

UNIVERSITY OF NAIROBI

Institute of Diplomacy and International Studies (IDIS)

Diplomatic Duplicity: Abuse of Privileges and Immunities by Diplomats in Receiving States //

**A Research Project Submitted in Partial Fulfillment of the Requirements of the Degree in:
Masters of Arts in Diplomacy**

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DECLARATION

I would like to declare that the research project I present is my original work and has not been presented or published in any other University.

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This thesis paper has been dully supervised checked by;

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DEDICATION

I would like to dedicate this thesis to my Husband Cosmas Musyoki Maundu, my son Jayden Maundu and mother Alice Muli. You have been all very resourceful towards its completion.

ABSTRACT

Diplomatic immunity is one of the oldest elements of foreign relations, dating back as far as Ancient Greece and Rome. Today, it is a principle that has been codified into the Vienna Convention on Diplomatic Relations regulating past customs and practices. This Convention has been influenced by past practices and by three theories during different eras namely extritoriality, personal representation and functional necessity.

The Vienna Convention on Diplomatic Relations further provides certain immunities and privileges to different levels of diplomatic officials, their staff and families. Each category receives privileges and immunities, for example immunities enjoyed by the diplomatic mission include mission correspondence and bags. Diplomatic officials enjoy personal inviolability, immunity from jurisdiction and inviolability of diplomats' residence and property. Although the Vienna Convention on Diplomatic Relations provides remedies against diplomats, staff and families who abuse their position, it gives the impression that it is not enough.

The issues examined in this study include the issues that surround the abuse of diplomatic immunities and privileges, the fact that so many diplomatic cases go unpunished under the cover of diplomatic immunities. According to the modern rational actor theory which is used as the theoretical framework in this study, the actor pursues goals which reflect the actor's perceived self interest. The behavior results from conscious choice where, the individual is the basic unit of analysis. The methodology used will be interviews, questionnaires, trusted net sources, case studies, journals and scholarly books by trusted opinion writers and columnists with vast knowledge on the topic.

The key question answered in the study is that diplomatic immunity is necessary for the efficient functioning of foreign relations between states. However, limiting measures should be put in place to curb the numerous cases of abuse that continue to soar up. This could be done through some of the measures that have been previously recommended such as amendment of the Vienna Convention on Diplomatic Relations, use of the functional necessity theory, bilateral treaties, formation of a Permanent International Diplomatic Criminal Court. Other solutions would be limitation of the criminal immunity of diplomats, their staff and families.

LIST OF ABBREVIATIONS

VCDR.....	Vienna Convention on Diplomatic Relations
SONU.....	Students of Nairobi University
ICJ.....	International Court of Jurists
UN.....	United Nations
NY CONVENTION.....	New York Convention

CHAPTER 1

1.1 Introduction to the study

Diplomatic duplicity can be defined as the tendency on the part of diplomats to disregard the law of the receiving state and to invoke their diplomatic immunity to escape liability.¹ Diplomatic duplicity is on the increase in diplomatic circles. Although some people in the society feel that the problem is insignificant and being overblown, it is threatening to add an impediment in terms of criminal acts that are increasingly being committed by diplomats. According to Grant, diplomatic immunity is a vital protection given on a reciprocal basis by different governments and that that no diplomat can function without it².

Diplomatic immunity has been established since ancient times when the exchange of permanent ambassadors between the states of Europe became common during the 16th and 17th Century. States provided diplomats with immunity from the criminal jurisdiction of sovereign even where there was evidence than an ambassador had engaged in conspiracy or treason against the receiving sovereign.

The basis for diplomatic immunity were “representative” of the sovereign where the envoy is seen to personify the sovereign he/she represents, ‘extritoriality’ where a diplomat is always seen to be on the native country’s soil and ‘functional necessity’ where a diplomat is seen as not able to function without the immunities as efficiency would become low.³

The roots of diplomatic immunity are lost in history. Nicolson entertains the idea that tribes of cave –dwelling anthropoid apes would probably have had dealings with one another in such

¹ Farhangi, L.S. *‘Insuring against Abuse of Diplomatic Immunity’*. Stanford Law Review. 1986pp 1517-1547

² McClahan G.V. *‘Diplomatic Immunity: Principles, Practices, Problems’*. American Society of International Law.1990.pp 951-954

³ Reiff. H. *‘Diplomatic and Consular Privileges, Immunities and Practises’* 1954 pg 26

matters as drawing the limits of their relevant hunting grounds and bringing to an end a day's battle.⁴ Although his speculation cannot be proven, Barker believes it is not an unreasonable thought.⁵ It is an interesting theory and possibly the genesis of social interaction between tribes.

The earliest record of organized diplomatic immunity lies in Ancient Greece. Diplomatic missions, until the 15th Century, were established strictly on an ad hoc basis and a diplomatic appointment and immunity ended once the diplomat had fulfilled his duties in the foreign State and returned home.⁶ The Greek city-states and eventually all societies recognized that the practice of protecting foreign diplomatic personnel benefited all concerned. Envoys were accorded absolute immunity.⁷ Reciprocity continued throughout the ages and is explained better as "Do unto their representatives as you would have them do unto yours"⁸. As the nature and functions of diplomats changed from messenger to negotiator and in some instances to spy, so the legal basis of justifying diplomatic immunity changed.⁹

In recent times, the subject of diplomatic immunity is very much alive because of the tendency of revolution regimes to participate in flaunting rules of diplomatic immunities laid in the VCDR, exploitation of diplomatic immunities to escape prosecution for various non diplomatic activities, widespread criticism of this incidences by the public and difficulty many people have in understanding why a diplomatic and his family have immunities.¹⁰

⁴ Elgavish 'Did Diplomatic Immunity Exist in the Ancient Near East?' *Journal of the History of International Law* 2000 pg 73

⁵ Barker, *The Abuse of Diplomatic Privileges and Immunities: A necessary evil* (1996) pg 14

⁶ Parkhill, *Hastings International & Comparative Law Review* 1997-1998 pg 568

⁷ Ross *Rethinking Diplomatic Immunity: A review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities* 1989 pg 176-177

⁸ Frey and Frey, *The History of Diplomatic Immunity*, 1999 pg 4

⁹ Parkhill, *Hastings International & Comparative Law Review* 571'. 1997-1998 pg 21

¹⁰ Nicolas Henderson in G V McClahan *Diplomatic immunity: 'Principles, Practices, Problems'*, London (1989) pg 11,12

Statement of the research problem

Diplomats are sometimes guilty of performing diplomatic activities which violate the established protocols. Regularly, diplomats transport and receive 'secret and confidential' materials in what is labeled as diplomatic bags but have nothing to do with the said missions. These activities are mainly done undercover.

Despite VCDR clearly stating that "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"¹¹, this provision is unenforceable due to some of the provisions under the Convention which excludes diplomats from the jurisdiction of the host country. For instance, the convention provides that the premises of the mission, its archives and documents and the person of the diplomatic agent consequently the agents of the receiving state may not enter the premises because the premises are immune from search, requisition, attachment or execution while the inviolability of the diplomat implies that he is not liable to any form of arrest or detention. However, the diplomatic agent enjoys immunity from criminal jurisdiction of the host state except if his sending state waives that immunity.¹²

States recognize that the protection of diplomats is a mutual interest founded on functional requirements of reciprocity. The host country is therefore under an obligation to take all appropriate steps to prevent any attack on the person, as well as to the freedom or dignity of the diplomat. In short, the diplomat himself cannot be touched. The only remedy the host country has in the face of offences alleged to have committed by a diplomat is to declare him *persona non grata* under Article 9 of the convention. There is an unfortunate tendency, on the part of the

¹¹ Vienna Convention on Diplomatic Relations, Article 41

¹² Vienna Convention on Diplomatic Relations Article 22,24,29,31 and 32

diplomatic officials, to disregard the laws of the receiving state and invoke their diplomatic immunity as a cover, to escape liability, for their crimes.

As the number of diplomats grows, the consequences in some capitals of having these privileged foreign elite have been largely negative. McClahan,¹³ notes that there may be too many diplomats in the world and further argues that some of their traditional immunities and privileges need to be further trimmed down to essentials, with tougher curbs applied to offenders.

1.2 Objectives of the study

The objectives of this study are;

- To establish the prevalence of the abuse of diplomatic immunities and privileges among the diplomatic community that enjoys them.
- Examine appropriate strategies and methods that would help reduce diplomatic abuse of privileges and immunities
- Examine critically the immunities enjoyed by diplomatic agents
- Ascertain if the immunities extended to the diplomatic community are really necessary.

1.3 Literature review

Diplomatic immunity, a principle of International law is broadly defined as the freedom from local jurisdiction accorded to diplomatic agents and members of their immediate household.¹⁴ These immunities rest on long tradition of usage, court judgment, a number of specific bilateral agreements and most important a few multilateral, almost universal conventions of recent decades. It is true that diplomatic immunities have their legal complexities because they are in

¹³ Grant V McClahan, *'Diplomatic Immunity: Practices, problems'* , 1990 pg 951-954

¹⁴ G V McClahan *'Diplomatic immunity: Principles, Practices, Problems'*, (1989) Hurst: London pg 1

essence a limitation that one sovereign state places on its own actions towards another state. They are not forceable for there is now for there is no way the sovereign state can be imprisoned or pay a fine for violating diplomatic immunity. The international rules of diplomatic immunities and privileges are among the oldest examples of International Law finally entrenched in practice, treaties and municipal legislations. Considerations of reciprocity give powerful; support to maintaining the customary and treaty status of diplomats.¹⁵

Rules that regulate diplomatic relations are one of the earliest expressions of International Law.¹⁶ Diplomacy exists to establish and maintain communication between states in order to achieve commercial, political and legal objectives.¹⁷ International Law, along with diplomatic immunity, is not imposed by states but is generally accepted through consensus and reciprocity, on the basis that peaceful compromise must override violent confrontation¹⁸ hence immunities should be well used for the purpose they were meant for.

The doctrine of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions.¹⁹ It is considered to be the exception to the general rule of territorial jurisdiction.²⁰ There are distinctions between immunity and privileges though people tend to use them interchangeably. Various authors have tried to distinguish between the meanings. Although each write defined the concept in his own words, they essentially have a

¹⁵ G V McClahan *'Diplomatic immunity: Principles, Practices, Problems'*, (1989) Hurst: London pg 2

¹⁶ Shaw International Law 4ed (1997) 523 and Barker International Law and International Relations (2001) pg 1

¹⁷ Brownlie, *'Principles of Public International Law'* 5ed (1998) page 349

¹⁸ Hoffman, *'Reconstructing Diplomacy'* (2003) page 5 and British Journal of Politics and International Relations 533.

¹⁹ Keaton *'Does the Fifth Amendment Takings Clause Mandate Relief for victims of Diplomatic Immunity Abuse'* (1989-1990) pg 17 Hastings Constitution Law Quarterly 567

²⁰ Higgins *'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience'*. American Journal of International Law 1985 pg 641.

common thread. "Privileges" can be defined as the exemption from local jurisdiction.²¹ Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a legal basis, while only some privileges are based on law and others are a matter of courtesy.²²

Diplomacy is conducted on the basis of a code that has evolved over many centuries. Some of its rules are made into writing, such as those laid down in the famous legremot of 1815 of the Havana convention of 1928.²³ The Vienna convention of 1961 has then codified this well established rule of immunities and privileges²⁴.

As common law, diplomatic immunities first arose as an extension of sovereign immunities. The inviolability, in theory, of the herald and the flag of truth had been recognized as a practical necessity from the earliest times but as a matter of law, it was a consolation that the sovereign dignity and independence must be preserved. That gave protection to the diplomatic agents and was considered that the diplomatic agent, while occupying that position must be accorded the same immunity as the sovereign. The sovereign personal immunity is law, an extension of the immunity that may be accorded entities of sovereign status²⁵, almost regarded as binding international legal rules of diplomatic interaction between states.

There had been early attempts to create a regime in this filed for example the Vienna regulation of 1815, the Havana convention of 1928, the resolution of the institution of international law of 1929 and the Havana draft convention of 1932, but none has been as

²¹ Przetacznik 'The history of the Jurisdictional Immunity of the Diplomatic agents in English Law'. *Angle American Law Review* (1978) pp351-352

²² Barker 'The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?' (1996) pg 67

²³ Chandra. P.' *International Law*, Vikas Publishing House 1985 p 98

²⁴ Chandra. P.' *International Law*, Vikas Publishing House 1985 p 99

²⁵ Lewis. C., Lyods. L Lloyd "'What's in the Name?' The Curious Tale of the Office of High Commissioner" (2000) 11 *Diplomacy and Statecraft* 47
London press Ltd. London 1985 pg 159.

comprehensive as the convention of 1961, which has provided the starting point for other treaties for example VCDR and NY convention of special missions.²⁶

Some authors²⁷ believe that the Vienna Convention of 1961 should be revisited, to prevent abuses by diplomats, their families and their staff of the laws of the receiving state. Particular emphasis is to be placed in this thesis, on the inviolability of diplomatic bags and missions, and thereby clearly distinguishing the nature and scope of official and private functions.

Barker suggests that abuse occurs where the diplomat is subject to substantive law, but when he breaks it, the receiving state has no jurisdiction over him. The fact that the receiving state is not entitled to enforce its jurisdiction against a person because of his immunity is due to the existence of two distinct but related concepts: inviolability and immunity from jurisdiction²⁸. Inviolability is the foundation of diplomatic privileges and immunities²⁹. Inviolability of the person is one of the first principles of diplomatic law that has remained prominent. The inviolability of premises was confirmed soon after the establishment of permanent missions³⁰. It is reinforced by the immunities of the receiving state given by virtue of diplomatic law. It has been said that inviolability demands, as a prerequisite, immunity from jurisdiction³¹.

There have been several occasions where local courts have been called upon to apply international law in relation to diplomatic immunity. It is thus necessary for courts to appreciate and be able to apply the tenets of diplomatic law.³² The continued increase in the numbers of

²⁶ Lewis. C., Lyods. London press Ltd. London 1985 pg 161.

