplomats avoid being held accountable for crimes they have committed? To what extent should the international community continue to turn a blind eye towards diplomats violating local laws? Should a line be drawn for the more serious crimes? The dissertation attempts to address the underlying philosophical justification for the immunity rule and assesses these critically. Lastly, the remedies that are currently available where a diplomat has abused his immunity are discussed and the question is posed whether the receiving state should not be

given more power over the offending foreign diplomat? Are there alternative solutions that can be found to ensure a just outcome for all the role players?

1.2 Outline of Chapters

The dissertation is set out in three main sections: the international law, South African law and English law.

The first chapter provides a brief overview of diplomacy in the international society with specific mention of representatives of a state in another state's territory. These states recognise each other as independent states and choose to enter into diplomatic relations.

The second chapter discusses the origin of diplomacy and its development since early human civilisations. It provides background information and a brief history of the developments of the use of diplomats in our society. It explains the Italian and British influence that shaped diplomacy and how diplomats in South Africa were treated and acknowledged.

In the third chapter, the importance of the Vienna Convention will be considered. The changes brought about by the Vienna Conventions are discussed and it is acknowledged that the Convention is the reason why different nations of the world are able to communicate and correspond with each other freely.

The main body of the dissertation, chapter four to six, will focus on a critical analysis of the functions of the diplomat and his immunities as well as the rights and privileges that they receive from the Vienna Convention. This will include the immunities of the diplomat as a person, his personal property and the property of the state as well as the immunity that is enjoyed by his family members, and the diplomatic bag. The diplomatic bag is given its own Chapter due to influential role it plays, not just as official property for the use of the sending state, but also as an instrument to abuse the privileges diplomats enjoy.

The remedies that are available to the receiving state if there is a violation of these rules will be discussed in chapter seven.

In the eighth chapter, the South African legislation will be examined, and the South African legal principles will be assessed in light of the Vienna Convention.

Chapter nine is briefly highlights how diplomacy has developed in England.

Finally in chapter ten, the dissertation will be concluded with a critical analysis on whether diplomats enjoy too much immunity and if so, what solutions should be adopted to ensure justice for all parties.

It should be noted that a diplomat may be either male or female but for the sake of convenience, this dissertation will address the diplomat as male.

1.3 Research Methodology

The research method employed in this dissertation is the standard desktop method, including a historical overview on diplomacy and an analysis of the existing International, British and South African laws. This type of research seeks facts, general information and the historical background to contextualise a topic and formulate an argument. Primary sources such as international conventions and instruments are used as well as domestic legislation. In addition, further desktop research has been undertaken as secondary sources are also used, and involves the accessing of information from published resources and non-published sources. These include newspaper archives, government, university and journal articles that are used in the search for information on the topic at hand. This method is efficient and necessary for this study as there is limited academic research literature on the topic.

1.4 Recognition of Statehood

To be able to discuss diplomatic immunity as a concept, namely the privileges diplomats enjoy as representatives of their states and the duties they are required to do, it is important to bear in mind that the states themselves need to recognise each other and be recognised by the international community.¹ There are only two ways in which a nation can achieve that status:² One is through a public declaration of another recognised state or international organisation which is collective recognition; the other is through clear conduct of the state whose ties are established with another through economic trade and/or political association or unilateral recognition.³ Recognition is usually followed by the establishment of diplomatic relations

¹ Aust A *Handbook of International Law* (2010) 109; Raic D *Statehood and the law of self-determination* (2002) 2; Castellino J *International law and self-determination* (2000) 2; James A *Sovereign statehood: the basis of international society* (1986) 13 20.

² Aust A 109; Raic 30.

³ Aust 109; Raic 32. James 13.

between the states by the signing of bilateral treaties. The establishment of diplomatic relations in itself may also constitute an act of recognition.⁴ There are, however, exceptions to this, for example South Africa continued its diplomatic relations with Rhodesia (1965 -1980) even though it made it clear that its conduct did not constitute recognition of Rhodesia independence and sovereignty.⁵

Three fundamental outcomes are achieved once a state is recognised. Firstly, in the political sense, the recognising state is given approval to enter into international relations with a new state, encouraging other states to do the same.⁶ Secondly, the recognising states acknowledge that according to them the factual conditions necessary to become an international subject has been fulfilled.⁷ Thirdly, once the recognizing state has acknowledged the entity of statehood it cannot revoke that and change its position towards the new state.⁸ For this discussion, it is presumed that all requirements of statehood have been fulfilled and that the international community can enter into diplomatic relations with one another.

1.4.1 Territorial Jurisdiction of a State

One consequence of recognition of a state is that independent states enjoy territorial jurisdiction over its own national boundaries.⁹ There are, however, two exceptions to this principle: authorities in one state have no jurisdiction over individuals and property from another foreign sovereign state.¹⁰ Although the foreign property and diplomatic agents are not exempt from legal liability or immune from the observance of the local law, international law exempts them from the exercise of territorial jurisdiction.¹¹ This principle arose from the argument ‘that because all sovereigns are equal no one of them can be subjected to the jurisdiction of another [state] without giving up a fundamental right.’¹²

One exception to territorial jurisdiction is immunity. Dugard notes that the immunity can take two forms: the first category, sovereign immunity, is given to the head of a foreign

⁴ Aust 109.

⁵ Dugard J *International Law* (2005) 93, 94.

⁶ Cassese A *International Law* (2005) 74; Raic 32, 35; Shaw M N *International Law* (2003) 415.

⁷ Cassese 74; Raic 32, 35.

⁸ Cassese 74.

⁹ Dugard J *International Law: a South African Perspective* (2006) 238.

¹⁰ Dugard 238.

¹¹ Dugard 238.

¹² Dugard 238 with reference to O’Connell *International Law* (1970) 2; 842.

state, the government and its departments.¹³ This means that they enjoy immunity from the laws of the receiving state. The same can be said to apply to diplomats and consular agents who constitute the second category of immunity.¹⁴ The focus of this dissertation will be on the second exception to state territorial jurisdiction, namely the immunity and privileges given to the diplomatic agents.

Diplomats represent states. The diplomat, it is argued, is the symbolic representative of his or her country's sovereign statehood. Diplomats and the diplomatic system continue to derive their authority from the claim that they represent sovereign states in their relations with one another.¹⁵

Diplomatic immunity is an agreement between governments which ensures the invulnerability of these individuals, when sent as representatives of one state (sending state) to another state (receiving state). As will be discussed *infra*, when a diplomat is sent on a mission, they must follow various rules and regulations as set out by the Vienna Conventions on Diplomatic Relations of 1961. In return they are immune to prosecution of any kind and are given several privileges due to their status.

Just because diplomatic relations have commenced between two states, it does not automatically mean the establishment of a permanent diplomatic mission in each other's state.¹⁶ Often, a mission is set up only in one state, or if the two states do not have many common interests, then both states may decide against the need to have a permanent mission, especially when both states have limited resources.¹⁷ If one state nevertheless does set up a permanent mission in the receiving state, then the receiving state may use that mission to further its diplomatic relations with the sending state.¹⁸ In addition, other states may further their diplomatic relations with the sending state by requesting permission from the head of the mission to also use the permanent mission for their use.¹⁹ The third state may then visit the receiving state according to the Vienna Convention²⁰, and make temporary use of that mission and its facilities. This practice is expanding due to the number of states and as a cost cutting measure.²¹

¹³ Dugard 238; Shaw 621.

¹⁴ Dugard 238; Shaw 621.

¹⁵ Hoffman J 'Reconstructing diplomacy' (2003) 5(4) *British Journal of Politics and International Relations* 531.

¹⁶ Aust 109.

¹⁷ Aust 109.

¹⁸ Aust 109.

¹⁹ Aust 109.

²⁰ Article 5.

²¹ Aust 109.

Customary International Law made it clear that no state enjoyed a prerogative to simply enter into diplomatic relations with another state without first obtaining their consent.²² In the Vienna Convention this principle has been upheld and in Article 2 it states that diplomatic relations may only occur if both states have given their consent to it.²³ This means that no individual state no matter how powerful or how small and insignificant it might be in the broader picture of economic and military power can simply invoke that the states enter into diplomatic correspondence.²⁴ Article 4 of the Convention further states that the receiving state needs to consent to the representatives of the sending state that the latter intends to send as head of the mission.²⁵

1.4.2 Theories of Immunity

There are three commonly accepted theories that explain why diplomatic privileges and immunities should still exist today.²⁶ The first is called the theory of “ex-territoriality”.²⁷ This theory was established approximately in the sixteenth century and it reasons that the diplomatic envoy should be treated as if the envoy is still in the territory of the sending state.²⁸

Two principles can be deduced from this: firstly in the concept of residence, the diplomat does not reside in the receiving state but in the sending state and therefore the diplomat cannot be subjected to the laws of the receiving state.²⁹ Secondly the concept of territory is considered by the local authority of the receiving state that the diplomatic premises are foreign territory.³⁰

To explain why there should be an exception to jurisdiction over all persons within a state's borders, early theorists adopted the broadly accepted medieval idea that the law of one's own state follows wherever one goes. ... States applied the theory literally and viewed

²² O'Brien J *International Law* (2001) 300.

²³ O'Brien 300.

²⁴ O'Brien 300.

²⁵ O'Brien 300.

²⁶ Ling Y '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) *Law Review* 91 at 9; Ross M S '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* 173 at 177; Farhangi L S 'Insuring against abuse of diplomatic immunity' (1985-1986) *38 Stanford Law Review* 1517 at 1520.

²⁷ Ling 93.

²⁸ Ling 93; Farhangi 1520; Garretson A H 'The immunities of representatives of foreign states' (1966) 41 *New York University Law Review* 67; Maginnis V L 'Limiting Diplomatic immunity: Lessons learned for the 1946 Convention on the privileges and immunities of the United Nations' (2002-2003) 28 *Brooklyn Journal of International Law* 989 at 994. McClanahan G V *Diplomatic Immunity: principles, practices, problems* (1989) 4530.

²⁹ Ling 93.

³⁰ Ling 93.

embassy premises, grounds and acts committed on them as existing outside the territory of the receiving state and, hence, outside the state's jurisdiction. By the mid-eighteenth century, the shortcomings of literal application became apparent as local common criminals would flee to diplomatic missions or claim attachment to the diplomatic suite to avoid prosecution.³¹

However, this theory has been criticised by legal scholars and has been widely disregarded as outdated.³² The theory suggests that the diplomat is immune from criminal and civil suits in the receiving state because it is not under their jurisdiction. Rather, the diplomat is only held accountable for the laws as would be incurred in the sending state but even these offences are not judged and the theory fails to address this legal gap.³³

The “representative theory” argues that the diplomat represents and embodies the king or the ruler, and that therefore his person must be respected.³⁴ This logic provides arguments for the concept that the diplomat needs to be cloaked with immunity as he represents the head of state and that any acts that he performs during the official stay needs to be protected.³⁵ However, the logical argument falls apart with regards to the immunities that are given to the diplomats’ family members, the administrative staff, technicians and domestic servants.³⁶ It also does not explain why the diplomat should be immune from acts done outside his official capacity.³⁷ Furthermore, if the foreign diplomat would receive the same amount of immunity as the sending state, then that diplomat would be entitled to more authority than that of the receiving state.³⁸

The third theory is called “functional necessity” and is most relevant to today’s modern time.³⁹

Functional necessity theory rests on the fundamental assumption that a receiving state’s action which affects diplomats duties represent a potential for real and perceived harassment, were diplomats not protected by immunity. In turn, harassment by the receiving state would likely impair the functioning of the diplomat and hinder the diplomatic process. In essence, functional necessity assumes that the absence of diplomatic

³¹ Wright S L ‘Diplomatic Immunity: A proposal for amending the Vienna Convention to deter violent criminal acts’ 5 *Boston University of International Law Journal* 177 at 198.

³² Ling 93.

³³ Maginnis 994.

³⁴ Ling 94; Ross 177; Farhangi 1520; Garretson 70; Maginnis 995; Groff J D ‘*Proposal for diplomatic accountability using the jurisdiction of the International Criminal Court: The decline of absolute sovereign right*’ (2000) 209, 215, 216.

³⁵ Ling 94.

³⁶ Ling 94.

³⁷ Ling 94; Ross 178; Maginnis 995; Wilson C E *Diplomatic Privileges and Immunities* (1967) 4.

³⁸ Ross 177; Farhangi 1520.

³⁹ Ross 178; Wright 202; Groff 216; McClanahan 32; Farber R E ‘Immunity or impunity? How current US interpretation of diplomatic immunity facilitates diplomatic abuse of A-3 domestic workers’ (2006) 2 *Journal of Migration & Refugee Issues* 63 at 71, 72.

immunity would lead to a breakdown in the conduct of foreign relations. Accordingly, at least those activities of the diplomat which are essential to the diplomatic process should be subjected to immunity. Conversely, functional necessity does not require immunity to cover those activities which are not essential to the diplomatic process.⁴⁰

The theory of functional necessity therefore dictates that it is vital that each diplomat receives immunity in order to perform his functions to the best of his ability and to ensure that the objective of the sending government is adhered to.⁴¹ However, this proves to be illogical as it concludes that the diplomat is required to violate the laws of the receiving state in order to perform his official duties.⁴² It should therefore rather be said that the immunity is necessary to ensure that the diplomat does not get hindered or distracted from the receiving government's laws.⁴³ This mutual agreement between all states that their respective diplomats all receive the same amount of respect and immunity is derived from the principle of "functional necessity".⁴⁴ The Vienna Convention on Diplomatic Relations acknowledges the functional necessity theory as sound and has set regulations that the diplomatic agent receives immunity for the purpose of his official functions and not for his personal gain and benefit.⁴⁵

1.4.3 Summary and Conclusion

In this chapter it was recognised that diplomacy is based on the recognition by states of each other, combined with consent between two sovereign states on whether to enter into diplomatic relations. The three theories of "ex-territoriality," "representative theory" and "functional necessity" were discussed to show the changes in diplomatic immunity. It is submitted that the third theory, "functional necessity", is the most relevant today and that the rationale behind the principle of immunity is to prevent real and perceived harassment of diplomats, to ensure that they can function optimally. However, to have a better understanding of the origins of diplomatic immunity and its development over the centuries, the next chapter will briefly highlight the history thereof.

⁴⁰ Wright 195, 196.

⁴¹ Ling 94; Farhangi 1521; Maginnis 995; McClanahan 32.

⁴² Ross 179; Farahmand (1989-1990) 16 *Journal of Legislation* 94

⁴³ Ling 94; Farhangi 1521; Maginnis 995.

⁴⁴ Ling 94.

⁴⁵ The Vienna Convention none the less still allows for absolute immunity for certain classes of diplomatic personnel. Farhangi 1521; Groff 216, 217; Wright 202, 203; Maginnis 998.

Chapter Two Historical Background

2.1 Greek and Roman Mythology

The concept of an ancient diplomat is found in mythology.⁴⁶ The messenger god Hermes/Mercury played a significant role in the Greek and Roman myths.⁴⁷ Hermes was renowned for his symbolized qualities of charm, trickery and cunning.⁴⁸ On the day of his birth, he stole fifty head of cattle from his brother Apollo and then, having hidden the cows in a cave, returned to sleep peacefully in his cradle.⁴⁹ This resourcefulness on his part was warmly applauded by Zeus who thereafter sent Hermes on the most delicate diplomatic missions, including the murder of the monster Argos.⁵⁰ In Greek mythology, Hermes was regarded as the kind but unscrupulous patron of travellers, merchants and thieves.⁵¹ He was the one who awarded Pandora with the gift of flattery and deception,⁵² and the heralds⁵³ the strength of their voices and the retentiveness of their memory.⁵⁴

The importance of this mythical story is that people recognise the advantage of having particular amiable and shrewd individuals to promote their interests or the interests of others. On this point it is regarded as vital for diplomats to further the cause of their state and to convince others to act in their best interest.

2.2 Adaptations of the concept of immunity in early civilisation

The concept of a diplomat is as old as man itself.⁵⁵ The ancient clans had to develop means of conveying official messages between neighbouring tribes and rivals.⁵⁶ Examples of this type

⁴⁶ Nicolson H 'Diplomacy' 2nd ed (1950)19.

⁴⁷ Nicolson 19.

⁴⁸ Nicolson 19; Hansen W F *Handbook of classical mythology* (2004) 142,196,198.

⁴⁹ Nicolson 19; Hansen 35; Grimal P *The dictionary of classical mythology* (1996) 50.

⁵⁰ Nicolson 19; Hansen 173.

⁵¹ Nicolson 19; Hansen 142, 196,198.

⁵² Nicolson 19; Hansen 72, 257.

⁵³ 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.

⁵⁴ Nicolson 19.

⁵⁵ Nicolson 19; Farhangi 1518; The Preamble of the Vienna Convention states: 'Recalling that people of all nations from ancient times have recognised the status of diplomatic agents'; Griffin M 'Diplomatic Impunity' (1984-85) 13 *Student Law* 18 at 20.

of Diplomacy are most evident during war for the purpose of conveying a truce in order for wounded warriors to be tended to and for the dead to be buried, or to simply halt a day of battle.⁵⁷ It was apparent that such negotiations would be severely hampered if the emissary from one clan were ambushed and killed by the rival clan before he had time to deliver the message from his tribal leader.⁵⁸ Therefore, a customary practice must have been established and agreed upon to grant such negotiations and privileges to a member of the clan, other than a warrior.⁵⁹ The concept of immunity has therefore been around for thousands of years.⁶⁰

These practises used by the ancient clans were common among many peoples in the ancient times not only in Greece and Rome, but across the globe including the far and near East, the Chinese, Indians and the Egyptians.⁶¹ Elgavish mentions that messengers in Ancient Near East did not enjoy immunity as such but were still vested with protection.⁶² He provides four ideas; namely the concept of international agreement, provisions of escorts made to provide safety during the travels, deterrence (in the form of personal guards) and an appeal to the recipient to treat the messenger with respect.⁶³ However, the first recorded diplomatic immunity comes from the ancient Greeks.⁶⁴ The concept of diplomacy evolved by the time of the Roman civilisation and their main focus was on the personal safety of the diplomat as well as his freedom to travel in order to ensure good relations with different kingdoms, tribes and clans.⁶⁵ It became clear that the inviolability of the diplomat was a safeguard mechanism and a breach would result in negative consequences, often resulting in a hostile approach.⁶⁶

The Romans included the immunity into their own legal system and made it clear that any agent travelling into the provinces or to neighbouring countries would be considered inviolable.⁶⁷

The concept of diplomatic immunity dates back to the Indian, Roman and Greek city states.

As early as Mohammed time, Islamic law granted diplomats immunity. The practice

⁵⁶ Nicolson 27.

⁵⁷ Nicolson 27.

⁵⁸ Nicolson 27.

⁵⁹ Nicolson 27.

⁶⁰ Wright 195.

⁶¹ Hanrahan N *A History of Diplomatic Immunity and the development of International organisation immunity* (2005) CAIO 2.

⁶² Elgavish D 'Did Diplomatic Immunity exist in the ancient near east?' (2000) *Journal of the History of International Law* 2: 73-90 at 80.

⁶³ Elgavish 81.

⁶⁴ Hamilton K and Langhorne R *The practice of diplomacy* (1995) 8; Groff J D 213.

⁶⁵ Hanrahan 2.

⁶⁶ Hanrahan 2; Young E 'The Development of the law of Diplomatic relations' (1964) *40 British Yearbook of International Law* 141at 143.

⁶⁷ Hanrahan 2.

survived into the Byzantium era after the fall of Rome and spread of Venice after that city developed into a trading centre.⁶⁸

The practice to exchange envoys of communication and of a political nature was during the Roman and ancient Greek always on a temporary and ad hoc basis.⁶⁹ Great distances had to be travelled through dangerous waters, barbarians, wolves and the elements, therefore making it important that a diplomat's safety be guaranteed after having to endure these hardships already.⁷⁰ As soon as the orders of the King had been fulfilled, the envoy would then leave again to return with the news from the other country of the progress they had made and of the new developments that occurred during their stay.⁷¹

2.3 Italy and the Netherlands

The establishment of permanent mission was found only in the 15th century in Europe and is a relatively new concept in world history.⁷² Before that time all over the world not only in Europe, but places in South East Asia, the Islamic countries of West Asia, missions were set on a temporary basis and the mission would leave as soon as the purpose was fulfilled irrespective of whether it was of an economic, political or cultural matter.⁷³ The Italians where the first to recognise the advantage of having a permanent mission in the neighbouring capital's and Venice send its first permanent representatives out to represent their interest.⁷⁴

The first recorded permanent mission is established at Genoa in 1455 by Francesco Sforza, Duke of Milan.⁷⁵ Five years later the Duke of Savoy sent Eusebio Margaria, archdeacon of Vercelli, to be his permanent representative in Rome.⁷⁶ In 1496 Venice appointed two merchants then resident in London as "*subambasciatori*" on the ground that "the way to the British Isles is very long and very dangerous".⁷⁷ This proved to be a strategic

⁶⁸ Labuschagne J T M 'Diplomatic Immunity as criminal defence: an anthropo – legal anachronism?' (1997) 22 *South African Yearbook of International Law* 32-45.

⁶⁹ Sen B A *Diplomatic Handbook of International Law and practice* (1988) 5.

⁷⁰ Parkhill J S 'Diplomacy in the modern world: a reconsideration of the bases for diplomatic immunity in the era of high tech communications' (1997-1998) 21 *Hastings International & Comparative Law Review* 565 at 570.

⁷¹ Hamilton and Langhorne 10.

⁷² Sen 6; Farhangi 1518.

⁷³ Sen 6; Nicolson 30 Italy became the mother of organized or professional diplomacy.

⁷⁴ Sen 6; Young 145.

⁷⁵ Nicolson 30; Young 145.

⁷⁶ Nicolson 30; Young 145.

⁷⁷ Nicolson 30.

move and Italy became exceptionally influential and soon an ethic developed on how the diplomats were to behave themselves in the foreign countries.⁷⁸

It can therefore be said that there are two obvious stages of diplomacy, the first stage being the time where all embassies were of a non-permanent basis that ranged from the early times in history and coming to a stop in the 15th century.⁷⁹ The second stage developed when permanent missions were established, starting from the 15th century and lasting till today and most probably will endure.⁸⁰ Europe at the time experienced a number of civil wars and political instability.⁸¹

However, the Renaissance, the Reformation and the Industrial revolution brought the neighbouring countries of Europe closer together.⁸² The need for trade, market and expansion made the permanent diplomatic missions crucial.⁸³ The temporary missions quickly became a stable form to conduct diplomatic representation and to strengthen the diplomatic tie with that state.⁸⁴ The temporary form of diplomacy has, however, in no way decreased or lost its importance.⁸⁵ The non-permanent missions or, also known as special missions, still serve their purpose to communicate and resolve political, economic or military conflicts.⁸⁶ State visits of leading political figures or head of state or members of the foreign ministry still play a major role in the diplomat's state of affairs and are the starting points of many more negotiations to come.⁸⁷

Italy, however, was not the only country that provided unique qualities and shaped the development of diplomacy. The end of the French Revolution in 1799, and the further expansion in industrial development, called for universal binding rules to regulate the laws regarding diplomats, as the European countries no longer were isolated from trade and commerce.⁸⁸

During the Middle Ages they were less distinctly recognized, and it was not until the seventeenth century that they were firmly established. The institution of resident permanent legations at all the European courts took place subsequently to the peace of Westphalia (1648), and was rendered expedient by the increasing interest of the different States in each

⁷⁸ Hanrahan 5; Young 145,146.

⁷⁹ Sen 6; Young 145.

⁸⁰ Sen 6; This was the beginning of a new era, where now, the diplomatic missions stationed themselves permanently in the host territory; Hanrahan 5; Young 145.

⁸¹ Sen 6.

⁸² Sen 6.

⁸³ Sen 6; Parkhill 569.

⁸⁴ James M and Hardy L *Modern Diplomatic Law* (1968) 2. Young 146.

⁸⁵ James & Hardy 2.

⁸⁶ James & Hardy 2.

⁸⁷ James & Hardy 2.

⁸⁸ Sen 6.

other's affairs, growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power, given them the right of mutual inspection as to all transactions by which that balance might be affected.⁸⁹

A few years after the first permanent mission was recognised, more Italian embassies were established in London, Paris and other major cities. Three centuries, however, lapsed before any diplomatic hierarchy was definitely established and recognized.⁹⁰

Louis XI was the first French monarch to realize the importance of diplomacy as an instrument of foreign policy and he succeeded in establishing that monopoly of the right to send ambassadors which was soon to be acknowledged as a corollary of sovereignty.⁹¹

Wright notes that:

When the exchange of diplomats became a general practice in western Europe during the sixteenth and seventeenth centuries, the sending state immunity from criminal jurisdiction was recognised, even where evidence existed that the diplomat was involved in high treason against the host state. By the eighteenth century, the customary international law surrounding the privileges and immunities of diplomats was starting to take shape.⁹²

By the beginning of the 1500s the main European countries such as England, Spain, Germany and France had their representative in each of the respective countries.⁹³ The step from temporary visits to permanent missions was a big step for the development of diplomatic immunity; however this also increased the chances and possibilities to abuse their positions.

From a South African perspective, the influences of Dutch writers are of particular historical significance, especially Grotius. He has been described as one of the most influential legal scholars of the sixteenth and seventeenth centuries.⁹⁴ Grotius already argued for complete immunity as a general principle in the 1620s.⁹⁵ He advocated that the security of ambassadors was fundamental to the diplomatic system that could only be accomplished by making diplomats accountable to their own sending sovereign.⁹⁶ Grotius's theory of complete immunity was debated heavily during the seventeenth century and did not become widespread until the eighteenth century.⁹⁷

⁸⁹ Wheaton H *Elements of International Law* (1866) Section 206.

⁹⁰ Nicolson 30.

⁹¹ Young 146.

⁹² Wright 195,196; Labuschagne 32, 45.

⁹³ O'Brien J *International Law* (2001) 297.

⁹⁴ Hamilton & Langhorne 45; Parkhill 570; Griffin 20.

⁹⁵ Hamilton & Langhorne 45; Parkhill 570.

⁹⁶ Hamilton & Langhorne 45; Parkhill 570; Young 147.

⁹⁷ Hamilton & Langhorne 45; Parkhill 570.

2.4 Summary and Conclusion

In this chapter the evolution of diplomacy in Europe developed from simple envoys in ancient Greece and Rome, to permanent missions. Since the 15th century the exchange of diplomatic missions and agents has reached a new stage in that through the institution of diplomacy, states have the power to conduct their foreign affairs on a more permanent basis.⁹⁸ These privileges of the representatives have increased gradually and as a result of state practice it was a well established concept by the time of the Congress of Vienna in 1815.⁹⁹ This congress foregrounded the first step towards the codification of diplomatic immunity which would be firmly established in the Vienna Convention of 1961, a landmark in diplomatic immunity and the topic of the next chapter.

⁹⁸ James & Hardy 2.

⁹⁹ O'Brien 297.

Chapter Three Vienna Convention on Diplomatic Relations

3.1 The Establishment of the Vienna Convention 1961

Although all independent states recognized diplomatic immunity, there was no uniformity and certainty between all the states.¹⁰⁰ The forerunner of the 1961 Vienna Convention was the Vienna Congress in 1815.¹⁰¹ The Vienna Congress initiated the idea to bring together all elements of diplomacy and to set up a new regulatory system to shape the classification of diplomatic agents and issues relating thereto, as well as the signing of international treaties.¹⁰² The Vienna Congress of 1815 identified three distinct groups of representatives; ambassadors, ministers plenipotentiary, and *charges d'affaires*.¹⁰³ In 1818 a Protocol of Aix-la-Chapelle continued the discussion of diplomatic relations. Dialogues between nations persisted on the rights and duties of the diplomats at the Sixth International Conference of American States held at Havana in 1928.¹⁰⁴ That Conference dealt more intensively with the issue of diplomatic privileges than the Vienna Congress in 1815 or the Protocol of Aix-la-Chapelle, and yet it failed to give a complete outline of the privileges of the diplomats and the rights and duties that are to be conferred on the receiving and sending state, nor did it reflect the current practices or regulations.¹⁰⁵ The Draft Convention conducted by the Harvard Research in International Law in 1932 was more progressive.¹⁰⁶

The establishment within the United Nations framework of the International Law Commission opened the way to comprehensive codification to confirm what were acceptable as well-established – if not universally respected – rules of international law.¹⁰⁷

¹⁰⁰ Ross 180.

¹⁰¹ McDonough M B 'Privileged outlaws: Diplomats, Crime and Immunity' (1996-1997) 20 *Suffolk Transnational Law Review* 475 at 478.

¹⁰² Do Nascimento E S G E *Diplomacy in International Law* (1972) 16-30; Young E 167; Garretson A H 69. Denza E *Diplomatic Law – Commentary on the Vienna Convention on Diplomatic Relations* (2008) 1.

¹⁰³ O'Brien 297.

¹⁰⁴ Garretson A H 69; Convention Regarding Diplomatic officers, adopted by the Sixth International American Conference, signed at Havana, Feb 20, 1928. 155 L.N.T.S. 261, in 7 U.N. Leg. Ser. Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities 419 (ST/LEG/SER.B/7) (U.N. Pub. Sales No. 58.V.3) (1958); Denza 1; Donoghue 617.

¹⁰⁵ Garretson 69; Denza 1.

¹⁰⁶ Denza 1; Donoghue 618.

¹⁰⁷ Denza 2.

The General Assembly requested the International Law Commission to prioritise the codification of diplomatic relations and articles were drafted by the Commission in 1957.¹⁰⁸ These were debated in the Sixth Committee of the General Assembly and sent to all members of the United Nations.¹⁰⁹ Twenty-one governments submitted their comments which were taken into consideration and a revised article was presented in 1958.¹¹⁰

The importance of diplomatic law meant that it received the early attention of the International Law Commission which produced final draft articles in 1958 and organised a conference on the subject in 1961.¹¹¹

The Vienna Convention of 1961 was the culmination of a number of drafts put together by the International Law Commission with the final draft being tabled in the UN Conference.¹¹² Eighty-one states took part in the Conference held in Vienna from the 2nd of March to the 14th of April 1961 and the Convention was signed on the 18th of April 1961.¹¹³ O'Brien regards this Convention as one of the best treaties in the advancement of the codification of International Law.¹¹⁴ The Convention became effective on the 24th of April 1964 after the 22 ratifications that were necessary to enact the Treaty were gathered in order to fulfil Article 51.¹¹⁵ There are fifty-three articles on diplomatic immunity and they are well organised and structured in such a way that even a layman is able to understand the relatively easy terminology put into place.¹¹⁶ The number of countries that have ratified the Convention has increased rapidly since then and only 30 years later the number of states grew from the mere 22 to 174 in January 1996.¹¹⁷ The ratification from so many states also meant that it has attracted near universal support and that the provisions that it contained are part of customary international law.¹¹⁸ The codification of the diplomatic immunities in the Vienna Convention is the most extensive form of rules and regulations with regards to diplomats of our time.¹¹⁹

The Vienna Convention on Diplomatic Relations set the ground rules for all states that are signatory to the Convention to regulate the conduct of all diplomats actions and their

¹⁰⁸ Denza 2; Maginnis 998; Donoghue 620.

¹⁰⁹ Denza 2; Maginnis 998; Donoghue 621.

¹¹⁰ Denza 2; Maginnis 998.

¹¹¹ O'Brien 300.

¹¹² O'Brien 300; Farhangi 1517.

¹¹³ Denza 2. Maginnis 998.

¹¹⁴ O'Brien 300; Farhangi 1517.

¹¹⁵ O'Brien 300; Farhangi 1518; Garretson 67.

¹¹⁶ McClanahan 45; Farhangi 1522.

¹¹⁷ O'Brien 300.

¹¹⁸ O'Brien 300.

¹¹⁹ Farhangi 1519; Denza 1.

mission.¹²⁰ With regard to the Vienna Convention on Consular Relations, consular's primary functions are concerned with the nationals in the receiving state to assist them with travel and business. This includes things such as travel documents, authentication of marriage and divorce documents, visas and assisting private individuals and corporations on matters such as inheritance and representation in court proceedings.¹²¹ Consular personnel, in contrast to diplomat personnel, have a more restricted form of immunity. With regards to criminal immunity for a consular, they are immune from arrest and detention¹²², except in cases where a serious crime has been committed. The severity of the crime depends on how the receiving state would view the degree of penalty or the length of the sentence. Bilateral treaties may be signed.¹²³ In 1989 South Africa acceded to the Convention without making any reservation and has since then, an obligation to incorporate the Convention into its local laws.

3.2 The Purpose of the Vienna Convention

The purpose of the Convention is to provide immunity to diplomats.¹²⁴ In this regard the Vienna Convention provides protection to each diplomat from the sending state as they fulfil their daily tasks in the receiving state, which may be in a country that has a different political background and set of local laws.¹²⁵ The Convention allows the diplomat to perform his duties and provide information on political, social and humanitarian conditions in the receiving state.¹²⁶ The Vienna Convention is the ultimate multilateral treaty agreement in the field of international law, giving all states that are signatory to it surety and clarity in regards to diplomats.¹²⁷ The practicality of the Convention provides safety and continuous diplomatic relations between foreign states and their respective missions.¹²⁸ The missions work runs smoothly due to the Vienna Convention and in the seldom case of an abuse of the diplomatic privileges, a false picture is portrayed about the regulations when in fact its operation runs efficiently on a permanent level.¹²⁹

¹²⁰ Brown J 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37(1) *International & Comparative Law Quarterly* 71.

