The Administration of Diplomatic Privileges, Immunities and Facilities: A Critical Analysis of Kenya's Practice

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Submitted in partial fulfillment for the award for the degree of Master of Arts in International Studies, in the Institute of Diplomacy and International Studies, University of Nairobi.

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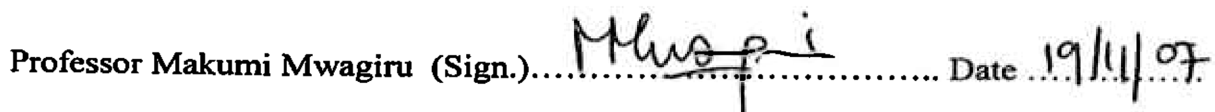
DECLARATION

I declare that this research is my own, unaided work. It is submitted in partial fulfillment for the award for the degree of Master of Arts, Institute of Diplomatic and International Studies,University of Nairobi and has not been submitted before for any degree or study in any University or educational institution.

Michael Kapkiai Kiboino (Sign.)..date 5-11-2007

This Dissertation has been submitted for examination with my approval as a University Supervisor



Professor Makumi Mwagiru (Sign.).. Date 19/11/07

Dedication

To my wife Suzy and our children Jadhili and Wema who through their fervent support walked with me through the challenging, but rewarding and memorable participation at the National Defence College - Kenya.

Acknowledgements

I am greatly indebted to several people and institutions who contributed not only to the successful completion of this work, but also to my participation at the prestigious National Defence College, Kenya. I am grateful to the Ministry of Foreign Affairs for according me the opportunity which also enabled me to pursue a Master's degree programme of the University of Nairobi.

I consider myself privileged to have undertaken this work under the keen supervision of Professor Makumi Mwagiru, the Director of the Institute of Diplomacy and International Studies (IDIS), a renowned authority in the field of diplomatic studies and a stickler of academic excellence. I am thankful for his guidance without which this research would certainly have wandered off its target.

My sincere appreciation also goes to the entire National Defence College fraternity under the stewardship of Lt. Gen J.K. Tuwei, the College Commandant, whose encouragement not only motivated me to keep moving on when things got tough, but also inspired me to focus on solutions. I am especially indebted to my sponsor Maj Gen A Rob for his concern in making sure that this work was completed within the stipulated time frame.

I am grateful to all persons including the Chief of Protocol and his officers, the Police Spokesman, and the Nairobi City Council Engineer who participated in the interviews that immensely enriched this work. My colleague and the then Acting Head of the Legal Division, at the Ministry of Foreign Affairs, Mrs. Juliet Gicheru deserves to be singled out for going an extra mile in this regard. I also appreciate the prayers and encouragement from my loving parents, Bible Study group, Men on Fire, COTH Sunday School teachers, and Lasoi Close Fellowship.

Finally, but very importantly, my heartfelt gratitude goes to my wife suzy and children, Fadhili and Wema for their prayers, unwavering support and understanding through the whole process.

ABSTRACT

This paper analyses Kenya's practice in the administration of diplomatic privileges, immunities and facilities. It examines their theoretical justifications and undertakes a comparative examination of the practice in other countries. Its objective is to establish the extent to which Kenya has succeeded or otherwise in the administration of diplomatic privileges, immunities and facilities.

Using the international society approach as its theoretical framework, the study argues that as members of the international society, states must accord diplomatic missions and diplomatic agents, privileges, immunities and facilities. They must, however, strictly adhere to the functional necessity justification in order to ensure that the rights of citizens are not impinged in the process.

The study establishes that Kenya's administration of diplomatic privileges, immunities, and facilities is faced with a number of challenges chief of which is lack inadequate coordination among the many relevant organs. Thus, the essence of coordination is emphasized. The legal framework is also found wanting in certain aspects especially concerning host country agreements. The courts are found to be conservative in their interpretation of the law. With a few exceptions, they have exhibited a predisposition to avoid entertaining any dispute launched against a diplomatic mission or diplomatic agent in the absence of an express waiver of immunity. The mediation services of the Ministry of Foreign Affairs offer an opportunity for the possibility of striking the elusive balance between diplomatic privileges, immunities and facilities on one hand and the rights of citizens on the other.