²⁷ McClanahan. 'Diplomatic Immunity' 165-178. See also Dixon Textbook on 'International Law' 2ed (1990) pg 164 and Higgins. 'The abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience (1985) American Journal of International Law' pg 65

²⁸ Barker. *Abuse of Diplomatic Privileges and Immunities* pg 71

²⁹ Fuchille and the ICJ

³⁰ Barker. 'Abuse of Diplomatic Privileges and Immunities' pg 67

³¹ Barker. 'Abuse of Diplomatic Privileges and Immunities' pg 76-77 and Belotsky Jnr. The effect of the Diplomatic Relations Act (1981) pg 11 and California Western International Law Journal pg354.

³² Ogdon. Juridical Basis of Diplomatic Immunity p195

diplomats in foreign countries and the demands of the diplomatic system has led to the development of several conventions regarding immunities, privileges and the behavior of diplomats.³³

By eighteenth century, European states had broadly outlined the customary international law regarding the privileges and immunities of diplomats³⁴. It was generally accepted, however, that these immunities only protect diplomats from local jurisdiction and gave them no authority to disregard the law. This effectively meant that the diplomat was under no obligation to obey the laws, a situation that has remained unchangeable to the present day.³⁵

The Vienna Convention governs every aspect of diplomatic immunity from accreditation of ambassadors, to the use of flags on diplomatic vehicles, to the exemption from local taxation. The provisions relevant to the problem of abuse of diplomatic immunity concern the diplomat, the mission and diplomatic correspondence, known as the “diplomatic bag”.³⁶

Four articles of the Vienna Convention apply when a diplomat has abused his/her immunity. Article 29 provides that the person of the diplomat shall be inviolable and that the diplomat is not liable to any form of arrest or detention. Article 31 exempts the diplomat from the criminal jurisdiction of the receiving of the receiving state, though a diplomat can be tried in the receiving state if his/her immunity is waived. The fourth provision, article 41, requires that the diplomat respect the laws and regulations of the receiving state and not interfere in the internal affairs of the receiving state. This almost makes it impossible for the diplomat to be touched.

As with the diplomat, the mission itself is inviolable. If a crime is committed on embassy grounds or from embassy premises, local authorities are not supposed to enter the embassy

³³ Frey and Frey. *'History of Diplomatic Immunity'* (1999) pg 216.

³⁴ Gore-Booth, *'Satow's guide to diplomatic practice'*, supra note 8, pg 107

³⁵ Gore-Booth, *'Satow's guide to diplomatic practice'*, supra note 8, pg 124

³⁶ Vienna Convention, articles 5,6,7

without the invitation of the ambassador. Article 23 provides that the archives and documents of the mission are inviolable wherever they may be³⁷.

Article 27 governs the treatment of the diplomatic bag. It requires “visible external marks of its character” and that the bag contains only diplomatic documents or articles intended for official use. Subsequently, section 3 states that “the diplomatic bag shall not be opened or detained”. These immunities that international law grants to diplomats enable a number of them to disregard the law. When a diplomat does break the receiving state’s law, article 9 is the only recourse for the receiving state which allows the receiving state at any time, without any explanation to notify the sending state that the ambassador or any other member of the mission is *persona non grata*. This is however not enough to keep the diplomats from abusing the immunities and privileges.

Abuses of diplomatic immunity fall into two broad categories, the use of the diplomatic bag to smuggle illegal goods in and out of the receiving state, and crimes committed by diplomats themselves. Smuggling goods into or out of the receiving state using the diplomatic pouch is relatively common. There have also been more unusual and violent cases of abuse of immunity by diplomats. In all these situations, the host government had an alarmingly narrow range of options. Expulsion and severance of diplomatic relations were the only actions available. Because these actions were the most severe that could be taken under the Vienna Convention, there was great public feeling that justice could not take place.

Under the Vienna Convention, a state can take three possible actions against an erring diplomat. The receiving state can negotiate with the sending state to waive the diplomat’s immunity. Regrettably, this method is rarely used, despite the fact that it follows both the letter

³⁷ Denza. E. *Supra* note pg 90

and the spirit of the Vienna Convention's protections when the receiving state does not infringe any of the Vienna Convention's protections when the receiving state acts against the offending diplomat. This approach makes the diplomat's duty to respect local law more tangible, while simultaneously respecting the spirit of the convention. Although negotiating with a sending state to waive its diplomat's immunity is excellent in theory, it rarely works in practice. No enforcement mechanism compels the sending state to waive immunity.

While article 9 remedy of declaring the offender *persona non grata* and forcing her 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. If authorities do not know which individual is responsible for the crime, they might be forced to break off diplomatic relations by expelling all the diplomats.³⁸

The question of inviolability of diplomatic agents has roots deeply embedded in history. So fundamental a privilege was diplomatic immunity that Cicero declared: "The inviolability of ambassadors is protected both by divine and human law; they are sacred and respected so as to be inviolable not only when in an allied country, but also whenever they happen to be in the midst of the forces of enemies."³⁹ This greatly causes the rampant abuse of immunities by diplomats as they have since time immemorial appeared "untouchable".

Nonetheless, the benefits of inviolability are more uncertain in the eyes of vulnerable governments vulnerable to terrorist attack. The growing ease of air travel and the growing amount of firepower that can be hidden in diplomatic bags impose a rising security burden on nations whose educational system or cultural tradition makes them a refuge for dissidents. The

³⁸ The Times London, April 18, 1984, pg 12 col 2

³⁹ Edmund A. Walsh, *The History and Nature of the International Relations*, Newyork

immunity of the diplomatic pouch can be open invitation for import of spies and criminal with drugs, guns and explosives.

Several texts have been written on the abuse of immunities with different authors coming out with different opinions. Stowell states that in diplomatic immunities, international agreements, the fruit of diplomatic negotiations, are then a means to conserve human energy, to help to secure and preserve the peace, which means to conserve human energy, to help to secure and preserve the peace, which means in the end to help to develop a greater measure of the co-operation essential to the progress of each state.⁴⁰

Brandon however notes that the practice of the Foreign Office is based on the principle that diplomatic immunity is accorded to the diplomat, not for the benefit of the individual in question, but for the benefit of the state in whose service he is, in order that he may fulfill his diplomatic duties with the necessary independence⁴¹

Several solutions have been proposed to the problem encountered with the abuse of immunities and privileges. Great Britain has discussed isolating nations which abuse the 1961 Vienna Conventions provisions. The United States has also considered creating a fund to compensate American victims of foreign diplomats. A third option requires prosecution of the diplomat in his sending state and a fourth would interpret some of the Vienna Convention's provisions more restrictively. The last option is to amend the Vienna Convention could itself.⁴²

The above literature clearly shows that there is a variance between proper use of diplomatic immunities and privileges and the proper strategies and measures to mitigate their abuse. This is

⁴⁰ Ellery. C. Stowell. *'The American Journal of International Law'*, Vol 20. Pg 4 (Oct 1926), pp 735-738

⁴¹ Michael Bandon. *'The International and Comparative Law Quarterly'*, Vol 1, No 3 (Jul 1952), pgs 358-361

⁴² Understanding on Hijacking of Aircraft and vessels, Feb.15.1973, United States, Cuba.

very dangerous in the society that is increasingly welcoming the increase of numbers of citizens and non citizens enjoying these privileges.

1.4 Justification of the study

The object of this study is to establish whether diplomats, their staff and families need absolute criminal immunity. Possible alternatives to immunity will be discussed and responses by South Africa will be considered. Diplomats ensure that communication between states is made possible. As a consequence, they are granted certain immunities and privileges to facilitate this function within the state to which they are accredited.

Academic scholars and writers have tried to come up with various methods of curbing diplomatic abuse of privileges and immunities. Year by year, the abuse of the same significantly increases. None of the methods has been fully successful. This study will therefore greatly help by exploring other possible solutions that could help come up with an ultimate solution to the abuse of privileges and immunities.

Diplomatic immunities and privileges are an important part of a diplomat's life and greatly help the diplomat in efficiently carrying out his/her duties in the receiving state. This is an important study that will enable policy makers to come up with better policies that will enable stop the abuse of immunities and privileges and put up proper measures that will enable stop the vice.

1.5 Theoretical framework

This study is based on the theory of rational action which originated in the application of Adam Smith's classical economic theory of the market model to politics⁴³ in an attempt to explain factors that contribute to diplomatic duplicity among diplomats. According to the

⁴³ Monroe. K. *'The Economic approach to politics: A critical Assessment of the theory of rational action'*. New York: Harper Collins 1991.

modern rational actor theory, the actor pursues goals which reflect the actor's perceived self interest. The behavior results from conscious choice where, the individual is the basic unit of analysis. The actors have preference orderings that are consistent and stable and if given options, the actors choose the alternative with the highest expected utility and finally actors' posse's extensive information on both the available alternative and the likely consequences of their choices.

The actions of the actors are guided by individual actor's perceived self interest as opposed to qualitatively different guiding principles as collective interest, altruism, moral imperatives or theological commands. It is therefore possible that the actors aim less at "maximizing utility" than at seeking a minimum level of satisfaction.⁴⁴

Their emphasis is on the mental process rather than the outcome of the decision making and on subjective limitations on an actor's ability to compute such knowledge and education. The study therefore attempted to find out to what extent the rational actor theory was applicable in investigating why there is an increase in criminal acts by diplomats which is an abuse of diplomatic immunities and privileges. This according to Monroe⁴⁵ is because an individual actor can be guided by self interest as opposed to the guiding principles. Therefore, if the society can bring up people with the reasoning of making decisions based on common good, diplomats would first assess the damage caused by abusing the privileges and immunities.

1.7 Hypotheses

1. There is a significant relationship between increase of diplomats and increase in abuse of immunities by the diplomats.

⁴⁴ Simon. H. *'Human Nature in politics: The dialogue of Psychology with political science'*. American political science review. 1984.pg293-304

⁴⁵ Monroe. K. *'The Economic approach to politics: A critical Assessment of the theory of rational action'*. New York: Harper Collins 1991

2. There is no significant impact of criminal acts of diplomats in the receiving state.
3. Granting of immunities to the diplomatic community does not assist in proper functioning of foreign missions.

1.8 Research methodology

This study aims at collecting information from respondents on their experiences, past examples, attitudes and opinions in relation to diplomatic abuse of immunities together with the increase of criminology acts performed by diplomats.

1.8.1 Primary data

The primary data will include information obtained from officers working in the Ministry of Foreign Affairs and Embassies. Interviews with the relevant people such as the diplomats, government officials in the Ministry of Foreign Affairs especially those that enjoy the immunities and privileges will be conducted. This will follow a structured form of questions that will be set to achieve the objectives of the study and also obtain relevant materials for the study.

1.8.2 Secondary data

Secondary data from the internet will be used (trusted sources as jstor and ebstor), journals and scholarly books by people such as opinion writers and even columnists who have vast knowledge of the subject. There are a myriad articles on the subject collected from previous knowledge of writers and culminated in well balanced opinions that would easily enable the researcher make a good, balanced subject of the subject.

The reason for the researcher to use case study design is in order to see what a specific country has done in its efforts to curb diplomatic duplicity in details, context and holistically. The researcher also wants to allow in depth investigation of this problem the selected country. This will enable the researcher to get first hand accurate information of the whole study.

1.9 Scope and limitation of the research

There are a number of limitations expected while carrying out the research especially since the topic under study is not a positive one to the respondents. This may cause the respondents to be hesitant especially at admitting that there exists or are involved in the abuse of immunities and privileges. The respondents themselves could also lack objectivity since they might be involved in the abuse directly or indirectly.

Accessing of records to establish the actual statistics of the abuse of privileges and immunities is another challenge. This is especially because there is fear of implication now or in the near future and the records of the Ministry are normally private and confidential.

1.10 Chapter outline

Chapter 1 Constitutes the proposal

Chapter 2: Privileges and immunities of missions, diplomatic agents and their families.

Chapter 3 Abuse of immunities and privileges by diplomats residing in Kenya

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CHAPTER 2

PRIVILEGES AND IMMUNITIES OF MISSIONS, DIPLOMATIC AGENTS AND THEIR FAMILIES

2.1 Introduction

The doctrine of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions.¹ It is considered to be the exception to the general rule of territorial jurisdiction.² There is little distinction between immunity and a privilege and in many cases these have been used interchangeably. Various authors have tried to distinguish between the meanings. Although each writer defined the concepts in his own words, they essentially have a common thread. "Privileges" can be defined as a benefit or right to do something that others have no right to do, while "immunities" can be defined as the exemption from local jurisdiction.³ Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a legal basis, while only some privileges are based on law and others are a matter of courtesy.⁴

The primary abuses of diplomatic immunity can be divided roughly into three categories: the commission of violent crimes by diplomats or their family; the illegal use of the

¹ Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 Hastings Constitutional Law Quarterly 567.

² Higgins "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience" (1985) American Journal of International Law 641.

³ Przetacznik "The History of the Jurisdictional Immunity of the Diplomatic agents in English Law" (1978) Anglo-American Law Review 351-352.

⁴ Barker' *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996) 67.

diplomatic bag; and the promotion of state terrorism by foreign governments through the involvement of their embassies in the receiving State.⁵ Many nations have been affected by diplomats abusing their immunity, but the US is seeing the larger share, since the embassies are situated in Washington DC and the UN officials reside in New York City.

Barker suggests that abuse occurs where the diplomat is subject to substantive law, but when he breaks it, the receiving State has no jurisdiction over him. The fact that the receiving State is not entitled to enforce its jurisdiction against a person because of his immunity is due to the existence of two distinct but related concepts: inviolability and immunity from jurisdiction.⁶ Inviolability is the foundation of diplomatic privileges and immunities.⁷ Inviolability of the person is one of the first principles of diplomatic law that has remained prominent. The inviolability of premises was confirmed soon after the establishment of permanent missions.⁸ It is reinforced by the immunities from jurisdiction of the receiving State given by virtue of diplomatic law. It has been said that inviolability demands, as a prerequisite, immunity from jurisdiction.⁹

⁵ Farahmand *"Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses"* (1989-1990) 16 *Journal of Legislation* 97. For a discussion of each reason see Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 583-586.

⁶ Barker *'Abuse of Diplomatic Privileges and Immunities'* (1996) 71.

⁷ Fauchille and the ICJ have stated this concept

⁸ Barker *'Abuse of Diplomatic Privileges and Immunities'* (1996) 67.