¹²¹ Hickey J Fisch A 369; Garretson 79.

¹²² Article 41 of the Vienna Convention of Consular Relations.

¹²³ Garretson 80, 81.

¹²⁴ Preamble of Vienna Convention; Ross 181.

¹²⁵ Ross 181.

¹²⁶ Ross 181.

¹²⁷ Brown 54; Farhangai 1519.

¹²⁸ Brown 54.

¹²⁹ Brown 54.

The Preamble of the Vienna Convention of 1961 has five distinct points that highlight the clear intention of the diplomatic immunities and privileges the delegates had in mind at the time:

- Recalling that people of all nations from ancient times have recognised the status of diplomatic agents.
- Having in mind the purpose and principle of the Charter of United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations.
- Believing that an international convention on diplomatic intercourse privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.
- Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.
- Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.¹³⁰

The Preamble to the Convention highlights that the main intention of the diplomatic immunities is to promote friendly relations among States and to ensure that the immunities and privileges granted to the diplomat is for the purpose to carry out the functions and instructions of the diplomatic mission in the receiving State and not for their own personal profit and agenda.¹³¹

3.3 The Diplomatic Agents and their Respective Ranks

Diplomacy is the application of intelligence and tact to the conduct of official relations between the governments of independent states.¹³²

The first draft of the Vienna Convention did not include a section on definitions, since it was common practice at the time that all diplomatic staff members whether they are administrative staff, or servants of the Diplomat, they all jointly were given the same immunity although not the same privileges.¹³³ However, a clear distinct difference in today's

¹³⁰ Preamble of the Vienna Convention of 1961.

¹³¹ Denza 11.

¹³² Satow E A *Guide to Diplomatic Practice* (1932) 1.

¹³³ The Netherlands pointed out during the draft Articles that the "head of the mission" is the "person authorised by the sending state to act in that capacity" and the diplomatic staff" as those "authorised to engage in diplomatic activities proper"; Denza 14.

diplomatic rank and class of immunities exist due to the establishment of the Vienna Convention.¹³⁴

Once consensus through negotiation has been reached between two states to enter into diplomatic relations the following question that arises is the class of the envoy that will be dispatched.¹³⁵ The terminology of who qualifies as a diplomat is often obscure and misleading, and the 1961 Vienna Convention on Diplomatic Relations usefully define the staff of a diplomatic mission (with the French expression in brackets) as follows in Article 1:

- a) The “head of a mission” (*chef de mission*) is the person charged by the sending state with the duty of acting in that capacity.
- b) The “member of the mission” (*membres de la mission*) are the head of the mission and the members of the staff of the mission.
- c) The “members of the staff of the mission” (*membres du personnel de la mission*) are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission.
- d) The “members of the diplomatic staff” (*membres du personnel diplomatique*) are the members of the staff of the mission having diplomatic rank.
- e) A “diplomatic agent” (*agent diplomatique*) is the head of the mission or a member of the diplomatic staff of the mission.
- f) A “member of the administrative and technical staff” (*membre du personnel administrative et technique*) is a member of the staff of the mission employed in the administrative or technical service of the mission
- g) A “member of the service staff” (*membre du personnel de service*) is a member of the staff of the mission in the domestic service of the mission
- h) A “private servant” (*domestique privé*) is a person who is in the domestic service of a member of the mission and who is not an employee of the sending state.¹³⁶

It is thus important to use the correct terminology when talking about diplomats.¹³⁷ In former days the term ‘diplomatic agent’ addressed only the head of the mission or the ambassador.¹³⁸ Today, however, a “diplomatic agent” refers to all members of the diplomatic staff that have a diplomatic rank, such as the administrative and technical staff, the service staff and the domestic staff, which includes also the attachés, advisers and members of other ministries.¹³⁹ The diplomatic rank is provided to distinguish between the degree of immunity and privileges that they are exposed to.¹⁴⁰ When referring to the head of the mission the

¹³⁴ Denza 14.

¹³⁵ Sen 24.

¹³⁶ Article 1 of the Vienna Convention 1961.

¹³⁷ Feltham, R G *Diplomatic Handbook* (1998) 16.

¹³⁸ Feltham 16.

¹³⁹ Feltham 16. Griffin 20.

¹⁴⁰ Feltham 16.

correct term would thus be “diplomatic agent,” however, “the commonly accepted (though less precise) terminology is diplomat.”¹⁴¹

In terms of “heads of missions” there are three distinguished classes that exist which is reliant on the mutual agreement between the two States.¹⁴² Article 14(1) defines these groups as follows:

- a) Ambassadors, Apostolic Nuncios¹⁴³, and other heads of mission of equivalent rank¹⁴⁴ who are accredited to Heads of State.
- b) Envoys, Ministers and Papal Internuncios¹⁴⁵ who are accredited to Heads of State. This class is now virtually non-existent.
- c) Chargés d’Affairs who are accredited to Ministers for Foreign Affairs. This class is also rare.¹⁴⁶

Section 14(2) provides that:

No differentiation may be made between heads of mission on account of their class, except in matters of precedence and protocol, and in that the right of reception by a Head of State is normally reserved to those of ambassadorial rank.¹⁴⁷

Prior to the head of the mission being appointed to represent the sending state in the receiving state, the approval or consent of the receiving state is inquired.¹⁴⁸ Each state has to decide their delegate’s title.¹⁴⁹

Article 7 of the Vienna Convention provides that:

Subject to the provision of Article 5, 8, 9 and 11 the sending state may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving state may require their names to be submitted beforehand, for its approval.¹⁵⁰

Article 9 of the Vienna Convention sets out that:

- 1) The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the

¹⁴¹ Feltham 16.

¹⁴² Feltham 3; O’Brien 297.

¹⁴³ The highest rank of a ordinary and permanent representative of the pope safeguarding the interests of the Holy Sea. Kirsch J P (1911) Nuncio. In the Catholic Encyclopaedia. Retrieved from New Advent: <http://www.newadvent.org/cathen/11160a.htm>

¹⁴⁴ High commissioners exchanged between Commonwealth countries.

¹⁴⁵ It is the name given in the Roman Curia to a diplomatic agent of the papal service. Baumgarten P M (1910) Internuncio. In the Catholic Encyclopedia. Retrieved from New Advent: <http://www.newadvent.org/cathen/08078a.htm>

¹⁴⁶ Article 14 of the Vienna Convention.

¹⁴⁷ Article 14(2).

¹⁴⁸ Feltham 4; Larschan B ‘The Abisinio Affair: A restrictive theory of Diplomatic immunity?’ (1987-1988) 26 *Columbia Journal of Transnational Law* 283 at 285.

¹⁴⁹ O’Brien 297.

¹⁵⁰ Article 7 of the Vienna Convention.

person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in territory of the receiving state.

- 2) If the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving state may refuse to recognise the person concerned as a member of the mission.¹⁵¹

In this regard, article 9 states that in most times approval is given, except in circumstances where the appointed head of the mission is a person that the receiving state perceives as an undesirable person to communicate with.¹⁵² If this instance should occur then the receiving state is under no obligation to provide reasons why they disapprove and the sending state would have to appoint a different person as head of the mission.¹⁵³ The receiving state may refuse to give their consent in regards to the appointed diplomatic delegation that the sending state has nominated to be represented by and the receiving state is under no duty to provide reasons for their position.¹⁵⁴ The receiving state may further at any time after the consent has been given revoke it and stop all diplomatic correspondence if it wishes.¹⁵⁵

The general rule is that the sending state designates its diplomatic agents to the mission in the receiving state, and the receiving state simply accepts those members according to their ranks given by the sending state.¹⁵⁶ The sending state has the right to freely appoint the members of the diplomatic mission.¹⁵⁷ In some cases the persons have been appointed as representative by the sending state in good faith.¹⁵⁸ Yet the freedom of appointment is ineffective without acceptance.¹⁵⁹ The receiving state must “accord” diplomatic status to a representative of the sending state if it is to be operative.¹⁶⁰

There is no regulation which states that the heads of each mission of the two countries have to have the same diplomatic rank. It has become common practice, however, that the exchange of diplomatic representatives is of the same and equal rank.¹⁶¹ Exceptions do occur in practice but this is mainly due to past precedents between two parties.¹⁶² Countries where

¹⁵¹ Article 9 of the Vienna Convention.

¹⁵² Feltham 4.

¹⁵³ Feltham 4.

¹⁵⁴ O'Brien 300.

¹⁵⁵ O'Brien 300.

¹⁵⁶ Brown 57.

¹⁵⁷ Article 7 of the Vienna Convention.

¹⁵⁸ Brown 58.

¹⁵⁹ Brown 58.

¹⁶⁰ Brown 58.

¹⁶¹ Sen 24.

¹⁶² Sen 24.

there was a difference in rank have changed to ensure that there is an equal rank of representatives.¹⁶³

Nonetheless, this was not always the case, diplomats of the ambassador rank were only sent to the countries that were economically and military influential as well as to countries that were considered by the local government as traditionally friendly. All other countries received a lower status.¹⁶⁴ Nevertheless, it is imperative to note; that it is made clear which person, if any, holds the proper rank and privileges.¹⁶⁵ This is especially important for the receiving state and to any aggrieved citizen when a member of the diplomatic mission is claiming diplomatic immunity.¹⁶⁶

To determine the status of a diplomatic agent, it is usually in the form of ministerial certificates or letters from the foreign ministry.¹⁶⁷ Therefore, to ensure that there is no confusion among all parties, the relevant Ministry of the sending state has compiled a

Diplomatic List which is a record of the names and designations of:

- the heads of diplomatic missions accredited to a state at a particular date, together with the names and diplomatic rank of the members of the diplomatic staff of their mission, and
- other institutions and individuals received in a diplomatic capacity.

The Diplomatic List includes information normally about the diplomat's name, rank, marital status, and whether spouse or family members have accompanied them.¹⁶⁸ The List also includes information with regards to a certain post in the mission being vacant, or if it has been temporarily filled.¹⁶⁹ In order to ensure that the information as contained in the Diplomatic List remains accurate and up to date, it is frequently modified and republished by both the sending state and the heads of the diplomatic mission as they are responsible for this.¹⁷⁰ Both have an interest in the accuracy of the document as it is *prima facie* evidence of the right to diplomatic status.¹⁷¹

The significance of the Diplomatic List is to ensure that each staff is given the correct rank to prevent members from abusing their immunities.¹⁷² A driver, who holds membership

¹⁶³ Sen 24; Art 14(2).

¹⁶⁴ Sen 25.

¹⁶⁵ Brown 56.

¹⁶⁶ Brown 56.

¹⁶⁷ Brown 57.

¹⁶⁸ Feltham 30.

¹⁶⁹ Feltham 30.

¹⁷⁰ Feltham 30.

¹⁷¹ Feltham 30.

¹⁷² Brown 57.

as part of the administrative and technical staff enjoys full immunity from criminal jurisdiction.¹⁷³ This is controversial. It has been argued that the driver, however, should rather be regarded as a member of the service staff who enjoys immunity only in respect of acts performed in the course of his duties.¹⁷⁴ Similarly, the same concepts apply to members of the administrative and technical staff that have the privilege of duty-free imports.

Article 10 of the Vienna Convention provides the following general guidelines with regards to appointment, arrival and departure of diplomat:

- 1) The Ministry for Foreign Affairs of the receiving state, or such other ministry as may be agreed, shall be notified of:
 - a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
 - b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
 - c) The arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
 - d) The engagement and discharge of persons resident in the receiving state as members of the mission or private servants entitled to privileges and immunities.
- 2) Where possible, prior notification of arrival and final departure shall also be given.¹⁷⁵

With regard to the size of the mission it is usually agreed upon by the states involved. Article 11 (1) of the Vienna Convention makes provision for the scenario where there is no agreement.

In the absence of specific agreement as to the size of the mission, the receiving state may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving state and to the needs of the particular mission.

Article 11 (2) continues that the:

receiving state may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

The Vienna Convention makes further stipulations with regards to immunity that immunity is given to family members of diplomats. Family members are those of whom the diplomat is directly responsible for.¹⁷⁶ This will be discussed in more detail in chapter 5.

¹⁷³ Brown 57.

¹⁷⁴ Brown 57; Article 37.3 of the Vienna Convention.

¹⁷⁵ Article 10 of the Vienna Convention.

¹⁷⁶ Article 37 of the Vienna Convention

3.4 Establishment of Mission Abroad

A mission's diplomatic policy is vital for each mission and it is the duty of the head of the mission to ensure that new policies are put into place to strengthen the relationship between the receiving state and the sending state.¹⁷⁷

The establishments of permanent missions in each capital of a foreign nation have made it difficult in modern times to maintain.¹⁷⁸ With more and more independent states and through the advancement of technology in communication, poorer countries with limited capital and personnel resources, find themselves difficult to maintain many permanent missions of their own.¹⁷⁹ The Vienna Convention has therefore allowed one representative to be responsible for multiple missions, in an aim to relive the financial burden.¹⁸⁰ This, however, is not always the best option or in the interest of all parties, and in practice many other obstacles become apparent.¹⁸¹ Feltham identifies four ways in which a state can ensure that diplomatic representation will nonetheless occur in another state, if the former does not have the funds to establish a permanent mission.¹⁸²

1. By requesting a government which is represented by a permanent mission in the state concerned to act on its behalf, which it may do with the approvable of that state. In these circumstances the head of the permanent mission would normally limit his activities to transmitting messages between the two governments concerned and dealing with consular matters; and if any conflict arose between the interests of his own government and those of the foreign government on whose behalf he was acting, the interest of his own government would prevail;
2. By accrediting one of its heads of mission resident in another state as a non-resident or "visiting" head of mission in the state concerned;
3. By establishing a diplomatic mission headed by a duly accredited non-resident head of mission, but with a Chargé d'Affairs *ad interim* in charge. In practice, owing to the difficulty encountered by several states in finding adequate senior diplomatic staff for the posts they wish to fill, it is not uncommon for a host state to agree to such a mission being headed by a diplomat of lesser standing;

¹⁷⁷ Feltham 17; Ben 27.

¹⁷⁸ Sen 21.

¹⁷⁹ Sen 21.

¹⁸⁰ Article 5 of the Vienna Convention; Sen 21.

¹⁸¹ Sen 21.

¹⁸² Feltham 8.

4. By accrediting a very senior official (e.g. the Permanent Secretary of the Foreign Ministry) as a non-resident or “visiting” head of mission in a number of states while maintaining his residence in his own capital.¹⁸³

It is also not uncommon for states to come to the conclusion that their diplomatic missions are no longer required or that because of the financial burden it is not in their interest to maintain the mission any longer. A mission may be withdrawn for political reasons or an act of foreign policy. In addition, when all diplomatic avenues have been exhausted and the outset of war is imminent, diplomatic missions are often withdrawn. This is also true for third party states that are neutral to the aggression, and may withdraw as a form of protest in the hope that the state in question would re-evaluate its current course.

As states in today’s age are becoming more and more interdependent, it is with increasing interests for states to remain in contact and to negotiate using diplomatic channels. Although dependent on the severity of a conflict between states, members of a diplomatic mission are nowadays hardly withdrawn. At best the head of the mission would return to the sending state for a set period of time, usually for “consultation purposes”, or he would take along the majority of the diplomatic staff leaving only a small attaché behind.

From country to country it varies for a diplomat as to how long he remains in one mission that is abroad.¹⁸⁴ This factor rests mainly on the objective of the Ministry and how effective the mission is.¹⁸⁵ However, one may not underestimate the surrounding circumstances that a diplomat faces living in a foreign country.¹⁸⁶ The standard time a diplomat normally remains in a mission is about three to four years.¹⁸⁷ This may of course vary.¹⁸⁸ Arguments for a longer stay are often related to the diplomat and his family requiring more time to settle down domestically.¹⁸⁹ The diplomat often requires time to learn the language, its history and the political composition of the nation especially if it is a nation he has never encountered or had previous associations with.¹⁹⁰ The diplomat also requires time to make personal contacts and strengthen bonds with political leaders and other influential personal like the military or the business sector for instance.¹⁹¹ It is often perceived, however, as a disadvantage, when the

¹⁸³ Feltham 9.

¹⁸⁴ Feltham 13.

¹⁸⁵ Feltham 13.

¹⁸⁶ Feltham 13; Sen 320; McClanahan 184.

¹⁸⁷ Feltham 13.

¹⁸⁸ Feltham 13.

¹⁸⁹ Feltham 13.

¹⁹⁰ Feltham 13; Sen 320.

¹⁹¹ Feltham 13.

diplomat has found himself too emotionally attached to the problems of the foreign country and is unable to act or advice his own government for its best interest.¹⁹²

3.5 Summary and Conclusion

This chapter set out how the Vienna Convention was established. The purpose of the Vienna Convention is to provide immunity of diplomats. The various types of diplomatic agents were distinguished and their ranks were discussed. It is submitted that consensus remains important although the sending state has a free choice who to send and the receiving state has a veto to deny certain persons access into their country without giving reasons. It is further noted that the Vienna Convention provides general guidelines with regards to appointment, arrival and departure and size of missions with no special consent on point. Moreover, how a mission is established abroad was discussed and the challenges faced by the diplomat and his family by moving every three to four years. It is because of these challenges and the objective of the Mission that immunities are granted but one needs to understand the convention better by delving deeper. This may be done by exploring the functions and obligations that the diplomat has to fulfil in his capacity as representative of a nation which will be highlighted in Chapter 4.

¹⁹² Feltham 13.

Chapter Four Diplomatic Agent under the Vienna Convention

4.1 Functions of a Diplomat

This chapter discusses the role of a diplomat in light of the provisions of the Vienna Convention.

Article 3 of the Vienna Convention sets out the functions of a diplomatic mission as being the following:

1. The functions of a diplomatic mission consist *inter alia* in:
 - i) Representing the sending state in the receiving state;
 - ii) Protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law;
 - iii) Negotiating with the government of the receiving state;
 - iv) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state;
 - v) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.¹⁹³

Watson¹⁹⁴ breaks down the obligations of diplomacy into six broad categories. The first is the representation of the sending state in the receiving state.¹⁹⁵ The envoy or diplomatic agent acts as a mouthpiece to channel official communications between their government and that of the receiving state.¹⁹⁶ This consists of formal representation, including presentation of credentials, protocol and participation in the diplomatic circuit of the national capital or institution.¹⁹⁷ Arguably the most important aspect is substantive representation.¹⁹⁸ This includes the explanation and defence of national policy through embassies and other outlets.¹⁹⁹ The diplomat is constantly negotiating and interpreting the

¹⁹³ Article 3 of the Vienna Convention.

¹⁹⁴ Watson A *Diplomacy: the Dialogue between States* (1984) 223.

¹⁹⁵ Watson 223; Sen 56.

¹⁹⁶ Watson 223; Sen 56.

¹⁹⁷ Watson 223; Sen 56.

¹⁹⁸ Watson 223; Sen 56; Sharp P 'Who needs diplomats?' (1996-1997) 52 *International Law Journal*. 609 at 614.

¹⁹⁹ Watson 223, Sen 56.

foreign and domestic policies of the receiving government and uses his acquired knowledge and skill to press his own agenda forward.²⁰⁰

Second, according to Watson, is the function of acting as a listening post for the receiving state.²⁰¹ Next to substantive representation, an embassy, if it is functioning correctly, should identify key issues and domestic or external patterns which are emerging, together with their implications in order to advise or warn the sending government.²⁰² He is to report on the political, economic and social conditions in the country in which he is living, on the policy of its government and on his conversations with political leaders.²⁰³ Above all, timely warning of adverse developments is one of the major functions of an embassy, requiring considerable expertise, judgment and political courage.²⁰⁴ This is how the sending government will always be a step ahead of the media and can react to political instabilities, economic crises or social movements behind the scenes quickly and efficiently before the media exploits the situation for their own gain.²⁰⁵

The third function of diplomacy is laying the groundwork or preparing the basis for a policy or new initiatives.²⁰⁶ Fourth, in the event of actual or potential bilateral or wider conflict, diplomacy is concerned with reducing friction or oiling the wheels of bilateral or multilateral relations.²⁰⁷ The knowledge of imminent civil war or conflict with another country is a power that should not be underestimated.²⁰⁸ Diplomacy too may be a vehicle for the continuation of a dispute or conflict; it all depends on what angle the sending government perceives the situation.²⁰⁹

The fifth category is to provide order and systematic change.²¹⁰ It is not enough to manage the change but that it is maintained consistently.²¹¹ Diplomats have to ensure that once new policies have been set and agreed upon that they are not just on paper but are actually implemented in the country.²¹² These policies can range from all sort of things from opening trade routes with neighbouring countries, promoting financial, economic, scientific, defence and cultural matters, to implementing a better police system to work better together

²⁰⁰ Watson 223, Sen 56; Sharp 614.

²⁰¹ Watson 223.

²⁰² Watson 223.

²⁰³ Watson 223.

²⁰⁴ Watson 223.

²⁰⁵ Watson 223.

²⁰⁶ Watson 223; Sharp 614; Murty B S *The International Law of Diplomacy* (1989) 20, 28.

²⁰⁷ Watson 223; Sharp 614.

²⁰⁸ Barston R P *Modern Diplomacy* (1988) 2.

²⁰⁹ Barston 2; Sharp 621.

²¹⁰ Aust 109; Watson 223.

²¹¹ Aust 109; Watson 223.

²¹² Aust 109; Watson 223; Murty 28.

with neighbouring countries fighting side by side against crimes such as terrorism, drug smugglers and woman and children trafficking, or unifying educational standards or health and sanitation regulations and any other issue that the two states wish to discuss will be through means of their respective diplomatic missions.²¹³

Lastly, Watson argues that diplomacy is the creation, drafting and amendment of a wide body of international rules of a normative and regulatory kind, which establish structure in the international system.²¹⁴ The management of international relations and the reconciliation of diverse foreign policy priorities is the task of the diplomat.²¹⁵

The functions of a diplomat (and the diplomatic mission) is varied and complex. The primary objective of every diplomatic mission abroad is to ensure that the instructions that are stipulated by the sending State's Ministry are adhered to.²¹⁶ The head of the mission in his wisdom is none the less expected to use his own inventiveness and ideas on how to best adopt those policy.²¹⁷ This expectation is derived from the reasoning that the mission's existence in that country is to learn the language, history, politics and national temperament of the country and therefore it is in a far better position to assess the current situation and how to deal with the policy brought forward by the Ministry.²¹⁸

Article 20 of the Vienna Convention sets out the following:

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.²¹⁹

4.2 Head of the Mission

A senior ambassador normally becomes the head of the mission and he has junior staff that assist him with the duties of the mission.²²⁰ In the 19th century the ambassadors came from aristocratic backgrounds that were rich, educated and influential.²²¹ The ambassadors of today are usually career diplomats who have accumulated work experience over the years in foreign missions.²²²

²¹³ Aust 109; Watson 223.

²¹⁴ Barston 3.

²¹⁵ Feltham 1.

²¹⁶ Feltham 13.

²¹⁷ Feltham 11-12.

²¹⁸ Feltham 12.

²¹⁹ Article 20 of the Vienna Convention; James & Hardy 42.

²²⁰ O'Brien 297. Ross 181.

²²¹ O'Brien 297.

²²² O'Brien 297.

The head of the mission is responsible for all matters connected with his mission.²²³ He delegates various functions to his staff, but he alone is responsible both to his own government and to the government to which he is accredited for the conduct of the mission.²²⁴ The head, however, has certain priorities that he normally devotes his personal attention to. One of these priorities is to formulate diplomatic policy between the two states.²²⁵ The head of the mission also conveys to the host government the political views of his government and focuses on important matters of common interest and common policy between the two states.²²⁶ The head of the mission is responsible to report any significant events that occur in the host government to his Ministry.²²⁷ These can be of political, economic, cultural or scientific interest. Feltham gives the example of a direct significance such as the national budget or ministerial changes, and also indirect significance such as changes and trends in social and economic conditions in the country.²²⁸ The head of the mission will often also include third party views such as the opinion of other diplomats and what the local media broadcasts.²²⁹ The head of the mission needs to remain close to people of great influence in the country and those that have national power.²³⁰ It is natural that the head of the mission needs to conduct himself in a manner that is appropriate to his official rank and not bring his government into disrepute.²³¹ Feltham argues that it is vital to the head of the mission to have a wide pool of powerful friends in order to fulfil his duties to the best of his abilities and to be able to provide an accurate report to his Ministry as possible.²³²

The head of the personnel department [in the department of Foreign Affairs] has one of the most important tasks in the Ministry, deciding whom to send where and for how long. A diplomat is subject to a wide variety of pressures in different posts abroad, and some can cope with particular circumstances better than others: a posting that suits his temperament and personality is in many ways as important as one that suits his ability.²³³

Should the situation occur where the head of the mission is not able to perform his function due to illness or if the post of head of mission is vacant then the most senior diplomatic staff fills the post as *Chargé d’Affairs ad interim*.²³⁴ Procedure dictates that a

²²³ Feltham 18.

²²⁴ Feltham 18.

²²⁵ Feltham 16; Murty 20, 29.

²²⁶ Feltham 16; Murty 29.

²²⁷ Feltham 17.

²²⁸ Feltham 17.

²²⁹ Feltham 17; Ritchie C ‘What are diplomats made of?’ (1974-1975) 30 *International Law Journal*. 15 at 18.

²³⁰ Feltham 17; Ritchie 18; Murty 29.

²³¹ Feltham 17; Ritchie 18.

²³² Feltham 17.

²³³ Feltham 12.

²³⁴ Article 19(1); Feltham 22; Sen 27.

chargés d'affaires diplomat is appointed to represent the mission temporarily until the arrival of the head of the mission that the foreign affairs ministry has appointed.²³⁵ The *chargés d'affaires* also takes up the responsibility in the absence of the head or when the head of the mission is unable to perform his functions.²³⁶ If no diplomatic staff is available then an administrative or technical staff may fill the post temporarily with the approval of the host state.²³⁷ The sending state's Ministry will inform the appropriate authorities of the change of leadership in the mission and will inform them further when the new official head of the mission will be announced.²³⁸ This is in accordance with Article 19 of the Vienna Convention of 1961.

Article 19 of the Vienna Convention states:

- 1) If the post of head of the mission is vacant, or if the head of the mission is unable to perform his function, a *charge d'affaires ad interim* shall act provisionally as head of the mission. The name of the *charge d'affaires ad interim* shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending state to the ministry for Foreign Affairs of the receiving state or such other ministry as may be agreed.
- 2) In cases where no member of the diplomatic staff of the mission is present in the receiving state, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending state to be in charge of the current administrative affairs of the mission.²³⁹

The Vienna Convention makes further provisions for all other staff members of the mission. These include the administration and technical staff, the service staff and the private domestic staff. More about the privileges and immunities and the differences of these in comparison to diplomatic immunity will be discussed in more detail in chapter five.

4.3 Procedures to Begin and End Diplomatic Functions

As discussed supra, no sovereign power is under a duty to send or receive public ministers, diplomats or ambassadors; at most it has become a reciprocal duty performed out of

²³⁵ Sen 27.

²³⁶ Sen 27.

²³⁷ Article 19 (2); Feltham 2; Sen 27.

²³⁸ Feltham 22; Sen 27.

²³⁹ Article 19 of the Vienna Convention.

respect.²⁴⁰ But once sent, the diplomat has to conform to certain requirements prior to function in the receiving state, specifically by presenting his credentials.

In this regard, article 13 of the Vienna Convention states:

- 1) The head of the mission is considered as having taken up his functions in the receiving state either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving state which shall be applied in a uniform manner.
- 2) The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.²⁴¹

Alternatively, article 39(1) of the Vienna Convention states that with regards to diplomatic agents, the same principle applies as with heads of the mission. As soon as a diplomatic agent enters the receiving states territory and presents his credentials and is accredited his diplomatic privileges and immunities will be effective. In the instance where the diplomat is already in the territory from the point onwards when his appointment has been notified to the Ministry of Foreign Affairs or any other relevant Ministry as may be agreed upon.

Article 39(1) should be read with article 5 of the Vienna Convention that highlights that:

- 1) The sending state may, after it has given due notification to the receiving states concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objections by any of the receiving States.
- 2) If the sending state accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a *charge d'affaires ad interim* in each state where the head of mission has not his permanent seat.
- 3) A head of mission or any members of the diplomatic staff of the mission may act as representative of the sending State to any international organization.²⁴²

The next question to be answered is when do the privileges and immunities cease to exist?

Article 39(2) of the Vienna Convention notes that:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or upon expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.²⁴³

²⁴⁰ Article 4; Wheaton section 208 (p 290).

²⁴¹ Article 13 of the Vienna Convention.

²⁴² Article 5 of the Vienna Convention.

²⁴³ Vienna Convention 1961.

This article, about the termination of a person enjoying diplomatic privileges and immunities, states that when the diplomat's functions have come to an end it does not mean that this is immediate. The diplomat will continue to enjoy his privileges until he has left the country, or after "a reasonable time" has lapsed.

A practical example of the meaning of a "reasonable period of time" as interpreted by the courts can be illustrated by the case that occurred in Ottawa, Canada in 1982. An embassy official from Nicaragua left a bag with a large package of cocaine and a revolver accidentally at a car wash. Local authorities apprehended and arrested him but he claimed diplomatic immunity.²⁴⁴ The difficulty in this case was that the diplomat had already been replaced two weeks ago and that he was in fact preparing to return home to Nicaragua.²⁴⁵ In normal circumstances the Vienna Convention is clear that the diplomat remains immune for a reasonable period after cession of his official duties.²⁴⁶ The offending diplomat in this example, however, undertook a four day vacation to the United States of America after his duties were terminated.²⁴⁷ Since the diplomat had already been replaced and the vacation trip to the US which was a pleasure trip and not an official trip, the prosecution argued that the reasonable period of time had therefore lapsed and that therefore the diplomat could no longer claim diplomatic immunity.²⁴⁸ The court, however, interpreted the "reasonable period" broadly concluding that only once the ambassador departs back to his home country will the immunity come to an end.²⁴⁹ This case also makes it clear how political pressures and the harassment of uniformed law enforcement can lead to such misdirected decisions.²⁵⁰ In addition, the prosecutor who had already foreseen that the court would come to the decision of invoking that the immunity would still stand, had prepared an appeal that if served to the diplomat would ensure that he would not be able to leave the country until the appeal.²⁵¹ The diplomat knowing very well the consequence if he was served these papers ensured that an accomplice blocked the prosecutor from serving the papers to him, granting the diplomat sufficient time to leave the country and therefore escaping the possibility of a conviction.²⁵²

²⁴⁴ Ashman C & Trescott P. *Outrage: The Abuse of Diplomatic Immunity* (1986) 174. Parkhill 580.

²⁴⁵ Ashman & Trescott 174; Parkhill 581.

²⁴⁶ Article 39.2 and Article 39.3 of the Vienna Convention.

²⁴⁷ Ashman & Trescott 174; Parkhill 581.

²⁴⁸ Ashman & Trescott 174; Parkhill 581.

²⁴⁹ Ashman & Trescott 174-175; Parkhill 581.

²⁵⁰ Ashman & Trescott 175; Parkhill 581.

²⁵¹ Ashman & Trescott 175; Parkhill 581.

²⁵² Ashman & Trescott 175; Parkhill 581.

The fact that at the time the country might be under armed conflict is irrelevant. Furthermore any acts that he continues to perform as a member of the mission he will continue to be protected by his privileges and immunities.

This article is controversial. Legal scholars like Larschan²⁵³ are of the legal opinion that the second sentence of article 39(2) should be interpreted that immunities for official acts done during the term of office remain immune and that this never comes to an end even after the official accreditation to the mission has ended.²⁵⁴ This would have the consequence that diplomats that have committed an offence during their term of office would never be held accountable for their misconduct even after their diplomatic immunity as been terminated.

The problems in this regard can be illustrated by the following example. The U.S State Department in the Abisinto Affair, interpreted article 39(2) differently. It argued that:

On termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecution him 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.²⁵⁵

The US department relied on article 39(2) submitting that since the diplomat's accreditation has come to an end, the State Department is now free to prosecute him. This stance leads to two different viewpoints.

Larschan argues that article 39 refers to the immunity of a diplomat which continues to be in place after the termination period. He acknowledges that diplomats immunity remains intact during the early period of accreditation and that he does not lose his immunity after his termination for any acts done in his official capacity.²⁵⁶

Donoghue, however, provides arguments that this has been wrongly interpreted and is in line with the State Department that the former diplomat does not retain his immunity after termination.²⁵⁷ He argues that since Article 39(1) already makes it clear that the diplomats immunity come to an end with his termination (once the diplomat has left the country or after the expiry of "a reasonable time"), any other interpretation would clearly be contradictory.²⁵⁸

²⁵³ Larschan 283, 295.

²⁵⁴ Larschan 293.

²⁵⁵ Circular Note of March 21, 1984, Dep't of State File No. P84-0056-1827, reprinted in (1984) 78 *American Journal of International Law* 657.

²⁵⁶ McDonough 483; Denza 249.

²⁵⁷ Donoghue 621, 622, 623.

²⁵⁸ Donoghue 623.