⁹ Barker *'Abuse of Diplomatic Privileges and Immunities'* (1996) 76-77 and Belotsky Jnr *"The Effect of the Diplomatic Relations Act"* (1981) 11 *California Western International Law Journal* 354.

2.2 Rationale for Granting Privileges and Immunities

2.2.1 Introduction

Since the 16th century there have been three major theories of diplomatic immunity. Each theory plays a prominent role during different periods in history. These theories are: (a) personal representation, (b) exterritoriality and (c) functional necessity.¹⁰ Not only will their historical context be reflected but reference to their use in modern practice will be made in this study to indicate the role of each theory throughout the ages and how they apply today.

2.2.2 Personal representation

This theory has the deepest and earliest origin. Long before the age of the modern diplomats and resident embassies there were rulers who sent representatives. The theory gained widespread recognition during the Renaissance period when diplomacy was dynastically oriented.¹¹ These representatives received special treatment. When the receiving State honored them their ruler was pleased and unnecessary conflict was avoided.¹² The representative was treated as though the sovereign of that country was conducting the negotiations, making alliances or refusing requests.¹³ The great theorists of the 16th and 17th century like Grotius, Van Bynkershoek, Wicquefort and Vattel supported and encouraged the use of this theory.¹⁴ Montesquieu describes representation as follows;

¹⁰ McClanahan. '*Diplomatic Immunity*' 27-28.

¹¹ Wilson '*Diplomatic Privileges and Immunities*' (1967) 2.

¹² G V McClanahan '*Diplomatic Immunity: Principles, Practices, Problems*' (1989) Hurst: London 28 and Parkhill (1997-1998) 21 Hastings International & Comparative Law Review 571.

¹³ McClanahan Diplomatic Immunity 28 G V McClanahan '*Diplomatic Immunity: Principles, Practices, Problems*' (1989) Hurst: London 28 and Barker Abuse of Diplomatic Privileges and Immunities 38. See comments made by Benedek "The Diplomatic Relations Act: The United States Protects Its Own" (1979) 5 Brooklyn Journal of International Law 383.

¹⁴ Barker '*Abuse of Diplomatic Privileges and Immunities*' (1996)35.

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

In *The Schooner Exchange v McFaddon*¹⁵ the court held that by regarding the ambassador as the sovereign’s representative, it ensured their stature. If they were not accorded exemptions, every sovereign would cast a shadow on his own dignity when sending an ambassador to a foreign State.¹⁶

If applied in modern times this theory would be less appropriate, in that it was based mainly on monarchies and not on sovereign States.¹⁷ This is an interesting concept, since a president of a sovereign State could be seen as having the same functions and stature as a monarch. Ross discredits this theory on three grounds. First, the foreign envoys cannot have the same degree of immunity as the ruler or sovereign.¹⁸ Second, the decline of the monarchs and the progression of majority vote makes it unclear who the diplomat represents. Last, the immunity does not extend from the consequences of the representatives’ private actions.¹⁹ Wright further criticizes the theory by placing the diplomat above the law of the receiving

¹⁵ *The Schooner Exchange v McFaddon* 11 U.S. (7 Cranch) 116 (1812). See further Wilson “*Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*” (1984) 7 *Loyola of Los Angeles International & Comparative Law Journal* 115.

¹⁶ *Magdalena Steam Navigation Co. v Martin* 1859 QB 107, *Taylor v Best* Hilary Term. 17 Victoria (1854), 14 C.B. 487 and *Musurus Bey v Godban* (1894) 2 QB 361.

¹⁷ McClanahan ‘*Diplomatic Immunity*’ 29 and Wilson (1984) 7 *Loyola of Los Angeles International & Comparative Law Journal* 115.

¹⁸ Ross (1989) 4 *American University Journal of International Law & Policy* 177-178 and Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 573.

¹⁹ *Ibid.* For more detail on this theory refer to Wilson ‘*Diplomatic Privileges and Immunities*’ p 1-5.

sovereign, which is opposite to the principle that all sovereigns are equal.²⁰ Yet despite its declining popularity, the theory is still used, albeit infrequently. For example, in 1946, a federal court in New York granted diplomat immunity from service of process under this theory.²¹

2.2.3 Exterritoriality

This theory was of limited applicability in the early centuries after the establishment of resident embassies in the 15th century. It derived from imperfect notions of personal and territorial jurisdiction.²² During this time there was a great emphasis over the supremacy of national law on everyone in the territorial state, irrespective of their nationality. In order to try and avoid this being imposed on diplomats, the theory of exterritoriality was developed.²³ This is based on the Roman law principle whereby a man took his own land's law with him when he went to another land.²⁴ The crux of this theory is that the offices and homes of diplomats and even their persons were to be treated, throughout their stay, as though they were on the territory of the sending State and not that of the receiving State.²⁵ The irony of this theory is that a diplomat would not necessarily be immune for the same illegal conduct in the sending State,

²⁰ Wright "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University International Law Journal* 197.

²¹ Keaton (1989-1990) 17 *Hastings Constitutional Law Quarterly* 574.

²² Przetacznik (1978) *Anglo-American Law Review* 353 and Ogdon *Juridical Basis of Diplomatic Immunity* 63.

²³ Przetacznik (1978) *Anglo-American Law Review* 353.

²⁴ Przetacznik (1978) *Anglo-American Law Review* 353 and Ogdon *Juridical Basis of Diplomatic Immunity* 68.

²⁵ McClanahan *Diplomatic Immunity* 30 and Ogdon *Juridical Basis of Diplomatic Immunity* 63.

but could not be prosecuted for it.²⁶ Further, ambassadors were seen in two ways, (a) as a personification of those who sent them, and (b) they were held to be outside the limits of the receiving State.²⁷ Authors like Emmerich de Vattel (1758) and James Lorimer (1883) emphasized that an ambassador's house and person are not domiciled in the receiving State, but in the sending State.²⁸

The decline of this theory can be seen, according to McClanahan, as a result of academic groups abandoning the theory in order to draft codifications for international law.²⁹ Other reasons stem from the vagueness of the term "exterritoriality" leading to incoherent and politically motivated interpretations.³⁰ For instance, the term is persistently used to describe not only the mission, but all types of immunities and privileges enjoyed by the personnel, which seems contrary to the original understanding of the term.³¹ The courts also found exterritoriality conceptually difficult when finding that the actions of a diplomat were committed on the receiving State's soil rather than domestic soil.³²

²⁶ Maginnis (2002-2003) 28 *Brooklyn Journal of International Law* 994 and Benedek (1979) 5 *Brooklyn Journal of International Law* 383.

²⁷ Przetacznik (1978) *Anglo-American Law Review* 354.

²⁸ G V McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) Hurst: London p30

²⁹ McClanahan *Diplomatic Immunity : Principles, Practices, Problems* (1989) 32. For an in-depth discussion of this theory and its decline, refer to Preuss "Capacity for Legation and Theoretical Basis of Diplomatic Immunities" (1932-1933) 10 *New York International Law Quarterly Review* 170.

³⁰ Ross (1989) 4 *American University Journal of International Law & Policy* 178 and Farahmand "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse" (1989-1990) 16 *Journal of Legislation* 93.

³¹ Wilson *Diplomatic Privileges and Immunities* 12.

³² Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 572.

2.2.4 Functional Necessity

This theory is more dynamic and adaptable than the other two theories and has gained acceptance since the 16th century to modern practice. The rationale behind a need for a diplomat's privilege and immunities is that it is necessary for him to perform his diplomatic function.³³ Diplomats need to be able to move freely and not be obstructed by the receiving State. They must be able to observe and report with confidence in the receiving State without the fear of being reprimanded.³⁴ Grotius' dictum *omnis coactio abesse a legato debet* stresses that an ambassador must be free from all coercion in order to fulfill his duties.³⁵ Although Grotius, Van Bynkershoek and Wicquefort regarded it as necessary to protect the function of the mission, they felt that it was not the primary juridical basis of the law.³⁶ It was Vattel who placed the greatest emphasis on the theory in order for ambassadors to accomplish the object of their appointment safely, freely, faithfully and successfully by receiving the necessary immunities.³⁷ In the 18th century, the Lord Chancellor in *Barbuit's* case declared that diplomatic privileges stem from the necessity that nations need to interact with one another.³⁸ Similarly, in *Parkinson v Potter*³⁹ the court observed that an extension of exemption from jurisdiction of the courts was essential to the duties that the

³³: McClanahan *Diplomatic Immunity ; principles, Practices and problems* p32 and Parkhill (1997-1998) 21 'Hasting International & Comparative Law Review' 572

³⁴ McClanahan 'Diplomatic Immunity ; principles, practices and problems' p32, Benedek (1979) p5, *Brooklyn Journal of International Law* 384

³⁵ Przetacznik (1978) 'Anglo-American Law Review' p357.

³⁶ Barker 'Abuse of Diplomatic Privileges and Immunities' p 46-47.

³⁷ Barker 'Abuse of Diplomatic Privileges and Immunities' p47 and Ogdon *Juridical Basis of Diplomatic Immunity* P 171.

³⁸ *Buvot v Barbuit* (1737) Cas. Temp. Ld. Talb. 281.

³⁹ *Parkinson v Potter* [1885] 16 QBD 152.

ambassador has to perform.

This theory gained credence during the First World War and gained even more impetus since then due to the expansion of permanent resident embassies, the increase of non-diplomatic staff to help perform diplomatic functions, and the increase of international organizations which require immunity to be granted to more people.⁴⁰ So it seems that necessity and the security to perform diplomatic functions are the real reasons for diplomatic immunity; hence the test is not whether acts are public, private or professional, but whether the exercise of jurisdiction over the agent would interfere with his functions.⁴¹

The primary advantage of this functional necessity is that it is adaptable and has safeguards against excessive demands for privileges and immunities. In other words, it restricts immunity to the functions of the diplomat rather than giving him absolute immunity. A disadvantage is that it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function.⁴² Generally, diplomats should not commit criminal acts or act in a manner unbecoming of their status. A diplomat's behavior in a foreign country is best described by the Arabic proverb: "*Ya ghareeb, khalleek adeeb*" which translates to "O stranger, be thou courteous".⁴³ What is of greatest importance is that diplomats should act in good faith for the protection of the receiving State's security. Functional necessity is recognized in the Vienna Convention, and was deemed practical under the UN Convention.⁴⁴

⁴⁰ Przetacznik (1978) '*Anglo-American Law Review*' 357- 358 and Southwick (1988-1989) 15 '*Syracuse Journal of International Law & Commerce*' 88. See further Wilson *Diplomatic Privileges and Immunities* 21.

⁴¹ Ogdon '*Juridical Basis of Diplomatic Immunity*' 180.

⁴² McClanahan '*Diplomatic Immunity ; principles. Practices and problems*' p32

⁴³ McClanahan '*Diplomatic Immunity ; principles. Practices and problems*' p33.

⁴⁴ Maginnis (2002-2003) 28 '*Brooklyn Journal of International Law*' 996.

Current juridical understanding of diplomatic immunity demonstrates that diplomats cannot be prosecuted for criminal or civil acts outside their diplomatic functions.⁴⁵ Yet it seems that in practice they have absolute immunity against criminal prosecution, whether their acts are during or outside their functions. Another criticism of this theory is that it is vague, since it does not establish what a “necessary” function of a diplomat is.⁴⁶ What is reflected in the theory is that diplomats cannot function properly without immunity. The extent of this immunity may be understood to mean that diplomats may break the law of the receiving State in order to fulfill their functions.⁴⁷

2.3 Abuse of Immunities and Privileges

2.3.1 Personal Inviolability

Diplomats are accorded the highest degree of privileges and immunities. Five privileges established in the Vienna Convention are exemption from taxation,⁴⁸ custom duties and baggage inspection,⁴⁹ exemption from social security obligation,⁵⁰ from personal and public services,⁵¹ and exemption from giving evidence.⁵² Except for the exemption from baggage inspection, the other privileges fall under the realm of private law and will not be considered.

⁴⁵ This is indicated in the Vienna Convention under Article 31

⁴⁶ Farahmand (1989-1990) 16 *Journal of Legislation* 94 and Wright (1987) 5 *Boston University International Law Journal* 202.

⁴⁷ Ross (1989) 4 *American University Journal of International Law & Policy* '179.

⁴⁸ Vienna Convention under Article 28.

⁴⁹ Vienna Convention under Article 36

⁵⁰ Vienna Convention under Article 33.

⁵¹ Vienna Convention under Article 35.

⁵² Vienna Convention under Article 31 paragraph 2

Under Article 29, diplomats are accorded full immunity and, like the inviolability of a mission, this has two aspects. Firstly, there is immunity from action by law enforcement of the receiving State, and secondly there is the special duty of protection by the receiving State to take appropriate steps against attack.⁵³ Ogdon adds a third aspect, stating that the State has a duty to punish individuals who have committed offences against diplomats, which most foreign States make provision for in domestic laws.⁵⁴

Although the Vienna Convention does place a duty on the receiving State to protect diplomats, the receiving State would reasonably expect that missions and diplomats would take measures to protect themselves.⁵⁵ In addition, Barker points out that in times of peace and when relations between the receiving and sending State are normal and undisturbed, diplomats are entitled to minimum protection; in the event of war or internal tension involving the two States, the receiving State is under a duty to reinforce the means of protection to missions or diplomats who have become vulnerable.⁵⁶

2.3.2 Immunity from Jurisdiction

Jurisdictional immunity entails that persons with immunity cannot be brought before the courts for any illegal acts or offences committed while in the receiving State during the period of their functions.⁵⁷ The distinction is well summarized in *Dickinson v Del Solar*⁵⁸ where it was

⁵³ Lord Gore-Booth (ed) *'Satow's Guide'* 121 and Von Glahn *'Law Among Nations'* 424-425.

⁵⁴ Ogdon *'Juridical Basis of Diplomatic Immunity'* 216 and Berridge *'Diplomacy'* 117.

⁵⁵ *Ibid.*

⁵⁶ Barker *'Abuse of Diplomatic Privileges and Immunities'* 74 and Dixon and McCorquodale *'Cases and Materials on International Law'* 329.