Denza²⁵⁹ supports Donoghue view in stating that:

The fact that the offence or the act or contract in respect of which the proceedings were brought had taken place during the subsistence of immunity was no bar to subsequent proceedings so long as it was of a private nature and not performed in the exercise of diplomatic functions.²⁶⁰

Denza makes the point that diplomats continue to retain their diplomatic immunity for acts done in their official capacity as diplomatic agents.²⁶¹ This means that acts done that were not of an official nature can be prosecuted against the diplomat only once his immunity has come to an official end.²⁶²

Diplomatic functions also end upon death of a diplomat. Article 39(3)²⁶³ deals with this instance where a member of the mission dies. His family members will continue to enjoy the privileges and immunities that they were entitled to until the expiry of “a reasonable time” in order to leave the country.

If permission for an inquest on the body of a diplomat is not given, it is unlikely that any alternative inquiry elsewhere could satisfy the interest of the receiving state in ascertaining the cause of a death occurring on its territory. But in all these cases, proceedings could not take place without impeding the diplomat in the exercise of his functions or impairing the dignity of the mission.²⁶⁴

The subject of inquest following the death of a diplomat in the receiving state has not been addressed, however.²⁶⁵ Although it is in the interest of justice to inquire about the death of a diplomat especially in circumstances where the death of the diplomat is suspicious and not clear, it is international common practice that no public inquiry is held without the expressed consent of the mission.²⁶⁶ This logic is deduced from Article 31.1 as it is regarded as an exercise of civil and administrative jurisdiction to which the diplomat is immune although he is dead.²⁶⁷ Article 39.2 and 39.3 suggest that his immunities do not cease to exist immediately after his functions at the mission have been completed or even if he is declared a *persona non grata*. His immunity would only expire after he has left the country or after a

²⁵⁹ Denza E *Diplomatic Law – Commentary on the Vienna Convention on Diplomatic Relations* (1998) 248.

²⁶⁰ Denza 248.

²⁶¹ Denza 249; McDonough 483; McClanahan 67.

²⁶² Donoghue 625, 626, 628, 630.

²⁶³ of the Vienna Convention.

²⁶⁴ Denza 246.

²⁶⁵ Denza 232.

²⁶⁶ Denza 232.

²⁶⁷ Denza 233.

“reasonable period of time”.²⁶⁸ The same can be deduced if the diplomat was to die, then his immunity does not come to an end immediately but after a “reasonable time”.²⁶⁹

Moreover, article 39(4)²⁷⁰ also makes provision for the death of a member of a mission or a family member that are not nationals or permanent resident to the receiving country. It obliges the receiving state to permit the withdrawal of all movable property of the deceased, with the exception of goods that were acquired in the country that are prohibited by the country’s export laws at the time of the death of the deceased. Any estate, succession and inheritance duties that arise will not be levied on the movable property where the presence of which in the receiving state was due solely because of the deceased forming part of the mission or the family member of the mission.

4.4 Summary and Conclusion

The aim of this chapter was to highlight what the actual functions of a diplomatic agent in general and the Head of Mission in particular is. The commencement and end of a diplomatic agent’s privileges and immunities were set out. The diplomat’s personal privileges and immunities commences from the point he arrives in the receiving state to take up his position in the mission. If the diplomat is already in the country then his privileges and immunities start once his position has been given to the Foreign Affairs Ministry in the receiving state.

The diplomat’s privileges and immunities normally cease to exist once he leaves the receiving country because he has accomplished his duties that were required from the sending state or he has been recalled. The immunities, however, do not cease to exist immediately but after “a reasonable time”, in order to give the Diplomat sufficient time to prepare to depart back to his home country. In the United Kingdom “a reasonable time” is a period between four to six weeks. However, if the diplomat still continues to exercise acts that are in line with his official duties his immunity will not cease, only acts carried out in his own personal capacity. In the case where the diplomat dies, his family that remain in the receiving state will continue to be immune from jurisdiction for a reasonable time for them to make all sufficient preparation to leave the country.²⁷¹

The following explores and analyses the privileges and immunities that the diplomat enjoys and the extent and consequences that come with it.

²⁶⁸ Article 39.2 and Article 39.3 of the Vienna Convention.

²⁶⁹ Article 39.2 and Article 39.3 of the Vienna Convention; Denza 233.

²⁷⁰ of the Vienna Convention.

²⁷¹ Fletham 45.

Chapter Five Rights of a Diplomatic Agent

5.1 Rights Enjoyed to the Individual Diplomatic Agent

The privileges and respect that diplomats enjoy has been established over the centuries, although this has been maintained, the reasons for its necessity.²⁷² Representatives of a state can only carry out their diplomatic functions to their utmost capability if they do not have to worry about the legal consequences a state can impose on them.²⁷³ Immunity does not mean that one becomes completely void of moral rule to hold peoples accountable for wrongdoing. In most democratic countries, the privileges and immunities diplomats enjoy can appear to be disproportionate and superfluous, leaving the general citizen angry at the special treatment they receive.²⁷⁴ While in other countries only the threat of reciprocity enables diplomatic relations to be maintained without any incident.²⁷⁵ These privileges and immunities apply to the diplomatic mission, its functions, and to the individual.²⁷⁶

International customary law grants a host of privileges and immunities to diplomatic agents.²⁷⁷ These immunities are subdivided into two broad categories or classes.²⁷⁸ One class encompasses immunities that are attached to the premises and assets used by the diplomat for accomplishing his mission;²⁷⁹ the other class embraces immunities covering the personal activities of that official.²⁸⁰ Both of these categories will be analysed.

This much is true: diplomatic immunity is a necessary evil, though evil it truly rarely is. However, despite that concession, there are improvements that can be implemented that would serve to possibly prevent future offences or tragedies from occurring. At the very least, the public perception of diplomatic immunity may become more positive.²⁸¹

²⁷² Feltham 38.

²⁷³ Feltham 38; Hickery and Fish 'The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States' (1989-1990) 41 *Hastings Law Journal* 351 at 356.

²⁷⁴ Feltham 38; Maginnis 1009.

²⁷⁵ Feltham 38; Hickery & Fisch 358, 359.

²⁷⁶ Feltham 38; McDonough 479.

²⁷⁷ Cassese 114; McDonough 479.

²⁷⁸ Cassese 114.

²⁷⁹ Cassese 114.

²⁸⁰ Cassese 114.

²⁸¹ Zaid M S 'Diplomatic Immunity: To have or not to have, that is the question' (1997-1998) 4 *ILSA Journal of International & Comparative Law* 623.

The importance of a diplomat's work in the international community and the silent work behind the scenes to ensure friendly relations with neighbouring countries cannot be underestimated. In the broader picture their work results in an international community that is closer and allows the citizens of their governments to bear fruits from their respective work.

These fruits may be seen by the ability to travel internationally and be able to purchase exported goods which the normal person takes for granted.

This is why immunities are in place so that the official mission might be accomplished without being jeopardized from local laws.²⁸² The traditional rationale being the expression of the dictum *ne impediatur legatio*.²⁸³

5.2 Property and Assets of the Mission

The Vienna Convention defines the premises of the mission as follows:

The “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission including the residence of the head of the mission.²⁸⁴

The mission is predominantly based in the capital of the receiving state and any other offices that form part of the mission needs to be established in other cities of that particular state if special permission has been provided by that state.²⁸⁵ The Netherlands is the exception to the rule in this regard.²⁸⁶ Although Amsterdam is the official capital of the country all diplomatic missions are stationed in The Hague.²⁸⁷

As Article 1 explicitly states that only the private residence of the head of the mission is included to be part of the mission's property, the private residence of all other staff members to the mission are therefore excluded. Nonetheless, Article 30 of the Convention grants those premises inviolability:

The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premise of the mission. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.²⁸⁸

It is accepted worldwide that the Vienna Convention is the codification of customary international law, which means that not only are the diplomatic premises considered to be

²⁸² Cassese 114.

²⁸³ Cassese 114.

²⁸⁴ Article 1 of the Vienna Convention 1961.

²⁸⁵ O'Brien 297; Fletham.R.G, *Diplomatic Handbook* 7th ed. (1998) 7.

²⁸⁶ Feltham 7.

²⁸⁷ Feltham 7.

²⁸⁸ Article 30 of the Vienna Convention 1961.

inviolable in countries that are signatory to the Vienna Convention but in all nations throughout the world.²⁸⁹ Article 11 of the Vienna Convention states:

1. In the absence of specific agreement as to the size of the mission, the receiving state may require that the size of a mission to be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving state and to the needs of the particular mission.
2. The receiving state may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.²⁹⁰

Furthermore Article 12 sets out that:

The sending state may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.²⁹¹

This is a new international law principle that was created due to past problems of large numbers of diplomats and staff being brought into the receiving state and the receiving state suffering from the large number of the entourage that the ambassadors would bring.²⁹² With this new principle the receiving state has the power to control each mission size according to the objectives and relationship the receiving state enjoys with the sending state.²⁹³ States should be careful, however, in imposing too strict a limit on the size of the mission as this may lead to reciprocal behaviour from the other state.²⁹⁴ Nor is it recommended that all diplomatic missions in a particular state are to be given the same amount of representatives, as there are missions that carry far more influence, political and economic value to the receiving state than other states.²⁹⁵ An example hereof is the US which limits members in Washington on the basis if the particular mission is in debt that the mission should reduce its numbers of representatives until the debt has been settled.²⁹⁶

The mission in the receiving state is thus protected by the Vienna Convention and it is the duty of the receiving state to ensure that the mission is given its due safety²⁹⁷:

1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.

²⁸⁹ Choi W M 'Diplomatic and Consular Law in the Internet Age' 10 *Singapore Yearbook of International Law*. 120.

²⁹⁰ Article 11 Vienna Convention 1961.

²⁹¹ Article 12 of the Vienna Convention.

²⁹² Denza 77; James & Hardy L 29.

²⁹³ Denza 77; James & Hardy L 29.

²⁹⁴ Denza 80.

²⁹⁵ Denza 80.

²⁹⁶ Denza 81.

²⁹⁷ Higgins R 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 *American Journal of International Law* 641-651 at 646.

2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbances of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.²⁹⁸

The receiving state therefore has an active obligation to ensure the safety and well being of the mission and the premises and all persons residing in the premises, this concept has become very important.²⁹⁹ The Article is clear that no unauthorised entry is permitted by any person of the receiving state.³⁰⁰ In the case that a crime has been committed inside the embassy premises or from within the mission, the local authorities of the receiving state may not enter the mission premises without the expressed consent of the ambassador.³⁰¹

At the same time the duty to protect embassy premises came to assume greater importance. As the duty to protect all foreign property became more firmly established in international law, the special duty towards foreign mission increased correspondingly to a higher level. The 1895 Resolution of the Institute of International Law used the term inviolability to denote the duty to protect, by unusually severe penalties, from all offence, injury or violence on the part of the inhabitants of the country...³⁰²

This particular Article 22, however, is far more difficult to abide by than what one merely understands from surface value.³⁰³ An example of this inviolability principle is the Chinese delegation that emphasised the importance of receiving states taking an active preventative stance to protecting the foreign missions.³⁰⁴ The mission needs to be protected in order for threats and attacks to be prevented before they occur and not only to take an active role once the attack has already occurred.³⁰⁵ Lijiang argues that not only special security guards need to be provided for them but frequent contacts of security information needs to pass between the mission and the receiving state.³⁰⁶ During sensitive times extra precautions need to be made to ensure the safety and integrity of the mission.³⁰⁷ In this regard, states must not only concern themselves once the attack has occurred; to prosecute them and pay out

²⁹⁸ Article 22.

²⁹⁹ Higgins 650; James & Hardy 41; Berridge *Diplomacy: Theory and Practice* 3ed (2005) 116

³⁰⁰ Article 22; McClanahan 50.

³⁰¹ Farhangi 1522.

³⁰² Denza 114.

³⁰³ Aust 118.

³⁰⁴ Lijiang Z H U 'Chinese Practice in Public International Law:2008' (2009) 8(2) *Chinese Journal of International Law*, 493-551 at 531. On 23 October 2008, Mr Zhou Young of the Chinese Delegation statement at the 63rd Session of the UN General Assembly on Item 77 "Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives".

³⁰⁵ Lijiang 531.

³⁰⁶ Lijiang 531.

³⁰⁷ Lijiang, 531.

compensation, but to take active steps to decrease the likelihood of these incidences re-occurring.³⁰⁸ Lijiang furthermore stresses that legislative, administrative and judicial countermeasure need to be put in place to deter the perpetrators but to also prosecute them.³⁰⁹ The failure of this, he argued, will only lead to a breakdown of international relations between the states and does not show a forthcoming approach from the receiving state.³¹⁰ It should follow then that the receiving state should be solely held responsible for the damages the mission received for the failure to take the necessary precautions.³¹¹

Foreign missions can face different hardships in the receiving state. In a receiving state where the values of democracy are adhered to and rights such as freedom of speech and the right to demonstrations are exercised freely then it becomes a challenging to observe not only the rights of the national citizen but also the rights that the Convention has set in place.³¹² Some states have taken active measures to reduce the hardship of the missions, such as public demonstrations.³¹³ They need to be taken seriously and states should ensure that there are certain rules and regulations that are followed before a demonstration can occur.³¹⁴

Many states passed legislations which banned even purely political or symbolic injury – such as insult to the flag or protest demonstrations – or prescribed particularly severe penalties for trespass or acts of violence towards mission premises.³¹⁵

As an illustration, in the United States in 1938, a Joint Resolution of the Senate and House of Representatives made it unlawful within the District of Columbia to display a flag or placard intended to intimidate or bring into ridicule foreign diplomatic representatives, to interfere with performance of diplomatic duties within five hundred feet of any embassy premises except in accordance with a police permit, or to congregate within the same area and refuse to disperse on police orders.³¹⁶

The receiving state needs to protect not only the immovable property, that is the mission but also the movable property such as the contents in the mission and its motor

³⁰⁸ Lijiang, 531.

³⁰⁹ Lijiang, 531.

³¹⁰ Lijiang 531.

³¹¹ Lijiang 531. www.china-un.org/eng/hyyfy/t519428.htm. See also www.fmprc.gov.cn/eng/xwfw/s2510/2511/t418491.htm with regard to the report that Chinese embassies in more than of countries were attacked; www.fmprc.gov.cn/eng/xwfw/s2510/2511/t421192.htm with regard to French claim that it will remove the police protecting the Chinese embassy; www.fmprc.gov.cn/eng/xwfw/s2510/2511/t450335.htm with regard to China's request to Nepal to protect the Chinese Embassy in Nepal.

³¹² Aust 118.

³¹³ Higgins 650.

³¹⁴ Aust 118.

³¹⁵ Denza 114.

³¹⁶ Denza 115.

vehicles.³¹⁷ All property belonging to the mission is therefore protected and immune from police search, requisition, legal attachment and execution.³¹⁸ This does not only apply to members of the diplomatic staff but also to administrative and technical staff.³¹⁹ The mission's documents, archives and correspondence are equally protected and immune and the receiving state has no right over them wherever they may be.³²⁰ The "documents" in this case need to include electronic documents that are saved electronically such as computer files and web pages and binary codes on the main system computer.³²¹ It is important to ensure the protection of diplomatic property for the safety and well being of the diplomats and the mission's objectives that have to be fulfilled.

Under Article 22(2) of the Vienna Convention Act, it limits liability of "all appropriate steps" to protect the mission from any sort of harm.³²² The receiving state normally still pays for compensation for the damage of property or loss of life even in a situation where it has not openly admitted fault or negligence.³²³ Customary International Law practice dictates that the receiving state would still agree to pay compensation to the sending state even in the circumstance where there had been no breach of the said duty.³²⁴ In most instances these are conditional to reciprocity.³²⁵ The United Kingdom is a good example of paying *ex gratia* payment for damage in circumstances that would otherwise not be justifiable, such as a terroristic attack.³²⁶ Those types of attacks are unpredictable and in most instances the affected state is powerless to avoid harm that is caused to third parties, and therefore it is not illogic to assume that the state in that instance will not pay compensation.³²⁷ The United Kingdom has therefore suggested to missions in its territory to insure themselves against damage of such sort.³²⁸

Consular missions receive similar inviolability with regard to mission premises, with the exceptions that authorities may enter the premises without the consent of the consular head to areas that are not used exclusively for consular work i.e. bathroom, kitchen, bedroom,

³¹⁷ Feltham 42; James & Hardy 43; McClanahan 50.

³¹⁸ Feltham 42.

³¹⁹ Feltham 42; James & Hardy 43.

³²⁰ Article 24 of the Vienna Convention; Feltham 42.

³²¹ Choi 123.

³²² Denza 139; Higgins 650.

³²³ Denza 139; Shaw 672.

³²⁴ Aust 117.

³²⁵ Aust 117.

³²⁶ Denza 139.

³²⁷ Denza 139.

³²⁸ Denza 140.

if they have a valid reason for entering.³²⁹ In the instance of a cyber crime committed in a consular post, the authorities have far better options of bringing these activities to a halt than in a diplomatic mission, since the authorities may enter the premises and may search and gather evidence in those parts of the premises that are not used exclusively for consular purposes.³³⁰

In addition, the mission must also be protected “...against any intrusion or damage and [prevention] [of] any disturbance of the peace of the mission or impairment of its dignity”.³³¹ The question one needs to ask though is, what is the procedure in the case of an emergency where the swift action of local authorities is required in order to save human lives and mission property such as a fire?³³² The Vienna Convention on Consular Relations states that in such an instance no consent is required as the consent is “assumed”.³³³ The Vienna Convention on Diplomatic Relations is silent on the matter and has proved to be a point of contention for those who argue for and against this matter.³³⁴ Choi makes the example where there is a threat to the communications of a diplomatic mission through the use of cyber bombs and viruses.³³⁵ If the local authorities are aware of such activities then they are under a special duty to protect the diplomatic mission and ensure the safety of the mission.³³⁶ The question, however, remains whether this can be seen as an emergency that would legitimise the use of entry into the mission without the appropriate consent of the head of the mission.³³⁷ Such cyber terror and threats would have the potential of not only financial loss but also the loss of data and information which is vital to the successful functioning of a mission.³³⁸

Part of the inviolability principle is that a diplomat and members of his family forming part of his household (provided that they are not nationals or permanent residents of the host state) are exempt from the inspection of personal luggage, unless there are serious grounds for believing that it contains articles that do not come within the scope of the privileges permitted, or illegal imports or exports.³³⁹ In this event the inspection must be conducted only in the presence of the diplomat or of his authorized representatives.³⁴⁰ This is applied to the

³²⁹ Choi 121.

³³⁰ Choi 121.

³³¹ Article 22(2) of the Vienna Convention.

³³² Choi 122-123.

³³³ Article 31(2) of the Vienna Convention of Consular Relations; Choi 121.

³³⁴ Choi 121; Shaw 671.

³³⁵ Choi 121.

³³⁶ Choi 122.

³³⁷ Choi 122; Shaw 671; Denza 120, 125, 126.

³³⁸ Choi 123.

³³⁹ Feltham 48; Aust 134.

³⁴⁰ Feltham 48; Aust 134.

mission's documents, archives and correspondence which are also valuable for the successful completion of the Mission and is regarded as inviolable.

5.3 Hostage Case

The receiving state is under a special duty to take all appropriate steps to protect diplomatic and consular premises and a failure to comply with this duty is likely to meet with strong international condemnation.³⁴¹ Undoubtedly, the most significant failure to protect diplomats in history concerned the seizure and subsequent occupation of the US Embassy in Tehran, Iran in 1979.³⁴² Iran's government's lack of action against the seizure of the United States Embassy in Tehran in November 1979 was a unique desertion of the receiving state obligations under the Vienna Convention.³⁴³

Although the seizure of the Embassy took place on the 4th of November 1979, this was not the first time the Embassy had come under attack.³⁴⁴ In the beginning of that same year, on the 14th of February, an armed group of radicals stormed the US Embassy, where 6 men lost their lives and 70 individuals including the US Ambassador were held hostage.³⁴⁵ Iran, however, was quick to respond and only a few hours after the incident members of the Revolutionary Guard rescued the Diplomats. The Embassy was given back to the Diplomats with an official letter of apology. However, tension again rose in October in the same year and the US requested better protection for their foreign embassy. The Iranian government reassured the US that all protective measures were in place to guarantee the safety of the Embassy. The members of the mission in Tehran confirmed that more guards had been posted and that they were satisfied with the security measures. This was affirmed on the 1st of November when a demonstration crowd of 5000 individuals made their way to the US embassy. The crowd was kept under control and the guards were able to disperse them. Only 3 days later a similar occurrence took place, this time they were able to enter the embassy without any resistance as it seems that none of the guards that were put in place, offered any resistance. It seems that the guards simply left when they saw the crowds coming towards

³⁴¹ Strydom H A '*Diplomatic Immunities*' LAWSA 2nd ed, vol 11 Reissue para 173.

³⁴² Barker C J *The Protection of Diplomatic Personnel* (2006) 8.

³⁴³ Case concerning United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 3, para 63,76 and 92, Denza 138; Maginnis 991; McClanahan 8, 9.

³⁴⁴ Barker 8; Maginnis 991; McClanahan 8.

³⁴⁵ Barker 8.

them.³⁴⁶ 52 hostages were held captive for 444 days until their final release on 20 January 1981.³⁴⁷

The International Court of Justice in the Hostage Case found that: "...the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion." As to the second phase, during which the occupation of the mission premises by militants continued, this 'clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Convention even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.'³⁴⁸

The International Court of Justice³⁴⁹ further held that the blatant disregard to protect the Embassy by the government of Iran was of such severe gravity that it is not just private individuals or a group of individuals that have not complied with the basic principle of international law governing diplomatic relations, but the receiving state itself.³⁵⁰

Such events cannot fail to undermining the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day.³⁵¹

The Tehran case shows the importance of diplomatic personnel having diplomatic immunities and rightly so. The diplomat needs to be free from political persecution and act independently from the receiving state without any fear.³⁵²

5.4 The Importance of Free Communication

As mentioned above, a diplomatic mission is entitled to communicate freely for all official purposes and to have access to every facility available in the state in which it is situated.³⁵³ It may use any appropriate means such as messages in code or cipher to communicate with its own government and with any of its government's mission and consulate wherever they may be situated.³⁵⁴

This is in line with the Vienna Convention of 1961 which stipulates in Article 27 (1):

³⁴⁶ Barker 9.

³⁴⁷ Barker 9; Maginnis 991; McClanahan 9; Satow 235.

³⁴⁸ Case concerning United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 3, para 63,76 and 92; Denza 138.

³⁴⁹ Case Concerning United States Diplomatic and Consular Staff in Tehran 1980 ICJ Reports 3, 42-43.

³⁵⁰ Case concerning United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 3, para 63,76 and 92; Denza 138.

³⁵¹ HA Strydom, para 173.

³⁵² Maginnis 992; Barker 219.

³⁵³ Feltham 42; James & Hardy 36.

³⁵⁴ Feltham 42; James & Hardy 36.

The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However the mission may install and use a wireless transmitter only with the consent of the receiving State.

If the receiving State does not adhere to this provision and the mission is unable to freely and secretly communicate with its Government then the mission's daily functions become ineffective.³⁵⁵ The right to communicate freely and secretly is one of most important aspects in diplomatic law and if the mission is unable to do so then two of the missions most vital functions become futile as the mission can no longer negotiate with the Government of the receiving state and the mission cannot report back to the sending state on conditions and developments in the receiving state.³⁵⁶ Furthermore the advantage over the media reporting on new developments in the receiving state are then lost as well.³⁵⁷

In a more analytical sense, the diplomatic process consists of diplomatic personnel acting as conduits for communication between the governments of the states. The embassy personnel collect information from diverse sources in the receiving state, transmits the information to the sending state government and relays messages from the sending state to the government of the receiving state. However, the Vienna Convention shows the intent of its drafters to limit the means of gathering information to "all lawful means," apparently in reference to espionage.³⁵⁸

All formal communication between a diplomatic mission and the foreign government is made (a) by or on behalf of the head of mission, and (b) to the Ministry of Foreign Affairs, except where special permission has been given for dealing with another department.³⁵⁹

Choi³⁶⁰ highlights the technological advancements in today's age which make the functions of a diplomat far easier.³⁶¹ Through the use of the internet he states that negotiations between states have become far more simplistic and financially cheaper.³⁶² Not only can prior negotiations between states be set up electronically but the entire negotiation can be done over the net.³⁶³ It is possible to speak to multiple parties at the same time, to

³⁵⁵ Denza 173; McClanahan 66.

³⁵⁶ Denza 173; James & Hardy 36.

³⁵⁷ Denza 173.

³⁵⁸ Wright 194; James & Hardy 42.

³⁵⁹ Feltham 32; James & Hardy 36, explain that the mission must also be able to communicate with third party states, nationals of the sending state, missions and consulates and international organizations; McClanahan 66.

³⁶⁰ Choi 117.

³⁶¹ Choi 119.

³⁶² Choi 119; James & Hardy 37.

³⁶³ Choi 119.

discuss current events, reducing travelling costs and time.³⁶⁴ Negotiations over the internet are far less confrontational, and time difference between states become virtually irrelevant when sending a simple email.³⁶⁵ However, the principle of inviolability remains. This is articulated in Article 27(2) And Article 27(3) which highlights that the diplomatic bag remains free from inspection and search.

The right to use “all appropriate means, including diplomatic couriers and messages in code or cipher” is on the other hand restricted by the terms of the second sentence of Article 27.1 to communication with the sending government and its missions and consulates wherever situated. The use of diplomatic couriers other than to carry out communications between different agencies of the same government could hardly be regarded as “appropriate”. Written messages from the mission would, however, be entitled to inviolability either as archives or as correspondence of the mission while in transit to the intended recipient, so that the receiving State would in any event not be entitled to inspect them in order to verify whether or not they were in code or cipher.³⁶⁶

This includes free and easy access to the internet.³⁶⁷ The receiving state needs to take all “appropriate steps” to ensure free and communication which includes the use of the internet and electronic data such as e-mails.³⁶⁸ These need to remain confidential just like any other means of communication between the sending state and mission.³⁶⁹ The protection of espionage is crucial and the receiving state has an obligation to ensure steps are taken to protect all foreign missions.

Another fact that needs to be taken into consideration about Article 27 is that although it stipulates expressly that the communication is to be free it does not imply the exemption from chargers levied for specific services rendered, such as telephone bills.³⁷⁰ This means that the receiving state does have the power to discontinue those kinds of services if the levy for these services are not paid by the sending state on the same justification the state discontinues it for private citizens.³⁷¹ It is, however, a matter of courtesy by the relevant Minister of Foreign Affairs in the receiving state to ensure that this only happens in a matter

³⁶⁴ Choi 119.

³⁶⁵ Choi 119.

³⁶⁶ Denza 175.

³⁶⁷ Choi 125.

³⁶⁸ Choi 125.

³⁶⁹ Choi 125.

³⁷⁰ Denza 179.

³⁷¹ Denza 179.

of last resort, as the occurrence of disconnecting the mission's telecommunication with the sending state due to unpaid bills, is rather embarrassing.³⁷²

With regards to eavesdropping devices and technical advanced instruments to intercept communication that is made between the mission and the sending state, it is clear that it is a violation of both Article 22 and 27.

The receiving state must not attempt to become acquainted with the content of the communications – and it must take all reasonable precautions to prevent others from doing so. Thus the receiving state does not have the right to censor ordinary mail, or to open the diplomatic bag, or to listen in to telephones or private conversations, or to copy or decipher telegrams. If it employs these practices in respect of its own citizens, it must make an exception for diplomatic communications.³⁷³

5.5 Privileges and Immunities Conferred on the Diplomat as an Official

5.5.1 General Principle

Today diplomatic immunity often contradicts fundamental principles of justice in civilized countries.³⁷⁴

The Vienna Convention in Article 29 make is clear that the diplomat enjoys personal immunity.

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.³⁷⁵

The word “inviolable” is used not only to convey that the diplomat is free from arrest and detention in the receiving state, but also that there is an onus on the receiving state to treat the diplomat with due respect and to take measures to ensure the safety of the diplomat at all times.³⁷⁶

³⁷² Denza 179. The Minister of Foreign Affairs in Germany has permitted that the diplomatic mission in such circumstances would at least still be able to receive incoming calls although prohibit any calls being made back to the Sending Government.

³⁷³ ‘Diplomatic Freedom of Communication’, 14 *Scandinavian Studies in Law* (1970) 193, at 209 and 219; Denza 180.

³⁷⁴ Ross 201.

³⁷⁵ Article 29 of the Vienna Convention.

³⁷⁶ Ling 104; Kaczorowska *A Public International Law* (2010) 402; Hillier T ‘Sourcebook on Public International Law’ (1998) 317.

Article 29 of the Vienna Convention therefore obliges all states that are signatory to the Convention to assert a higher protection towards diplomatic agents than what is normally accorded to the private person of the state.³⁷⁷ Ling argues that the state is required to prosecute, for instance, all private persons that have violated the diplomat as a person, his freedom or his dignity, as well as to make any necessary redress and officially apologies to the diplomat and his state for the offence.³⁷⁸ Needless to say these can only occur once an attack or offence has been committed already.³⁷⁹ In addition, Ling claims that the host state should take all “appropriate steps” in order to ensure that such occurrence will not materialise.³⁸⁰ Nevertheless, in reality over the last century this has become almost impossible due to the vast amount of official diplomatic agents that are accredited to a receiving country.³⁸¹ Many states do provide secret police or personal body guards that provide a certain degree of safety to them, especially in states where incidents of frequent kidnapping involving diplomatic agents is this the case.³⁸²

In general, the immunity granted to a Diplomat and members of his family forming part of his household are set out in Article 31 and include:

1. Immunity from arrest and detention
2. Immunity from criminal jurisdiction – the diplomat and his family forming part of his household are immune from criminal jurisdiction of the host state provided that they are not nationals or permanent residents of the host state.
3. Immunity from civil and administrative jurisdiction - exception according to Article 31 with regards to:
 - i. Private immovable property which is not held by the sending state and not used for the purpose of the mission
 - ii. Succession – where he is acting as an executor, administrator, heir or legatee as a private person and not with connection to the sending state.
 - iii. Any professional or commercial activity outside his official functions.
 - iv. If the diplomats voluntarily submit to jurisdiction, initiating proceedings, they cannot invoke immunity as they have waived their rights, this is also with regards to counterclaims and appeals that the diplomat have initially engaged with.
 - v. A diplomat and members of his family forming part of his household are not obliged to give evidence as witnesses. This is to ensure that the Diplomats do not misuse their immunities.
4. Immunity from violation of the diplomats residence, papers, correspondence and property

³⁷⁷ Ling 106; McClanahan 115.

³⁷⁸ Ling 106

³⁷⁹ Ling 106

³⁸⁰ Ling 107; McClanahan 115; Kaczorowska 402.

³⁸¹ Ling 107; McClanahan 115.

³⁸² Ling 107.

5. Immunity from taxes, personal or real, national, regional or municipal.³⁸³

Each of these will be discussed in more detail.

5.5.2 Immunity from Criminal Jurisdiction

All Diplomatic agents and the mission are assured freedom of movement in the receiving state.³⁸⁴ It is seldom that a state will deny diplomatic agents a restriction of movement because of the fear of reciprocity from the other state towards its own diplomatic agents.³⁸⁵ Even in the case where the diplomat deliberately ignores such a restriction, the diplomatic agent nevertheless still enjoys diplomatic immunity and is therefore exempt from any form of punishment or legal consequences, the only remedy that the state does have, however, is to declare the diplomatic agent a *persona non grata*.³⁸⁶ More about the official remedies that a state has available to use against offending diplomats will be discussed in chapter 9.

There have been a number of circumstances where diplomats have in fact been arrested or detained.³⁸⁷ These can be divided into three categories: one, where diplomatic agents have been accused of harassment and where the detention period was a couple of days.³⁸⁸ Two, instances where diplomats were in possession of cameras and taking pictures in “forbidden zones” and three, where diplomats have actually trespassed into those “forbidden zones” or were engaged in some sort of espionage.³⁸⁹

Personal inviolability, however, remains in force and the right to exemption for the local courts is absolute in regards to criminal matters.³⁹⁰ The diplomat may not be tried or punished and this principle is a firm foundation in the customary international law.³⁹¹

It needs to be mentioned at this stage that police officials unfortunately often lack the necessary training and knowledge when it comes to dealing with people that hold a diplomatic rank.³⁹² Those that have full immunity may not be subjected to any form of

³⁸³ Cassese 115.

³⁸⁴ James & Hardy 34.

³⁸⁵ James & Hardy 35.

³⁸⁶ McDonough 482.

³⁸⁷ Ling 104; Wilson 19.

³⁸⁸ Ling 104.

³⁸⁹ The scenario occurred when four consular's from the United State were on a boat that had left British waters and where in the Russian territory in the Travemunde Bay in Germany. The Russians detained them for twenty four hours; Ling 104; James & Hardy 34, 35.

³⁹⁰ Ling 108; Maginnis 993.

³⁹¹ Ling 108.

³⁹² Rudd J L *J.D Legal Digest: Diplomatic Immunity* (2008) 25.

criminal jurisdiction in the receiving state's court.³⁹³ This includes that the police may not arrest them, detain them, and search them or that they may enter their property without their expressed consent.³⁹⁴ The police nonetheless may still stop offending officials even if they are entitled to full immunity in cases of issuing traffic citations, or attempting to interview or obtain consent to search.³⁹⁵ Where public safety is in imminent danger police authorities may and must intervene to the extent necessary to halt such activities.³⁹⁶

It needs to be kept in mind that although it is possible to institute criminal proceedings against a diplomat once his immunities have been lifted or once the individual is no longer a diplomatic agent, it is difficult to succeed with these proceedings in the sending state. The difficulty alone with trying to get witness's to appear in court from another country is a financial nightmare nor would those witness be forced to appear in court for they can hardly be considered to be in contempt. Also, with regards to a divorce hearing the relevant jurisdiction may not apply. The same applies to the inquest of a diplomatic body.

5.5.3 Immunity from Civil Jurisdiction

The basic principle is that a diplomat agent enjoys immunity from the civil and administrative jurisdiction of the receiving state³⁹⁷. The exceptions that the Vienna Convention provides in terms of civil jurisdiction are real actions – these relate to diplomats' private immovable property situated in the territory of the receiving state unless he holds it on behalf of the sending state for purposes of mission.³⁹⁸ Since every state claims exclusive jurisdiction over immovable property within its territory there is little debate that diplomats should nonetheless enjoy immunity.

There are two more exceptions, however, which Article 31 of the Vienna Convention sets out where a diplomat is not immune from the jurisdiction of the receiving state.

1. A diplomat agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
2. An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State.

³⁹³ Rudd 25.

³⁹⁴ Rudd 25.

³⁹⁵ Rudd 25.

³⁹⁶ Rudd 25.

³⁹⁷ Article 31(1) of the Vienna Convention.

³⁹⁸ Article 31(1)(a) of the Vienna Convention.

3. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.³⁹⁹

Article 31(1)(b) highlights the reason why diplomats are not immune from actions arising out of succession is based on the complexity of succession laws and the incidental interactions of a potentially large number of parties. Moreover, succession proceeding should not be hampered with, just because a diplomat refuses to appear in court on the basis of his immunity.

Article 31(1)(c) states that when it comes to professional or commercial activities in which the diplomat engages in, it has been accepted that since those activities have nothing in common with his position as a diplomat and fall outside his official duties that the immunities will not apply.

It is also noteworthy that Article 32(3)⁴⁰⁰ sets out that diplomats' cannot invoke diplomatic immunity in regards to civil claims if they themselves have initiated the court proceedings.⁴⁰¹ To illustrate, in the case of *Hart v Helinski*⁴⁰² a member of the US Embassy, who instituted legal proceedings against his landlord seeking repayment of excess rent and the landlord counter claimed.⁴⁰³ Both claim and counter claim were accepted – the diplomats claim being for a much larger amount- and the diplomat raised his immunity as a bar to execution of the judgement on the counter-claim. Since the diplomat initiated the proceedings he could not then claim his immunity afterwards. The sending state has the power to deny to it diplomats the right to initiate civil proceedings.⁴⁰⁴

5.5.4 Distinction between Nationals and Non National Diplomatic Agents

An exception for immunity from jurisdiction also applies for diplomats who are nationals to the Receiving state and therefore are permanent residents, and act on behalf of the State.⁴⁰⁵ Article 38 makes it clear that accordingly:

³⁹⁹ Article 31.1 of the Vienna Convention.

⁴⁰⁰ 'The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim'.

⁴⁰¹ Denza 282.

⁴⁰² 78 ILR 4, at 8.

⁴⁰³ Denza 282.

⁴⁰⁴ Denza 282.

⁴⁰⁵ Article 37.1, Article 38.1, Article 38.2.

...diplomatic agent who is a national of or permanent resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.⁴⁰⁶

The Vienna Conference agreed that the meaning of “official acts performed in the exercise of his functions” is limited to acts done on the instruction of the government of the sending state only, and does not include acts performed in the course of his duties.⁴⁰⁷ The interpretation and meaning of the wording is left to the local courts but it is accepted that a member of the diplomatic mission can rely on his immunity only if proven that his act was an official act done on the instruction of the sending state.⁴⁰⁸

It has been criticised that it has been difficult to determine the meaning of permanent resident in light of Article 38 as there is no universal determination.⁴⁰⁹ France and Switzerland determine permanent residency by reference to the diplomatic agent status at the time of appointment to the local diplomatic mission, and do not accept that this changes. Australia, Canada and the United Kingdom have enunciated principles by which diplomatic agents, once non-residents may become regarded as permanent, losing much of their privilege status as a consequence.⁴¹⁰ New Zealand and the United States have not perceived any need to make any formal pronouncements on the point, perhaps taking the view that there is no fiscal disadvantage or difference between one diplomatic agent enjoying privilege and a succession of diplomatic agents enjoying the same privileges.⁴¹¹

5.5.5 Exceptions to Immunity

As mentioned above, Article 31(1) of the Vienna Convention sets out the exceptions where a diplomat is not immune from the jurisdiction of the receiving state:

1. A diplomat agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission.

⁴⁰⁶ Article 38.1.

⁴⁰⁷ Denza 342; This is strict rule only applies to nationals to the receiving state; McClanahan 58.

⁴⁰⁸ Denza 342.

⁴⁰⁹ Brown 67.

⁴¹⁰ Brown 67.

⁴¹¹ Brown 67.

- b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State.
- c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.⁴¹²

This is very crucial to private citizens that want to claim damages against a diplomat and to ensure that the diplomat does not unjustly enrich himself on the expense of others. In regards to (a) it is clear that in the case where there is a real action to an immovable property the diplomat cannot hide behind his immunity if the property is in actual fact not his but that of a private citizen, unless of course the property is used for the purpose of the mission. If a diplomat is involved in a succession matter he has to avail himself and ensure that his duties in regards to the matter are resolved, and the diplomat cannot continuously hide behind his status.

5.5.6 Immunity in Third Party States

Article 40 has been addressed specifically to the issue of immunity in third party states (ie a state that is neither the receiving state nor the sending state).

1. If a diplomatic agent passes through or is in the territory of a third state, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this Article, third states shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third states shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving state. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary and diplomatic bags in transit the same inviolability and protection as the receiving state is bound to accord.
4. The obligation of third states under paragraphs 1,2, and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official

⁴¹² Article 31(1) of the Vienna Convention.

communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.⁴¹³

Article 40 sets out that when the diplomat needs to travel through a third state to either travel home to the sending state or to the receiving state, the third state needs to provide the diplomat inviolability and immunity to ensure the diplomats safe passage and transit.⁴¹⁴ This includes the family members that are accompanying the diplomat but also if they are travelling separately. The third state is then required to provide them inviolability and immunity for the transit home or to the receiving state. With regards to administrative and technical staff the third state “shall not hinder” their travelling affairs. All official correspondence, documentation and communication need to be accorded with the “same freedom and protection” as the receiving state is obliged to provide.⁴¹⁵

An example of the problems that could be encountered is with transit states where persons who have been charged can claim immunity on the basis of Article 40. This is what happened when an Algerian was travelling to Brazil through Netherlands where he was detained as he was found to be carrying explosives and weapons. Although the dangerous arms were confiscated, the diplomat was unscathed by the law as the Dutch police believed they could not arrest him because of his immunities.⁴¹⁶

5.6 Customs and Tax Duties

The Vienna Convention has set out a number of Articles regarding tax and custom duties. There are no tax implications for the diplomatic mission as they are exempt as this is stated in Article 28.

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.⁴¹⁷

The Convention makes special provision to highlight that heads of the mission are exempt from tax in Article 23.

- 1) The sending state and the head of the mission shall be exempt from all national, regional, or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

⁴¹³ Article 40 of the Vienna Convention.

⁴¹⁴ McClanahan 68.

⁴¹⁵ McClanahan 68.

⁴¹⁶ Brown 59.

⁴¹⁷ Article 28 of the Vienna Convention.

- 2) The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving state by persons contracting with the sending state or the head of the mission.⁴¹⁸

Article 34 of the Vienna Convention regulates Income Tax and Capital Gains Tax.

Article 34 is the principal provision dealing with exemption from taxation. It states:--

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:--

- a) indirect taxes of a kind which are normally incorporated in the price of goods or services;⁴¹⁹
- b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;⁴²⁰
- c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;⁴²¹

The diplomatic agent pays the standard price for goods, which mean that the diplomat is paying the purchase tax and the import duty or any other indirect tax that is related in the price.⁴²² This is also in line with the Vienna Convention Article 39(4):

Article 39(4) states that in the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property, the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.⁴²³

Article 34(b) has long been recognised as being ambiguous and Morris⁴²⁴ sums up three possible interpretations; firstly, that immunity is only valid if it is held in the name of the head of the mission or by a staff of the mission; secondly, the private property of the diplomat, whether his own or provided by the sending State, is an essential asset to carry his duties out and thus is exempt from taxes, and finally that although countries continue with pre-Vienna convention practices, it is generally accepted that the residence of the diplomat is exempt from tax.⁴²⁵

⁴¹⁸ Article 23 of the Vienna Convention.

⁴¹⁹ Article 34 (a).

⁴²⁰ Article 34 b).

⁴²¹ Article 34 (c).

⁴²² Buckley M 344.

⁴²³ Article 39(4) of the Vienna Convention.

⁴²⁴ Steven N. Morris. 'The tax liability of foreign diplomats in the United Kingdom' (1991) *British Tax Review* 208.

⁴²⁵ Morris 208.

This means that if the diplomat occupied the premises for the purpose of the mission then the diplomat was “exempt from any charges to Income Tax Schedule B in respect of the profits of occupation and also if he owned the property, from Income Tax Schedule A in respect of profits of ownership”.⁴²⁶ He is liable to dues and taxes only if it is his private residence.⁴²⁷

... that such duties shall not be levied on movable property which was in the receiving State solely as a consequence of the presence there – in his official capacity – of a member of the mission, since deceased.⁴²⁸

The Article also goes hand in hand with Article 31(1)(b) which provides that the diplomatic agent cannot enjoy his immunity in regards to civil and administrative jurisdiction to an action in succession where he is involved as an executor, administrator, heir or legatee in his capacity as a private person and not that in his official capacity or on behalf of the sending state.⁴²⁹

- a) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;⁴³⁰
- b) charges levied for specific services rendered;⁴³¹
- c) registration, court or record fees, mortgage dues and stamp duty with respect to immovable property, subject to the provisions of Article 23.”⁴³²

Before this Article was included in the Vienna Convention, state practice did not support a legal requirement that all diplomats are exempt from customs.⁴³³ The simple reason for this stand was that the state wanted control and limits on goods being imported and exported out of their country.⁴³⁴ The custom duties are famous for abuse in the diplomatic circle.⁴³⁵ It was therefore state practise that each state has its own form of control and regulation with regards to consumable imports and exports. During the formation of this Article, states agreed that the exemption from custom duties should not be binding only because of reciprocity but be given to everyone.⁴³⁶ However, it was stressed that each state should still be given the right to regulate the amount of diplomatic goods. The sending state has an equal interest as the

⁴²⁶ Satow 232.

⁴²⁷ Buckley 344.

⁴²⁸ Buckley 344.

⁴²⁹ Morris 211.

⁴³⁰ Article 34 (d).

⁴³¹ Article 34 (e).

⁴³² Article 34 (f).

⁴³³ Denza 311.

⁴³⁴ Denza 311; Aust 133.

⁴³⁵ Denza 312.

⁴³⁶ Denza 313.

receiving state to ensure that the diplomat goods are regulated and to prevent abuse.⁴³⁷ The receiving state is obliged to permit entry in to its state, but it does not mean that goods that are prohibited from entry are allowed.⁴³⁸

According to Article 36 of the Vienna Convention the diplomat and his family is further exempted from Custom Duties and Inspection. The Article reads as follows:

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:
 - a. Articles for the official use of the mission;
 - b. Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.⁴³⁹

Because customs agents of the receiving state have no choice but to accept the word of the mission that incoming articles are for the mission's official use, or that the diplomat's baggage contains his personal property, this privilege is the most abused in the form of smuggling drugs and other contrabands.⁴⁴⁰

As Article 41(1) states:

Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

It needs to be said at the outset that Article 41 is not enforceable for the simple reason that the diplomat enjoys civil and criminal immunity, and hence the diplomat cannot be held accountable.⁴⁴¹ Reading this Article in conjunction with custom regulations, it means that diplomats may not import goods for either their personal benefit or official use; goods that are prohibited by law in the receiving country, goods such as alcohol or tobacco.⁴⁴² There is, however, an inconsistency within Article 36 and Article 30, as Article 36 provides the right to have the possession searched in the case that there are serious grounds to believe that the

⁴³⁷ Denza 313.

⁴³⁸ Denza 315.

⁴³⁹ Article 36 of the Vienna Convention.

⁴⁴⁰ McDonough 475

⁴⁴¹ Farhangi 1522; Ross 182.

⁴⁴² Denza 315.

personal baggage may contain articles that are prohibited by law from entering or leaving the country.⁴⁴³ This is contrary to Article 30 which states clearly that the personal property of the diplomat is inviolable.⁴⁴⁴ In addition, Article 36 provides that all diplomatic *personal* bags or luggage will undergo a screening even in the case where there is no reasonable suspicion at all in regards to prohibited or dangerous objects, when the bag or luggage either accompanied or unaccompanied enters an aircraft.⁴⁴⁵ Consequently, every time a diplomat travels, his personal luggage and the diplomatic bag will be searched but the search will be conducted by agents of the airline and not of the receiving state. If the diplomat refuses then the luggage and other piece of items that the diplomat initially wanted to travel with will have to be returned to its place of origin.⁴⁴⁶

In regards to Article 36 of the Vienna Convention exemptions from customs duties and inspection, the court case of *Artwohl v United States*⁴⁴⁷ illustrates how the diplomats profited from the exemptions.⁴⁴⁸ In Latin and South America the ambassadors of American missions were asked to regulate the sale of goods on members of its own mission when the import and export of goods were sent back and forth to the United States.⁴⁴⁹ This was necessary as diplomats had lucrative business deals in regards with shipping over cars from Latin and South America back to the United States, as there was no imported duty tax to be paid. In the *Artwohl* case the decision of the ambassador who imposed restrictions and regulations was challenged, but the court confirmed the ruling of the ambassador since it was in his discretion to ensure that if these regulations and restrictions were not adhered to it could tamper the international relations that the mission had with the receiving state. It was therefore vital to the mission in Brazil that all its members were free from suspicion of profit making schemes and other impropriety.⁴⁵⁰

Article 37 of the Vienna Convention also makes provisions for service and private servant staff that are affiliated with the foreign mission. Staff members who are not citizens or permanent residents of the receiving state also receive some immunities which are granted during tasks performed officially and are exempt from certain taxes as contained in Article 33.

⁴⁴³ Denza 316.

⁴⁴⁴ Denza 318.

⁴⁴⁵ Denza 318; Farahmand (1989-1990) 16 *Journal of Legislation* 99.

⁴⁴⁶ McClanahan 64; *Satow's Guide* 140.

⁴⁴⁷ 434 F 2d 1319 (1970); 56 ILR 518.

⁴⁴⁸ Denza 314.

⁴⁴⁹ Denza 314.

⁴⁵⁰ Denza 314.

5.7 Immunity for Staff Members of the Mission

There are three categories of members of staff of the mission who are entitled only to limited diplomatic privileges and immunities.⁴⁵¹ Firstly, these members of the mission are those that are either nationals or permanent residents in the receiving country in which the mission is based.⁴⁵² Secondly, members of the mission that are administrative and technical staff and thirdly, the private servants of the mission.⁴⁵³ The diplomat, however, is restricted to concentrate his work solely for the benefit of the mission and may not be employed in the sending state to do any other occupation whether it is for profit of any professional or commercial activity.⁴⁵⁴

It is customary (but not universally accepted) practice for members of diplomatic missions to be issued with diplomatic identity cards by the host state. These carry the photograph and signature of the holder, together with whatever instructions the host state may see fit to add for the benefit of its officials with regard to the privileges, facilities and immunities which should be accorded to the bearer. The immunity granted to a diplomat and members of his family by the host state does not exempt them from the jurisdiction of their own state.⁴⁵⁵

The immunity of these staff members should be distinguished from diplomatic agents that enjoy full diplomatic privileges and immunities and have blanket immunity to both acts done in their official capacity and what they do in their personal free time. All other diplomatic agents enjoy a more limited immunity that only covers acts done in their official capacity as a member of the mission.⁴⁵⁶ The repercussions are immense and stretch far beyond the logic of a reasonable man. A problem that may arise is to determine where the line needs to be drawn between the functions of the mission and personal activities of its members.⁴⁵⁷

5.8 Privileges and Immunities Conferred on the Diplomats Family

It is a long established rule in the international law that privileges and immunities extend to family members of diplomatic agents, although publicists have disagreed whether this

⁴⁵¹ Feltham 44.

⁴⁵² Feltham 44; Akehurst M B 'Modern Introduction to International Law' (1997) 125; Graham, M. Goldstein, E & Langhorne, E. *Guide to International Relations and Diplomacy* (2002) 543, 544; Hillier T. 317.

⁴⁵³ Feltham 44; Akehurst 125; Graham, Goldstein & Langhorne 543, 544; Hillier 317.

⁴⁵⁴ Feltham 44.

⁴⁵⁵ Feltham 44.

⁴⁵⁶ Hillier 317; Graham, Goldstein & Langhorne 543, 544; Akehurst 125.

⁴⁵⁷ Denza 34.

should be “full” or “limited” immunities for the wife and children of only the head of the mission or whether immunities should extend to families of other diplomatic personnel.⁴⁵⁸

Family members linked to the diplomat by direct relation are not of significance. What is of significance, are those family members living with the diplomat himself (part of his household) and for whom he is responsible for.⁴⁵⁹ It is those family members that have been granted immunities and privileges set out in Article 37:

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.⁴⁶⁰

Before 1961 the international community unanimously agreed that certain members of the diplomatic family need to be provided with some sort of privileges and immunities.⁴⁶¹ However, that is as far as the agreement went.⁴⁶² It could not be agreed upon to which family members these privileges should apply or if it can extent to family members of mission personnel of a lower diplomatic rank.⁴⁶³ It was generally accepted that the wife of the Ambassador would receive the same degree of protection has her husband, but not whether this would also apply to a member of the technical staff.⁴⁶⁴ Family members of diplomatic agent as well as of administrative and technical staff are given full criminal immunity.⁴⁶⁵

Family of service staff and private servants cannot claim criminal immunity, not even for acts done in official capacity.⁴⁶⁶ However, in regards to civil and administrative jurisdiction they are only granted immunity for acts done in the official course of their duties.⁴⁶⁷ The same problem arose with children, generally it was accepted that the children of

⁴⁵⁸ Wilsen 1279.

⁴⁵⁹ Satow 156.

⁴⁶⁰ Article 37 of the Vienna Convention.

⁴⁶¹ O’Keefe, P. ‘Privileges and Immunities of the Diplomatic Family’ (1976) 25 *International & Comparative Law Quarterly* 331.

⁴⁶² O’Keefe 331.

⁴⁶³ O’Keefe 331.

⁴⁶⁴ O’Keefe 331.

⁴⁶⁵ Graham, Goldstein & Langhorne 543; Hillier 317; Satow 155.

⁴⁶⁶ Graham, Goldstein & Langhorne 543; Hillier 317; Satow 155.

⁴⁶⁷ Satow 158.

the Ambassador would receive the same amount of privileges and immunities, however, there is disagreement whether this would also apply to the children of diplomats with a lower rank.⁴⁶⁸

Unfortunately, the Vienna Conference in 1961 was unable to bring about an agreement about the definition of “members of the family of a diplomatic agent forming part of his household” as these members also enjoy the same immunity and privileges as the Diplomat.⁴⁶⁹ This is in line with Article 37.1 which states:

The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

Each State has its own unique interpretation of the meaning “family”.⁴⁷⁰ It has been accepted that the diplomats spouse and his minor children will always be included in that definition of “family”.⁴⁷¹ A diplomat who is a single or widowed, or where the spouse is not accompanying the diplomat, then the diplomat may include his parents or siblings if they live with him. The diplomat needs to be legally responsible for them.⁴⁷² The international practice has to a certain extent agreed with the American definition of “family members” during the negotiation of the formulation of the Vienna Convention, although it was not accepted.⁴⁷³ According to Denza, a member of the family may be the partner of a member of a mission, any minor/unmarried, full time student and other relatives which may be agreed upon between the receiving and the sending state.

States, however, could not agree further than including the spouse and the minor children and the Convention has left it to each individual state to regulate it.⁴⁷⁴ It could also not be agreed upon whether the sending or receiving state determines the meaning of family on behalf of the diplomatic agents.⁴⁷⁵ Since Article 10(b) of the Convention requires notification when a member of the family becomes or ceases to become part of the common

⁴⁶⁸ O’Keefe 331.

⁴⁶⁹ Satow 156.

⁴⁷⁰ States have remained flexible though in order to accommodate special cases, such as polygamous marriages, same –sex marriages and partners. Satow 156-157.

⁴⁷¹ States, however, have a different interpretation when the child is no longer considered a minor, and these are mentioned during negotiations.

⁴⁷² Feltham 44.

⁴⁷³ Denza 322.

⁴⁷⁴ Brown 63; Satow 156.

⁴⁷⁵ Brown 63; Satow mentions that the receiving state determines the meaning of family according to its own national laws 157.

household of the diplomat.⁴⁷⁶ Once the notification has been sent then it is normally an appropriate time to discuss whether they will form part of the family or not.⁴⁷⁷

For receiving states, the family members of diplomats may entail pressure in seeking approval to undertake local employment – for while they are not bound by the duty in Article 43 not to practice for personal profit any profession or commercial activity, it is general practice of receiving states to prohibit employment by family members in the absence of any bilateral agreement or arrangement or approval in a particular case and fiscal privileges mostly in the form of free or subsidised education.⁴⁷⁸

It needs to be clear which family members are protected by diplomatic immunity and who are not, also family members that have immunity but are granted special permits to work for personal profit or a similar profession or commercial activity,⁴⁷⁹ needs to be clearly identified in order to ensure that if an offence occurs it can be easily deduced whether the particular family member in question has first of all immunity, and secondly to determine whether the immunity is applicable in that particular instance.⁴⁸⁰

It goes so far that even polygamous marriages are in essence family members provided that the marriages were lawful in the sending state, and therefore receive the same amount of privileges and immunities.⁴⁸¹ It is further considered discourteous of the receiving state to question whether a particular person is married to the diplomatic agent as it would be equally impolite to question whether the diplomat's children are legitimate.⁴⁸²

Family members are not bound by Article 42, which prohibits diplomats to seek employment for personal gain or commercial activities, but it has been general practice that family members will only be allowed to find employment with a separate and bilateral agreement and in most cases they are only given in the form of free educational subsidies for the children of the diplomat.⁴⁸³ Those family members that are permitted to work are liable to pay tax to the receiving state and may be sued as long as the matter arises out of the employment.⁴⁸⁴

Although it seems justified that family members of a diplomatic agent should receive similar immunities, it also provides a certain amount of potential risks. Many diplomatic agents enjoy diplomatic privileges and immunities but is small compared to the vast number

⁴⁷⁶ Denza 323.

⁴⁷⁷ Denza 323.

⁴⁷⁸ Brown 63.

⁴⁷⁹ Satow 157.

⁴⁸⁰ Brown 63.

⁴⁸¹ Brown 64. Satow 156.

⁴⁸² Brown 64.

⁴⁸³ Brown 63.

⁴⁸⁴ Article 31.1(c), 34(d), 37.

of family members that also enjoy immunities. The international community has a large pool of its members that are travelling around the world with immunities and transverse freely without any legal consequences. An American case provides a good illustration revealing the extent of which the international community has gone in order to protect diplomatic relations in a case where a family member was involved in an accident.

The case of *Skeen v Federative Republic of Brazil*:⁴⁸⁵ On November 29, 1982 Antonio da Silveira Jr., the 23 year old grandson of the Brazilian ambassador to Washington, visited a night club.⁴⁸⁶ The Ambassador was away in Brazil to assist with a visit there by President Reagan.⁴⁸⁷ Antonio was the instigator of a shoot out in a club and the bouncer, Mr Skeen, was shot in the stomach.⁴⁸⁸ Although the youth was apprehended that same evening by the local police force, he spent less than 24 hours in detention. He did not give his name to the police when he was detained. After some further questioning he then gave what turned out to be a false name of one “Frank Sanchez”. He was taken to the police headquarters to await trial.

The following day the Brazilian embassy becoming aware that the ambassador’s grandson was missing contacted the police and the FBI to search for the boy. That evening the detained young man revealed his real name to the police, thus ending the search. Once the Brazilian embassy became aware of his whereabouts, he was immediately released. The youth left several days after his release the country and returned to Brazil. No arrests were ever made nor was any person held accountable for the attempted murder on the bouncer and the manager. The Ambassador, who was the Grandfather of the offender, remained in his office for several months after the incident before being released from his foreign affair ministry. During the bouncer’s convalescence, Skeen hired a lawyer, filed a suit for damages in US District Court and wrote a letter to President Reagan, which was forwarded to the State Department. State Department officials met in confidence with the Brazilian embassy. The only consolation that the bouncer received, as he had been in intensive care for several months and his hospital bill rose to over \$10,000, was that the newly appointed ambassador offered an undisclosed amount of money to him for his word that he would no longer discuss the incident publicly.⁴⁸⁹

⁴⁸⁵ 566,F Supp. 1414 (DDC 1983).

⁴⁸⁶ McClanahan 15. Farhangi 1525.

⁴⁸⁷ McClanahan 15.

⁴⁸⁸ McClanahan 16; Maginnis 1008; Farhangai 1525.

⁴⁸⁹ McClanahan 16.

The plaintiff sued the Ambassador, his grandson and the state Brazil unsuccessfully.⁴⁹⁰ The suit against Brazil was on the basis that the Ambassador's family was an official or employee acting with the scope of their office or employment.⁴⁹¹

The Judge held that a family member was not an employee or agent of the sending State and was granted immunity not in recognition of any official status but as courtesy to the diplomat.⁴⁹²

The court further explained that even if one would accept that the grandson was in fact an employee of the state Brazil, the grievous assault committed by him was simply a personal matter and resulted in no way furthering the interests of Brazil, nor was it a outcome of his employment.⁴⁹³ A further claim that the Ambassador had a special duty to control his family members was rejected by the court, as this falls under the jurisdiction of the State Department, which is responsible to seek compensation or if necessary declare an individual a *persona non grata*.⁴⁹⁴

The ambassador's son of Ghana to the United Nations in the 1980s was accused and arrested for the suspicion of several rapes.⁴⁹⁵ Manuel Ayree, was taken into custody by the police in the present of one of the rape victims and was later identified by another victim he had raped.⁴⁹⁶ The police was of the firm belief that if Mr Ayree would have continued to remain in custody more rape victims would have come forward.⁴⁹⁷ Since Ghana refused to waiver immunity, Mr Ayree had to be released and was escorted by embassy personnel back to Ghana.⁴⁹⁸

Another example occurred in London where police are aware of at least three incidences where women were lured into a car, beaten and then raped.⁴⁹⁹ Police learned that the car that was used had diplomatic plates, and when the Foreign Affairs Ministry released a statement to all Diplomatic mission requesting the help to identify the perpetrator the crimes came to a stop.⁵⁰⁰

⁴⁹⁰ Denza 271. Farhangi 1525. Maginnis 1008.

⁴⁹¹ Denza 271.

⁴⁹² Denza 271.

⁴⁹³ Denza 271.

⁴⁹⁴ Denza 272.

⁴⁹⁵ Ashman and Trescott 22.

⁴⁹⁶ Ashman and Trescott 22.

⁴⁹⁷ Ashman and Trescott 23.

⁴⁹⁸ Ashman and Trescott 23.

⁴⁹⁹ Ashman and Trescott 64.

⁵⁰⁰ Ashman and Trescott 65.

The function of the diplomat does not become a cause of concern if the diplomat remains within his employment.⁵⁰¹ The problem arises when diplomats go outside the scope of their employment and use their status to evade legal responsibility.⁵⁰² It is then, when a diplomat appears to have violated a law, and is not held accountable for it, that the general public questions the legality of his immunity.⁵⁰³

5.9 Summary and Conclusion

If the host state accepts the establishment of a permanent mission, the state is under an obligation to provide such facilities and immunity in order for the mission to function to its full potential and that those members that work in the mission be given the respect and immunity necessary for them to carry out their respective mission without any fear of legal, political or social persecution and hindrance. It is this immunity that was discussed in this chapter. The diplomat enjoys various privileges and out of courtesy for the diplomat, he is also exempt from taxation. Absolute diplomatic immunity is granted to the diplomatic agent and his family for all acts done within official capacity. Administrative and technical staff, as well as service staff receive immunity in proportion to their status.

Furthermore his personal belongings remain immune and may not be searched. Article 27 dealing with diplomatic bag is, however, different as it is not the diplomat's personal possession but it contains articles that the sending state wishes to deliver to the mission. The diplomatic bag remains free from inspection and search and more will be discussed in chapter 6.

⁵⁰¹ Groff '*Proposal for diplomatic accountability using the jurisdiction of the International Criminal Court: The decline of absolute sovereign right* (2000) 209.

⁵⁰² Groff 209.

⁵⁰³ Groff 209.

Chapter Six The Diplomatic Bag

6.1 Introduction

As discussed in chapter 5, the Vienna Convention stipulates that the mission and other property and means of transport of diplomats are immune from search, requisition, attachment or execution.⁵⁰⁴ This includes the diplomatic bag, as well as the use of diplomatic courier and messages in code and cipher may not be violated.⁵⁰⁵ The aim of this chapter is to discuss the principles pertaining to the diplomatic bag itself even though it would fall under the property of the mission mentioned in Chapter 5.

The diplomatic bag holds an important place as it is the safest way for states to communicate with their mission has for a long time been through the diplomatic bag.⁵⁰⁶ All sensitive material would be stored in the diplomatic bag and even today in a far more technologically advanced era, the diplomatic bag has not lost its popularity.⁵⁰⁷ Even though many documents could be transferred within minutes through the internet or fax, the transportation of documents is still frequently transported by the diplomatic bag.⁵⁰⁸

6.2 The Identity and Status of the Diplomatic Bag

With respect to the status and use of diplomatic bags, the immunities and the inviolabilities as stated in the Vienna Convention in Article 27 are as follows:

1. The receiving State shall permit and protect free communication on the part of the mission of all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However the mission may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained

⁵⁰⁴ Cassese 114; Sen 131; Shaw 676.

⁵⁰⁵ Cassese 114; Sen 131; Shaw 676.

⁵⁰⁶ Aust 122.

⁵⁰⁷ Aust 122.

⁵⁰⁸ Aust 122.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorised port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.⁵⁰⁹

In most instances the diplomatic bag as it is commonly understood looks more or less like a sack; however, looking at customary international practise it does not provide a clearer description.⁵¹⁰ Moreover, Article 27 sets no limitations in regards to size and weight of the diplomatic bag.⁵¹¹ Unfortunately, frequently diplomatic bags contain large equipment such as photocopy machines, cipher equipment, computers and building materials for construction of new embassy premises which would require the diplomatic bag being rather large.⁵¹² The reason why even building materials are sanctioned to be inside the diplomatic bag is because that often sending states prefer to build their own buildings to reduce the likelihood of listening devices being planted for purposes of espionage.⁵¹³ It is not unusual that even transport containers have been permissible as diplomatic bags. Nonetheless, aircrafts and trucks do not meet the criteria of being a “package”.⁵¹⁴

What Article 27(4) actually requires is that the packages constituting the diplomatic bag “must bear visible external marks of their character”.⁵¹⁵ While it is clear that a package does not lose its character as a diplomatic bag by reason of suspicion that it may contain items other than “diplomatic documents or articles intended for official use” (since this can in

⁵⁰⁹ Article 27.

⁵¹⁰ Denza 189.

⁵¹¹ Denza 189; Aust 122.

⁵¹² Denza 189; Aust 122; Satow 118. McClanahan 144.

⁵¹³ Denza 189; Aust 122; Satow 118.

⁵¹⁴ In 1985, for example, authorities of the Federal Republic of Germany declined to accept that a truck with a load of 9,000 kilograms could be regarded as a single diplomatic bag of the Soviet Union. They required the Soviet Embassy to open the truck and to submit a list with the number of packages. Denza 189; Aust 122.

⁵¹⁵ Denza 191.

general only be established by breach of the prohibition on opening) a package which does not bear visible external marks of its character is not entitled to the status of diplomatic bag.⁵¹⁶

The inviolability prevents correspondence being opened by the authorities of the receiving state and prevents it from being used as evidence in the courts of the receiving state.⁵¹⁷ This is the most important of all the privileges and immunities agreed upon under international law, namely the provision of free and secret communication between the sending government and its foreign missions.⁵¹⁸

The provision is essential if the mission is to effectively carry out two of its most important functions:⁵¹⁹

- 1) negotiating with the government of the receiving state; and
- 2) reporting to the government of the sending state about the conditions and developments within the receiving state.⁵²⁰

The receiving state is under an obligation to ensure that the communication between the mission and the sending state run smoothly, freely and secretly.⁵²¹ Article 27(3) stresses the importance of the right to confidential communication above all other. It makes it clear that as long as it has to do with documentation and information regarding the mission and its objectives, these packages and documents are inviolable.⁵²² There needs to be a balance, however, between the right to free communication and keeping the contents confidential and free from any form of inspection.⁵²³ The lack of inspection of diplomatic material has led to a number of abusive behaviour among some diplomats with regards to the contents of the diplomatic bag.⁵²⁴

6.3 Scanning, searching and opening the Diplomatic Bag

Article 27(3) does not make it clear whether scanning of the diplomatic bag is a violation of the provision in any kind of manner.⁵²⁵ The Article only states that it may not be opened or

⁵¹⁶ Denza 191; Aust 122.

⁵¹⁷ Wiebalck 175.

⁵¹⁸ Wiebalck 175.