⁵⁷ Barker *'Abuse of Diplomatic Privileges and Immunities'* (1996) 77.

emphasized that diplomatic immunity does not signify immunity from legal liability, but rather imports exemption from local court jurisdiction. This extends to all jurisdictions whether civil, administrative or criminal. Thus, a diplomatic agent who commits an illegal act in the receiving State cannot be prosecuted in the local courts as the courts would be “incompetent to pass upon the merits of action brought against such a person”.⁵⁹

The rationale behind criminal jurisdiction is to prosecute and punish those who commit illegal acts or offences.⁶⁰ Immunity from criminal jurisdiction of a diplomatic agent, provided in Article 31, means that the diplomat cannot be brought before the criminal courts of the receiving State for illegal acts or offences committed in that State during his stay, which is contrary to the very ethos of the rule of law and justice.⁶¹

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

Article 31 lays down no procedure as to when or how immunity should be pleaded or established. These issues are usually left to the law of each State.⁶² When a court determines the issue of immunity, it must do so on the facts at the date when the issue comes before it and not on the facts at the time when the conduct or events gave rise to a charge or

⁵⁸ *Dickinson v Del Solar* (1930) 1 KB 376.

⁵⁹ Przetacznik (1978) 'Anglo-American Law Review' 351.

⁶⁰ Przetacznik (1978) 'Anglo-American Law Review' 358.

⁶¹ *Ibid.*

⁶² Denza 'Diplomatic Law' 253.

when proceedings were begun.⁶³ There was a suggestion by the Venezuelan delegation at the Vienna Convention to place an obligation on the sending State to prosecute a diplomat accused of an offence that is punishable in both States. This suggestion seems appropriate and reasonable, but it was criticized as being too extreme.⁶⁴ Immunity should be granted on the functions of the diplomat, his *ratione materiae*, and not his *ratione personae*.⁶⁵ The distinction is that the former deals with permanent substantive immunity from local law, while the latter deals with exemption from judicial process in the receiving State,⁶⁶ meaning that *ratione personae* expires at the end of an assignment while *ratione materiae* continues.⁶⁷

2.3.3 Inviolability of Diplomat's Residence and Property

Previously there was no distinction between the residence of the ambassador and the premises of the mission. However, as a result of the growing numbers of diplomatic and official staff, it is often necessary to separate these premises.⁶⁸ Many States enacted legislation conferring inviolability on the residence of the diplomat and later express provision was made for inviolability in the Havana Convention.⁶⁹ The nature of the property was made clear by the ILC, which stated that it denoted a residence distinct from the mission, which could include a hotel room, an apartment or house, whether owned or leased.⁷⁰ A second residence, such as a holiday home or a hotel room away from the capital would also have inviolability, but if the

⁶³ Denza 'Diplomatic Law' 256.

⁶⁴ Kerley (1962) 56 *American Journal of International Law* 124.

⁶⁵ Dinstein "Diplomatic Immunity from Jurisdiction *Ratione Materiae*" *Comparative Law Quarterly* 78.

⁶⁶ Dinstein (1966) 15 *International & Comparative Law Quarterly* 80.

⁶⁷ Dinstein (1966) 15 *International & Comparative Law Quarterly* 81

⁶⁸ Lord Gore-Booth (ed) *Satow's Guide* 122-123.

⁶⁹ Denza 'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations' 2ed (1998) 221.

⁷⁰ Denza 'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations' 2ed (1998) 221-222.

diplomat began living in it, it might lead to the loss of inviolability of the principal residence.⁷¹ The papers and correspondence of a diplomat under customary law were not accorded inviolability.

However, the Vienna Convention goes beyond customary practice and confers inviolability on all papers and correspondence that may be private in character. The diplomat's property included movable and immovable property, ranging from houses and furniture to motor vehicles and lawn-mowers.

Article 36 provides that the personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds of suspicion that it contains articles that are not for official use of the mission or for personal use of the diplomat or his family.⁷² Possessing a diplomatic passport means that personal luggage is seldom subjected to inspection.⁷³ Therefore, most diplomats seem ready to take the risk because of the potential rewards.⁷⁴

2.4 Vienna Convention on Diplomatic Relations on Immunity

The development of diplomatic immunity over the years led to the Vienna Convention which became a universal Convention and its provisions clearly marked progression of custom into settled law and resolved areas of contention where practices conflicted.⁷⁵ According to Frey and Frey, Vienna in 1815 was the first site of a meeting for diplomatic agents. The first international attempt to codify the rules of diplomatic immunity was in 1895 with the

⁷¹ Denza *'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations'* 2ed (1998) 222.

⁷² McClanahan *Diplomatic Immunity* 157.

⁷³ Denza *'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations'* 2ed (1998) 255 and Ashman and Trescott *'Diplomatic Crime'* 171.

⁷⁴ Farahmand (1989-1990) 16 *'Journal of Legislation'* 99.

⁷⁵ Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) p1.

Draft Convention of the Institute of International Law.⁷⁶ This resolution stipulated that diplomats enjoyed extrterritoriality. This extrterritoriality was curtailed in 1929.⁷⁷ This is the genesis of the Vienna Convention.

In 1927, the League of Nations Committee of Experts for the Progressive Codification of International Law drew up a report that analyzed the existing customary law of diplomatic privileges and immunities. Another important document was the Harvard Research Draft Convention on Diplomatic Privileges and Immunities in 1932 (“the Harvard Convention”). McClanahan states that had Harvard been an international organization instead of a prestigious university, it would have heavily impacted on thoughts of diplomatic immunity. However, owing to its academic nature, this document has persuasive value only and not many States implemented the provisions in national law.⁷⁸ The Harvard Convention was one of the first documents that attempted to make a clear distinction between official and non-official acts.⁷⁹ Creating this distinction aided in identifying when immunity could be relied upon. However, this only applies to lower staff, since diplomats have absolute immunity against criminal prosecution.⁸⁰

The Vienna Convention was considered to be a success in that by 1985, 145 member

⁷⁶ Frey and Frey *‘History of Diplomatic Immunity’* (1999) Ohio State University Press: Columbus 480

⁷⁷ Frey and Frey *‘History of Diplomatic Immunity’* (1999) 481 and Barker *Abuse of Diplomatic Privileges and Immunities*²⁹.

⁷⁸ McClanahan *‘Diplomatic Immunity’* p41 and Barker *Abuse of Diplomatic Privileges and Immunities* 29-30.

⁷⁹ Dinstein *“Diplomatic Immunity from Jurisdiction Rationae Materiae”* (1966) 15 *International & Comparative Law Quarterly* 78.

⁸⁰ Refer further to Article 31 of the Vienna Convention and Chapter 4.

states had acceded to it; ten years thereafter this number had increased to 174 member states.⁸¹ The formulation of the Vienna Convention was a reaction to the absolute immunity granted to diplomats throughout the ages.⁸² However, a question that can be raised is whether diplomatic representatives adhere to this concept, especially when there are other Articles in the Vienna Convention that counter this.⁸³

The Vienna Convention clarifies that diplomats are exempt from jurisdiction of the local courts only during their mission, but are not exempt from the law of the state.⁸⁴ It further grants many fiscal privileges, but also limited customs exemptions which many envoys abuse and use as a way to increase their salaries. Other countries at the same time denoted that custom exemption is based on international community rather than law.⁸⁵ According to Denza, there are six provisions that may be singled out as marking significant developments of previous customary international law principles.⁸⁶ Article 22 deals with the inviolability of mission premises. The Convention does not clearly state the ambit of inviolability of missions, but the implications of inviolability and provision of emergency or abuse may justify the receiving State's entry onto the premises. Article 27 deals with the protection of all forms of diplomatic communication. Examples are the use of wireless transmissions and the fact that

⁸¹ McClanahan '*Diplomatic Immunity*' p42 and Van Dervort '*International Law and Organization: An Introduction*' (1998) p291.

⁸² See further Ross (1989) 4 '*American University Journal of International Law & Policy*' 180 and Chapter 6.

⁸³ With regard to immunities, Article 29 deals with personal inviolability, article 30 with inviolability of residence and property and Article 31 with immunity from jurisdiction. Furthermore, granting privileges such as exemption from tax (Article 34), personal service (Article 35) and customs and custom duties (Article 36) cannot be said to protect the diplomatic representative's *function* alone, but his *person* too.

⁸⁴ VCDR Article 40, See further Frey and Frey '*History of Diplomatic Immunity*' 485.

⁸⁵ Frey and Frey '*History of Diplomatic Immunity*' (1999) 482-483.

⁸⁶ Denza '*Diplomatic Law*' 3.

diplomatic bags are not searched by the receiving State. Article 31 looks at settled exemptions to civil jurisdiction in order to ensure the minimizing of abuse by diplomats. Article 34 looks into the basic principle of exemption from domestic taxes in all cases with some exceptions to taxes on private income and property arising in the receiving State, indirect taxes and charges levied for services rendered. Article 37 proved the most difficult to resolve in view of great diversity of approach by the parties to the Convention. This Article deals with the treatment of junior staff of diplomatic missions and families.⁸⁷ It limits civil jurisdiction while allowing full immunity from criminal jurisdiction. Article 38 deals with debarring nationals and permanent residents of the receiving State from all privileges and immunities.⁸⁸

Article 14 was formulated to help classify envoys and personnel. The motive of this Article was that before the First World War, only powerful States sent and received ambassadors who enjoyed greater status than other envoys. By the time of the Second World War the number of ambassadors rose, while the number of envoys declined. The Vienna Convention confirmed that heads of missions would take precedence.⁸⁹

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

⁸⁷ Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 4.

⁸⁸ Denza *Diplomatic Law* Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 2ed (1998) 5.

⁸⁹ Frey and Frey *History of Diplomatic Immunity* (1999) 432.

2.5 Receiving State recourse to Abuse of Diplomatic Immunity

2.5.1 Declaring a Diplomat Persona Non Grata

The diplomatic officer must be acceptable to the receiving State if he is to have any official status at all. Article 9 of the Vienna Convention allows for the receiving State not to accept individuals before appointment and also to expel diplomats after their appointment as a result of their wrongful acts.

The fundamental rationale of this Article allows for the receiving State to expel a diplomat who has behaved unacceptably.⁹⁰ This Article essentially means that declaring a diplomat, staff or his family persona non grata forces the sending State to take one of two actions: either recalling the diplomat to his home country or terminating his functions with the sending State's mission. Should the sending state refuse to remove the individual from his duties then the receiving State may refuse to recognize the person as a member of the mission, resulting in him being liable to prosecution.⁹¹

One of the most common reasons for declaring a person persona non grata is for espionage.⁹² Another reason for declaring a diplomat persona non grata is involvement in a conspiracy against the receiving State.⁹³ This has, today, largely fallen into disuse. Diplomats have also been required to leave following the discovery of the use of violence or implication in a threat. Article 41 has made it clear that diplomats should not interfere in the internal affairs of the receiving State.

⁹⁰ Denza *'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations'* 2ed (1998) 59 and 62. McClanahan *Diplomatic Immunity* 128 and Hill (1931) 25 *American Journal of International Law* 256.

⁹¹ Southwick (1988-1989) 15 *'Syracuse Journal of International Law & Commerce'* 92-93 and Hill (1931) 25 *American Journal of International Law* 256.

⁹² Denza *'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations'* 2ed (1998) 63

⁹³ Denza *'Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations'* 2ed (1998) 65.

Article 9 is not used in every case of suspected serious crime. It is used sparingly, especially in instances of persistent or serious abuse, for example in cases where diplomats cannot be prosecuted and waiver is not granted.⁹⁴ There is no need to give reasons for expulsion, as it is clear cut: a crime was committed and the responsible diplomat cannot be prosecuted or punished. Thus the fear of reciprocal action by the sending State will not be relevant because no other options are available to the receiving State.⁹⁵ Hill points out that this method is effective, in that it prevents gross violations of the laws of the receiving State and prevents repeated violations by removing the offender.⁹⁶

2.5.2 Waiver of Immunity for Prosecution

The waiver of immunity, empowered by Article 32, is the “act by which the sending State renounces that immunity with regard to the person concerned”.⁹⁷ Once waiver occurs, the local courts in the receiving State will have jurisdiction to prosecute and punish the offender.⁹⁸ The Preamble of the Vienna Convention states that the purpose of a diplomatic agent’s immunity is not to benefit the individual, but to ensure that his performance to represent his State is unhindered.⁹⁹

There was a debate in both the ILC and the Conference as to who was entitled to waive immunity and whether there should be a distinction between civil and criminal jurisdiction. A further aspect of the problem was whether the head of the mission was entitled to

⁹⁴ Barker’ *Abuse of Diplomatic Privileges and Immunities* ‘ (2000) 111.

⁹⁵ Barker’ *International Law and International Relation* ‘(2000) 168.

⁹⁶ Hill (1931) 25’ *American Journal of International Law* ‘ 257.

⁹⁷ Przetacznik ‘*Anglo-American Law Review* ‘(1978) 384.

⁹⁸ Przetacznik ‘*Anglo-American Law Review* ‘(1978) 386.

⁹⁹ *Ibid.*

waive immunity of any member of his staff or if it always required a formal decision by the sending State. The view that the head of mission could waive immunity was rejected by the majority of the ILC.¹⁰⁰ Furthermore, waiver by the sending State is a serious decision, for it places the diplomatic agent, as far as legal responsibility is concerned, in a situation where he is equal to that of a citizen in the receiving State. Diplock LJ in *Empson v Smith*¹⁰¹ interprets diplomatic actions as voidable rather than void. It has been stated by international authors and a court decision by Kerr LJ in *Fayed v Al-Tajir*¹⁰² that jurisdictional immunity is not personal to the diplomatic agent but belongs to the sovereign of the sending State; hence that waiver can only be given by the sending State and not by a diplomatic agent.¹⁰³ In terms of paragraph 2 of the Vienna Convention, waiver must always be express and irrevocable. Despite the fact some States do waive immunity of diplomats, family or staff, waiver is seldom granted.¹⁰⁴ The decision to waive immunity is not based on a legal decision but rather on a political basis; for instance, retaliatory measures taken against their own diplomats or even fabricated charges being brought against their personnel in the receiving State.¹⁰⁵ Waiver is a good remedy if States are willing to grant it. A possible solution is for States to enter into agreements for automatic waiver in serious criminal offences. This would serve as a better deterrent than merely having the option to waive immunity.

¹⁰⁰ Barker 'Abuse of Diplomatic Privileges and Immunities' (1996) 120.