⁵¹⁹ Wiebalck 175.

⁵²⁰ Wiebalck 175.

⁵²¹ Shaw 676.

⁵²² Shaw 676; Aust 123.

⁵²³ Shaw 676; Aust 122; Denza 185,

⁵²⁴ Shaw 676; McClanahan 116.

⁵²⁵ Article 27(3) Denza 194; Aust 123.

detained.⁵²⁶ That leaves the question open whether or not it constitutes a breach of the Vienna Convention if the diplomatic bag is scanned.⁵²⁷ Modern technology makes it possible not only to scan the diplomatic bag with X-ray vision to determine the objects inside the diplomatic bag, but other instruments, such as weapons and radioactive material.⁵²⁸ The same problem arises whether or not dogs may sniff the diplomatic bag.⁵²⁹

There are in general two views on this issue and some states have made it clear that they would scan the diplomatic bag and other states oppose the scanning in any kind of form.⁵³⁰ The one view to be pro scanning is the argument of offering safety and security to the aircraft, vessel, passengers and the receiving state before the diplomatic bag enters the receiving state territory.⁵³¹ The other view where states refuse the scanning of diplomatic bags all together is that the scanning is a constructive opening of the diplomatic bag, where the contents of the bag is no longer confidential which is the purpose of the Act.⁵³²

In addition, modern technology also makes it possible to gain access to the electronic equipment inside the diplomatic bag and that would defeat the protection of free and secrete communication between the sending state and the mission.⁵³³ Even if a suspicious diplomatic bag was to be scanned or a dog gave a warning sign to the authorities of an illegal item inside the bag, it may not be opened or detained even in the case where the scan has identified the object.⁵³⁴ The receiving state only has the power to inform the sending state that an illegal item has been identified and await instructions from them. If the sending state insist that the bag be let through, then the receiving state has to do so, unless the bag possess immediate danger only then can the bag be brought back to its origin and will not enter the receiving state territory.⁵³⁵

The Commentary of the International Law Commission stated that the diplomatic bag shall be inviolable and be exempt from any form of scanning. If, however, on strong suspicion, from the receiving state, the authorities may request that the diplomatic bag is

⁵²⁶ Denza 194.

⁵²⁷ Denza 195.

⁵²⁸ Denza 185; Aust 124.

⁵²⁹ Denza 195 Aust 124.

⁵³⁰ Denza 195; Satow 118.

⁵³¹ The Government of Switzerland commented to the International Law Commission that 'it would be illusory to believe that , today, the captain of an aircraft would be willing to transport a package without subjecting it to some form of control; Denza 194-197; Aust 124; Satow 117,118.

⁵³² Denza 196; McClanahan 116; Satow 118.

⁵³³ Denza 196; McClanahan 116; Satow 118.

⁵³⁴ Denza 197; Aust 124; Dixon 163.

⁵³⁵ Denza 197. Immediate danger would be explosives and radioactive material weapons. Atomic, Biochemical, Chemical weapons. (ABC weapons); Aust 124 argues that the mere fact that a weapon has been identified does not constitute immediate danger and if the sending state insists that the bag should not be returned then the receiving state has to let it through; Satow 118.

opened with the consent of a representative of the sending state that has accompanied the bag. Alternatively, if the consent is not given, that the bag is then returned to its place of origin.

6.4 The Diplomatic Bag as a Tool of Crime

The abuse of the inviolability of the diplomatic bag is as old as the regulation itself. The diplomatic bag is used for all sorts of thing such as smuggling alcohol, cigars and tobacco.⁵³⁶ It has also been used for serious criminal activities such as human trafficking, drug smuggling, weapon smuggling and even the transport of radioactive material.⁵³⁷

An incident of kidnapping and abusing the status of the diplomatic bag occurred in 1964.⁵³⁸ Inside an Egyptian diplomatic bag found at the airport in Rome was a former Israeli citizen who had been an interpreter at the Egyptian Embassy in Rome.⁵³⁹ The Israeli was found to be drugged and gagged inside the Diplomatic bag after authorities found the bag to be grumbling, which resulted in the Italian Government declaring two Egyptian Diplomats *persona non grata*.⁵⁴⁰

In the United States in 1983 two Diplomats from Guatemala were responsible for the kidnapping of the spouse of a former El Salvador ambassador to the United States.⁵⁴¹ \$1.5 million was demanded for her release after the wife was abducted from her residence in Florida.⁵⁴² The State Department arrested the two diplomats involved contra to diplomatic immunity and negotiated the express waiver from the Guatemalan Government.⁵⁴³

6.5 Diplomatic Courier

It does not matter whether the diplomatic bag is accompanied by a diplomat or a diplomatic courier or whether the diplomatic bag is travelling unaccompanied and is waiting to be picked up in the receiving country.⁵⁴⁴ The diplomatic bag will at all times be inviolable.⁵⁴⁵ A

⁵³⁶ Farhangi 1523; Wilson 136, 137.

⁵³⁷ Farhangi 1523.

⁵³⁸ Denza 66; Ashman & Trescott 122-3; Satow 117.

⁵³⁹ Denza 66; Satow 117; Farhangi 1525.

⁵⁴⁰ Denza 66; Satow 117.

⁵⁴¹ Farhangi 1525.

⁵⁴² Farhangi 1525.

⁵⁴³ Farhangi 1525.

⁵⁴⁴ Feltham 43; McClanahan 65.

⁵⁴⁵ Feltham 43; McClanahan 65.

diplomatic bag is usually accompanied by at least a diplomatic courier who is given protection from the sending state to deliver the bag to the mission in the receiving state.⁵⁴⁶

The diplomatic courier enjoys personal inviolability during his travels to the receiving state or through a third state to the mission at all times and may at no time be arrested or detained while the diplomatic courier is accompanying the diplomatic bag.⁵⁴⁷ He, however, is required to have the necessary visa to travel from state to state.⁵⁴⁸ Diplomatic bags that are properly identified and have the correct markings are equally inviolable when in transit through a third state.⁵⁴⁹ The diplomatic courier is frequently a full time employee in the sending state's Foreign Affairs Ministry and the courier needs to be provided by his Ministry with a certificate to indicate his status and the number of diplomatic bags he is accompanying.⁵⁵⁰

6.6 Summary and Conclusion

The main function of the diplomatic bag is to transport official documentation from the sending state to the Mission in the receiving state. As the size of the diplomatic bag is negligible, or the size, all content are placed in the diplomatic bag are placed there for the use and improvement of the diplomatic mission. However, diplomatic bags have not been used for official purposes alone and therefore has been abused. Due to the fundamental principle of the importance of free communication between a sending State and its mission, all attempts to limit the contents of the bag or to introduce means of inspection where there were serious grounds for suspecting that the diplomatic bag was being misused contrary to article 27, have failed. The following chapter will look at the available remedies that each state has as its disposal in order to respond to diplomats that have violated the local laws and abuse their status to escape.

⁵⁴⁶ Feltham 43; McClanahan 65; Aust 124; Sen 132; Satow 118.

⁵⁴⁷ Feltham 43; McClanahan 65; Aust 124; Sen 132; Satow 118.

⁵⁴⁸ Feltham 43; McClanahan 65; Satow 118.

⁵⁴⁹ Feltham 43; McClanahan 65; Aust 124; Satow 118.

⁵⁵⁰ Feltham 43; McClanahan 65; Aust 124.

Chapter Seven Remedies to curb abuse towards the Host Nation

7.1 General

The sending state and representatives of the sending state have a duty to respect the local laws of the receiving state. Both states and the individuals in question benefit in ensuring that the diplomatic agents do their duties and functions to the best of their ability without coming into conflict with the local laws and regulations.⁵⁵¹ The diplomats must discharge the Vienna Conventions duty imposed on them, one of the most important aspects of which is “to respect the laws and regulations of the receiving State”.⁵⁵² In the vast majority of cases these duties are accomplished and therefore conflict or any other form of dispute is rare. If conflict, however, does arise and there is a dispute between a diplomatic agent and a civilian, the Vienna Convention is not clear in how to deal with civil claims.⁵⁵³

Brown argues that the disputes that arise between the diplomatic agent and civilians are normally not a dispute with the diplomatic agent of the mission but more a dispute with the sending State.⁵⁵⁴ It needs to be highlighted that the diplomatic mission is not a legal entity in itself but that it consists of many individuals who all enjoy personal inviolability separately.⁵⁵⁵ The receiving state still has jurisdiction to hear matters of dispute and the Vienna Convention only confers fiscal privileges to the diplomatic mission.⁵⁵⁶ Employee’s in the receiving state, for example, working in the mission of the sending state have a particular interest of ensuring that the local laws on labour enforcement and regulations are followed.⁵⁵⁷

The receiving state has three main options in regards to taking action against an offending diplomat. It has the option to request a waiver from the sending state to uplift his immunity. It may declare the diplomat a *persona non grata* if the waiver is not approved or the violation is too severe. Lastly, it can break off all diplomatic ties with the receiving state.

⁵⁵¹ Brown 77.

⁵⁵² Article 41(1).

⁵⁵³ Brown 77.

⁵⁵⁴ Brown 80.

⁵⁵⁵ Brown 80.

⁵⁵⁶ Brown 80.

⁵⁵⁷ Brown 80.

Goodman,⁵⁵⁸ however points out that in terms of the Vienna Convention, the receiving State is faced with three slightly different possibilities which are more practical when a diplomat has committed a crime. Firstly, it can refrain from any action. Secondly, it may negotiate with the host state to lift his immunity and thirdly, it may declare the diplomat *persona non grata* and expel him from the country.⁵⁵⁹

Each of the possibilities will be discussed in more detail.

7.2 Waiver

Should an incidence of abuse of diplomatic privileges and immunities be revealed, then the receiving state cannot itself initiate legal proceedings against the offending diplomats unless the sending state waives immunity. This immunity to legal proceedings is an integral part of a diplomatic immunity, the rational being that a diplomat who is in jeopardy of legal proceedings may be incapacitated or limited to some extent in his freedom of diplomatic action.⁵⁶⁰

A point of concern that the International community needs to deal with and especially the courts, is the matter of waiving immunity. Who has the authority to waive the immunity of the diplomat and what are the procedures the court needs to follow to ensure that the waiver is authorised and successful? The Vienna Convention in Article 32 states the following:

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.⁵⁶¹

Denza notes that:

⁵⁵⁸ Goodman 'Reciprocation as a means of curtailing diplomatic immunity abuse in the United States; the United States needs to play hard ball' (1989) *Houston Journal of International Law* 393, 401.

⁵⁵⁹ Higgins 644; Ross 189.

⁵⁶⁰ Wiebalck W A 'Abuse of the Immunity of Diplomatic Mail' (1984) 10 *South African Yearbook of International Law* 175.

⁵⁶¹ Article 32 of the Vienna Convention.

...although Article 32 deals expressly only with waiver of diplomatic immunity from jurisdiction, there may also be waiver of the inviolability of mission premise, archives or communication, of the person, residence or property of a diplomatic agent or any other immunity accorded by the Vienna Convention.⁵⁶²

The Vienna Conventions states that the immunity conferred on the diplomat does not belong to the diplomat but to the sending state and it is only the latter who may waive the immunity.⁵⁶³ This principle can be illustrated by the case of *R v Kent*.⁵⁶⁴ An American cipher clerk in the United Kingdom was dismissed from duty after he had stolen embassy documents. The United States waived his immunity in order for the English courts to put him on trial for theft and espionage. The clerk was no longer entitled to the diplomatic immunity and could not raise the defence of immunity. The court said “that the privilege claimed by the appellant is a privilege which is derived from, and in law is the privilege of the ambassador and ultimately of the State which sends the ambassador.” This judgement goes hand in hand with the preamble of the Vienna Convention in 1961 (twenty years later), which states that the privileges and immunities is not to benefit the individual but the efficiency and performance of the mission.⁵⁶⁵

The Resolution on the Constitution of Civil Claims recommends a waiver:

... that a sending state should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving state when this can be done without impeding the performance of the functions of the mission, and that when the immunity is not waived, the sending state should use its best endeavours to bring about a just settlement of the claims.⁵⁶⁶

This has also been confirmed by the American law in the case of *Abdulaniz v Metropolitan Dade County and Others*,⁵⁶⁷ Prince Turki Bin Abdulaziz was a member of the Saudi Arabian royal family residing in Florida. Following an allegation from a former employee of the Prince, that the Prince was holding an Egyptian woman captive against her will, the Florida State Attorney’s office obtained a search warrant after an inquiry with the United State Department of State in the belief that he was not entitled to diplomatic immunity. The search warrant was issued and Miami police officers attempted to execute it. The attempt was resisted by the Prince, his family and his bodyguards and there was a

⁵⁶² Denza 288.

⁵⁶³ Garretson 76.

⁵⁶⁴ (1941) 1 KB 454, 1941 -2 AD No. 110.

⁵⁶⁵ Denza 274.

⁵⁶⁶ A/CONF.20/10/Add 1 adopted at the 12th plenary meeting of the Conference on 14 April 1961 by 50 votes to 2, with 18 abstentions; Brown J 78.

⁵⁶⁷ 741 F 2d 1328 (1984), 99 ILR 113; Ashman & Trescott 149; Ross 185.

confrontation. The Prince and his family sued the police for violation of their civil rights for \$210 million and the police counter claimed for injuries received during the incident. The State Department filed papers confirming the entitlement of the Prince to diplomatic status as a “special envoy” and conferred full immunity retroactively. The police challenged the diplomatic status and claimed that the status was unsubstantiated and that the immunity was waived when the Prince filed for the counter claim. The court held that the controlling Statute being the Diplomatic Relations Act of 1978 which incorporates the Vienna Convention and that according to sec 254a-e the Prince is justified to raise diplomatic immunity as a defence. Sec 254d states:

...any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under sections 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.⁵⁶⁸

The issue that the police was raising was that only once the action commenced and the counterclaimed was filed, did the Prince seek diplomatic status from the Department of State, which the State duly granted. They argued that diplomatic immunity could not apply in this instant as the Prince waived the diplomatic immunity. The court held with regards to the diplomatic immunity being waived, that at the time the suit was brought before the court the diplomatic immunity was not clear and therefore the Prince could not have waived immunity. Once it was clear that the Prince was indeed entitled to immunity the Prince immediately sought for dismissal of the action and the counterclaim. The court therefore came to the conclusion that even if a certificate of diplomatic status is issued after the commencement of a suit, the person entitled to that status may raise the defence of Diplomatic immunity. This is because once the Department of State issues a certificate of diplomatic status the courts are bound to accept the immunity.

With regards to waiver of immunity one needs to bear in mind that the privileges and immunities are extended from country to country and not to the actual foreign individual official.⁵⁶⁹ This means that the foreign government still holds the power to waiver the immunity of its own nationals on their behalf and the official may then be held accountable

⁵⁶⁸ 741 F 2d 1328 (1984), 99 ILR 113. Ashman & Trescott 150.

⁵⁶⁹ Rudd 27.

for its actions.⁵⁷⁰ This occurs where the prosecutor provides sufficient evidence to the U.S Department of State that if it was not for the immunity, charges would have been pursued.⁵⁷¹

If this occurs then the U.S Department of State requests a waiver from the concerning foreign department, if this is unsuccessful and the charges are serious then the only other remedy is to expel the offender from the United States by declaring the individual a *persona non grata*.⁵⁷²

Goldberg is of the opinion that when a diplomat has committed a crime he has automatically waived his diplomatic immunity.⁵⁷³ He argues that when diplomats resort to terroristic attacks they have waived their diplomatic immunity as they can no longer be recognised as a *bona fide* diplomats.⁵⁷⁴

The sending states are, however, very cautious when it comes to waiving immunity as they do not want to abandon their diplomats to the criminal or civil jurisdiction of the receiving state.⁵⁷⁵ Nevertheless, the sending state holds the power to still prosecute the offending diplomat in its own state, if it does not choose to waive the immunity.⁵⁷⁶

The problem with diplomats escaping liability is first of all in the process to serve him with court proceedings, because of the inviolability the receiving State cannot do this.⁵⁷⁷ Once the diplomat's objective has ended in the receiving State it does not mean that the diplomat leaves immediately to the sending State but may take up another appointment with a third State where he would receive new inviolability. Another problem is the vast expenses that the plaintiff has to carry to ask willing witnesses to travel to the sending State to testify; after all they cannot be compelled to do so.⁵⁷⁸ This makes civil claims in the sending State not practical. The same can be said in the case of a criminal case. The diplomat cannot be extradited to the sending State, nor can witnesses in the receiving State be compelled to travel to the sending State to testify in court about the misconduct of the diplomat.⁵⁷⁹ The only other solution is for the sending State to waive the diplomat's immunity and to consent to the

⁵⁷⁰ Rudd 27. Maginnis 1002.

⁵⁷¹ Rudd 27.

⁵⁷² Rudd 28.

⁵⁷³ Goldberg A J 'The shootout at the Libyan Self-Styled People's Bureau: A case of State-Supported International Terrorism.' (1984) 30 *South Dakota Law Review* 1,2.

⁵⁷⁴ Goldberg 3

⁵⁷⁵ Ross 190; Maginnis 1002; McClanahan 137.

⁵⁷⁶ Ross 190.

⁵⁷⁷ Denza 266.

⁵⁷⁸ Denza 266.

⁵⁷⁹ Denza 267.

arrest of its diplomat in the receiving State.⁵⁸⁰ The unfortunate thing is that even in cases of serious abuse the sending case seldom waives the immunity.⁵⁸¹

If a diplomat that is entitled to immunity commits a crime then he will be barred from the jurisdiction of the court.⁵⁸² This means that for the duration of the diplomat's immunity the diplomat may not be prosecuted unless his immunity has been waived or terminated. Furthermore, if a crime is committed by an individual that did not have immunity at the time of the crime but is vested with immunity during the trial proceedings then again the individual may raise his immunity as a defence.⁵⁸³ The courts have to verify the facts on the date that it came before it and not on the date that the crime was committed.⁵⁸⁴

Although the sending State may choose to agree that a diplomatic agent has acted in a manner that is unacceptable and waives the immunity of the diplomat so that the diplomat may be brought to trial, the sending State needs to provide further express intention that the diplomat shall also be immune from execution/sentencing.⁵⁸⁵ If the sending State is not satisfied with the courts judgment then the sending State may refuse to waive the diplomats immunity to sentencing, which results in the diplomat having been brought to trial for his actions but is not sentenced or punished.⁵⁸⁶

A diplomat of the Georgian Republic was witnessed committing a horrid act in 1997.⁵⁸⁷ He was observed speeding on a residential street and killing a 16 year old girl when his car skidded out of control. Police reported that they suspected that he was under the influence of alcohol at the time. The President of the Georgian Republic announced that he removed the cloak of immunity from the diplomat in New York. That individual was then apprehended by police and had to stand trial for his actions. The diplomat Gueorgui Makharadze was sentenced for seven years in the year 2000. This decision proved to be ideal for any receiving state in the same position. However, it is a prerogative rarely used by other States.⁵⁸⁸ The idea to negotiate with the sending state about waiver is an the ideal outcome, however, this does

⁵⁸⁰ Denza 267.

⁵⁸¹ Barker C J 169; Shapiro L J 'Foreign Relations Law; Modern Developments in Diplomatic Immunity'. (1989) *Annual Survey of American Law* 281. at 285; Maginnis 1003.

⁵⁸² Denza 256.

⁵⁸³ Denza 256.

⁵⁸⁴ Denza 256.

⁵⁸⁵ McClanahan 56.

⁵⁸⁶ McClanahan 56.

⁵⁸⁷ Zaid 628.

⁵⁸⁸ Zaid 630; Farhangi 1526; Minzesheimer 'Exceptions to the Rules' *Wash. Post, Feb.20, 1983* (Magazine) 16, col.3.

not work in practice as there are no enforceable measures to coerce a state to waive their diplomats immunity.⁵⁸⁹

It also came to light that a similar incident occurred in Russia, where an American envoy killed a pedestrian at night and the local law enforcement's also came to the conclusion that the driver was intoxicated. America, however, refused to waive the immunity of the said Diplomat but recalled him. The diplomat left the country within thirty-six hours although no disciplinary measures were taken and it seems that the individual is still employed.⁵⁹⁰

Although the remedy to declare a offending diplomat a *persona non grata* does solve the problem of the diplomat being removed from the country, victims of the offending diplomat are left with no reasonable means to be remunerated or reclaim lost damages.⁵⁹¹

7.3 Declaring a Diplomat a *persona non grata*

The Vienna Convention does make provision for the receiving state when diplomatic agents are raising their defence of immunities. This can be found in Article 9 of the Vienna Convention:

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is a *persona non grata* or that any other member of staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his/her functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under Para 1, the receiving State may refuse to recognize the person concerned as a member of the mission.⁵⁹²

Article 9 also states that the receiving state may declare a person from the sending state a *persona non grata*, which gives the receiving state the power to enforce the removal of the individual from the mission.⁵⁹³ This measure is taken when a diplomat has committed a crime or behaved inappropriately to such an extent that the receiving state is of the opinion that the diplomat should no longer remain in its country. Again the receiving state is not obliged to

⁵⁸⁹ Farhangi 1526.

⁵⁹⁰ Zaid 630.

⁵⁹¹ Ross 188.

⁵⁹² Article 9 of the Vienna Convention.

⁵⁹³ O'Brien 300.

provide reasoning as to why.⁵⁹⁴ The particular person or persons must cease to continue to function in their official capacity as a representative of the sending state and are asked to leave the receiving state country as soon as possible.⁵⁹⁵ The reasoning being that the particular head of the mission, has to conduct some form of diplomacy between the two states and therefore needs to be suitable to both states to continue their diplomatic relations.⁵⁹⁶ If the receiving state no longer approves of the head of the mission of the sending state then the head is declared a *persona non grata* and is asked to leave his office.⁵⁹⁷ His immunity, however, normally remains intact.⁵⁹⁸

While the article 9 remedy of declaring the offender *persona non grata* and forcing him to leave the country is appropriate in most cases, in the face of terrorist actions by diplomats it is both an inadequate deterrent and an inadequate punishment. On the two sides of the Atlantic, fear is growing that the current level of diplomatic immunity makes more incidents of this sort inevitable.⁵⁹⁹

This basic principle that the receiving state has the power to expel the sending diplomat without even providing reason has been present from a very early stage in diplomatic practice.⁶⁰⁰ It is the most effective form of defence to a receiving State who has foreign diplomats that are abusing their privileges and immunities to an extent that is unacceptable to the receiving State.⁶⁰¹ Justifications for such actions are; if the diplomat has acted inappropriately and has violated social norms and antisocial behaviour, or where he abuses his immunity for criminal offences.⁶⁰² Another reason is where the diplomat acts hostile towards the State and jeopardizes the security of the State.⁶⁰³ Another might be where the State declares diplomats a *persona non grata* for retaliation purposes, to put pressure on another State to negotiate.⁶⁰⁴ The declaration results in that the person is no longer recognised by the receiving State as a member of the mission and any acts that are committed after the declaration may be faced with legal proceedings.⁶⁰⁵ The diplomatic functions of the individual are terminated and unless he is a permanent resident or national he is recalled back

⁵⁹⁴ O'Brien 300.

⁵⁹⁵ O'Brien 300; Maginnis 1003.

⁵⁹⁶ Denza 40.

⁵⁹⁷ Denza 40.

⁵⁹⁸ Maginnis 1004.

⁵⁹⁹ Farhangi 1527.

⁶⁰⁰ Denza 62; Brown 87; Farhangi 1523.

⁶⁰¹ Denza 62; Brown 87.

⁶⁰² Feltham 8.

⁶⁰³ Feltham 8; Denza 63.

⁶⁰⁴ Feltham 8.

⁶⁰⁵ Denza 63; Brown 87.

to the sending State.⁶⁰⁶ The declaration can be made before or after the arrival of the diplomats.⁶⁰⁷

The International Court of Justice had suggested in the Tehran case⁶⁰⁸ that although evidence might suggest that the American diplomats were interfering with internal affairs of the Iran government and it might even be considered to include espionage, the actions of the Iran Government to hold them hostage cannot be justified.⁶⁰⁹ The Iran Government had alternative actions to their disposal to declare those diplomats as *persona non grata*.⁶¹⁰

Declaring a diplomat *persona non grata* only leads to the removal of the diplomat, but this is not always desirable.⁶¹¹ In the case of the murder of Constable Fletcher it is inappropriate and disproportionate.⁶¹² The diplomat or diplomats in the Libyan Bureau did not just smuggle guns and ammunition into the country illegally but killed a police officer. To simply declare the diplomat a *persona non grata* is not a sufficient remedy for such a serious crime, especially because they would also escape criminal liability.⁶¹³ England could no longer ensure the safety of its citizens if the diplomatic mission remains functional. Since Libya refused to waive immunity, the only appropriate action would be then to sever all ties with Libya.

After the enactment of the Vienna Convention a number of diplomats have been recalled for suspicion of espionage and involvement in terroristic or subversive activities.⁶¹⁴ Libyan diplomats were recalled in the United States and in the United Kingdom on suspicion of terroristic activities.⁶¹⁵ Moreover, Iraqi, Iranian, Soviet Unions and Cuban diplomats have also been asked to return to their respective countries.⁶¹⁶ American diplomats have also been alleged of meddling and interfering in domestic and internal affairs and as a result were asked to return to the United States.⁶¹⁷ South African diplomats were also declared *persona non grata* by the French Government when their intelligence suggested a plot between South Africa and Ulster Loyalists to exchange surface-to-air missiles.⁶¹⁸

⁶⁰⁶ Feltham 8.

⁶⁰⁷ Feltham 8.

⁶⁰⁸ United States Diplomatic and Consular Staff (1980) ICJ Reports 3.

⁶⁰⁹ Denza 63; Brown 87.

⁶¹⁰ Para 81-7 of Judgement, Denza 63; Brown 87.

⁶¹¹ Wright 183

⁶¹² Wright 183

⁶¹³ Wright S L 184

⁶¹⁴ Denza 63.

⁶¹⁵ Denza 63.

⁶¹⁶ Denza 64.

⁶¹⁷ Denza 64.

⁶¹⁸ For a more detailed discussion on the subject Denza 65-66.

Although States are entitled to declare a diplomat a *persona non grata* at any time, receiving States seldom use those drastic remedies.⁶¹⁹ In the United Kingdom, even after the Fletcher incident the government only declared diplomats *persona non grata* that have been accused of very serious crimes such as drug trafficking, unless the sending State waived the immunity.⁶²⁰ The total numbers of person being declared *persona non grata* remained relatively small.⁶²¹ In 1993 for example out of 33 alleged serious criminal offences committed by diplomats only eight of those were being asked to leave the country.⁶²² The only plausible logical conclusion as to why State's are reluctant to make better use of their remedies against diplomats that abuse their immunities is the possibility of reciprocal action of the other State.⁶²³ Often the mere fear or expectation that a diplomat might be called off and declared a *persona non grata* has left most States to only use those measures available to them in the most drastic cases and where the State is left with little alternative action.⁶²⁴

Request for recall and in a higher degree dismissal and expulsion are used with great caution by governments since States have shown great reluctance in granting to the receiving State the right to terminate the function of a diplomatic representative unless a serious charge is brought against him and adequately proved... second these sanctions have been limited in application to offences committed against the receiving State such as conspiracy, infraction of neutrality laws or interference with the internal affairs of the receiving state or discourteous or unfriendly conduct.⁶²⁵

7.4 Reciprocity

The receiving state has another option in dealing with offending diplomats other than requesting a waiver or declaring them *persona non grata*. The State can with the help of the Minister of Foreign Affairs implement stricter rules that the foreign mission would have to abide to. Though the sending state may react reciprocal to it, it holds the parties in check. The power of reciprocity should not be undermined and it is a way to keep all parties in check.

7.5 Severing Diplomatic Ties

⁶¹⁹ Barker 168.

⁶²⁰ Barker 168.

⁶²¹ Barker 168.

⁶²² Barker 168.

⁶²³ Barker 168.

⁶²⁴ Barker 168.

⁶²⁵ Barker 167.

Severing diplomatic relations is the most drastic option a state has. It has the same effect as declaring a *persona non grata*, which result in the “criminal” leaving the country. In extreme cases, the international option of trade boycotts and isolations may come into play, although as rare as it is this could in turn lead to reprisals.⁶²⁶

The receiving State does have a more radical remedy available if it believes that the abuses of diplomatic functions have reached serious proportions and the sending State has not acted appropriately.⁶²⁷ The power of every receiving State allows them to break off diplomatic relations with the sending State and to call for the immediate closure of the offending mission.⁶²⁸ The receiving State can:

1. Protest through diplomatic channels against the abuse of diplomatic immunities by the offending diplomat or staff
2. Ask for the recall of the offending member
3. Break off diplomatic relations with the sending State.⁶²⁹

The reaction or response of the sending state could be detrimental, however, and cause an overreaction as it could then declare all diplomats of the receiving state inside the sending states *persona non grata*, and run the risk of losing all diplomatic and consular trade and relations with the state.⁶³⁰

Missions that were withdrawn as a deliberate act of foreign policy with the consequences of breaking off of diplomatic relations were often a prelude to war.⁶³¹ The threat of such action by a State is usually sufficient to convince the other State to review its foreign policy.⁶³² Today it is not so often used as a threat but rather as a form of protest.⁶³³ Even if a mission is withdrawn and diplomatic relations are terminated the contact between the two States rarely ceases.⁶³⁴ This is because the States of the world are becoming increasingly more interdependent and diplomatic relations has to continue on certain levels.⁶³⁵ The two most well known incidents where state have broken off all diplomatic ties is England with Libya after the Fletcher shooting incidents and the United States of America with Iran after the hostage situation in Tehran.⁶³⁶

⁶²⁶ Laubschange 40.

⁶²⁷ Wiebalck 179.

⁶²⁸ Wiebalck 179.

⁶²⁹ Wiebalck 179.

⁶³⁰ Wiebalck 179.

⁶³¹ Feltham 9.

⁶³² Feltham 9.

⁶³³ Feltham 9.

⁶³⁴ Feltham 9.

⁶³⁵ Feltham 9.

⁶³⁶ Ross 190.

7.6 Possible Alternative Remedies

The amount of crimes committed by diplomatic agents, both trivial and severe and the growing number of diplomats in today's era makes it more questionable as to why the broad concept of immunity should be upheld.⁶³⁷ With the advancement of technology in communication and travel it has made the functions of a diplomatic agent to a lesser level of importance.⁶³⁸ This is because governments now send Ministers to the receiving state to negotiate terms even though they are not career diplomats.⁶³⁹ Ministers travel, negotiate and leave again, remaining in the receiving state for only a very short time before they leave again.⁶⁴⁰ Parkhill is of the opinion that diplomatic immunity should be more restricted and that diplomats should only enjoy immunity to official acts done in their official duty, just as their consular counterparts.⁶⁴¹ It has to be taken into consideration, however, that the success of this lies in narrowing the interpretation of in "the scope of official duties".⁶⁴² In this way at least the more severe cases of abuse such as rape, murder and drug smuggling could finally be dealt with, and diplomats would be required to be held accountable for their misdeeds.⁶⁴³

It has been suggested that the violations of laws broken by the diplomatic agents and the lack of power sometimes by the receiving State is frustrating and often leads to innocent victims not being compensated.⁶⁴⁴ The Vienna Convention does not always provide a solution to a problem and one of the ideas is to ensure that at least in regards to civil claims victims will be compensated.⁶⁴⁵ Suggestions have been made for a fund to be opened by each embassy to compensate any national that has a rightful claim to be compensated.⁶⁴⁶ Since it has become the norm that embassies have to be insured for any vehicle accidents, it should be further extended to any other form of civil claims.⁶⁴⁷ In such an instance the sending state is required to ensure that their diplomat is continuously covered while the diplomat is abroad.⁶⁴⁸

⁶³⁷ Parkhill 588.

⁶³⁸ Parkhill 588.

⁶³⁹ Parkhill 588.

⁶⁴⁰ Parkhill 588.

⁶⁴¹ Parkhill 588.

⁶⁴² Parkhill 588.

⁶⁴³ Parkhill 588.

⁶⁴⁴ Brown 87.

⁶⁴⁵ Brown 87.

⁶⁴⁶ Brown 87; Groff 220; Ross 192.

⁶⁴⁷ Brown 87; Groff 221; Ross 194; McDonough 491.

⁶⁴⁸ Farhangi 1529; McDonough 493; Ross 194.

The failure of the sending state to do so could then result in the diplomat being declared a *persona non grata*.⁶⁴⁹ Civilians that have fallen victim to a diplomatic offence then at least are able to be reimbursed directly and can get around the diplomatic immunity.⁶⁵⁰

Other commentators believe that no amendments need to be done on the Vienna Convention and that the current system is working. This is because the outcomes of the Vienna Convention exceed any minor statistical outcome of abuse that are committed by diplomats in the broad picture.⁶⁵¹

The answer to resolving diplomatic incidents, however, is not to overreact. Sadly, this is too often the case. Responses to diplomatic abuses must be rational, and implementation should be consistent. The development of international law from which diplomatic immunity extends finds much of its roots in the notion of reciprocity.⁶⁵²

Green⁶⁵³ suggests that the sending countries need to do more about the training and selection of diplomatic personnel. It is also the sending's state responsibility to ensure that only diplomatic officials are sent that are fit and proper to represent their country.

Another alternative remedy could be the enforcement of protecting fundamental human rights over all other rights. Which would mean that even in the case where a diplomat enjoys immunity and violates a fundamental human right, then the diplomat would not be able to escape liability. In Chile a case was brought forward all the way to the Supreme Court that dealt with the issue of whether diplomatic immunity must still be upheld even in case of a fundamental breach of human rights.

In Chile the 1980 Constitution has developed a legal principle that states that in the case of fundamental infringement of basic human rights, the courts have the power to ensure that the fundamental right is being protected over all other legal rights.⁶⁵⁴

As provided for under Article 20 of that Constitution:

Whomsoever by reason of arbitrary or illegal acts or omissions suffers deprivation of or is affected or threatened in the legitimate exercise of the rights and guarantees established in [an enumeration of articles follows] shall have recourse by himself or by anyone representing him to the respective Court of Appeals, which shall immediately adopt the measures deemed necessary for the re-establishment of the rule of law and ensure adequate

⁶⁴⁹ Farhangi 1529; McDonough 493.

⁶⁵⁰ Farhangi 1529; McDonough 493.

⁶⁵¹ James E Hickey Jr and Fisch A, 'The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States' 41 *Hastings Law Journals*, 351, 355-56, at 355-76

⁶⁵² Zaid 629.

⁶⁵³ Green L C 'Trends in the Law Concerning Diplomats' (1981) 19 *Canadian Yearbook of International Law* 132 at 155.

⁶⁵⁴ Vicuna F O 'Diplomatic and Consular Immunities and Human Rights' (1991) *International & Comparative Law Quarterly*. 34 -48.

protection of the person affected without prejudice to other rights which may be invoked before the competent authority or tribunal.

A German high ranking diplomat was investigating the town of Colonia Dignidad in the South of Chile. The settlement has been under scrutiny for some time and the said diplomat was investigating allegations that a Chilean-German national was being retained against his will in the secluded village of Colonia Dignidad. During the course of the diplomats investigation two Chilean-German nationals brought an action against the diplomat on the grounds that he infringed their rights to privacy and honour during his investigation. A further action was pressed against the diplomat of defamation due to a newspaper article where the diplomat suggests that the leaders of the settlement of Colonia Dignidad are guilty of abduction. The Diplomat invoked diplomatic immunity under the Vienna Convention and the Court of Appeal came to the conclusion that the action would fail. However the Supreme Court ruled differently with the reasoning that Diplomatic Immunity can no longer be upheld when fundamental human rights are at risk. This would have meant that diplomats could no longer hide under the cloak of immunity when they have been suspected of having violated a fundamental human right. The Supreme Court argued that according to its view the diplomatic immunities will only cover the “acts performed in the exercise of official functions”. The court relied on functional interpretation of the Vienna Convention and stated that only acts performed in the course of the diplomats function would provide immunity. The second argument that the Supreme Court provided as to why the diplomatic immunity should not be upheld is that according to the Court the rights protected under the Constitution should outweigh the Treaty rule of Diplomatic Immunities. The laws of the Constitution are superior to any other law and therefore the International Law is only of a secondary nature.

The Ministry of Foreign Affairs played an active role in the Supreme Court’s decision. It provided clarity on the concepts of Diplomatic Immunities and its importance in the International sphere and eventually swayed the court’s ruling to dismiss the action.

What the case points out is that the diplomat’s immunity should not over rule the importance of fundamental human rights such as the right to life and physical integrity. Although the immunity exists due to concept of sovereignty it needs to be more confined and limited. The immunity of the diplomat should not ignore other citizen basic human rights, and should not be taken for granted. The Supreme Court intention was to rule that the diplomatic immunity cannot be more important than an individual’s right to human rights. It is vital to find a balance between the need to protect foreign diplomats and that of the local citizens that

are affected because of them.⁶⁵⁵ There is a new and different form of jurisdiction emerging: the humanitarian jurisdiction and this ought certainly to prevail over any form of immunity should a conflict arise.

If one aspect has been perfectly established in the contemporary law of human rights, it is that no State can stand above the requirements of protection of such fundamental rights, as a consequence of which sovereignty or domestic jurisdiction can no longer be invoked as a bar against these requirements.⁶⁵⁶

Functional necessity as has been explained above, is the concept that the diplomat's immunity is upheld for acts that he performed to carry out the mission's goals and objectives.

The House of Commons Foreign Affairs Committee stated that terrorism or other criminal activities can never be justified by reference to these functions, and that if a diplomat acts in fact as a terrorist that they can no longer be identified as diplomats and therefore lose the immunities that they were initially entitled to. This concept should be expanded further to diplomats and consular agents who violate basic human rights. Such an act could never be associated with an official diplomatic function.

Had the events in St James's Square and the Dikko affair been examined in the light of their implications in the field of human rights, they might have been treated as giving rise to no claim to functional immunity. In the Dikko affair, had the crate containing Dikko been claimed to be the diplomatic bag, would not the overriding duty to protect human life and personal freedom under the law of human rights have sufficed to disregard an immunity resulting in the gross violation of such rights?⁶⁵⁷ This is the issue prompted by most of the incidents confronting human rights and diplomatic and consular immunities.⁶⁵⁸

Although the concept of Diplomatic Immunity is far too important in the international sphere to ignore or to change, there are a few possible alteration that could be done that insures that diplomats will take the local laws of a foreign country more to heart. The Statement given by Congressman David Dreier in the U.S.⁶⁵⁹ provides several suggestions:

⁶⁵⁵ Vicuna 42.

⁶⁵⁶ Henkin L 'Human Rights and 'Domestic Jurisdiction' (1977) *Human Rights, International Law and the Helsinki Accord* 25.

⁶⁵⁷ This view was in fact present in the handling of the Dikko affair, the Secretary of State for Foreign and Commonwealth Affairs having stated that even if the crate had constituted a diplomatic bag the action undertaken "took fully into account the overriding duty to preserve and protect human life", a statement that was welcomed by the House of Commons Foreign Affairs Committee Report, Session 1984-85 (the abuse of Diplomatic Immunities and Privileges 12 Dec.1984, at paras.111, 127(8); the government reply also referred to "the overriding right of self-defence or the duty to protect human life", Government Report, Diplomatic Immunities and Privileges Government Report on Review of the Vienna Convention on Diplomatic Relations, April 1985, Cmnd.9497, at para.48.

⁶⁵⁸ Vicuna 44.

⁶⁵⁹ Dreier Statement on Reform of Diplomatic Immunity. Zaid M 631.

The first being that the United States of America should implement bilateral treaties with other foreign states that have similar legal systems as the United States, countries like Canada and United Kingdom. He claims that the fear of an offending diplomat not getting a fair trial is minimal. Another point he makes is that in the case where the receiving state does provide sufficient evidence that the offending diplomat did indeed commit a crime, then the diplomat should remain in the country for trial. It is normally custom that the diplomat gets recalled, however, it would be more advantages that the diplomat remains in the country to stand trial if the offence in question is illegal in both the sending and the receiving country. In the case where the likely punishment is too foreign to the sending state arrangement could be made to have the offending diplomat serve his punishment or sentence in his home country.

It would further be advantages that before the credentials are presented to the sending state, an inquiry should be made in regards to the diplomats criminal history. Other receiving countries can be contacted to investigate whether the diplomat has been accused of other misdemeanours.

Wright⁶⁶⁰ is of the opinion that it is vital that more needs to be done in order to prevent diplomats from committing criminal activities. He refers specifically to violent crimes like rape, murder and assault. He suggests the establishment of a Permanent International Diplomatic Criminal Court, since the International Court of Justice jurisdiction is in regards to civil claims only.⁶⁶¹ The Court would exist of a variety of legal experts of the state parties and would also promise “neutral treatment” as the party’s to a hearing would be selected in order to avoid geographical and cultural bias. He goes on to explain how the court would operate and ensure that though the party’s deserve a fair trial it is also to ensure that the case actually gets heard and that the potential citizen that lays claim against a diplomat actually get justice. Each diplomatic agent would have to have a personal account that would provide potential compensation to the court so that it can be transferred to the victim. The court would further have the power to imprison the diplomat thus furthering deterrence to criminal activity.

7.7 Summary and Conclusion

The three main remedies that the State has available in regards to a diplomat violating local laws are: a request to waiver the immunity; to declare the diplomat *persona non grata*; and

⁶⁶⁰ Wright 177.

⁶⁶¹ Wright 117; Groff 222.

lastly the state can sever all diplomatic ties with the diplomat's State. If waiver is granted then the receiving state may prosecute the diplomat which would provide justice and reduce abuse of immunity. However, this route is rarely used as it would mean that the diplomat's official duties come to a standstill which is undesirable for both the sending and receiving states. In cases where the diplomat has been declared *persona non grata*, the diplomat remains immune and will not be held accountable for his actions. He will, however, be released of his duties and be forced to leave the country. Lastly, with regards to severing diplomatic ties, this route is seldom used by States due to the repercussions involved; namely economic and political ties being jeopardised. In most cases where a diplomat abuses his immunities, the citizens of the receiving state are left without any compensation. Civil claims can be easily remedied if diplomatic missions have a separate fund available in order to remunerate the damages done to civilians in cases where the evidence against the diplomat is clear. This is also desirable as a diplomat can still continue his official duties. An additional alternative is to establish a separate court for diplomats so that they may be held accountable.

Each state needs to be held more responsible for their own diplomats and by doing so be vigilant of abuse that their diplomats commit whilst representing their country.

The following two chapters investigate South African and British laws with regards to the development of diplomatic immunity.

Chapter Eight Diplomatic Immunity in South Africa

8.1 Introduction

During the colonisation of South Africa under the British crown any diplomatic agent representing South Africa did not receive diplomatic status at that time.⁶⁶² Any representative or mission from South Africa was seen as British and in most instances was only established for trade.⁶⁶³

The first piece of legislation that was established after the British colonisation was the Diplomatic Immunities Act 9 of 1932. Already then it was clear that diplomatic agents would not be subjected to civil and criminal proceedings in the Union.⁶⁶⁴ The Act also provided immunity to the staff and family of the diplomat provided that they were not nationals of the Union.⁶⁶⁵ The Minister of External Affairs was obliged under Section 4 of the Act to keep a register or list of all members that enjoyed diplomatic status and it would be published once a year in the *Government Gazette*. It was also prohibited to bring any proceedings against a diplomatic representative as this would lead to a fine not exceeding £500 and/or being imprisoned for no longer than three years.⁶⁶⁶ The Act was amended in 1934 to redefine the diplomatic agents and counsellors.⁶⁶⁷

A new Act was established in 1951 called The Diplomatic Privileges Act 71 of 1951. The Act also recognised public organisations and official representatives from foreign government that attend international conferences to be also vested with immunity against criminal and civil jurisdiction including any other person the Minister nominated.⁶⁶⁸ These privileges were also given to the families and staff. However the Act made it clear that it will not include immunity for tax incurred on personal incomes or any other private transaction that fell outside his official capacity.⁶⁶⁹ Section 4 made it mandatory to keep a register of all personnel being vested with diplomatic immunity and privileges. The Act also continued to

⁶⁶² Lloyd 53.

⁶⁶³ Lloyd 53.

⁶⁶⁴ Section 1.

⁶⁶⁵ Section 2.

⁶⁶⁶ Section 10.

⁶⁶⁷ Diplomatic Immunities Amendment Act 19 of 1934.

⁶⁶⁸ Section 2(1).

⁶⁶⁹ Section 3.

criminalise any proceedings that were taken up against any official person being vested with diplomatic immunity.⁶⁷⁰ The penalty remained constant with a fine not exceeding £500 and/or a maximum of three years imprisonment.

South Africa has since 1989 consented to the contents of the Vienna Convention on Diplomatic Immunities and Privileges without making any reservations.⁶⁷¹ Section 2(1) of the Act⁶⁷² then stated that the application of the Vienna Convention will be incorporated into the South African municipal law.⁶⁷³ The Vienna Conventions is part of customary international law and unless a state made reservations with regards to any portion of the Convention, the state is obliged to give effect to all the provisions it entails and to incorporate it into its national laws.⁶⁷⁴ Since South Africa made no reservations when becoming signatory to the Convention it is obliged to incorporate the laws of the Convention into its municipal laws to its fullest.⁶⁷⁵

The Diplomatic Immunities and Privileges Act No 37 of 2001, as amended by Act 35 of 2008 is the primary source for South African legislation on the topic of diplomatic immunities and privileges. The Act has been adopted in line with the South African Constitution that added the following legal principles under s231(4) that – “any international agreement becomes law in the Republic when it is enacted into law by national legislation”.⁶⁷⁶

With regards to human rights, section 39⁶⁷⁷ obliges the court to consider International Law when interpreting any provision of the Bill of Rights.⁶⁷⁸ Section 232⁶⁷⁹ provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”, and section 233⁶⁸⁰ states that all courts who interpret any legislation “must prefer any reasonable interpretation of the legislation that is consistent with International Law over any alternative interpretation that is inconsistent with International Law.”⁶⁸¹

⁶⁷⁰ Section 11.

⁶⁷¹ Diplomatic Immunities and Privileges Act 37 of 2001 (preamble).

⁶⁷² Diplomatic Immunities and Privileges Act.

⁶⁷³ Diplomatic Immunities and Privileges Act.

⁶⁷⁴ Diplomatic Immunities and Privileges Act (preamble).

⁶⁷⁵ Diplomatic Immunities and Privileges Act (preamble); Botha 453.

⁶⁷⁶ Constitution of the Republic of South Africa, 1996.

⁶⁷⁷ Constitution of the Republic of South Africa, 1996.

⁶⁷⁸ Labuschagne 45.

⁶⁷⁹ South African Constitution 1996.

⁶⁸⁰ South African Constitution 1996.

⁶⁸¹ Labuschagne 46.

Although deceptively simple, section 232 of the Constitution has far reaching implications for the practice of South African law. The Constitution does not create a hierarchy, providing rather only that customary international law is “law”. One must therefore assume that customary international law enjoys a status at least equal to that of legislation and the common law and must be treated accordingly by the courts. Further, the Constitution specifically limits the exclusion of customary international law to two instances, namely, conflict with the Constitution itself or with an Act of Parliament. The traditional grounds, based largely on the Westminster system of government, on which the application of customary international law was excluded, notably common law inconsistency, precedent and the act of state doctrine, are no longer supportable.⁶⁸²

The South African Diplomatic Immunity and Privilege Act incorporates all provisions of the Vienna Convention on Diplomatic Relations 1961 which must be observed and which have the effect of law in the Republic.⁶⁸³ In case of any ambiguity between statutory and the Vienna Convention on Diplomatic Immunities and Privileges, the courts must prefer any reasonable interpretation of the statutory law that is consistent with International Law.⁶⁸⁴ In addition to statutory and the Vienna Convention, the rules of customary international law will be applicable unless such rules are inconsistent with the Constitution or an Act of Parliament.⁶⁸⁵

The preamble of the Act states the following:

To make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives, of the United Nations, and its specialised agencies, and other international organisations and of certain other persons; to make provision regarding immunities and privileges pertaining to international conferences and meetings; to enact into law certain conventions; and to provide for matters connected therewith.

In section 2(b)(ii) of the Diplomatic Immunities and Privileges Act the definition of a member of spouse is defined. It states:

Member of a family means:

- i. The spouse;
- ii. Any dependent child under the age of 18 years;
- iii. Any other dependant family member, officially recognised as such by the sending State or the United nations, a specialised agency or an international organisation: and
- iv. The life partner, officially recognised as such buy the sending State or the United nations, a specialised agency or an international organisation,

⁶⁸² Botha 453.

⁶⁸³ Strydom para 172.

⁶⁸⁴ Strydom para 172.

⁶⁸⁵ Strydom para 172.

and if applicable, “spouses and relatives dependant” has the same meaning.⁶⁸⁶

The amendments in 2008 made to the Diplomatic Immunities and Privileges Act define more clearly the members of a diplomat's family entitled to immunity.⁶⁸⁷ In terms of section 1 of the Amended Act, the term “member of a family” in section 2 (b) of the Act now adds, apart from a spouse, dependent children under the age of eighteen years, other dependant family members officially recognized as such by the sending state, the United Nations, a specialized agency, or an international organization, and the life partner of the diplomat are entitled to diplomatic immunity as they form part of the diplomat’s family.⁶⁸⁸

Since this definition is for purposes of the Conventions on Diplomatic and Consular immunity alone, immunities and privileges for family members, for instance, can still be claimed in terms of article 37(1) of the Vienna Convention on Diplomatic Relations 1961 and, as indicated above the Act authorises the Minister of Foreign Affairs to confer immunities and privileges on any person or organisation by agreement if it is in the interest of the Republic.⁶⁸⁹

The South African Diplomatic Immunity and Privilege Act has enacted the following procedures to identify which persons are entitled to Diplomatic immunity. In section 9 the Act stipulates that all persons that are entitled to immunity have to be registered with the Department of Foreign Affairs:

S 9. Register of persons entitled to immunities or privileges

1) – the Minister must keep a register in which there must be registered names of all the persons who enjoy –

- a) Immunity from civil and criminal jurisdiction of the courts of the Republic; or
- b) Immunities and privileges in accordance with the Conventions or in terms of any agreement contemplated in section 7.

2) The Minister must cause a complete list of all persons on the register to be published on the Website of the Department of Foreign Affairs, and must cause the list to be updated as frequently as may be necessary, and made publicly available.⁶⁹⁰

Bringing international relations into the electronic age through the use of digitising of documents, social networks and websites etc, section 9(2) of the principal Act is amended to provide that a list of the names on the register of persons entitled to diplomatic immunities must appear on the web site of the Department of Foreign Affairs.⁶⁹¹ This list must be

⁶⁸⁶ Section 2 of the Diplomatic Immunities and Privileges Act,

⁶⁸⁷ Botha, N ‘Diplomatic Immunity’ (2008) *Annual Survey* 1178.

⁶⁸⁸ Botha 1180.

⁶⁸⁹ Strydom para 173.

⁶⁹⁰ Section 9 of the Diplomatic Immunity and Privileges Act.

⁶⁹¹ Botha 1182.

updated “as frequently as may be necessary” and is publicly available.⁶⁹² Importantly, section 9(3) is amended to provide that:

[i]f any question arises as to whether or not any person enjoys any immunity or privilege under this Act [the principal Act] or the Conventions [on Diplomatic and Consular Immunity], a certificate under the hand or issued under the authority of the Director-General [of Foreign Affairs] stating any fact relating to that question, is prima facie evidence of that fact.⁶⁹³

8.2 Privileges to Diplomats

Section 3(1)⁶⁹⁴ confirms the incorporation of the Vienna Convention.

The Vienna Convention on Diplomatic Relations, 1961, applies to all diplomatic missions and members of such missions in the Republic.

Similarly section 4 makes it clear that the heads of state will enjoy immunity and privileges as have been accredited to them by customary law.

- (1) A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-
 - (a) heads of state enjoy in accordance with the rules of customary international law;
 - (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or
 - (c) may be conferred on such head of state by virtue of section 7(2).
- (2) A special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-
 - (a) a special envoy or representative enjoys in accordance with the rules of customary international law;
 - (b) are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or
 - (c) may be conferred on him or her by virtue of section 7(2).

Representatives of foreign states are exempted from the civil and criminal jurisdiction of the courts.⁶⁹⁵ The privilege extends to heads of state, and special envoys or representatives from other states, governments or organisations.⁶⁹⁶ The privilege can be one that exists in terms of the rules of customary international law or an agreement entered into with a state,

⁶⁹² Botha 1183.

⁶⁹³ Botha 1183.

⁶⁹⁴ Diplomatic Immunity and Privilege Act 2001.

⁶⁹⁵ Strydom para 173.

⁶⁹⁶ Strydom para 173.

government or organisation, or one that is conferred on the recipient by executive notice in the *Government Gazette*.⁶⁹⁷ Agreements of the nature foreseen here must comply with the provisions of section 231 of the Constitution before South Africa will be bound by it, which means that parliament approval is required, and for domestic effect legislative enactment.⁶⁹⁸

Section 9 of the Diplomatic Immunities Act is in line with the Vienna Convention. The South African legislation has ensured that all diplomatic staff has to be registered and is kept on a Diplomatic List to provide *prima facie* evidence that the particular person in question is entitled to Diplomatic immunity and privileges.

The South African Diplomatic Immunities and Privileges Act further requires that all registered Diplomats must be insured.

S 13) Liability insurance requirements. – The Minister must prescribe by regulation liability insurance requirements which have to be met by any person who enjoys immunities or privileges under this Act or in terms of the Conventions.⁶⁹⁹

Since important parts of the Vienna Convention on Diplomatic Relations are incorporated into South African law in terms of the Act, the convention law with regard to the immunity of diplomatic premises, official correspondence, the person of the diplomatic agent and the private residence of an agent will have the force and effect of municipal law.⁷⁰⁰

Section 7 of the Diplomatic Privileges Act specifically confirms that:

- (1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*.
- (2) The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection 1 and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*.⁷⁰¹

However, the Minister has also the power to limit immunity under section 10.

If it appears at any time to the Minister-

- (a) that the immunities and privileges accorded to a mission of the Republic in the territory of any state, or to any person connected with any such mission, are less than those conferred in the Republic on the mission of that state, or on any person connected with that mission; or
- (b) that the exemptions granted to the Government of the Republic in the territory of any state are less than those granted by the Minister to that state,
the Minister may withdraw so much of the immunities, privileges and exemptions so accorded or granted by him or her as appears to him or her to be proper.

⁶⁹⁷ Strydom para 173.

⁶⁹⁸ Strydom para 173.

⁶⁹⁹ Section 13 of the Diplomatic Immunity and Privilege Act.

⁷⁰⁰ Strydom para 173.

⁷⁰¹ Section 7 of the Diplomatic Immunities and Privileges Act.

To be in line with the Vienna Convention the South African legislature has made certain provisions to protect the diplomat from facing any criminal or civil actions against him.

According to section 15 of the Diplomatic Immunity and Privilege Act no action may be brought against a diplomat:

(1) Any person who wilfully or without the exercise of reasonable care issues, obtains or executes any legal process against a person who enjoys immunity under this Act or in terms of the Conventions, whether as party, attorney or officer concerned with issuing or executing such process, is guilty of an offence.

(2) Any person who contravenes subsection 1 or who wilfully or without the exercise of reasonable care commits any other offence which as the effect of infringing the inviolability of any person contemplated in subsection 1, or of his or her property or of the premises occupied by him or her, is liable on conviction to a fine or to imprisonment for a period not exceeding 3 years or to both a fine and such imprisonment.⁷⁰²

It is a criminal offence to issue, obtain or execute legal process against a person with diplomatic immunity. It is punishable by fine and/or imprisonment of a maximum period of three years.⁷⁰³

8.3 Privileges to Property and Assets

The diplomat's property and assets in South Africa are also protected by its municipal laws. The following scenario is an example that South Africa has taken its international obligation towards the Vienna Convention seriously.

In 1985 South African police entered the mission premises of The Netherlands and rearrested a Dutch anthropologist who had escaped from detention under the Internal Security Act on grounds of assisting the African National Congress.⁷⁰⁴ The police subsequently claimed to be unaware of the status of the building.⁷⁰⁵ In the face of vigorous Dutch protests and a threat to recall their Ambassador the prisoner was released and apologies made for the violation of the premises.⁷⁰⁶ It shows that already then, even before South Africa officially became signatory to the Vienna Convention, its laws and regulations were acknowledged, respected and abided by.

⁷⁰² Section 15 of the Diplomatic Immunities and Privileges Act.

⁷⁰³ Strydom para 177.

⁷⁰⁴ 1986 RGDIP 180; Denza 123.

⁷⁰⁵ 1986 RGDIP 180; Denza 123

⁷⁰⁶ 1986 RGDIP 180; Denza 123.

Today the South African legislature has provided procedure as to how foreign missions are to address problems in regards to the changes made to the premises of the mission. Section 12 of the Diplomatic Immunity and Privileges Act states the following:

(1) – All foreign missions or consular posts, the United Nations and all specialised agencies or organisations referred to in this Act, must submit a written request to the Director – General for acquiring, constructing, relocating, renovating, replacing, extending or leasing immovable property in the Republic in the name of or on behalf of –

- a) The mission or post or its government
- b) The United Nations
- c) The specialised agency or organisation in question
- d) Any person referred to in section 4 or 5; or
- e) Any representative contemplated in the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963.

(2) Any such request must consist of an narrative and graphic description of, and indicate the reason for the proposed acquisition, construction, relocation, renovation, replacement, extension, or leasing.

(3) No deed of transfer of land may be registered in accordance with the Deeds Registries Act (Act No 47 of 1937), in the name of any such government, mission or post, the United Nations or any such specialised agency, organisation, person or representative unless the Director – General has informed the Registrar of Deeds in writing that the property has been recognised for the use of an embassy, chancellery, legation, office or official residence and that the Director –General approves of such registration.

(4) Diplomatic missions established in the Republic in accordance with the provisions of the Vienna Convention on Diplomatic Relations 1961, or other rules of customary international law, must be located in Pretoria or during sitting of Parliament, in Cape Town.

(5) Despite subsection 4, the Minister may approve that a section of the Diplomatic mission may be located elsewhere.⁷⁰⁷

Any foreign mission in South Africa is required to submit a written request to the Director General of Foreign Affairs in the case where there needs to be done any construction, relocation, renovation, replacing, extensions or leasing of immovable property in the Republic. The letter needs to be informative setting out the exact changes including a graphic explanation and providing valid reasons as to the necessity of the changes.⁷⁰⁸

An illustration that the laws of South Africa are consistent with those of the Vienna Convention is the case of *Portion 20 of Plot 15 Athol (Pty)Ltd v Rodrigues* 2001 SA 1285 (W). The company applied for an eviction order to the High Court against Mr Rodrigues who

⁷⁰⁷ Section 12 of the Diplomatic Immunities and Privileges Act,

⁷⁰⁸ Strydom para 176.

is an Angolan ambassador to South Africa.⁷⁰⁹ The Company averred that the ambassador did not comply to certain contractual obligations and that therefore the company wanted to evict Mr Rodrigues. The company effected service through the South African department of Foreign Affairs and the Angolan Government according to section 13 of the Foreign States Immunity Act 87 of 1981.⁷¹⁰ The company contended that the ambassador is not entitled to diplomatic immunity according to section 6(1)(a) of the Act which provides that the defence of Diplomatic immunity is not extended to a “real action relating to private immovable property on behalf of the sending State concerned”.⁷¹¹ The company provided evidence that the contract was entered into by the ambassador in his private capacity.

Rodrigues is entitled to immunity from criminal and civil jurisdiction according to section 2(1) and 3 of the Act as well as article 31 of the Vienna Convention on Diplomatic Relations.⁷¹²

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of... (a) a real action relating to private property situated in the territory of the receiving state unless he holds it on behalf of the sending State for the purpose of the mission...⁷¹³

No concrete evidence was submitted by Mr Rodrigues to support that the property was being held on behalf of the sending government. Judge Hussain J (at 1293) relied on the decision of the *Kings Bench Division in Dickinson v Del Solar* (1929) All ER 139 (KBD) 140, para 1293:

Diplomatic agents are not, by virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is, I think, that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.⁷¹⁴

The court came to the conclusion that Mr Rodrigues did not provide evidence to rebut the exclusion of immunity contained in section 6(1)(a) of the act and section 31(1)(a) of the Vienna Convention and was therefore liable.⁷¹⁵

⁷⁰⁹ Labuschangne 291.

⁷¹⁰ Labuschangne 292.

⁷¹¹ Labuschangne 293.

⁷¹² Labuschangne 294.

⁷¹³ Labuschangne 295.

⁷¹⁴ *Dickinson v Del Solar* (1929) All E Rep 139 (KBD) 140.

⁷¹⁵ Labuschangne 295.

As already mentioned in Chapter 5, the Vienna Convention is clear in regards to the protection and inviolability of foreign missions. Receiving states are under a proactive duty to ensure the safety and smooth running of all foreign mission and easy access to the Department of Foreign Affairs. Demonstrations of today in South Africa have become more and more disruptive and loud, using whistles and loudhailers, and the use of the famous vuvuzelas are a norm, this then causes the conflict between the demonstrators and the mission.⁷¹⁶ The one party has the right to express their right to demonstrate as long as the local rules are adhered to and on the other side the Convention is very clear that the mission's work must not be disrupted or that members of the mission are put at risk. This would therefore mean that the demonstrators would have to be kept at a safe distance from the missions and the local Foreign Affairs Ministry as to ensure the safe and smooth operation of the structure and that neither the demonstrators or the noise that they make be disruptive to the mission or the Ministry itself. South Africa still has not enforced this Vienna Convention principle into its legislation. The Labour Relation Act⁷¹⁷ still has to be amended to include that in case of strike actions or public demonstrations that the police force is obliged to ensure the safety and smooth running of all foreign missions in the Republic and that all representatives of the foreign missions have free and easy access to the Ministry of Foreign Affairs in order to continue their respective missions work without being threatened or intimidated by the demonstrators. This includes that the staff members and visitors to the mission can get access to the mission without any fear from the demonstrators and that they may enter and exit freely without harm.⁷¹⁸ But not only does each individual mission of the sending State need protection, the receiving States foreign ministry equally needs to be safeguarded.⁷¹⁹ Each diplomat and ambassador needs to have easy access to the foreign ministry in order to complete the objective of their respective foreign State.⁷²⁰

8.4 Abuse of Diplomatic Privileges

There have been numerous reports in popular media on the abuses of diplomatic privileges. In South Africa the media had reported a case about a drunk driver that killed a young

⁷¹⁶ Aust 118.

⁷¹⁷ Labour Relations Act 66 of 1995.

⁷¹⁸ Aust 118.

⁷¹⁹ Aust 118.

⁷²⁰ Aust 118.

student after driving into his stationary vehicle on the highway.⁷²¹ The local police service was able to quickly identify the driver of the vehicle but released the driver instantly after the accused driver stated to the arriving police, that she was the wife of a diplomat.⁷²² The driver that picked her up then flashed an identification card naming the driver a foreign diplomat. Without taking down any further details or queries the driver and the accused were immediately allowed to continue on with their travels.⁷²³ Only after a week did come to light that the initial identification card shown was fake and that at the time it could not have been a diplomat from the Malaysian embassy as was first thought.⁷²⁴

News 24 reports that on the 7th of May 2010 the Public Servants Association (PSA) has alleged that a senior South African diplomat is guilty of having assaulted the head of corporate services, Ms Lyn de Jong, at the South African Embassy in Harare.⁷²⁵ She sustained a number of injuries including to her face and bruises on her back and chest.⁷²⁶ It is further alleged that this has not been the first incident against the said diplomat and that in June 2009 a similar instance occurred where he also assaulted Ms de Jong.⁷²⁷ Spokesperson for the PSA Manie de Clercq stated that the foreign affairs department was able to convince her not to pursue the case further and to “make peace and in the interest of the mission to resolve the matter quietly”.⁷²⁸ It seems that the reason for the assault was caused by a “whistle-blowing” incident and that the said diplomat action and his conduct were under scrutiny.⁷²⁹ The Diplomat Mr Mlulami Singapi has since been charged for misconduct after an official investigation was initiated by the International Relations and Co-operation Minister Maite Nkoana Mashabane.⁷³⁰

On the 6th of May 2000 the South African Airways flight from Johannesburg to London Heathrow, were notified of a passenger that has made sexual attempts on a flight attendant.⁷³¹ The Pilot was informed and contacted the local Police in Heathrow to arrest the

⁷²¹ Roestoff A ‘Drunk diplomat’s wife kills man. Are we a society where influence equals immunity?’ (8 March 2009) *SA Media – news24 Sunday Times* 1.

⁷²² Roestoff 1.

⁷²³ Roestoff. 1.

⁷²⁴ Roestoff 1.

⁷²⁵ News24 – SA diplomat attacks colleague (2010)

⁷²⁶ ‘South African diplomat charged with misconduct’ (19 August 2010) *The Zimbabwe Mail*.

⁷²⁷ ‘South African diplomat charged with misconduct’ (19 August 2010) *The Zimbabwe Mail*.

⁷²⁸ ‘South African diplomat charged with misconduct’ (19 August 2010) *The Zimbabwe Mail*

⁷²⁹ ‘SA diplomat attacks colleague’ (2010-05-14) *News 24*.

⁷³⁰ ‘South African diplomat charged with misconduct’ (19 August 2010) *The Zimbabwe Mail*.

⁷³¹ ‘South African diplomat accused of fondling flight attendant’ May 2000 *Airline Industry Information*.

passenger.⁷³² It came to light however upon arrival at the airport that the passenger was a South African diplomat based in London.⁷³³

These are all serious abuses by diplomats and none of the examples that were mentioned have anything to do with the diplomat's actual official function. These are all examples where the diplomat should not be able to hide from the immunity and the diplomat should be held accountable for his actions.

8.5 Remedies Available to South Africa

South Africa has the same remedies available as contained in the Vienna Convention. The South African Legislature has adopted the regulations in the Vienna Convention in regards to waiver and set out in section 8 of the Diplomatic Immunity and Privilege Act that: ⁷³⁴

- (1) – A sending State, the United Nations, any specialised agency or organisations may waive any immunity or privilege which a person enjoys under this Act.
- (2) – for the purpose of subsection 1 any waiver by the head, or by any person who performs the functions of the head of
 - a) A mission
 - b) A consular post
 - c) An office of the United Nations
 - d) An office of a specialised agency; or
 - e) An organisation

Must be regarded as being a waiver by the state, the United Nations, the specialised agency or the organisation in question.