¹⁰¹ *Empson v Smith* 1965 [2] All ER 887

¹⁰² *Fayed v Al-Tajir* [1987] 2 All ER 396.

¹⁰³ Przetacznik *Anglo-American Law Review* (1978) 384.

¹⁰⁴ Barker 'International Law and International Relations' (2000) 170.

¹⁰⁵ *Ibid.*

2.5.3 Breaking of Diplomatic Ties

Previously the rupture of diplomatic relations between countries was considered a serious measure. In most cases, this rupture would lead to war. In some instances it is a measure used as the only remaining option to stop serious abuses.

Using this remedy might ensure that diplomats from that specific country never commit a crime in the receiving State again, but once again, the perpetrator goes unpunished. Yet it is interesting to note that although countries have severed diplomatic ties, it does not mean that the two countries do not negotiate or converse at all.¹⁰⁶ A group of diplomats of the State will work under the flag of another State. This is known as an “interests” section and is regulated by Article 45 and 46 of the Vienna Convention. Interests sections can also be established as a step towards reconciliation between disengaged States. An example was in 1955 when the Soviet Union and the South African government severed relations. However, as a result of their common and strong interests in the economic sphere of gold and diamond marketing, and the domestic changes in South Africa by the 1980s, interests sections were opened under the protection of the Austrian embassies in Moscow and Pretoria.¹⁰⁷

¹⁰⁶ G Berridge *'Diplomacy: Theory and Practice'* 3ed (2005) Macmillan: New York .138.

¹⁰⁷ G Berridge *'Diplomacy: Theory and Practice'* 3ed (2005) Macmillan: New York 140-141. For an in-depth look at the disadvantages of interests sections refer to 138-143. Also refer to Kear (2001) Vol. 12 No. 3 *Diplomacy and Statecraft* 68-80.

CHAPTER 3

ABUSE OF IMMUNITIES AND PRIVILEGES BY DIPLOMATS IN KENYA

3.1 Introduction

There have been many cases surrounding Kenyan Diplomats abusing their immunities and privileges and committing civil and criminal acts, only to hide under the cover of the immunity provided to them under the Vienna Convention of 1965. This chapter seeks to highlight some the cases that have been reported to have taken place in Kenya and to Kenyan Diplomats in their receiving states. Most of the cases however are normally handled under “Private and confidentially” labeled documents in the embassies of the Sending and receiving state. Only a few come out to the limelight through the media.

3.2 Case Studies

As early as 1966, cases of abuse of diplomatic immunity and privileges could already be established with the expulsion of USSR embassy’s first Secretaries; Mr. Y.A Youkalov and Mr. V.A.Kodakov of the out Kenya. The list also included the second Secretary at the Czechoslovak Embassy, Mr. Stanislav Kozubik and a clerk at the embassy of the people’s republucbic of China. In the midst of these were also Mr. Zdenek Kubes and Mr. Yuri Kuritsin of the Czechoslovak News Agency and Soviet Novosti Press Agency. The reasons behind the quit orders, which were of an anomaly nature, were not however disclosed as most of the Diplomatic cases are treated under “Private and Confidential” labels.¹

¹Nation reporter, Envoys expelled, Daily Nation, Nairobi. Friday, March 11 1966 pg 1 & 24

A case in 1973 caused the severing of Kenya with Israel relations where the then president, Hon Kenyatta announced the closure of the Israel embassy in Kenya which had been operating before Kenya gained independence. The closure of the Israel embassy in Kenya was termed to be due to occupation of Arab by force of arms by Israel, which is not only against the United Nations Charter but also against the national principles of Kenya. This therefore meant that as long as Israel continued to occupy Arab lands taken by force, Kenya would not maintain Diplomatic relations with them. In this case, Kenya could not take any measures on the Israel embassy as the embassy is inviolable hence the resort was to break diplomatic ties.² The Kenyan Government demanded departure of four accredited diplomats following the discovery of a traffic in clothing and footwear which exploited diplomatic privileges, according to diplomatic sources. The Kenyan Foreign Ministry confirmed that they had asked United Nations Environment Programme (UNEP), the UN Agency Habitat, the Ugandan High Commission and the Liberian Embassy to recall the diplomats concerned. The diplomats were later confirmed to either have left Kenya for their homes or preparing to leave. Kenya was tied by the diplomats immunity to prosecute the diplomats within the jurisdiction n the country laws. This was unfortunate as it was a breach of the Kenyan laws.³

Mr. Ahmed Khaliffer Arrajel, former ambassador to Libya in Kenya was served with a quit order to leave the country after being charged with persistently undermining the security of the country. He was expelled for funding the Nairobi University Student's Union, (Sonu) elections through SONU's immediate past chairman, Mr. Robert Buke Wafula and inturn given information concerning SONU's leadership. Mr. Arrajel had not apparently the first Lybian

² Nation reporter, *'Kenya breaks with Israel'*, Daily Nation. Nairobi. Friday November 2, 1973 pg 1

³ Nation reporter, *'Kenya demands recall of envoys'* Daily Nation. Nairobi. Thursday May 17,1984 pg 1

embassassador to be expelled from Kenya in 1987. In April the same year, the then Charge d'affaires, Mr. Wanis Ali Messelaty and four other Libyan diplomats were expelled after disclosures in court that they had recruited there former university students to spy for Libya. Kenya had suggested cutting diplomatic ties with the country, which was later closed in a no nonsense note given in December⁴. All these cases went unpunished due to diplomatic immunity.⁵

Kenya expelled two top diplomats in Kampala Brigadier Reuben Musonye and the first secretary Mr. W.L.Ndege following Kenya's accusation of Uganda's and Libya's plot to destabilize the country. Mr. Katungi was accused of "insulting the then Kenyan president, President Moi in a press release while his deputy was accused of issuing a press release with unacceptable and unjustified assault of the integrity of the Kenyan Judiciary and declined to apologize for the same"⁶ These cases which warrant arrest and prosecution were not due to Diplomatic Immunity of the concerned parties.

A murder case surrounding the wife of a Tanzanian diplomat was put off after the woman claimed diplomatic immunity. Mrs. Jane Betty Mwaisaje together with accomplices Mr. Mugiza and Mr. Azare were charged with the murder of former diplomat with UNESCO in Nairobi, Mr. Boniface Mwaisaje, whose partly burnt body was recovered in Adams Arcade in November

⁴ Chris Musyoka & Irungu Ndirangu, Kenya expels Uganda envoy, Daily Nation. Nairobi. Saturday, December 19, 1987 pg 1

⁵ Catherine Gicheru, *'Expelled Libyan leaves'*, Daily Nation. Nairobi. Tuesday, December 8, 1987 pg 1 & 2

⁶ Chris Musyoka & Irungu Ndirangu, Kenya expels Uganda envoy, Daily Nation. Nairobi. Saturday, December 19, 1987 pg 1

1986. The court advised that the woman, by virtue of her status of the diplomat's wife, "automatically fell under that immunity or otherwise".⁷

In 1990, Kenya cut diplomatic ties with Norway on charges of the government of Norway had demonstrated beyond reasonable doubt that they had been an accessory to illegal activities of those Kenyan fugitives bent on undermining the stability of the country and its constitutionally elected government, especially pointing out a case of Koigi wa Wamwere, a former legislator who had reportedly sneaked back into the country illegally. This was done on a basis of respect for the territorial integrity, people and government of each country that diplomatic relations were established. The relations with Norway breached that.⁸

The government of Kenya deported the Rwandan diplomat at the centre of a row between the country and Rwanda. The deportation follows the refusal by the Rwandan authorities to waive Mr. Francis Mugabo's diplomatic immunity as demanded by Kenyan officials who wanted to charge him with attempted murder, after being involved in a shooting incident. Mr. Mugabo was reportedly arrested at the scene of an attack on former Rwandan Interior Minister Seth Sendashonga on February 26, in possession of a pistol, a silencer and ammunition. He is the third high ranking Rwanda diplomat to be deported by Kenya in the year 1995-1996. Major Jacques Nziza and the man who succeeded him as Charge d'affaires were sent packing in quick succession within the same period for various offences. Mr. Sendashonga, a leading Hutu dissident in Kenya, was shot in the left arm and his nephew critically wounded by gunmen.⁹

⁷ Nation reporter, '*Murder case is put off*' Daily Nation. Nairobi. Tuesday, September 12, 1989 pg 3.

⁸ Muthui Mwai, Kenya cuts diplomatic ties with Norway', Daily Nation. Nairobi. Tuesday, October 23, 1990 pg 1-2.

⁹ Muthui Mwai, '*Arrested Rwandan diplomat deported*' Sunday Nation. Nairobi. Sunday, June 23, 1996. Pg 1 & 2

The capture of the Kurdish guerrilla leader Abdullah Ocalan seemed to spark the greatest of cases regarding abuse of diplomatic privileges and immunities, causing all the Kenya's 34 embassies in the world to be closed until the security situation improved.¹⁰

The Greek Ambassador to Kenya, Mr. George Costoulas had sheltered Mr. Ocalan for 2 weeks before the Kenyan authorities "uncovered firm evidence that he was in the country and ordered him out".¹¹ Mr. Costoulas had also harbored three other Kurdish women who were being investigated for unprocedural entry into the country and were believed to be allies of the captured separatist leader Abdullah Ocalan.¹² In Kenya, harboring a criminal is against the Kenyan Laws and diplomats are expected to respect the laws and regulations of the country which they are accredited.¹³ However, Article 22 of the Vienna Convention declares that the premises of the mission are inviolable and that the agents of the receiving state, including police, process servers, building safety and health inspectors and fire brigade may not enter such premises without the consent of the Head of the Mission.¹⁴

The Ambassador, Mr. Costoulas was later recalled back to his country, without any prosecution measures taken against him by the host or receiving country, due to the immunity accorded to him. This is an incidence that caused the country multiple security risks, which

¹⁰ Mutegi Njau & Stephen Muiruri, '*Godana closes our embassies*' Daily Nation. Nation. Thursday, February 18, 1999 page 1 col 2

¹¹ Mutegi Njau & Stephen Muiruri, '*Godana closes our embassies*' Daily Nation. Nation. Thursday, February 18, 1999 pg 2

¹² Ken Opalla, '*Recalled Greek envoy flies out*', Daily Nation. Nation. Thursday, February 18, 1999 pg 2

¹³ Vienna Convention on Diplomatic Relations, Article 41

¹⁴ Vienna Convention on Diplomatic Relations, Article 22

caused the closure of all the Kenyan embassies. Greece however formally apologized to Kenya over the rebel's capture in Nairobi.¹⁵

An Eritrean diplomat was in 2009 deported from Kenya for security reasons but sneaked back using another passport. When he was kicked out on August 8th, the government only cited "security reasons", a diplomatic jargon for involvement in activities that undermine the host country. The police went later to court seeking permission to detail the diplomat as they await new deportation orders from the government but with no avail. The then immigration public communication officer, Mr. E Njeru said that he was not aware of the return of the Eritrean. Three other Eritrean diplomats have previously been deported from the country on grounds of security reasons, but no legal action has been seen to be taken so far.¹⁶

Dr Migwe, A Nigerian envoy in 2011 was accused of assaulting his wife Ms Tee Iyi who recorded a statement with the Diplomatic Police Unit in Gigiri after the latter reported the case. Ms Iyi was examined in hospital and police have the medical reports from the hospital where she sought medical attention. Police sources also revealed that her daughter was also injured as she was trying to intervene. Despite all this, the envoy could not be summoned by the police due to diplomatic immunity. The Vienna Convention in Article 31 gives diplomat immunity from Jurisdiction. This derives that a diplomat cannot be brought before the criminal courts of the receiving State for illegal acts or offences committed in that state during his stay, contrary to the rule of law and justice.¹⁷ As seen in the previous chapter, this article does not lay down any procedure as to when or how immunity should be pleaded or established as these issues are left

¹⁵ Ken Opala, *'Greek tells Kenya sorry for Ocalan mess'* Daily Nation. Nairobi. Friday, February 27, 1999, pg 1

¹⁶ Fred Mukinda, *'Deported envoy sneaks back'* Daily Nation. Nation. Wednesday, September 30, 2009 page 55

¹⁷ Vienna Convention on Diplomatic Relations Article 31

to the law of each state. Despite efforts by Federation of Women Lawyers Kenya (FIDA) to have the envoy stripped off immunity and prosecuted in Kenya¹⁸, the Nigerian government recalled the diplomat “as part of its investigation and disciplinary measures. Being a diplomat, Dr Wigwe is not liable to any form of arrest or detention by Kenyan Authorities.¹⁹

In another case, Shelter Afrique boss, who enjoys diplomatic status was accused of assaulting his Financial Director, Karen Kandie. However, Shelter Afrique wrote to the government with an aim of withdrawal of the arrest warrant issued against Allasane Ba, the diplomat as he enjoys all rights and immunities set out in clause 23 of the host country agreement and that the facts reported in the press were one sided and heavily skewed against one of the parties. This is however one of the few cases that has seen justice as it attracted the interest of high government officials like the Prime Minister, Hon. Raila Odinga who asked the Immigration Ministry to have Mr. Ba’s diplomatic immunity stripped or have him face the law for assault.²⁰ The court case is set to continue.

The Venezuelan embassy has been currently in the limelight over a series of misapproprieties. The former Venezuelan ambassador to Kenya, Mr. Gerarto da Silva was earlier this year been accused of sexual impropriety to two staff of the embassy²¹ Before further investigations of the truth of the matter of the case that had been filed by the two male colleagues

¹⁸ Briefly, *‘Fida calls for lifting of envoy’s Immunity’* Daily Nation. Nairobi. Friday, May 27th, 2011 page 32

¹⁹ Nation correspondent, *‘Nigeria recalls diplomat over wife-beating allegations’* Daily Nation. Nairobi. Wednesday, June 1, 2011 pg 4.

²⁰ Nation correspondent, *‘Embassy staff cry foul over dismissal’* Daily Nation. Nairobi. Monday, July 23, 2012 page 9.

²¹ Nation correspondent, *‘Embassy staff cry foul over dismissal’* Daily Nation. Nairobi. Monday, July 23, 2012 page 6

as the embassy on April 23rd 2012, the ambassador was recalled back and another ambassador appointed to come and fill the vacant post. Justice had not been served.