- (3) for the purpose of this section, a waiver must always be express and in writing.⁷³⁵

The sending state has the power to waive any immunity or privilege vested on a person that is entitled under the Diplomatic Immunities and Privilege Act as long as the waiver is expressed in writing.⁷³⁶ Similarly the head of the mission has the same power to waive the immunity of his staff, and this waiver will be seen to be in line with the affiliated state.⁷³⁷

South Africa may further notify the sending state that an agent has been declared a *persona non grata*, it may request from the sending state that the diplomats immunity gets waived and it may sever all diplomatic ties with a sending state.

⁷³² 'South African diplomat accused of fondling flight attendant' May 2000 *Airline Industry Information*.

⁷³³ 'South African diplomat accused of fondling flight attendant' May 2000 *Airline Industry Information*.

⁷³⁴ Diplomatic Immunities and Privileges Act.

⁷³⁵ Section 8 of the Diplomatic Immunities and Privileges Act.

⁷³⁶ Strydom para 175.

⁷³⁷ Strydom para 175.

The section deals with “[j]urisdiction in respect of offences committed by certain persons outside the Republic”, and provides that where a South African citizen commits an offence outside South Africa, for which he or she cannot be prosecuted in the country in which the offence was committed as a result of immunity arising from the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialised Agencies, the 1961 Vienna Convention on Diplomatic Relations or its 1963 consular counterpart, or “any other international convention, treaty or any agreement between the Republic or any other country or international organization”, and he or she is found within the area of jurisdiction of any court in South Africa, that court may try the offence provided that it would have enjoyed jurisdiction had the offence been committed within its area of jurisdiction.⁷³⁸

From the Criminal Procedure Act⁷³⁹ section 110A(2) sets out requirements that have to be met. Firstly that the offence must have been an offence in South Africa, and that secondly the National Director of Public Prosecution has given instruction to prosecute.⁷⁴⁰

Thirdly, South Africa has the same power as all other States to sever all diplomatic ties if it feels that it is necessary that all other remedies have been exhausted.

The Minister of Foreign Affairs further has the power to restrict immunities and privileges conferred on foreign missions if it appears at any times to the Minister-

- a) That the immunities and privileges accorded to a mission of the Republic in the territory of any state, or to any person connected with any such mission, are less than those conferred in the republic o the mission of that state, or on any person connected with that mission: or
- b) That the exemptions granted to the Government of the Republic in the territory of any State are less than those granted by the minister to that state.

8.6 Summary and Conclusion

South African law has codified the Vienna Convention and is upholding customary international law when South Africa signed the Vienna Convention in 1989 without reservation. In 2001, the Diplomatic Immunities and Privileges Act No 37 of 2001, amended by Act 35 of 2008, has become the primary source for South African legislation.

⁷³⁸ The Judicial Matters Amendment Act 66 of 2008 also involves immunity. Its section 11 introduces a new section 110A in the Criminal Procedure Act 51 of 1977.

⁷³⁹ 51 of 1977.

⁷⁴⁰ Botha 1177.

Diplomatic personnel are granted the same immunity as stipulated by the Vienna Convention, as well as the diplomatic mission. A diplomatic list is regularly updated to provide information in regards to who has diplomatic status and what positions are vacant. It has been stipulated that if foreign mission would like to make any repairs or renovations on their properties, the permission of the Minister of foreign Affairs is required. South Africa has at its disposal the same remedies that are set out in the Vienna Convention.

The following chapter will highlight the English law and its relation with the Vienna Convention.

Chapter Nine Diplomatic Immunity in England

9.1 Introduction

The Italian principles influenced English law on this point when Gentilis, an Italian refugee, became a professor at Oxford in the 16th century and responded to a diplomatic problem which Queen Elizabeth I faced.⁷⁴¹ It was with regards to the Bishop of Ross who was a representative of the Queen of the Scots and was found to be part of a plot for the deposition of the English Queen.⁷⁴² The English faced the question of immunity which the Bishop raised when he was brought to trial.⁷⁴³ The lawyers came to the conclusion that in the case of an ambassador being part of an insurrection against her Majesty he would have forfeited his privileges.⁷⁴⁴ He was imprisoned for a short period and then expelled.⁷⁴⁵ A Spanish ambassador was similarly expelled when he too was found guilty of plotting against Queen Elizabeth I.⁷⁴⁶

The English Law was settled in 1708 when Parliament introduced the Diplomatic Privileges Act⁷⁴⁷ after the landmark case of *Mattueof*.⁷⁴⁸ The Russian ambassador had incurred debts and was unable to pay his creditors.⁷⁴⁹ The English law at the time allowed for the arrest of private individuals for having incurred debts and there was no provision to exclude ambassadors.⁷⁵⁰ Seventeen creditors detained the ambassador and hindered him from leaving the country.⁷⁵¹ The Russian Tsar, Peter the Great, was offended and demanded the immediate release of his ambassador and argued that this was a criminal offence against his official, demanding that the offenders be punished.⁷⁵² The creditors were tried for assault and the arrest of the diplomat. After the *Mattueof* incident the Crown enacted the Diplomatic

⁷⁴¹ Young 149.

⁷⁴² Young 149.

⁷⁴³ Young 149.

⁷⁴⁴ Young 149.

⁷⁴⁵ Young 149.

⁷⁴⁶ Young 149.

⁷⁴⁷ Buckley M 'Origins of Diplomatic Immunity in England' (1966) *University of Miami Legal review* 363, 339.

⁷⁴⁸ *Mattueof* (1709) 10 Modern 4, 88E.R.598.

⁷⁴⁹ Buckley 339.

⁷⁵⁰ Buckley 339.

⁷⁵¹ Buckley 339.

⁷⁵² Buckley 339.

Privileges Act, also known as the Act of Anne 1708.⁷⁵³ This Act was passed and stated that it was a legal offence to bring judicial proceedings against any diplomat or their servants.⁷⁵⁴

The court held the following ruling after the Act was enacted:

... all the proceedings against the said ambassador are declared void and it is enacted, 'that all writs and processes that shall at any time afterwards be sued forth or prosecuted, whereby the person of any ambassador or together public minister of any foreign prince or State, authorised and received as such by Her Majesty, or the domestic servant or any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distained, seized or attached, shall be deemed null and void.'⁷⁵⁵

The British jurists debated whether the Act was a new law or part of the common law.⁷⁵⁶ Although it has been suggested that the Act was declared common law, Buckley is of the opinion that the Act introduced for the first time international law into British legislation.⁷⁵⁷

Section 3 of that Act stated that any proceedings that are laid against any ambassador or his private servants would be declared void as this is a punishable offence and would lead to the arrest and imprisonment of the person bring forth such suit.

Britain, however, did not extend the Act to other commonwealth countries and treated those diplomats simply as high commissioners and not in their proper rank as Ambassadors.⁷⁵⁸ Only in 1964 did the new Diplomatic Immunity Act incorporate all diplomats, whether foreign or nationals of all commonwealth countries, to receive the same immunity. The Act also incorporated that all diplomats and staff are to be registered and listed in the official Gazettes. The Act of Anne was repealed in 1964 when the new Diplomatic Privileges Act gave effect to the new principles of the Vienna Convention.⁷⁵⁹ Diplomacy was for a long time conducted in Latin due to the Roman influence but in the time of Louis the XIV French became predominant.⁷⁶⁰ English was only accepted as a common language of correspondence by 1919.⁷⁶¹

The Vienna Convention on diplomatic Relations of 1961 has attracted near universal support and was given effect to in the United Kingdom by the Diplomatic Privileges Act

⁷⁵³ Przetacznik F 'The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law' (1978) 7 *Anglo-American Law Review* 369.

⁷⁵⁴ Buckley 339.

⁷⁵⁵ Mattueof (1709) 10 *Modern* 4, 88E.R.598

⁷⁵⁶ Buckley 340.

⁷⁵⁷ Buckley 341.

⁷⁵⁸ Lloyd L *Diplomacy and Statecraft* (2000) 53.

⁷⁵⁹ Przetacznik 369.

⁷⁶⁰ O'Brien 297.

⁷⁶¹ O'Brien 297.

1964. In the UK, the 1964 Diplomatic Privileges Act applies many of the provisions of the Convention to all states regardless of whether they are parties to the Convention.⁷⁶²

England's current legislation on Diplomatic Immunity is the Diplomatic Immunity and Privilege Act of 1964.⁷⁶³ Section 2 of this Act sets out that the Articles within the Vienna Convention are part of the laws in the United Kingdom. In section 3 the Queen of England is given the power to withdraw any immunity and privileges that have been vested to a foreign mission of equal status in England if its British mission in the receiving state enjoys a lesser degree of privileges and immunity. Section 4 states that the Foreign Secretary's certificate is *prima facie* evidence relating to any issue to a foreign diplomat status of immunity.⁷⁶⁴

Section 3(1) of the Act, as already indicated above, provides:

If it appears to Her Majesty that the privileges and immunities accorded to a mission of Her Majesty in the territory of any State, or to person connected with that mission, are less than those conferred by this Act on the mission of that State or on persons connected with that mission, Her Majesty may by an Order in Council withdraw such of the privileges and immunities so conferred from the mission of that State or from such persons connected with it as appears to Her Majesty to be proper.⁷⁶⁵

9.2 Privileges to Diplomats

The three categories, a) administrative staff and technical staff, b) service staff and c) private servants did not exist prior to the 1964 Act in England and it had significantly limited the immunities available to an individual mission.⁷⁶⁶ The Diplomatic Privileges Order 1999 is in line with the Vienna Convention acknowledging all three categories of diplomatic staff as legitimate holders of immunity and privileges.

Even before the 1964 Act it was common practice in England that diplomats would first of all inform the Foreign Affairs Ministry of their arrival and to ensure that their immunities shall be effective from that date.⁷⁶⁷ This is also to ensure that when the diplomat arrives in the Foreign country his privileges are in immediate effect and that he can enter the country with no difficulty including avoiding Customs according to Article 36 of the Vienna

⁷⁶² O'Brien 299.

⁷⁶³ The Statutory Instruments of 1999 No 670 International Immunities and Privileges state that the Diplomatic Privileges Act will now forthwith be called 'The Diplomatic Privileges (British Nationals) Order 1999.

⁷⁶⁴ Buckley 350.

⁷⁶⁵ Section 3 of the Diplomatic Privileges Act of 1964.

⁷⁶⁶ Buckley 352.

⁷⁶⁷ Buckley 359.

Convention.⁷⁶⁸ The duration of the diplomat continues until his termination or recall from the mission inside the United Kingdom. A person may also claim immunity after he has been served to stand trial.⁷⁶⁹

Paragraph 2 of Article 39 of the Vienna Convention talks about cession of the diplomat's mission and his privileges. Satow⁷⁷⁰ gives the following example of how these come about:

- i. By his recall on his appointment elsewhere
- ii. By his resignation and its acceptance by his Government
- iii. By his recall at the request of his Government (usually because of dissatisfaction)
- iv. By his recall at the request of the Government to whom he is accredited.
- v. By the deceased of his own sovereign⁷⁷¹ or the sovereign to whom he is accredited
- vi. If he has assumed the responsibility of breaking off diplomatic relations
- vii. By a change in his rank.⁷⁷²

Section 7 of the Diplomatic Immunity Act 1964 sets out the regulations for diplomatic immunity in the United Kingdom as follows:

- 1) Where any special agreement or arrangement between the Government of any State and the Government of the United Kingdom in force at the commencement of this Act provides for extending –
 - a) Such immunity from jurisdiction and from arrest or detention, and such inviolability of residence, as are conferred by this Act on a diplomatic agent; or
 - b) Such exemption from duties,(whether of customs or excise) chargeable on imported goods, taxes and related charges as is conferred by this Act in respect of articles for the personal use of a diplomatic agent;To any class of person, or to articles for the personal use of any class of person, connected with the mission of that State, that immunity and inviolability or exemption shall so extend, so long as that agreement or arrangement continues in force.
- 2) The Secretary of State shall publish in the London, Edinburgh and Belfast Gazettes a notice specifying the State with which and the classes of person with respect to which such an agreement or arrangement as is mentioned in subsection (1) of this section is in force and whether its effect is as mentioned in paragraph (a) or paragraph (b) of that subsection, and shall whenever necessary amend the notice by a further such notice; and the notice shall be conclusive evidence of the agreement or arrangement and the classes of person with respect to which it is in force.

⁷⁶⁸ Buckely 359.

⁷⁶⁹ Morris S. N 'The tax liability of foreign Diplomats in the United Kingdom' 1991 *British Tax Review* 207-213 at 212.

⁷⁷⁰ Satow 276.

⁷⁷¹ The death of a president of a republic does not have this effect although in such a case fresh credentials are necessary.

⁷⁷² Satow 274-276.

The immunities and privileges remain in place and available to the diplomat until the laps of a reasonable amount of time. This is to grant the diplomat time to close all his affairs in the receiving country to arrange his way back home.

The most serious difficulties that the government in the receiving state suffers under as a result of the diplomat being immune to civil actions, is with regards to driving and parking offence committed by the diplomat.⁷⁷³ In the United Kingdom the Foreign and Commonwealth Office in the 1985 Review of the Vienna Convention stated that most offence of the diplomats was caused due to driving under the influence of liquor or drugs.⁷⁷⁴ The United Kingdom therefore announced to all the heads of mission in London that diplomats that fail to comply with local traffic rules would be reconsidered whether they were still acceptable members of the mission and the government would use its power to declare members that fail to pay the fines as a *persona non grata*.⁷⁷⁵

London public awareness of the amount of traffic violations committed by diplomatic agents or members that enjoyed immunity was rather small. However, London was targeted as a great place for shoplifting and the likes. Between 1974 and 1984 there were 546 incidences recorded about individuals that avoided arrest for serious offences committed, of a potential prison sentencing of a minimum of 6 months all due to diplomatic immunity.⁷⁷⁶

With regards to Article 40 which deals with the travel of diplomats, staff and correspondence through a third State, it is clear that in England similar rules were upheld prior to the Act, as it is in the interest of the international community that each diplomatic envoy reaches safely and without any difficulty their destination.⁷⁷⁷

Article 37 States:

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

⁷⁷³ Graham Goldstein & Langhorne 544.

⁷⁷⁴ Denza 70; McClanahan 118.

⁷⁷⁵ Denza 70; Ross 174.

⁷⁷⁶ Higgins 643; Foreign Affairs Committee Report, para. 19 n.26.

⁷⁷⁷ Satow 243.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.⁷⁷⁸

The courts did not have to deal yet with the question of how to interpret Article 36 in regards to “forming part of his household”. It is open to a broader interpretation than merely “members of the family living with him” as they might belong to the same household but that does not mean that they have to live together.⁷⁷⁹ A good example would be where the son of the diplomat who is eighteen years old and is schooling in a different country than where presently his father is stationed. This would not mean that the son is not entitled to immunity.

When it comes to family members the English law has accepted to include the spouse and minor children of the diplomat. A minor child being a person under the age of 18 years. Further the following 3 categories have been included in the definition of family household:

1. A person who fulfils the social duties of hostess to the diplomatic agent, for example the sister or adult daughter of an unmarried or widowed diplomat;
2. The parent of a diplomat living with him and not engaged in paid employment on a permanent basis; and
3. The child of a diplomat living with him who is of full age but is not engaged in paid employment on a permanent basis. Students are included in this category provided that they live with the diplomat at least during vacations.⁷⁸⁰

9.3 Privileges to Property and assets

Article 11 of the Vienna Convention gives the receiving state the power to limit the size of the sending state mission.⁷⁸¹ In the past the United Kingdom has had problems with the Soviet Union for having a very large number of staff in its mission in London, when the British

⁷⁷⁸ Article 37 of the Diplomatic Immunities Act of 1964.

⁷⁷⁹ Buckley 349.

⁷⁸⁰ Denza 324.

⁷⁸¹ Article 11 of the Vienna Convention.

Government decided to limit the maximum number of representatives in the mission, the Soviet Union responded reciprocally.⁷⁸²

Article 36 of the Vienna Convention states:

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on
 - a) articles for the official use of the mission;
 - b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.⁷⁸³

The first paragraph of Article 36 has been applied already prior to the 1964 Act, and custom officials have therefore always allowed articles to enter the country without any inspection. The second paragraph however is new and it now empowers custom officials to open and search the personal luggage of the diplomat, on grounds of serious suspicion that it contains articles not covered by the exemptions mentioned in paragraph 1. The inconsistency with Article 30 remains. As it specifies that:

The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premise of the mission. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.⁷⁸⁴

The case of *Umaru Dikko* in 1984 with regards to his attempted kidnapping is a good illustration of the abuse of the diplomatic bag.⁷⁸⁵ In *R. v. Lambeth Justices, ex parte Yusufu, R. v. Governor of Brixton Prison, ex parte Yusufu*.⁷⁸⁶ Mr Dikko who was the Transport Minister of the Nigerian government until Shehu Shagrie was overthrown by the military at the end of 1983, fled Nigeria and took up residence in England.⁷⁸⁷ It is believed that he embezzled over one billion and the military declared him the most wanted man.⁷⁸⁸ On the 4th of July 1984 Dikko was kidnapped at gunpoint, drugged and was later found in a crate labelled

⁷⁸² Denza 80-82.

⁷⁸³ Article 36 of the Vienna Convention.

⁷⁸⁴ Article 30 of the Vienna Convention.

⁷⁸⁵ Kofele-Kale N 'The International Law of responsibility for economic crimes' (2006) 357. Farhangi L S 1524.

⁷⁸⁶ The Times, 20 Feb. 1985.

⁷⁸⁷ Kofele-Kale. 357.

⁷⁸⁸ Kofele-Kale. 357.

“Diplomatic Baggage” at the Stansted Airport.⁷⁸⁹ The crate with its human cargo was heading to Lagos in a Boeing 747.⁷⁹⁰ The crate, however, did not contain an official seal for diplomatic status and that was the only reason the authorities of the airport opened the contents of the crate.⁷⁹¹

Mr Yusufu was in the United Kingdom at the time and was in possession of a Nigerian Passport. He was part of the Nigerian High Commission staff although no official notification to his posting was extended to the Foreign Office. It is alleged that Yusufu was involved in the kidnapping of Umaru Dikko the former Nigerian government minister.⁷⁹² Yusufu claimed diplomatic immunity trying to get the court case set aside; however, the court held that his application had to fail on three accounts. First of all he was not entitled to diplomatic immunity by Article 10 of the Vienna Convention even though it is not mentioned in Schedule 1 of the Diplomatic Privileges Act 1964. Article 10 explicitly states that the sending state needs to ensure that the conferment of diplomatic status has been approved by the receiving state. Article 40 of the Convention does not apply as it only applies to personnel that first of all is entitled to diplomatic immunity and that is in transit through a third state and not that of the sending or receiving state. Thirdly, Article 39 does not sanction the conferment of diplomatic status to a person not entitled to immunity nor does the sending state have the power to grant the immunity unilaterally without the consent of the receiving state. The Secretary of State for Foreign and Commonwealth Affairs further provided evidence that no official notification of Yusufu being a diplomat had been received by the Foreign Affairs Office.⁷⁹³

Another illustration to the abuse of the diplomatic bag and the diplomatic immunities can be found in the United Kingdom, where an innocent police officer was shot.

In 1984, a sequence of events at the Libyan embassy in London ended in British police assisting a suspected murderer, an embassy occupant, to leave the United Kingdom. Diplomatic immunity under the Vienna Convention prevented police from making arrests and initiating criminal prosecution against the embassy occupants. These events illuminate the major flaw of diplomatic immunity as codified in the Vienna Convention: the absence of deterrence against criminal acts.⁷⁹⁴

⁷⁸⁹ Kofele-Kale, 357; Farhangi 1524.

⁷⁹⁰ Kofele-Kale, 357; Farhangi 1524.

⁷⁹¹ Kofele-Kale, 357.

⁷⁹² The Times, 25 Jan. 1985; see Akinsanya, ‘The Dikko Affair and Anglo-Nigerian Relations’ (1985) 34 *International & Comparative Law Quarterly* 602.

⁷⁹³ Davidson 436.

⁷⁹⁴ Wright 177.

In February 1984, the chancery building of the Libyan Peoples Bureau was taken over by a group of Libyan Students.⁷⁹⁵ On March 10, a bomb explosion in London Mayfair seems to have aroused suspicions of Libyan Connections.⁷⁹⁶ A planned demonstration was held in front of the embassy, on April 17, by a collation of at least three Libyan oppositions groups.⁷⁹⁷ The demonstration number was about seventy.⁷⁹⁸ A pro Qadhafi counter demonstration of about twenty persons, some from the embassy staff, was staged simultaneously.⁷⁹⁹ Automatic gunfire came from the embassy windows mortally wounding Constable Fletcher and injuring 11 demonstrators.⁸⁰⁰

British police immediately surrounded the embassy to prevent entry and exit. British Home Secretary Leon Brittan demanded that Libya allow British police to enter the building to seek suspects and forensic evidence, but was promptly rebuked by Libyan officials. In response to the British action, the Libyan government retaliated by ordering its police to besiege the British embassy in Tripoli. Thirty-five people, including the British ambassador, were held in the British embassy. With each government holding officials of the other hostage, a stalemate ensued.⁸⁰¹

The Libyan government stated to the world press that no shots had been fired from the embassy and there had been no weapons in the building.⁸⁰² On the 20th of April, a bomb exploded in the luggage hall of Heathrow Airport injuring 25 people.⁸⁰³ Even though the government reserved to comment whether this incident was also related, the Government notified Libya that diplomatic relations would terminate that same evening and that all diplomatic staff were to leave the country by the end of the month.⁸⁰⁴ In turn all diplomatic Staff from Tripoli was recalled back to England as well.⁸⁰⁵ The Libyan Bureau was evacuated by the 27th of April and those leaving were questioned and electronically searched but diplomatic bags were not searched nor scanned.⁸⁰⁶

The motivation behind the British decision to grant *de facto* diplomatic immunity to all Libyans in the People's Bureau regardless of actual diplomatic status is a matter of conjecture. Arguably, British authorities viewed the risk to the eight thousand British nationals in Libya and the encircled British embassy in Tripoli as outweighing their desire

⁷⁹⁵ McClanahan 5; Higgins 643; Maginnis 989; Wright 180.

⁷⁹⁶ McClanahan 5; Higgins 643; Maginnis 989; Wright 180.

⁷⁹⁷ McClanahan 5; Higgins 643.

⁷⁹⁸ McClanahan 6; Higgins 643.

⁷⁹⁹ McClanahan 6; Higgins 643.

⁸⁰⁰ McClanahan 6; Higgins 643; Maginnis 989; Farhangi 1524.

⁸⁰¹ Wright 180.

⁸⁰² McClanahan 6; Higgins 644.

⁸⁰³ McClanahan 7; Higgins 644.

⁸⁰⁴ McClanahan 7; Higgins 644; Maginnis 989.

⁸⁰⁵ McClanahan 7; Higgins 644.

⁸⁰⁶ McClanahan 7; Higgins 644.

to prosecute those alleged to be involved in the shooting. The British decision can also be explained in light of the language in the Vienna Convention. As both the United Kingdom and Libya are signatories to the Vienna Convention, the United Kingdom was obligated to permit Libya to withdraw its accredited diplomatic personnel free of interference.⁸⁰⁷

British police in the presence of a representative of the Saudi embassy then searched the vacated building, finding six handguns and ammunition.⁸⁰⁸ Libya said that these had been planted.⁸⁰⁹ The Libyan authorities searched the British embassy in Tripoli in the presence of an Italian representative for the British embassy and they found small arms and gas canisters.⁸¹⁰ The British denied there had been weapons in the Tripoli embassy and suggested planting by the Libyans. No one had been put on trial for the killing of Fletcher.⁸¹¹

The demonstration which Libyan diplomats requested the Foreign and Commonwealth Office to prevent, and the nature of legal powers and duties in respect of demonstrations outside mission premises was therefore examined carefully by the House of Commons Foreign Affairs Committee in their Report on the Abuse of Diplomatic Immunities and Privileges.⁸¹² They concluded that the duty to protect the peace of the mission:

cannot be given so wide an interpretation as to requires the mission to be insulated from expressions of public opinion within the receiving State. Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or the staff injured, the requirements of Article 22 are met.⁸¹³

After the shooting incident the United Kingdom Secretary urged other European countries to declare diplomats that have been expelled on the grounds of terroristic attacks to be regarded as unacceptable members.⁸¹⁴ The argument being that diplomats committing terrorism cannot be classified as diplomats as such an act can never be associated with official duties of another state.⁸¹⁵

The Summit Seven States in Tokyo on 5 May 1986 adopted a Statement on International Terrorism directed against States “clearly involved in sponsoring or supporting international terrorism” which included the following measure: “denial of entry to all persons, including diplomatic personnel, who have been expelled or excluded from one of

⁸⁰⁷ Wright 182-183.

⁸⁰⁸ McClanahan 8; Higgins 645.

⁸⁰⁹ McClanahan 8; Higgins 646.

⁸¹⁰ McClanahan 8; Higgins 646.

⁸¹¹ McClanahan 8; Higgins 647.

⁸¹² Denza 144.

⁸¹³ Denza 144.

⁸¹⁴ Denza 67.

⁸¹⁵ Higgins 649.

our States on suspicion of involvement in international terrorism or who have been convicted of such a terrorist offence.⁸¹⁶

After this incident in the United Kingdom, a commission agreed that although the Convention requires that the bag shall not be opened or detained, it does not mean that it is not completely inviolable.⁸¹⁷ Hence if electronic scanning or police dogs warn that illegal contents could be inside the diplomatic bag and the representatives refuse to open the bag, then the receiving state can only insist that the bag be returned to its place of origin.⁸¹⁸

The Foreign Affairs Committee in its detailed report--which contains valuable memoranda and statements by the Foreign Office and others--entitled "The Abuse of Diplomatic Immunities and Privileges."⁸¹⁹

The Vienna Convention is partly to blame for the outcome of the shooting incidents. If it was not for the Vienna Convention it would have allowed local police to make arrests and allow for the apprehended individuals being prosecuted and put on trial for their actions. The Vienna Convention lacks deterrence against criminal acts committed and this is the major problem with granting diplomatic immunity.⁸²⁰

In statements of particular relevance to the St James's Square and Dikko incidents, the government said that it accepted that demonstrations outside missions should be allowed to continue as long as they do not imperil the safety or efficient work of the mission, and noted the difficulty of securing satisfactory formal restrictions on the use of diplomatic bags--which may include crates such as that in which Umaru Dikko was placed, and even larger containers. It has, however, tightened administrative procedures for handling diplomatic bags, and asserted that "prompt and firm action will be taken where the evidence is good that the contents of a bag might endanger national security or the personal safety of the public or of individuals".⁸²¹

9.4 Abuse of Diplomatic Privileges

Several cases will be highlighted with regards to diplomats abusing their privileges for their own personal benefit.

The first case involves a diplomat that is travelling around with his diplomatic passport for pleasure trips without having any real mandate to be in any of the countries at all.

⁸¹⁶ 1986 AJIL 951, Denza 67

⁸¹⁷ Higgins 649.

⁸¹⁸ Higgins 649.

⁸¹⁹ HC Paper 127 (1984-85); see Cameron, 'First Report of the Foreign Affairs Committee of the House of Commons' (1985) 34 *International & Comparative Law Quarterly* 610.

⁸²⁰ Wright 177.

⁸²¹ Davidson 434.

An example can be seen in the case of *R v Governor of Pentonville Prison, ex parte Teja*.⁸²² The Republic of India issued a warrant of arrest against Teja for having committed various offences and he was apprehended at the Heathrow Airport in London that was bound for Geneva.⁸²³ Teja claimed diplomatic immunity stating that he was on a “special mission” within the meaning of the UN Convention for the Costa Rican government and was therefore a holder of a diplomatic passport. It came to light that he had been travelling quite extensively including in the United Kingdom where he had spent two days. A letter was received by the Costa Rican Ambassador to the Secretary of State for Foreign and Commonwealth Affairs, which stated that under Article 40 of the Vienna Convention the United Kingdom is under a duty to uphold diplomatic status and to treat Teja as such as he was an economic counsellor to the Costa Rican embassy in El Salvador. The letter further stated that the reason why he was travelling Europe was under the authority of the Costa Rican government. A telegram was further received this time from the President of Costa Rica stating that Teja was on a special mission and is duly accredited to the Costa Rican mission in London. The Court of Appeal, however, was not convinced and held that even in the case where Teja had been duly accredited in El Salvador – though El Salvador never confirmed this – Teja was in no way either returning or taking up his post at the time of his arrest in England. No evidence indicated that he was departing for El Salvador to return to his post or take up a position. He had come from Geneva and was in fact trying to return to Geneva. Furthermore, nothing indicated either that Teja was in fact returning to Costa Rica his own home. A further argument failed when Teja claimed that he was taking up a post in Geneva, but Costa Rica has no embassy in Switzerland. In addition no evidence was provided that Switzerland had accepted him to a diplomatic position. The court of Appeal therefore came to only one conclusion that there was no violation of Article 40 and that Teja had no valid immunity at the time of arrest.

The case of *Shaw v Shaw*⁸²⁴ involves a divorce matter in which the wife of a diplomat presented a petition for divorce against her husband on 19th of December 1978.⁸²⁵ She and her husband had lived in England for one year. The diplomat was at the time a commercial attaché at the United States Embassy stationed in England. Mr Shaw, the husband and diplomat, issued summons to have the divorce petition against him strike out on the basis that he enjoyed diplomatic immunity. The Court agreed that at the time of the petition that the

⁸²² (1971) 2 Q.B. 274 (CA).

⁸²³ Brown 60.

⁸²⁴ (1979) 3 All ER 1; 78 ILR 483

⁸²⁵ *Shaw v Shaw* (1979) 3 All ER 1.

wife filed and when the husband issued his summons to strike out the petition the husband did indeed enjoy diplomatic immunity. However, the court only got to hear the matter on the 9th of February 1979. What had happened was that on the 25th of January 1979 the husband ceased to be in employment and therefore was no longer a diplomatic agent enjoying immunity. The husband's attorney conceded that the fact that the husband has returned to the United States is not a point of issue because at the time of the summons he was entitled to diplomatic immunity. Counsel also pointed out that the wife was entitled to present a new petition since now the husband was no longer entitled to diplomatic immunity.

The court came to the following conclusion:

It seems to me ... that this petition was a valid petition at the moment of its issue. The husband himself was entitled, as he did, to claim diplomatic immunity; and if he had still been entitled to that immunity at the moment when this summons came to be heard, the court would have struck it out. Similarly, as it appears from the authorities, if it had come to the attention of the court without direct action on the part of the husband that he was entitled to diplomatic immunity, the court should of its own motion have struck it out. But nevertheless, the fact is that by the time the matter has come before the court the husband is no longer entitled to diplomatic immunity. In either as a matter of law nor, I am glad to say, of sense, for striking out a petition when it is accepted that an identical petition could be issued tomorrow because of the removal of the bar to proceedings. I therefore dismiss the husband's summons to have the petition struck out.⁸²⁶

The third case, *Propend Finance Pty Ltd v Sing* Times, May 2, 1997 (CA), deals with the issue where Detective Superintendent Alan Sing who is an officer of the Australian Police Force acted contra to a court order and is found in contempt. Mr Sing was at the time employed as diplomat in the Australian High Commission as First Secretary in London. Mr Sing was at the stipulated time leading an investigation against the plaintiff on suspicion of tax evasion and obtained a search warrant against the plaintiffs' London-based lawyers and accountants. Documents were seized and brought into the possession of Mr Sing. The plaintiff was able to get a relief order from the court and Mr Sing had to ensure that the documents would remain under the jurisdiction of the court. A second order was granted by the court that the documents would be sealed until the next hearing. However, only three days after the first order of the court was given, Mr Sing had faxed extracts of the seized documents to the Australian authorities. Mr Sing claimed diplomatic immunity as there was no waiver of the said immunity nor was he the one that initialised the court proceedings. The plaintiff alleged that Mr Sing can't rely on diplomatic immunity as the defence of immunity

⁸²⁶ *Shaw v Shaw* (1979) 3 All ER 1 at 6 d-e.

would only be relevant to act performed in his official capacity as First Secretary to the mission and not as a member of the Police force.

The Court of Appeal agreed that Sing had acted in his capacity as a police officer but considered that this was within his diplomatic role which was to "represent the interests of the Australian Federal Police on matters of law enforcement, in particular to receive and distribute crime intelligence at post and to facilitate the provision of crime intelligence to Australian police forces." The Court of Appeal concluded: "We see no justification for a conclusion that the relevant acts of the Superintendent were other than acts performed in the exercise of his functions as a member of the Mission."⁸²⁷

A different case involved a counsellor for the Arab League affairs at the Syrian Embassy stationed in London, Mr Ahmed Walid Rajab. Mr Rajab had taken out a six month lease agreement with Mr John Chaffey that came to an end in 1982. Since the agreement came to an end Mr Rajab was required to evacuate the premises which he refused. A long dispute followed until Mr Chaffey decided to get a court order against him to leave the premises by February 1985. At this point Mr Rajab invoked his diplomatic immunity. Only with the assistance of the Foreign Office to pressure the Syrian Ambassador to instruct Mr Rajab to move out of the premises did Mr Chaffey get his premises back at the end of June 1985. The Foreign Office furthermore then requested that Mr Rajab be removed from his office for his misconduct but this request was denied by the Syrian Embassy. Mr Chaffey had also requested compensation and his claims against Mr Rajab for the additional three years but the Treasury was unable to provide a satisfactory answer.⁸²⁸

The last case, *P (Diplomatic Immunity: Jurisdiction)*, *Re* [1998] 1 F.L.R. 1026 (CA (Civ Div)), is an issue between that of diplomatic immunity and that of State immunity. The case started off that P, an United States Diplomat allegedly removed his two children wrongfully from the jurisdiction of the United Kingdom. The mother of the children had sought to prevent the children from being removed. Then court had come to the conclusion that since P was entitled to diplomatic immunity the court had no jurisdiction to hear the case any further. The plea of the mother, however, came to the court when P was no longer a diplomat in the service of the United States. The court held that since P was no longer a diplomat, he nor his children were entitled to diplomatic immunity under Article 39(2) of the Vienna Convention. Since the removal of the children did not occur during the course of his

⁸²⁷ Unreported. Reference will be made to a transcript of the judgment dated 17 Apr. 1997, Barker J C.