On arrival of the next ambassador Ms Olga Fonseca, staff at the embassy filed a complaint that Ms Olga had forcefully tried to make the staff apologize and document that they had fabricated lies about her predecessor, Mr. Silva. Further to this, the employees who filed the complaint were evicted from the premises of the embassy by Ms Olga.²²

The late Ms Fonseca was weeks later found dead in her embassy residence in Runda. This follows claims that she was strangled after stumbling upon a cocaine smuggling ring as claimed by newspapers and blogs.²³ She is alleged to have discovered that officials were smuggling drugs in diplomatic pouches from Caracas, the Venezuelan capital. Local dailies in Venezuela had earlier reported that the ministry was likely to be a home for trafficking narcotics internationally in the pouches that are immune to inspection, search and seizure under the laws of International Diplomacy. "It is estimated that over 200 tonnes of the drug are smuggled through Venezuela per year. This is a clear abuse of diplomatic immunities and privileges especially pertaining the diplomatic bag and couriers as indicated In the Vienna Convention in Article 27.

3.3 Loopholes in the Vienna Convention

The Vienna Convention on Diplomatic Relations may sometimes not be clear on particular issues hence leave room for incidences that cannot be clear cut as to where they stand. For example In the Ndung'u commission, while not sparing citizens in the report for the land

²² Angira Zadock, '*Venezuelan embassy linked to drugs*' Daily Nation. Nairobi. Monday, August 13, 2012 page 6

²³ Zadok Angira & Oliver Mathenge, '*Four arrested over envoy's murder*' Daily Nation. Nairobi. Saturday, July 28, 2012 page 1, 10.

grabbing, it has been forced to tread very carefully in cases of land grabbing by diplomats despite the fact that diplomats are expected to respect the laws and regulations of the country they are accredited to.²⁴

Diplomats enjoy the highest degree of privileges and immunities. They enjoy complete immunity from criminal prosecution and, with certain exceptions, civil suit. They cannot for example, be compelled to testify or provide evidence as witnesses, even in their own cases.

It should be understood that diplomatic immunity is not a license for misconduct nor is it a license either for avoiding litigation. It is however true that diplomats routinely break minor to major laws that should surmount to civil or criminal justice which go unpunished more often than not but the only recourse that a receiving state is left with is either to declare the envoy *persona non grata*, as the sending state to recall the envoy or incase the sending state refuses to waive immunity for justice to take place.

A good example is that of the Burundi embassy, the incoming ambassador still found the outgoing one occupying the residence. The incoming was therefore forced to park in a hotel awaiting for the departure of the former ambassador.

Article 39(2) of the Vienna Convention states 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 on expiry of a reasonable period in which to do so, but shall subsist until that time, even in 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

²⁴ Vienna Convention, Article 41

mission, immunity shall continue to subsist.”²⁵ This article does not give the limit for period of immunity.

The Restatement also takes the position that a diplomat should have absolute immunity from criminal jurisdiction for official acts, but should not have such luxury with regard to unofficial acts once his accreditation has been terminated. Barker states that this interpretation of Article 39(2) is within the ambit of customary international law and more importantly, the Vienna Convention.²⁶

The first sentence of Article 39(2) states that all privileges and immunities will cease when the diplomat departs or after he has had a reasonable time in which to depart, but will continue until that time. In the second sentence an exception is formed with the use of the word “however”. This impresses that the acts performed during the exercise of his function will remain immune.²⁷ Donoghue believes that this exception qualifies the basic proposition of the first sentence, in that immunity ends when the assignment ends but immunity for official acts never ends.²⁸

3.4 Conclusion

All the above cases clearly exhibit the carelessness or casualness with which cases of Diplomatic abuse are handled. These cases are rarely prosecuted and mostly let to slip under the carpet while innocent citizens watch helplessly.

²⁵ Vienna Convention, Article 32

²⁶ Barker, *'Abuse of Diplomatic Privileges and Immunities'* (1996) page 160.

²⁷ Donoghue “Perpetual Immunity for Former Diplomats? A Response to “The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?” (1988-1989) 27 *Columbia Journal of Transnational Law* Page 623.

²⁸ *Ibid*

Most of the cases that happen on a daily basis are reported to the embassy and tackled under “Private and confidential” tags that make it impossible for the citizens to be ware or catch a glimpse of the same. The media only brings to the limelight the few cases they are able to cover. The ends of these cases are however most of the time unfinished or mysteriously dismissed from our legal offices.

3.5.2 CONCLUSION & ANALYSIS OF THE RESPONSES

Abuse of Diplomatic Abuse and Privileges in Kenya can be summarized as follows;

	IMMUNITIES	PRIVILEGES
Number of cases a month	5	6
Nature of mostly abused class of immunity & Privilege	Civil as opposed to criminal	Civil as opposed to criminal
Frequency of prosecution for offences	low	low
Leading embassy in abuse	Saudi Arabia	Saudi Arabia
Vienna convention measures effectiveness	Low	Low
Support of VCDR amendment	Yes	Yes

CHAPTER 4

4. LEGISLATION AND RESPONSE TO ABUSES OF DIPLOMATIC IMMUNITIES IN KENYA

4.1. Introduction

Diplomats have frequently been a cause of public criticism and misunderstanding, especially with regard to invoking their immunity to protect themselves for acts which, if committed by ordinary citizens, would result in criminal prosecution.¹ Throughout history, Governments have recognized and applied the international law of diplomatic immunity to diplomats in their country and have sought reciprocal treatment for their own agents in foreign nations. The primary reason for this recognition was stated by the 1906 US Secretary of State Elihu Root:

“There are many and various reasons why diplomatic agents...should be exempt from the operation of the municipal law at this country. The first and fundamental reason...diplomatic officers are universally exempt by well recognized usage incorporated into the Common Law of nations...The reason of the immunity ...is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of duty in the person of a governmental agent or representative. If such an agent be offensive and his conduct is unacceptable...it is proper to request his recall; if the request be not honored he may be...escorted to the boundary and thus removed

¹ Barnes “*Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice*” (1960) 43 *Department State Bulletin* 173.

from the country.”²

The question of whether diplomats should be fully immune from criminal prosecution, no matter what the alleged crime, is not new.³ As a matter of international and domestic law, the source of the immunity and its extent is quite clear. But with each new offence that occurs, the public debate over diplomatic immunity rears its head again.⁴

The world of sovereign nations requires almost complete respect and there needs to be a strict distinction between municipal and international affairs. With regard to municipal affairs the rule of law and constitutionalism prevail, while under international affairs the equality of sovereign states is paramount.⁵ The rule that the State controls the international protection of individuals is often confirmed by municipal law by granting of diplomatic immunity.⁶

Kenya does not have a lot of recourse when it comes to dealing with the abuse of diplomatic immunities and privileges. It mainly acts on a reciprocity basis as stipulated by cap 179 of the laws of Kenya under reciprocal treatment which states, “Notwithstanding the foregoing provisions of this Part, the Minister may decline to accord immunities and privileges to, or may withdraw immunities and privileges from, nationals or representatives of any state on the ground that the state is failing to accord corresponding immunities and privileges to citizens or representatives of Kenya.”⁷

² Barnes 43 *Department State Bulletin* (1960) 177.

³ Zaid “*Diplomatic Immunity: To Have or not to Have, that is the Question*” (1998) 4 *ILSA Journal of International & Comparative Law* 623.

⁴ *Ibid.*

⁵ Erasmus and Davidson “*Do South Africans have a Right to Diplomatic Protection*” (2000) 25 *South African Yearbook of International Law* 117.

⁶ Erasmus and Davidson (2000) 25 *South African Yearbook of International Law* 115.

⁷ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Reciprocity stands as the keystone in the construction of diplomatic privilege.⁸ It is the largest contributor to the binding force of international law. Through reciprocity there is a more profitable cooperation and friendly relations usually occur.⁹ Furthermore, it forms a constant and effective sanction for the adherence to the Vienna Convention. Every State is both the receiving and sending State. The basic concept arising out of reciprocity is that in the event that there is failure to accord privileges and immunities to diplomatic missions or its members it would likely to be met by a countermeasure of the other State.¹⁰

Reciprocity has been stated by Southwick to be the “truest sanction” provided by diplomatic law.¹¹ States usually adhere to the law of immunities primarily because of the fear of retaliation. All diplomatic privileges and immunities are extended to representatives of the sending State are on the understanding that such privileges and immunities will be reciprocally accorded to the representatives of the receiving State.¹²

4.2 CAP179: Diplomatic Immunities and Privileges as in Kenyan Law

Kenya, since the Vienna Convention has tried to come up with a clause that addresses the issue of Diplomatic Immunities and privileges in Chapter 179 of the Kenyan Law Report.

⁸ Keaton 17 *'Hastings Constitutional Law Quarterly'* (1989-1990) 575.

⁹ Levi *'Contemporary International Law: A Concise Introduction'* 2ed (1991) 20.

¹⁰ Denza, 'Diplomatic Law' 1

¹¹ Southwick (1988-1989) 15 *Syracuse Journal International Law & Commerce* page 89.

¹² Keaton 17 *'Hastings Constitutional Law Quarterly'* (1989-1990) 575..

4.3 Restriction of Immunities, Privileges and Powers

“If it appears to the Minister that the immunities, privileges or powers accorded to a diplomatic mission or consular post of Kenya in the territory of any state, or to persons connected with that mission or post, are less than those accorded by this Act to the diplomatic mission or consular post of that state, or to the persons connected therewith, the Minister may, by order, withdraw such of the immunities, privileges or powers accorded by this Act from the diplomatic mission or consular post of that state, or from such persons connected therewith, as appears to the Minister to be proper.”¹³ This actually means that the Minister can strip or invest more power to an envoy.

4.4 Evidence

“If in any proceedings a question arises whether or not a person is entitled to the benefit of an immunity or privilege, or to exercise a power, under this Act, a certificate given by the Minister stating any fact relating to that question shall be conclusive evidence of that fact, and any such certificate purporting to be signed by the Minister shall be presumed to have been signed by him until the contrary is proved”.¹⁴ This cap however still leaves a loophole for abuse of Privileges and Immunities as the Minister could easily conspire to install Diplomatic Immunities and Privileges to individuals who do not deserve the same.

4.5 Kenya’s response to cases of Diplomatic Immunities and privileges

Any country only has 3 recourse actions in case of breach of Diplomatic immunities and privileges; to declare the diplomat *persona non grata*, advise sending state to waive immunity

¹³ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

¹⁴ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

for prosecution or break diplomatic relations with the sending state. Kenya has done all the three, as exhibited in the following cases.

Former Foreign Minister, Hon Kalonzo Musyoka said that the statutes in the Vienna Convention should be reviewed to permit host countries to proceed against diplomats who commit crimes in the country of their accreditation. This followed the closing of the Rwandan embassy closure on June 18th 1998 after many long term rows with the Kenyan government. “Statutes cannot be static, they need review, If an envoy comes along and sets your house on fire, will he plead the Vienna Convention?”¹⁵ The protocols of the VCDR expressly bar the arrest or prosecution of an envoy by a host country for whatever mistake. The country may only declare the diplomat *persona no grata* and request his/her government to withdraw him/her within a specific time. In this Rwandan case, (explained in chapter 3), the Rwandan embassy refused to strip immunity on their diplomat accused of attempted murder. This led to break of diplomatic relations.

In the Shelter Afrique case, the Shelter Afrique boss, who enjoys diplomatic status was accused of assaulting his Financial Director, Karen Kandie. However, Shelter Afrique wrote to the government with an aim of withdrawal of the arrest warrant issued against Allasane Ba, the diplomat as he enjoys all rights and immunities set out in clause 23 of the host country agreement and that the facts reported in the press were one sided and heavily skewed against one of the parties. This is however one of the few cases that has seen justice as it attracted the interest of high government officials like the Prime Minister, Hon. Raila Odinga who asked the

¹⁵ The East African, July 1-7, 1996.

Immigration Ministry to have Mr. Ba's diplomatic immunity stripped or have him face the law for assault.¹⁶ The court case is set to continue.

Rwandan diplomats (whose cases have been highlighted in chapter 3), who were charged with various offences, have been declared persona non grata and given notices of 24 hours and some 7 days to leave the country.

¹⁶ Nation Newspaper July 23, 2012 page 9.

CHAPTER 5

CONCLUSIONS

5.1 Introduction

Diplomatic immunity is one of the earliest principles of international law, dating back to antiquity. Its development was due to various social functions and bonds between States. The main bonds ensuring immunity and privileges were religion, culture and language. The Roman ideas and habits of immunity have been firmly established and have formed the basis of modern practices. Immunity was based on natural law making diplomats sacred and, as Alciati said “Time and seasons, come and go, but the Roman system remains in all its splendor and greatness as the ancients said, it is a work of the eternal gods”.¹ By the Middle Ages, immunity for all diplomats existed in most countries, but unlike today they were not immune for acts committed during their mission.

5.2.1 Amendment of the Vienna Convention on Diplomatic Relations

The aim of possibly amending the Vienna Convention was to reduce the scope of diplomatic immunity for criminal conduct, which poses a problem in receiving states. The areas of amendment can be divided into three categories, namely the criminal acts of diplomats, the abuse of the diplomatic bag, and the use of the mission.² With regard to the criminal acts of diplomats, the amendment is intended to limit the criminal immunity of diplomats. To achieve

¹ Frey and Frey ‘*The History of Diplomatic Immunity*’ (1999) 120.

² Farahmand “*Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuse*” (1989-1990) 16 *Journal of Legislation* 102. Alistair Brett proposed the amendments of Articles 22 and 27.

this, there needs to be international agreement on a list of criminal acts that all nations would exempt from the rules of diplomatic immunity, called a universal crime list.³ This list could include any violent behavior against another person, such as murder, assault, battery and one of the most problematic offences, driving while under the influence of intoxicating substances.⁴ Even offences against property, like forcible entry into a premises, vandalism and conversion of property by using of physical violence, could be included in the list. Once a diplomat commits a crime that is on the universal crime list, the receiving state would have jurisdiction to prosecute according to local law. A problem with this type of amendment is that it could lead the receiving state harassing diplomatic guests within its borders. Fabricated charges against diplomats could be made in order to arrest and prosecute diplomats, or expel unwanted representatives entering the receiving state's borders, thus gaining leverage over the sending state.⁵ However, it could be argued that reciprocity should provide a means to restrict this type of harassment. Hopefully, all states have a common interest in interaction that would keep the tit-for-tat reprisals at bay.⁶

The diplomatic bag has been a controversial topic for many decades. The amendment should firstly limit the diplomatic bag to a standard size, which should be large enough to allow diplomats to carry their confidential and official documents without interference from the

³ Farahmand (1989-1990) 16'' *Journal of Legislation* '103 and Wright "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts" (1987) 5 *Boston University of International Law Journal* 184.

⁴ *Ibid.*

⁵ Parkhill "Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communication" (1997-1998) 21 *Hastings International & Comparative Law Review* 588.

⁶ Parkhill (1997-1998) 21 '*Hastings International & Comparative Law Review*' 589.

receiving state.⁷ Before bringing bigger bags containing embassy equipment or similar items, special arrangements with the receiving state should be made. Furthermore, the amendment would allow for electronic scanning, discreet examination by equipment or the use of specially trained dogs.⁸ If the receiving state has strong suspicions concerning the contents of the bag, they should be able to request that the bag be searched in the presence of an official representative of the sending state. If there is a diplomat who abuses the use of the diplomatic bag, the receiving state should have jurisdiction to prosecute the diplomat to the full extent of the law.⁹

Original drafters of the Vienna Convention felt that the inviolability of the mission had to be absolute to prevent abuses by the receiving state.¹⁰ However, the increasing use of embassy premises for terrorist acts and different forms of espionage has led to suggestions of amending Article 22.¹¹ Ward has suggested that there is a need to re-evaluate the receiving state's domestic procedure and amend the Vienna Convention to restrict immunity for espionage.¹² However, this is not possible on its own. This could be solved through bilateral agreements. Brett has suggested a further amendment to give power to the ICJ to suspend from the UN any State that does not comply with the Vienna Convention.¹³ A

⁷ Farahmand (1989-1990) 16 *Journal of Legislation*. '103 and McClanahan *Diplomatic Immunity* '182-183.

⁸ Farahmand (1989-1990) 16 *Journal of Legislation* '104.

⁹ Ibid, Chapter 7 of Barker *Abuse of Diplomatic Privileges and Immunities* '220. See further Farhangi *Insuring Against Abuse of Diplomatic Immunity*" (1985-1986) 38 *Stanford Law Review* 1536.

¹⁰ Farahmand (1989-1990) 16 *Journal of Legislation* '104.

¹¹ Ward *"Espionage and the Forfeiture of Diplomatic Immunity"* (1997) 11 *International Lawyer* 667.

¹² Ibid

¹³ Farhangi (1985-1986) 38 *Stanford Law Review* '1536.

necessary amendment in the Article is to allow the mission to be searched when the alleged crime concerned is a crime on the universal crime list.

However, in order for the receiving State to enter the mission premises, it must show reasonable cause as to the questionable conduct within the embassy.¹⁴ The Vienna Convention contains no provision for its amendment; however, Article 39 of the Vienna Convention on the Law of Treaties¹⁵ creates as a general rule that treaties may be amended by agreement by the parties. In order for the amendments to be valid and effective, all signatory nations to the Vienna Convention must unite and agree to the amendments.¹⁶ It may be extremely difficult to amend the Vienna Convention from a logistic perspective, but in the event that the interests of the various States are aligned it should not prove impossible, even in circumstances of the super-powers' general reluctance to agree on any amendments to the Vienna Convention.¹⁷

5.2.2 Use of the Functional Necessity Theory

Barker believes that privileges and immunities are founded primarily on a functional foundation; however, the privileges and immunities are inextricably linked to the representative character of the state, i.e. the use of the personal representative theory.¹⁸ In other words, the extent of the privileges and immunities granted to diplomatic agents who are

¹⁴ Farahmand (1989-1990) 16 *Journal of Legislation* 104.

¹⁵ Vienna Convention on the Law of Treaties 23 May 1969, 455 U.N.T.S. 331 (1980) [hereinafter referred to as Law of Treaties Convention].

¹⁶ Farahmand (1989-1990) 16 *Journal of Legislation* 102 and Wallace *International Law* 242-243.

¹⁷ *Ibid* and Davidson *et al* "Treatise, Extradition and Diplomatic Immunity: Some Recent Developments" (1986) 35 *International & Comparative Law Quarterly* 433.

¹⁸ Barker *Abuse of Diplomatic Privileges and Immunities* 190 and Hickey Jnr and Fisch "The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States" (1989-1990) 41 *Hastings Law Journal* 358.

representatives of the receiving states must be limited to those same privileges and immunities which are granted to the sending state, unless they can be justified with the use of the functional necessity theory.¹⁹ Furthermore, the privileges and immunities of diplomatic agents are made possible through the principles of sovereignty, independence, equality and dignity.²⁰ Although it may be argued that all theories are intertwined into diplomatic immunity, functional necessity is the dominant theory.²¹ The preamble of the Vienna Convention shows intent for the use of the functional necessity theory as a basis. However, it also deviates from this theory significantly by stating diplomatic immunity in terms of individuals instead of in terms of their conduct, as dictated by the theory.²² The result is that diplomats' and their families' unlawful actions, violent or not, are universally shielded by immunity.²³ Drafters and signatories of the Vienna Convention lost sight of the true basis of the theory; namely, that it is the efficient functioning of the process and not the agent.²⁴

The use of this theory allows for the uninterrupted, efficient functioning of diplomats. Their purpose is to promote international discourse, which is essential for peace; a noble goal.²⁵ The need to ensure the freedom and independence of the diplomatic agent was and still is

¹⁹ Barker 'Abuse of Diplomatic Privileges and Immunities' (1996) 190

²⁰ Barker 'Abuse of Diplomatic Privileges and Immunities' (1996) 195-196.

²¹ Wright (1987) 5 'Boston University International Law Journal' 203.

²² McClanahan 'Diplomatic Immunity' 176.

²³ Wright (1987) 5 'Boston University International Law Journal' 203 and McClanahan 'Diplomatic Immunity' 176.

²⁴ Barker 'Abuse of Diplomatic Privileges and Immunities' 225

²⁵ O'Neil "A new regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978" (1979-1980) 54, Tulane Law Review 667.

a priority for those who formulated the Vienna Convention. Thus the fundamental justification for granting exemptions from local law is to limit interference with the diplomatic mission and to ensure its independence.²⁶ The argument that family members also perform official functions is weak and the reason behind the granting of privileges and immunities is to secure the independence and freedom of the diplomatic agent.²⁷

It has been stated that legal actions against the diplomat would cause disruptions in the diplomatic process. His status and stance as an international spokesperson for his country would be affected when prosecuted for a crime.²⁸ The diplomat's attention would be diverted from his political duties, to trying to defend himself and his family. Lines of communication between the countries would be affected and the entire process of international dealings would be at risk.²⁹

Diplomatic immunity aims to avoid such problems and further decrease any reprisal, by promoting an orderly and responsible manner of conducting international affairs.³⁰ This concept gives rise to the belief that in order to function efficiently the diplomat must engage in criminal offences that harm or violate the citizens of the receiving State.³¹ It hardly makes any sense that the Vienna Convention allows for the bringing of civil suits in certain

²⁶ Barker 'Abuse of Diplomatic Privileges and Immunities' 225 and Southwick "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms" (1988-1989) 15 *Syracuse Journal of International Law & Commerce* 88.

²⁷ Barker 'Abuse of Diplomatic Privileges and Immunities' 225.

²⁸ O'Neil (1979-1980) 54 *Tulane Law Review* 668.

²⁹ O'Neil (1979-1980) 54 *Tulane Law Review* 668. Refer to Vattel in Barker 'Abuse of Diplomatic Privileges and Immunities' 224 and cases *Republica v De Longchamps* (1784) 1 Dallas 111, '*The Schooner Exchange v McFaddon* (1812) 7 Cranch 116 and *Hellenic Lines Ltd v Moore* 345 F.2d 978 (D.C.Cir.1965).

³⁰ O'Neil (1979-1980) 54 '*Tulane Law Review*' 669.

³¹ O'Neil (1979-1980) 54 '*Tulane Law Review*' 669-670.

circumstances and not the prosecution of criminal acts, which could cause a bigger international problem between states. It is argued by O'Neil and Barker that bringing a civil suit does not harass a diplomat or affect the process of his functions, because the plaintiff has no personal influence on the diplomatic process, while prosecution could affect diplomatic relations between states, whether it was intended or not.³² This point of view cannot be accepted in its entirety. It can be argued that in both civil suits and criminal prosecutions, the plaintiff and complainant are not harassing the diplomat but seeking justice for the harm suffered.

There are three reasons for relying on this theory. First, a diplomatic agent should be free to perform the duties of his State. This has two aspects, the degree of immunity given and the immunity necessary for the performance of his diplomatic function.³³ Second, it permits the diplomat to perform bona fide functions in complete freedom and independence. However, would this theory still be valid if he committed crimes? And lastly, limiting diplomats' immunity to official functions has the effect of repudiating diplomatic immunity.³⁴ These categories were formulated in the 1930s. Times have changed since then and although the first and last category, with reference to service and domestic staff, still apply today, there are diplomats who do not perform bona fide functions.³⁵ Furthermore, the last category might promote the maintenance of the receiving state's internal public safety but at the cost of

³² Barker '*Abuse of Diplomatic Privileges and Immunities*' 226-227 and O'Neil (1979-1980) 54 '*Tulane Law Review*' 671.

³³ Ogdon '*Juridical Basis of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law*' (1936) 176 -181. Refer to Barker '*Abuse of Diplomatic Privileges and Immunities*' 222.

³⁴ Ogdon '*Juridical Basis of Diplomatic*' 176 -181. Refer to Barker '*Abuse of Diplomatic Privileges and Immunities*' 222-223.

³⁵ Barker '*Abuse of Diplomatic Privileges and Immunities*' 223.

stripping away diplomatic immunity, even if it is only for private acts, which does not conform to state or international practice.³⁶ Practice thus indicates the adequacy and reasonableness of immunity measured in what is necessary for the independent performance of the agent. In other words, it serves a useful purpose.³⁷

In case a diplomat engages in activities that go beyond his functions, the only recourse under the Vienna Convention is to request the recall of the diplomat, to declare him person non grata, to request waiver of immunity, and as a last resort to end relations between the receiving and sending states.³⁸ It can be argued that these methods in themselves can affect the diplomatic process, especially ending the diplomatic process between states.³⁹ To answer why countries do not limit privileges and immunities of offenders so they can be dealt with and thus preserve the diplomatic process, the argument is obvious, in that these privileges and immunities are to benefit the diplomatic process and not the individual, and committing crimes and violent acts does not promote friendly relations between states. It has further been mentioned that the immunity granted is for the protection of diplomatic agents and the premises. The question to be asked is whether the protection granted is for violence against diplomats or protection against prosecution.

Regardless of the differences between the reasons for immunity, it has been accepted that the functional theory is important in order to avoid war and injury. Vattel said that it is a "necessary instrument" in order to accomplish their objectives and perform their duties safely,

³⁶ Ibid

³⁷ Ibid

³⁸ Barker 'Abuse of Diplomatic Privileges and Immunities' 228

³⁹ Ibid

freely, faithfully and successfully.⁴⁰ This necessity has led States to be willing to accept limitations of jurisdiction upon their own territory, which has been done for many decades: this is the reason diplomatic immunity has been sanctified by usage.

5.2.3 Bilateral Treaties

Treaties fulfil a broad range of functions in international law and cover a variety of subject matters. A treaty can be defined as “an international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.⁴¹ They range from bilateral treaties whereby two States secure reciprocal rights and obligations to multilateral treaties, which act as legislation in the international system.⁴² Bilateral treaties can help with the expanding of the Vienna Convention. The Law of Treaties Convention is a multilateral treaty of a blend of codification and progressive development that guides States on the law of treaties.⁴³ It is interesting to note that although a State is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts that would defeat the object and purpose of such a treaty until it has made it clear that its intention is not to be bound by the treaty.⁴⁴

Article 2 of the Convention allows for agreements whereby two or more States can seek to establish a relationship amongst themselves governed by international law, and as long as it is

⁴⁰ Ogdon ‘*Juridical Basis of Diplomatic Immunity*’ 170-171.

⁴¹ Article 2(1)(a)

⁴² Davidson ‘*Law of Treaties*’ (2004) xi.

⁴³ Dugard ‘*International Law*’ 328 and Shearer Starke’s *International Law*’ 11ed (1994) 397.

⁴⁴ Ibid

agreed upon, there will be a legal relationship.⁴⁵ A treaty is the main instrument the international community possesses for the purpose of developing international cooperation, as contracts, leases and settlements govern national law. The object of treaties is to impose binding obligations on the States who are parties to them.⁴⁶

It should be borne in mind that a series of treaties laying down a similar rule may produce a principle of customary international law to the same effect.⁴⁷ Treaties include diplomatic acts, state laws, state juridical decisions, and the practice of international organs. An example is bilateral extradition treaties concluded during the 19th century, from which general rules have emerged, such as that persons accused or convicted of political offences are not extraditable. Another example is bilateral agreements between States with regard to consular privileges and immunities.⁴⁸ In addition, a rule in a treaty originally concluded between a limited number of parties only may be generalized by independent acceptance.⁴⁹ Lastly, a treaty may hold significant evidentiary value as to the existence of a rule, which has law by an independent process of development.⁵⁰ So, if many States start to conclude treaties that are similar to one another, perhaps combining all of the treaties into a multilateral treaty would be advisable.

The concept of “bilateralisation of multilateral conventions” is a novel one, where the general rules of a multilateral convention are formed into bilateral agreements confirming or

⁴⁵ Shearer *International Law* 397.

⁴⁶ Shearer *International Law* 399.