⁸²⁸ Davidson S 'Treaties, Extradition and Diplomatic Immunity: Some Recent Developments' (1986) *International & Comparative Law Quarterly*; *The Times*, 11, 12, 13, 14 and 15 June 1985; but now see Hansard, House of Lords, 18 July 1985, cols.858-860, giving a negative answer.

diplomatic functions and his diplomatic service having come to an end, the diplomatic immunity can no longer stand.⁸²⁹

On the other hand, Sir Stephen Brown went on to hold that, as the removal of the children "was an act which he was ordered to perform by his government",⁸³⁰ it "was an act of a governmental nature and as such is subject to State immunity from legal process".⁸³¹ Accordingly, he held that not only was the United States entitled to immunity in respect of the making of the order to remove the children but that P was entitled to the benefit of State immunity because he was following the orders of his government. Given that Sir Stephen Brown had earlier concluded that P was not acting within his diplomatic functions in removing his children it is clear that in order to be entitled to claim State immunity P must have been acting as an agent of the government of the United States on the basis that although he was no longer an accredited diplomat in the United Kingdom, he remained an employee of the US diplomatic service.

This means that even if a person no longer holds diplomatic status, he can still escape liability if he can prove that he has acted under State authority. The recognition of State doctrine⁸³² has never before been acceptable in the United Kingdom as a legitimate defence.⁸³³

All these cases illustrate the extent to which diplomats have abused their status and immunities granted to them. Whether it is travelling or avoiding court proceedings, all result in a responsibility that is supposed to be upheld, being violated.

9.5 Customs and Tax

Diplomatic Privilege Act 1964 Chapter 81 – the reference in Article 36 to custom duties shall be construed as including a reference to exercise duties chargeable on goods imported into the United Kingdom and to value added tax charged in accordance with section 10 or 15 of the Value Added Tax Act 1994 (acquisitions from other member States and importations from outside the European Community).

With regards to tax for diplomats in the United Kingdom the following has to be noted that any Diplomatic agents who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens or British Nationals (Overseas) or permanently resident

⁸²⁹ [1998] 1 F.L.R.1026,1034. For a critical discussion of this aspect of Sir Stephen Brown's decision see Barker, "Child Abduction and International Immunities--Balancing Competing Policies" (1998) 10 Child and Family Law Quarterly 214.

⁸³⁰ [1998] 1 F.L.R.1026, 1034.

⁸³¹ [1998] 1 F.L.R.1026, 1035.

⁸³² The doctrine of act of State is available as a defence to a legal suit whereas the issue of immunity concerns the ability to bring a suit. However, in the circumstances of this case, State immunity was allowed for reasons which would have been invoked as a defence to suit had State immunity not prevailed.

⁸³³ Barker J C 'State Immunity, Diplomatic Immunity and Act of State: a Triple Protection against legal action?' (1998) *International & Comparative Law Quarterly* 953.

in the United Kingdom are exempt from Income Tax in regards to any private income that has been acquired outside the borders of the United Kingdom.⁸³⁴ The same will apply to any family member being part of the diplomat's household so long as they are also not a British Citizen.⁸³⁵

The Diplomatic Privileges Act states clearly that income arising from within the United Kingdom is within the Income Tax Act and that members of the diplomatic mission must apply for and submit a return relating to that income as taxable.⁸³⁶

Furthermore the diplomatic agent that is not a British citizens or permanent resident will be exempt from capital gains tax with the exception of the removal of private immovable property that is not in conjunction with the sending state and that has no link with the mission and also any commercial investment that has been undertaken in the United Kingdom.⁸³⁷ Again the same applies to the diplomatic agents family members if they are part of his household and if they are also not British citizens then they are exempt from capital gains tax with the same exception in regards to any private immovable property as long as the said immovable property is not held in the name of the sending state and is now owned for the purpose of the mission.⁸³⁸ The same principle applies for any commercial investments made in the United Kingdom.⁸³⁹ All other capital gains that is liable to the United Kingdom need to be included in the return of income.⁸⁴⁰ Any non-exempt income, personal allowances and other applicable reliefs will be taken into account when calculating tax with the exception of exempt income.⁸⁴¹ It needs to be mentioned at this point that the diplomatic agent pays his tax even on non-exempt income at a lower rate than an unprivileged person who has an identical total income.⁸⁴²

In order to establish what a permanent resident is in the United Kingdom the following was said by the Foreign and Commonwealth Office in London on January 27 (1969) in a circular letter to all diplomatic missions:

- (i) The prospect of the individual being posted elsewhere. The individual should be regarded as permanently resident in the United Kingdom if his appointment in the United Kingdom is likely to continue or has continued for more than five years unless the Head of

⁸³⁴ Morris 209.

⁸³⁵ Morris 209.

⁸³⁶ Morris 209.

⁸³⁷ Morris 209.

⁸³⁸ Morris 209.

⁸³⁹ Morris 210.

⁸⁴⁰ Morris 210.

⁸⁴¹ Morris 210.

⁸⁴² Morris 210.

Mission states that the longer stay in the United Kingdom is a requirement of the sending State and not a result of personal considerations.

(ii) The intention of the individual will be relevant so a person should be regarded as permanently resident in the United Kingdom unless he is going to return to his own country or proceed to a third country as soon as his appointment in the United Kingdom ends.

(iii) A person who is locally engaged is presumed to be permanently resident in the United Kingdom unless the Head of Mission shows that he is going to return to his own country or proceed to a third country immediately upon the termination of his appointment in the United Kingdom.

(iv) A woman member of the Mission who is married to a permanent resident of the United Kingdom is presumed to be herself permanently resident in the United Kingdom from the time of her marriage unless there remains a real prospect in view of the special circumstances of her case that she will be posted as a normal career member of the service.⁸⁴³

It needs be highlighted that these are mere guidelines in order to determine whether a diplomat is a permanent resident in the United Kingdom or not. The most important aspect of this guideline, however, is with reference to the five year period.⁸⁴⁴ Although this itself is currently under review and likely to change it provides at least some idea to the all members whether or not the diplomat needs to be more closely monitored with regards to his tax returns.⁸⁴⁵

The Foreign and Commonwealth Office has despatched Annex D to the Memorandum on Diplomatic Privileges and Immunities to the missions in London. Annex D explains that local authorities have power to levy a community charge on all individuals including foreign nationals living in the area of the local authority unless they are exempt. For present purposes, those who are exempt are the Head of the Diplomatic Mission and his spouse, the Diplomatic Agent and his spouse, and the administrative and technical staff of an Embassy or High Commission and their spouses. Again, the Foreign and Commonwealth Office takes the view that the exemption of these categories does not extend to United Kingdom Citizens or foreign nationals permanently resident in the United Kingdom.⁸⁴⁶

9.6 Remedies Available to England

The United Kingdom has the following remedies available: it may request a waiver from the sending state in order to be able to prosecute the offending diplomat. It may declare a

⁸⁴³ Morris 210

⁸⁴⁴ Morris 211.

⁸⁴⁵ Morris 211.

⁸⁴⁶ Morris 212.

diplomat *persona non grata*, and it may sever all diplomatic ties with a country if all other remedies have been exhausted.

The United Kingdom has clarified what grounds and criteria's are used when contemplating the removal of a foreign diplomat for misconduct.⁸⁴⁷ The government stated that offences such as espionage and incitement to or advocacy of violence would always result in a diplomat being declared *persona non grata*.⁸⁴⁸ Further any violent crime or drug related incidence will result also that the offender will be declared as not fit to remain in the United Kingdom and will be asked to leave, unless a waiver is given by the receiving state which would make it then possible to prosecute the offender in the United Kingdom.⁸⁴⁹

A request for the withdrawal of a diplomat is normal following the commission by him or her of firearms offences, serious sexual offences, fraud, a second drink/driving offence, road traffic offences involving death or serious injury, driving without third party insurance, theft, and any other offences normally carrying a prison sentence of more than 12 months.⁸⁵⁰

Even prior to the Vienna Convention it was also common practice in England that the sending State has the power to waiver immunity of its representatives and that the diplomatic agent do not have the authority to waiver their immunity as it is a privilege given by the state.⁸⁵¹

Article 32 of the Vienna Convention does not address the issue of what evidence the national court can rely on whether the waiver is effective or not. The United Kingdom has established in its Diplomatic Privileges Act of 1964 section 2(3) that:

for the purpose of Article 32, a waiver by the head of the mission of any state or any person for the time being performing his functions shall be deemed to be waived by that State.⁸⁵²

This is a common practice used by many other states too, which acknowledges that the ambassador is the direct representative of the sending state and if the ambassador has waived the immunity then it is deemed to have been validly authorised.⁸⁵³ The United Kingdom requires missions abroad to seek authority from the Foreign and Commonwealth Office in each case before any waiver of immunity is made.⁸⁵⁴ They also require authority to be sought

⁸⁴⁷ Davidson 434.

⁸⁴⁸ Davidson 434.

⁸⁴⁹ Davidson 434.

⁸⁵⁰ Davidson 434.

⁸⁵¹ Buckley 353.

⁸⁵² Section 2(3) of the Diplomatic Privileges Act.

⁸⁵³ Buckley 353.

⁸⁵⁴ Denza 274.

before legal proceedings are instituted by any member of a United Kingdom diplomatic mission abroad, because of the consequential loss of immunity under Article 32.3.⁸⁵⁵

... it is now accepted that a state may agree in advance to submit a class of dispute to the jurisdiction of the courts of another state and that such an agreement may constitute a valid waiver of its own immunity.⁸⁵⁶

Article 2 of the European Convention on State Immunity of 1972⁸⁵⁷ provides that a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state if it has undertaken to submit to the jurisdiction of that court whether by international agreement, by express term contained in a contract in writing or by an express consent given after a dispute has arisen.⁸⁵⁸

It has also been reported in this connection that Mr Godfrey Lubinga, Third Secretary at the Zambian High Commission in London, was accused of smuggling heroin into the United Kingdom. The Foreign Office requested Zambia to waive Lubinga's immunity in respect of the conduct of inquiries, waiver was made by Zambia's President, Kenneth Kaunda, and Lubinga was remanded in custody.⁸⁵⁹

In practice the common cause of action in England is, that the sending's state government must waive the immunity of their head of the mission. The head of the mission in turn can waive the immunity of those in his charge⁸⁶⁰.

UK practice on the waiver of immunity was described as follows: "The government would not maintain diplomatic immunity from criminal jurisdiction in cases where a waiver would be without prejudice to the work of the mission and the fair treatment of the individual."⁸⁶¹

In terms of remedies available the ICJ declared unanimously that:

Beyond that remedy for dealing with abuse of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuse of the functions by members of a mission reach serious proportions. This is the power which every receiving State has at its own discretion, to break off diplomatic relations with the sending State and to call for the immediate closure of the offending mission.⁸⁶²

To the family and colleagues of Police Woman Yvonne Fletcher, who was shot dead outside the Libyan People Bureau in London on April 17th 1984, it may have seemed small comfort that the United Kingdom broke off relations with Libya on 22nd of April 1984 and that the

⁸⁵⁵ Denza 275.

⁸⁵⁶ Denza 275.

⁸⁵⁷ 11 ILM (1972) 470, European Treaty Series No 74.

⁸⁵⁸ Denza 275.

⁸⁵⁹ Scott Davidson 435. The Times, 2, 6, 8 and 16 March 1985

⁸⁶⁰ Buckely 353.

⁸⁶¹ Scott Davidson 434.

⁸⁶² (1980) ICJ Rep3, 61 ILR 530 para 85.

wanted gunman went free.⁸⁶³ But the severance of relations and the complete cessation of all the benefits diplomatic relations bring, must have been a far greater penalty for the sending state than had one of its representatives merely languished in gaol while the business of state went on.⁸⁶⁴

9.7 Summary and Conclusion

The United Kingdom has codified the Vienna Convention into its municipal laws, providing foreign and local diplomats with immunities. The English law developed from only having two categories of diplomatic personnel having immunity, to three clear categories. A diplomatic list is kept to keep track of each individual's immunity and status, to provide information not only to the sending state but also to the receiving state and the general public. The United Kingdom has experienced many examples of abuse and hardship with diplomats from foreign countries. The abuses are severe and yet there seems to be no justifiable outcome to punish the offenders which leaves the general public angry and frustrated.

⁸⁶³ Brown 88.

⁸⁶⁴ Brown 88.

Chapter Ten Conclusion

This research has attempted to answer several questions relating to the problems and abuse of diplomatic immunity. It has been attested that diplomats remain immune from the receiving states court jurisdiction. The high status of the diplomat is accredited to his role as negotiator between States. What this research has attempted to answer, therefore, is how the international community should limit and restrict the blanket immunity that is given to heads of state, diplomatic agents and family members by the Vienna Convention.

The concept of Diplomacy has been around since humans were able to form a society. Neighbouring tribes or clans had to develop means in order to communicate with one another, in order to trade, exchange gifts, establish boundaries, and declare war or to reconcile and bring peace. It was logical that the messenger needed to be identified easily and that he would not pose any threat to the other tribe and that therefore this could not have been a warrior. This concept developed and flourished. In the ancient Greek and Roman times their mythology confirms that the messenger of a King is a key person to the development of society and vital for neighbouring kingdoms to grow and develop. The Greeks and especially the Romans incorporated this into their own society and laws. Often the King or his advisor would hand pick certain learned individuals from court that would represent the King and carry the Kings message across to the neighbouring border. The Romans codified the laws that were already then customary practice, and insured that any person or nation attacking the King's messenger has attacked the King himself. Throughout the centuries these customs continued and developed further. In the Middle Ages this was the most common way to communicate with bordering nations not only in Europe but also in the Middle East, Asia and parts of Africa. Only very recently did the Italians come up with the idea that a more permanent establishment inside the neighbouring country is advisable and advantageous. Since the means of communication were still very primitive and England at the time was a long journey, it became necessary to have a permanent representative in the country. Thus Diplomacy continued to grow and expand in Europe. The advancement of technology have since then made it much easier and simpler to communicate with one's representatives and to re-assign new tasks and duties that have to be performed.

The Vienna Convention of 1961 is a true landmark in the long history of diplomacy. It has unified the majority of all states and nations all over the world to accept the same laws, principles and regulation of diplomats today. The Convention has been able to unite different

nations, with different backgrounds, cultures and languages, religious beliefs and history to agree and implement the regulations that were set out. Every country that is signatory to the Convention has obligated themselves to respect and make provisions in their own national legislation to incorporate the laws of the Vienna Convention.

Diplomatic personnel between countries are kept under control simply because of the threat of reciprocity. By protecting foreign countries and treating them with courtesy and respect, it has been accepted over time that such behaviour should be reciprocal. However, the reasoning for this is mainly for the good of diplomatic relations between states and often the rights of the individual citizen whose rights have been infringed is seen as secondary. Unfortunately there are always those members that use their privileges for their own personal gain and advantage, hiding under the cloak of immunity. Those diplomats that make use of the regulations to smuggle weapons and drugs, or are involved in human trafficking or even diplomats that have killed innocent citizen or where family members of the diplomat have caused harm to innocent bystanders are the major reasons why the public is dissatisfied with the way Diplomats continue to be treated above the law.

It is submitted therefore that certain additions or changes needs to be done in order for the relationship between states and individuals to continue to grow and prosper. The most drastic change should be that the diplomat should not be able to claim diplomatic immunity in cases of basic human rights violations. In cases where there is suspicion of torture, enslavement, murder and rape the receiving state needs to have the jurisdiction to detain and question the diplomat about these allegations. The sending state needs to be informed of the allegations being brought against their diplomat, and that a court of law in the receiving state needs to determine whether enough evidence has been brought forward to prosecute the offending diplomat. If the court determines there is sufficient evidence to prosecute then the diplomat is to immediately lose all diplomatic privileges and immunities and be tried. The Diplomat should not have the power to raise the defence of diplomatic immunity nor should it be necessary to request a waiver from the sending State. The immunities need to be limited to therefore to acts required for a diplomat to fulfil his official duties. If the court determines that there is not enough evidence for a conviction then it is in the interest of both the receiving and the sending state to recall that diplomatic individual. A diplomat who has been suspected or involved in such dealings should not continue to represent the sending State or be a member to that mission. This is to deter diplomats from thinking that they are above the law. Violating basic human rights are punishable in all nations and diplomats should not be the exception to the rule, nor should they hide behind the basis that these violations were

foreign to the Diplomat. The receiving state needs to be able to protect its citizens and prosecute those that have violated serious human rights. The immunity that diplomats enjoy in regards to criminal jurisdiction needs to be newly defined and it needs to be added that in the case of a violation that the diplomat has to stand accountable in a court of law in the receiving state. It is impractical to recall the Diplomat to the sending state and bring him to trial there. This has already been highlighted above as proving too difficult and expensive in order to collect evidence and bring witness into court from the receiving country. It would furthermore not be a just and fair trial to which all have an equal right. Additionally, the practice of requesting for a second waiver from the sending state in regards to execution of sentencing needs be removed all together. The integrity and inviolability of the mission should, however, remain intact and only his personal property may be searched for further investigation and evidence.

This research has attempted to provide insight to the development of South African and English law with regards to the Vienna Convention of Diplomatic relations. It has been shown that both countries, which have different backgrounds, were able to incorporate international law into their municipal laws. Both countries have experienced abuse of the diplomatic privileges granted to their representatives, and from both countries their nationals have suffered. Official acts of the mission can never be justified to terrorism or severe criminal acts that would undermine basic human rights.

As a result, it is submitted that changes need to be made to ensure such abuse do not take place. This involves the relationship between states and individuals to grow and prosper so as to maintain peaceful relationships and successful missions, without injustice being done to civilians. In cases where there is suspicion of torture, enslavement, murder and rape the receiving state needs to have the jurisdiction to detain and question the diplomat about these allegations. The sending state needs to be informed of the allegations being brought against their diplomat, and that a court of law in the receiving state needs to determine whether enough evidence has been brought forward to prosecute the offending diplomat. If the court determines there is sufficient evidence to prosecute then the diplomat is to immediately lose all diplomatic privileges and immunities and be tried. The Diplomat should not have the power to raise the defence of diplomatic immunity nor should it be necessary to request a waiver from the sending State. The immunities need to be limited to therefore to acts required for a diplomat to fulfil his official duties. If the court determines that there is not enough evidence for a conviction then it is in the interest of both the receiving and the sending state to recall that diplomatic individual. A diplomat who has been suspected or involved in such

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Moreover, the amount of privileges and protection that the Vienna Convention has authorized the individual diplomat also needs to be addressed. More power should be given to the receiving state over a diplomat that has breached a major violation of the local laws, which are also recognised as a severe contravention in the international community. It cannot be left open to the sending state only to decide on the future of their diplomat if he has committed a serious breach in the local laws of his mission. The abuse of privileges granted to diplomats has become common ground for corruption and one can see from these few examples that immunity for diplomats has many other problems still yet to be dealt with.

Further research may be initiated to resolve any civil claims that local citizens incur due to diplomat's negligence by having all diplomatic personnel ensured. In this way, the official functions of the diplomat would not be jeopardised or interrupted by court proceedings, but victims of crimes committed by diplomats or their staff may have justice and be remunerated.

Bibliography

Books

- Akehurst MB *Modern Introduction to International Law* (1997) Routledge: New York.
- Ashman C and Trescott P *Outrage: The Abuse of Diplomatic Immunity* (1986) W.H. Allen: London
- Ashman C and Trescott P *Diplomatic Crime: drugs, killings, thefts, rapes, slavery, and other outrages crimes* (1987) Acropolis Books Ltd: Washington D.C.
- Aust A *Handbook of International Law* (2010) University Press: Cambridge
- Barker JC *The Abuse of Diplomatic Privileges and Immunities: A necessary Evil?* (1996) Dartmouth: Aldershot
- Barker JC *International Law and International Relations* (2000) Continuum: London
- Barston RP *Modern Diplomacy* (2006) Pearson Longman
- Berridge G *Diplomacy: Theory and Practice* (2005) Macmillan: New York
- Brownlie *Principles of Public International Law* (1998) Oxford University Press: Oxford
- Cassese A *International Law* 2nd ed (2005) Oxford University Press
- Castellino J *International Law and Self-determination: The Interplay of Politics* (2000) Martinus Nijhoff Publishers The Hague
- David H *Public International Law in the Modern World* (1987) Pitman
- Denza E *Diplomatic Law – Commentary on the Vienna Convention on Diplomatic Relations* (2008) Oxford University Press
- Dixon M *Textbook on International Law* (1997) Oxford University Press
- Dixon M and McCorquodale R *Cases and Materials on International Law* (1991) Blackstone Press: London
- Dugard J *International law: A South African perspective* (2005) Juta: Kenwyn
- Do Nascimento E Silva G E *Diplomacy in International Law* (1973) Sijthoff
- Editors Heinze E and Fitzmaurice M *Landmark Cases in International Law* (1998) Kluwer
- Feltham RG *Diplomatic Handbook* 7th ed (1998) Longman: London

- Graham M Goldstein E & Langhorne E *Guide to International Relations and Diplomacy* (2002) Continuum International Publishing Group
- Grimal P *The dictionary of Classical Mythology* (1996) Blackwell
- Hamilton K and Langhorn R *The Practice of Diplomacy: its Evolution, Theory and Administration* (1995) Routledge
- Hansen WF *Handbook of Classical Mythology* (2004) ABC-CLIO
- Harris DJ *Cases and Materials on International Law* (1998) Sweet & Maxwell: London
- Hillier T *Sourcebook on Public International Law* (1998) Routledge
- James M and Hardy L *Modern Diplomatic Law* (1968) Manchester University Press ND
- Kaczorowska A *Public International Law* (2010) Routledge
- Kofele-Kale N *The International Law of Responsibility for Economic Crimes* (2006) Ashgate Publishing
- Levi W *Contemporary International law: A Concise Introduction* (1991) Westview Press: Boulder
- Lord Gore-Booth *Satow's Guide to Diplomatic Practice* (1979) Longman: London
- McClanahan GV *Diplomatic Immunity: Principles, Practices and Problems* (1989) Hurst: London
- Murty BS *The International Law of Diplomacy: the Diplomatic Instrument and World Public Order* (1989) New Haven Press: New Haven
- Nicolson H *Diplomacy* 2nd ed (1950) Oxford University Press
- O'Brien J *International Law* (2001) Cavendish
- Ogdon M *Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1936) John Byrne & Co.: Washington D.C.
- Sen B *A Diplomatic Handbook of International Law and Practice* (1988) Martinus Nijhoff publishers
- Shaw MN *International Law* 5th (2003) Cambridge University Press: New York
- Shearer IA *Starke's International Law* (1994) Butterworths: London
- Strydom HA *Diplomatic Immunities in* Joubert WA (ed) *The Law of South Africa* Vol 11 2nd Reissue
- Van Dervort TR *International Law and Organization: An Introduction* (1998) Sage Publications: London

- Wallace RMM *International Law* 5th ed (2005) Sweet & Maxwell: London
- Watson A *Diplomacy: the Dialogue between States* (1984) Routledge
- Wilson CE *Diplomatic Privileges and Immunities* (1967) The University of Arizona Press: Tucson
- Wheaton H *Elements of International Law* (1846) Lea and Blanchard: Philadelphia

Journal Articles

- Akinsanya A ‘The Dikko Affair and Anglo – Nigerian Relations’ (1985) 34 *International & Comparative Law Quarterly* 602
- Barnhoorn L ‘Diplomatic Law and Unilateral Remedies’ (1994) 25 *Netherlands Yearbook of International Law* 39-81
- Barker C J ‘Abuse of diplomatic privileges and immunities: a necessary evil?’ (1997) 46(3) *International & Comparative Law Quarterly* 724-725
- Barker C J ‘State immunity, diplomatic immunity and act of state: a triple protection against legal action?’ (1998) 47(4) *International & Comparative Law Quarterly* 950-958.
- Botha N ‘International Court of Justice – *United States of America v Iran* Order in Request for provisional measures: Judgment in the case concerning United States Diplomatic and Consular Staff in Tehran’ (1980) *South African Yearbook of International Law* 137
- Botha N ‘International Court of Justice: *United States Application Against Iran*’ (1979) *South African Yearbook of International Law* 153
- Botha N ‘Diplomatic Immunity’ (2008) *Annual Survey* 1175-1190
- Brown J ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37(1) *International & Comparative Law Quarterly* 53-88
- Buckley M ‘Origins of Diplomatic Immunity in England’ (1966) *University of Miami Legal Review* 349
- Cameron I ‘First Report of the Foreign Affairs Committee of the House of Commons’ (1985) *International & Comparative Law Quarterly* 610
- Carpenter G ‘Extradition, Extraterritorial Capture and Embassy Premises’ (1987-8) *South African Yearbook of International Law* 145

- Choi W M ‘Diplomatic and Consular Law in the Internet Age’ (2006) 10 *The Singapore Year Book of International Law* 117-32
- Davidson S ‘Treaties, Extradition and Diplomatic Immunity: Some recent developments’ (1986) 35 *International & Comparative Law Quarterly* 425
- Donoghue J E ‘Perpetual Immunity for former diplomats? A responds to “The Abisinito affair: A restrictive theory of diplomatic immunity?” (1988-1989) 27 *Columbia Journal of Transnational Law* 615
- Erasmus G and Davidson L ‘Do South Africans have a right to Diplomatic Protection?’ (2000) 25 *South African Yearbook of International Law* 113
- Elgavish D ‘Did Diplomatic Immunity exist in the ancient near east?’ (2000) 2 *Journal of the History of International Law* 73-90
- Evans MD ‘The restoration of diplomatic relations between Argentina and the United Kingdom’ (1991) 40(2) *International & Comparative Law Quarterly* 473-482
- Farahmand AM ‘Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse’ (1989-1990) 16 *Journal of Legislation* 89
- Farber RE ‘Immunity or impunity? How current U.S interpretation of diplomatic immunity facilitates diplomatic abuse of A-3 domestic workers’ (2006) 2 *Journal of Migration & refugee Issues* 63.
- Farhangi LS ‘Insuring against abuse of diplomatic immunity’ (1985-1986) 38 *Stanford Law Review* 1517
- Fox H ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ (1985) 34 *International & Comparative Law Quarterly* 115
- Garretson AH ‘The immunities of representatives of foreign states’ (1966) 41 *New York University Law Review* 67.
- Goldberg AJ ‘The shootout at the Libyan Self-Styled People’s Bureau: A case of State-Supported International Terrorism’ (1984) 30 *South Dakota Law Review* 1
- Goodman ‘Reciprocation as a means of curtailing diplomatic immunity abuse in the United States; the United States needs to play hard ball’ (1989) *Houston Journal of International Law* 393
- Griffin M ‘Diplomatic Impunity’ (1984-85) 13 *Student Law*. 18
- Groff JD ‘Proposal for Diplomatic Accountability using jurisdiction of International Criminal Court: The Decline of an Absolute Sovereign Right’ (2000) 14 *International Criminal Law and Justice* 209

- Grzybowski K 'The regime of diplomacy and the Tehran Hostages' (1981) 30 *International & Comparative Law Quarterly* 42
- Henkin L 'Human Rights and 'Domestic Jurisdiction' (1977) *Human Rights, International Law and the Helsinki Accord*
- Hickery J and Fisch A 'The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States' (1989-1990) 41 *Hastings Law Journal* 351
- Higgins R 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 *American Journal of International Law* 641-651
- Hoffman J 'Reconstructing diplomacy' (2003) 5(4) *British Journal of Politics and International Relations* 525-542.
- Labuschagne J T M 'Diplomatic Immunity as criminal defence: an anthropo – legal anachronism?' (1997) 22 *South African Yearbook of International Law* 32-45
- Larschan B 'The Abisinio Affair: A restrictive Theory of Diplomatic immunity?' (1988) 26 *Columbia Journal of Transnational Law* 283
- Lijiang ZHU 'Chinese Practice in Public International Law: 2008' (2009) 8(2) *Chinese Journal of International Law* 493-551.
- Ling Y 'A Comparative Study of the Privileges and Immunities of the United Nations members representatives and officials with the Traditions privileges and immunities of diplomatic agents (1976) 33 *Washington & Lee Law Review* 91
- Lloyd L 'What's in the name? The Curious Tale of the Office of High Commissioner' (2000) 11 *Diplomacy and Statecraft* 47
- Maginnis VL 'Limiting Diplomatic immunity: Lessons learned for the 1946 Convention on the privileges and immunities of the United Nations' (2002-2003) 28 *Brooklyn Journal of International Law* 989.
- McDade PV 'The effect of Article 4 of the Vienna Convention on the law of treaties 1969' (1986) 35(3) *International & Comparative Law Quarterly* 499-511.
- McDonough MB 'Privileged outlaws: Diplomats, Crime and Immunity' (1997) 20 *Suffolk Transnational Law Review* 475
- Minzesheimer 'Exceptions to the Rules' *Washington. Post, Feb.20, 1983* (Magazine)
- Morris SN 'Diplomatic Immunity; Diplomatic Privileges; Stamp Duties; Taxation' (1992) 2 *British Tax Review* 122-124

- Morris SN 'The tax liability of foreign Diplomats in the United Kingdom' (1991) 7 *British Tax Review* 207-213
- O'Keefe PJ 'Privileges and Immunities of the Diplomatic Family' (1976) 25 *International & Comparative Law Quarterly* 330-331
- Parkhill JS 'Diplomacy in the Modern World: A reconsideration of the bases for Diplomatic Immunity in the era of high-tech communication' (1998) 21 *Hastings International & Comparative Law Review* 565
- Przetacnik F 'The history of the jurisdictional immunity of the diplomatic agents in English law (1978) *Anglo-American Law Review* 348
- Ritchie C 'What are diplomats made of?' (1974-1975) 30 *International Law Journal*. 15
- Ross MS 'Rethinking diplomatic immunity: A review of remedial approaches to address the abuses of diplomatic privileged and immunities' (1989) 4 *American University Journal of International Law & Policy* 173
- Rudd JL 'Legal Digest' (2008) 25 *Diplomatic Immunity*.
- Shapiro LJ 'Foreign Relations Law; Modern Developments in Diplomatic Immunity' (1989) *Annual Survey of American Law* 281
- Sharp P 'Who needs diplomats?' (1996-1997) 52 *International Law Journal* 609
- Sutton S 'Diplomatic Immunity and the Siege of the Libyan People Bureau' (1985) *Public Law* 193
- Tai A 'Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity.' (2007) 16(1) *American University Journal of Gender, Social Policy & the Law* 175-222.
- Thomas AC '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* 153
- Vicuna FO 'Diplomatic and Consular Immunities and Human Rights' (1991) 40(1) *International & Comparative Law Quarterly* 34-48
- Wiebalck A 'Abuse of the Immunity of Diplomatic Mail' (1984) 10 *South African Yearbook of International Law* 175
- Wilsen C 'Diplomatic Privileges and Immunities: The retinue and families of the diplomatic staff' (1965) *International & Comparative Law Quarterly* 1279

- Wright SL 'Diplomatic Immunity: A proposal for amending the Vienna Convention to deter violent criminal acts' (1987) 5 *Boston University of International Law Journal* 177
- Zaid MS 'Diplomatic Immunity: To have or not to have, that is the question' (1997-1998) 4 *CILSA Journal of International & Comparative Law* 623

Other

- Kirsch JP (1911) Nuncio. In the Catholic Encyclopedia. Retrieved from New Advent: <http://www.newadvent.org/cathen/11160a.htm>
- Baumgarten PM (1910) Internuncio. In the Catholic Encyclopedia. Retrieved from New Advent: <http://www.newadvent.org/cathen/08078a.htm>

International Cases

- *Abdulaniz v Metropolitan Dade County and Others* 741 F 2d 1328 (1984), 99 ILR 113
- *Artwohl v United States* 434 F 2d 1319 (1970); 56 ILR 518
- *Hart v Helinski* 78 ILR 4
- *Shaw v Shaw* (1979) 3 All ER 1; 78 ILR 483
- *Skeen v Federative Republic of Brazil* 566,F Supp. 1414 (DDC 1983)
- *R v Govennor of Pentonville Prison, ex parte Teja* (1971) 2 Q.B. 274 (CA)
- *R v Kent* (1941) 1 KB 454, 1941 -2 AD No. 110
- *R v Mattueof* (1709) 10 Modern 4, 88E.R.598

International Instruments

- Convention on the Prevention and Punishment of Crimes against International Protected Person, including Diplomatic Agents International
- European Convention on State Immunity of 1972
- Vienna Convention on Diplomatic Relations 1961 Schedule 1

South African Statutes

- The Constitution of the Republic South Africa Act, 1996
- Diplomatic Immunities and Privileges Act 37 of 2001

English Statutes

- Diplomatic Immunity is the Diplomatic Immunity and Privilege Act of 1964