⁴⁷ Shearer *International Law* 40.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

amplifying the rules of the Convention.⁵¹ Both the Vienna Convention and the Consular Convention contain provisions that permit states to conclude agreements between themselves to supplement, extend or limit provisions in the Conventions.⁵² This means that both Conventions have established a set of minimum standards for the treatment of diplomatic and consular personnel. Thus, States are free to enter into other agreements. By using this approach and executing agreements between themselves, those who fear diplomatic persecution can continue using the articles in the Vienna Convention, but more importantly, functional necessity will blossom into a rule of customary international law, whereby all States will be bound to respect agreements and functional immunity.⁵³ It must be noted that any bilateral agreements entered into by States will supersede the Articles stated in the Vienna Convention. Furthermore, the treaty remains the best, most versatile means to regulate the conduct of States.⁵⁴ Therefore, a receiving and a sending State can enter into a bilateral treaty stating terms as to when automatic waiver can take place or whether a diplomat, staff and their families can be prosecuted. There have been no disagreements among the international community members on the use of bilateral treaties with regard to consular immunities.

⁵¹ Shearer' *International Law* ' 56 at footnote 6.

⁵² Parkhill (1997-1998) 21 *'Hastings International & Comparative Law Review'* 576. Refer to Article 47(2)(b) of the Vienna Convention and Article 73(2) of the Consular Convention.

⁵³ Maginnis "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations" (2002-2003) 28 *Brooklyn Journal of International Law* 1022.

⁵⁴ Davidson *Law of Treaties* xi. Treaties have been described as the "cement that holds the world community together".

5.2.4 Proposal for a Permanent International Diplomatic Criminal Court

The proposal for a Permanent International Diplomatic Criminal Court foresaw a court with compulsory jurisdiction over alleged criminal acts committed by individual diplomats. It would provide an acceptable means of adjudicating offences arising under the scope of diplomatic immunity.⁵⁵ It would be formed through an amendment to the Vienna Convention allowing its creation. The court would have the power to impose fines and imprison diplomats. With the adoption of the Court, through a staff of attorneys attached to the Court to play both prosecutor and accused, the likelihood of the receiving State obstructing discovery is diminished.⁵⁶ The Court's members would consist of legal experts from States party to the amendment and will be selected in a manner that avoids geographical or cultural bias.⁵⁷ Furthermore, members would not sit on any case involving suspects with whom the members share citizenship, and likewise with members of the offended State. A staff of investigators attached to the Court would conduct discovery of evidence, thereby reducing any conflict between the sending and receiving States.⁵⁸

In addition, the Court would be responsible for the administration of its own penal facilities.⁵⁹ This means that the Court will have the discretion to impose monetary fines as sentences. Each State would be obliged to create and replenish individual accounts. Judgments

⁵⁵ Wright (1987) 5 *Boston University International Law Journal* '185.

⁵⁶ Wright (1987) 5 *Boston University International Law Journal* '186.

⁵⁷ Ibid

⁵⁸ Wright (1987) 5 *Boston University International Law Journal* 186 and Ross (1989) 4 *American University Journal of International Law & Policy* '195.

⁵⁹ Barker *Abuse of Diplomatic Privileges and Immunities* 153 and Goodman "Reciprocity as a Means of Curtailing Diplomatic Immunity Abuse in the United States: The United States Needs to Play Hardball" (1988-1989) 11 *Houston Journal of International Law* 195.

would then be executed against the defendant's State account and transferred into the victim's State account.⁶⁰ The Court would also possess the power to imprison diplomats. Threat of imprisonment generally deters criminal acts.⁶¹ The Court would administer and own its own system of penal facilities, which would be accorded international organization status similar to that of UN agencies.⁶² The initial arrest of a diplomat would be made by the police force in the receiving State under the watchful eye of an impartial third State. This would further ensure that the receiving State does not abuse its privilege to enter the embassy while being inviolable. Custody of the accused diplomat would be given to officials of the Court's penal system as soon as possible.⁶³ Rules of discovery, procedure and evidence would be formed before the start of the Court operation using common regulations between the various States' civil and penal codes. The Anglo-American concept of "beyond a reasonable doubt" would be adopted as the standard onus of proof, to ensure a fair inquisitorial procedure.⁶⁴ The advantages of such a Court are twofold. Firstly, the Court would operate free from potential bias of local proceedings and secondly, the use of a court outside of a bilateral agreement excludes the possible termination of diplomatic relations between the two nations in extreme cases.⁶⁵ While this notion seems like an attractive option, it has been considered to be unworkable, as a result of the difficulty of obtaining evidence and ensuring the securing of witnesses and costs. More importantly, it

⁶⁰ Wright(1987) 5 '*Boston University International Law Journal*' 187.

⁶¹ Ibid

⁶² Wright (1987) 5 '*Boston University International Law Journal*' 187-188.

⁶³ Wright (1987) 5 '*Boston University International Law Journal*' 188.

⁶⁴ Wright (1987) 5 '*Boston University International Law Journal*' 186, at footnote 54

⁶⁵ Goodman (1988-1989) 11 '*Houston Journal of International Law* 195-196 and Ross (1989) 4 '*American University Journal of International Law & Policy*' 195.

would undermine the rationale of diplomatic privileges and immunities.⁶⁶ A practical difficulty relates to the method of bringing a case before the court. The Court would initiate process against an individual diplomat only upon receipt of a complaint from the receiving State, which would be required to be filed simultaneously with the arrest of the individual.⁶⁷ This means that the officials of the receiving State must make an arrest, and by doing so, it would constitute a clear infringement of the inviolability of the person of the diplomatic agent.⁶⁸

Finally, the Permanent International Diplomatic Criminal Court would only be a court with criminal jurisdiction, thus ignoring the aspect of civil and administrative law abuses.⁶⁹ A further problem with this proposal is that even though there is an element of deterrence present in prosecuting diplomats who commit crimes, there are instances when this form of deterrence will not succeed, especially when a diplomat is so intent on carrying out a violent crime that he is willing to sacrifice his own life.⁷⁰

Another problem is with reference to the accounts.⁷¹ It is a good idea to have such a system in place, but having a State that does not cooperate by paying money into the accounts could result in whichever State pays more money controlling the Court. Further, who or what would be the watchdog over the Court and review its rulings, and would it be free to decide on everything? Where will the penal facility be

⁶⁶ Barker 'Abuse of Diplomatic Privileges and Immunities' 155.

⁶⁷ Barker 'Abuse of Diplomatic Privileges and Immunities' 154.

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Wright (1987) 5 'Boston University International Law Journal' 189.

⁷¹ Ibid

situated and with what system? All these questions could pose major problems.⁷² Another problem with this Court relates to what and whose substantive law would apply.⁷³ For instance, a crime committed in the US might not be a crime in Kenya. A single body of international law would be reasonable but not possible or practical. The same standard of proof and punishment would have to be given to all diplomats committing crimes.⁷⁴

It has been suggested that the International Criminal Court (ICC) should have jurisdiction over diplomatic criminal jurisdiction and not be limited to genocide, crimes against humanity and serious violations of the laws and customs applicable to armed conflict. However, the problem with this suggestion is that the ICC deals with large-scale conflicts and acts, rather than acts committed by diplomats.⁷⁵ Wirth states that the practice of granting immunity is necessary to ensure the maintenance of international peace. He further asserts that they should even be granted immunity against "core crime prosecution" unless waived.⁷⁶ Thus, the court cannot be successful if no evidence can be used in court or the diplomat cannot be brought before court. The ICC will then be viewed as 'a giant without arms and legs' and hence not effective.⁷⁷

In order to predict the success of the Permanent International Diplomatic Criminal Court, the

⁷² See Shapiro "Foreign Relations Law: Modern Developments in Diplomatic Immunity" (1989) *Annual Survey of American Law* 297.

⁷³ Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 593.

⁷⁴ Ibid

⁷⁵ Parkhill (1997-1998) 21 *Hastings International & Comparative Law Review* 593 and Bekou and Cryer *The International Criminal Court* (2004) xvi.

⁷⁶ Article 98 of the *Rome Statute*" O Bekou and R Cryer (ed) *The International Criminal Court* (2004) 348.

⁷⁷ Bekou and Cryer *International Criminal Court* xviii.

success of the ICJ should be considered. The enforcement mechanisms for ICJ decisions are important in considering compliance with ICJ decisions. The availability of effective enforcement mechanisms will generally be a circumstance inducing compliance and in international law, adjudication is frequently described as weak for its lack of enforcement mechanisms.⁷⁸ The ICJ has a special role to play in unifying the international legal system, yet budgetary constraints by the UN have weakened the ICJ.⁷⁹ There have been several instances of non-compliance with ICJ judgments and as a result of the superiority of the court it has little to say on the success of the proposed Diplomatic Court.

For the last two decades, a variety of tribunals and courts have come into existence in order to deal with various international problems. With so many courts and tribunals available, some problems have arisen. One problem is that there are inevitably different outcomes in different forums.⁸⁰ The very essence of law is that like cases must be treated alike and, should there be too many courts, the legitimacy of international law could be at risk. Furthermore, it could lead to overlapping jurisdiction. With the formation of the Permanent International Diplomatic Criminal Court there will be two courts having jurisdiction to resolve diplomatic disputes.⁸¹ The range of problems arising from this is large

⁷⁸ Schulte' *Compliance with Decisions of the International Court of Justice* (2004) 36-37.

⁷⁹ Charney "The Impact of the International Legal System of the Growth of International Courts and Tribunals" (1998-1999) 31 *New York University Journal of International Law & Politics* 703 and Kingsbury "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1998-1999) 31 *New York University Journal of International Law & Politics* 693.

⁸⁰ Kingsbury (1998-1999) 31 'New York University Journal of International Law & Politics' 682.

⁸¹ Kingsbury (1998-1999) 31 'New York University Journal of International Law & Politics.' 683.

and somewhat chaotic and thus could lead to injustice.⁸² Another problem is that the connection between international courts and tribunals and national law and their institutions will be affected, which in turn will impact on State sovereignty and divide nations even further.⁸³ A strength of having many international courts or tribunals is that it allows for a degree of experimentation and exploration, which in turn could lead to the improvement of international law.⁸⁴

5.3. Reflections

In the attempt to combat diplomatic abuses there have been attempts by legal scholars and legislators to solve the problem; however, it has been stated that much of the discussion is purely academic.⁸⁵ For instance, if the Vienna Convention is amended, it could limit criminal jurisdiction as it does civil jurisdiction. It can further limit immunity to official acts only and gives the power to the court to decide what an official function is and what it is not. If it can be decided in normal vicarious liability suits, then why not in diplomatic cases? It is a well-established concept that immunity is not for the personal benefit of the individual, but for the efficient function. Diplomatic bags can be limited to standard sizes and even a list of items can be presented of what may be imported in a bag. There should be no difficulty in limiting immunity. In order to solve the problem of

⁸² Kingsbury (1998-1999) 31 *'New York University Journal of International Law & Politics'* 683 and 685.

⁸³ Kingsbury (1998-1999) 31 *'New York University Journal of International Law & Politics'* 694-695.

⁸⁴ Charney (1998-1999) 31 *'New York University Journal of International Law & Politics'* 700.

⁸⁵ Keaton "Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?" (1989-1990) 17 *'Hastings Constitutional Law Quarterly'* 569.

abuse, the international community must weigh the safety of diplomats against the desire to hold offending diplomats, staff and families responsible for their criminal acts. Once this has been done, a final decision must be made and adhered to. However, amending the Vienna Convention would be difficult, primarily because assembling all signatories would be daunting, which does not seem a good enough reason. If abuse of diplomatic immunity is a big problem as it appears to be, then States need to take the leap of amending the Vienna Convention.

Since necessity compelled the recognition of diplomatic immunity, it cannot be seen as a temporary phenomenon. It will always exist, whenever and wherever States wish to communicate with each other. As long as independent States exist, the necessity for diplomatic immunity will continue to exist. Additionally, diplomats have a special position. Some work in extreme conditions and some diplomats, their families and embassies are constant targets terrorism and violent attacks. When incidents like these occur it reinforces the need to hold privileges and immunities and prevent such attacks. Immunity together with reciprocity ensures that various diplomats, staff and their families are protected in the receiving and sending States. The fact that States have continued to recognize such privileges and immunities indicates that their protection and necessity to perform is superior to the national law of the receiving State. However, this should not be the case. Diplomatic immunity rationale is not only based on theoretical dominance, but rather on political motives and courtesy. Thus the functional necessity theory will remain and provides a strong case for the existence of immunity.

The use of bilateral treaties is a safe option for limiting immunities with the consent of both States. The proposal for a Permanent Diplomatic Criminal Court is a solution but also has

many problems. The main issues are bringing a diplomat before the court and enforcing the court's decision. Other international courts and tribunals experience problems with enforcement, which leads to the question of enforceability of this diplomatic court. A further problem is that the Vienna Convention is not a legal system, but merely a set of rules. In all legal systems, legal rules can only be successful in their application, and it could be challenging for the court as to which law, convention, treaty or practice to apply.

Although the statistics indicate that diplomatic crime is not very high, there is no justification for a diplomat, staff and his family to commit any form of crime or be above the law. Not even presidents are above the law, so how can it be justified that the diplomat's status is so privileged? Their criminal behavior cannot be ignored or accepted as part of their official acts. A crime is a crime, whether you are an ordinary citizen, a president or a diplomat. If a diplomat does not obey local laws he is not performing his functions and thus cannot be considered a bona fide diplomat; thus he should be punished like any common criminal. The law on diplomatic immunity is a product of past customary practices, and although past practices cannot be changed, the present statesmen can help determine future practices. Removing the cloak of immunity is not the solution to the problem of abuse. It must be remembered that a State is both a sending and a receiving State. As a sending State it would want its representatives to be protected and have broad privileges and immunities, but as a receiving State it would be more inclined to limit privileges and immunities. There is a need to limit the criminal immunity of diplomats, staff and their families. They should not be above the law and the international community must acknowledge this, decide on the best method of reducing their immunity, take decisive measures and firmly implement them. The international community should take a firm stance against "protected" individuals who flaunt

their rights and civil liberties to those around them. However, realistically, some diplomatic immunity and protection against prosecution for crimes committed will probably remain.

QUESTIONNAIRE TO DIPLOMATIC COMMUNITY

1. How many cases in average do you handle regarding the abuse of diplomatic immunities and privileges?
A) 20 B) 10 C) 40
2. Of what nature are most of these cases? / Which are more recurrent?
A) Civil B) Criminal
3. Are most of these cases prosecuted?
A) Yes B) No
4. What embassy is leading in abuse cases?
5. Does the Vienna Convention provide enough measures to discourage the abuse of immunities and privileges?
6. Would you recommend the amendment of the Vienna Convention?

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