ABBREVIATIONS

ACT	National Capital Authority (Australia)
APS	Australian Protective Security (Australia)
CCK	Communications Commission of Kenya (Kenya)
DPPU	Diplomatic Protection Police Unit (Kenya)
DTEP	Diplomatic Tax Exemption Programme (Australia)
GST	Goods and Services Tax (Australia)
HCA	Host Country Agreement (Kenya)
ICJ	International Court of Justice
ICIPE	International Centre of Insect Physiology and Ecology
ILC	International Law Commission
ITCS	Indirect Tax Concession Scheme (Australia)
KRA	Kenya Revenue Authority (Kenya)
LCT	Luxury Car Tax (Australia)
MFA	Ministry of Foreign Affairs (Kenya)
OFM	Office of Foreign Missions (USA)
UN	United Nations
UNGA	United Nations General Assembly
UNON	United Nations Office in Nairobi
VCCR	Vienna Convention on Consular Relations (1963)
VCDR	Vienna Convention on Diplomatic Relations(1961)
VCLT	Vienna Convention on the Law of Treaties
NCC	Nairobi City Council (Kenya)
UNEP	United Nations Environmental Programme
UNON	United Nations Office in Nairobi
VAT	Value Added Tax (Kenya)

STATUTES

1982 Foreign Missions Act (22 USC 4301) (United States of America)

Arbitration Act (Chapter 49) (Kenya)

Communications Commission of Kenya Act of 1998 (Kenya)

Consular Privileges and Immunities Act of 1972 (Australia)

Customs and Excise Act (Chapter 472) (Kenya)

Diplomatic Privileges and Immunities Act of 1967 (Australia)

Diplomatic Privileges and Immunities Act (Chapter 179) (Kenya)

Diplomatic Immunities and Privileges Act, 2001 (South Africa)

Diplomatic and Consular Premises Act 1987 (United Kingdom)

Diplomatic Privileges Act 1964 (United Kingdom)

Firearms Act (Chapter 114) (Kenya)

Foreign States Immunities (the "FS" Act) Australia (Australia)

Foreign Missions and International Organizations Act (Canada)

Kenya Revenue Authority Act (Chapter 469)(Kenya)

Motor Vehicle Purchase Act (Chapter 484) (Kenya)

Non-Governmental Organizations Coordination Act of 1990 (Kenya)

State Immunity Act (Canada)

Rating Act (Chapter 267) (Kenya)

Tariff Act 1921(Australia)

Traffic Act (Chapter 403) (Kenya)

CHAPTER ONE

FRAMEWORK OF THE STUDY

Introduction

When states enjoy diplomatic relations, they are in principle prepared to conduct any necessary business by direct communication through official representatives. Generally, most international relationships of mutual importance in which the states concerned are in diplomatic relations are characterized by the exchange of diplomatic missions.[1] Thus, diplomacy has been broadly defined as the conduct of relations between sovereign states through the medium of officials based at home or abroad, the latter being either members of their states' diplomatic service or temporary diplomats.[2] There can, however, be diplomatic relations without representation and there can likewise be non-resident diplomatic representation.

The establishment of diplomatic relations *inter alia* constitutes a mutual agreement to launch diplomatic missions in each others' territories. Having agreed to the establishment of such missions, the receiving state must take steps to enable the accredited mission to function effectively. Diplomatic privileges, immunities and facilities refer to the special legal position accorded to diplomatic agents by receiving states to enable them to effectively perform their diplomatic function.

In general, a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security. Immunity on the other hand does not afford exemption from substantive law, but confers procedural protection

[1] G R Berridge. *Diplomacy: Theory and Practice,* London. Prentice Hall/Harvester Wheatsheaf. 1995 p 20.
[2] G R Berridge & Alan James. *A Dictionary of Diplomacy*. New York. Palgrave. 2001, p 62.

from its enforcement processes in the receiving state.[3] According to Mwagiru, diplomatic immunities refer to exemptions from criminal, civil and administrative jurisdiction of the receiving State. Diplomatic privileges on the other hand are defined as fiscal exemptions that include exemptions from taxation in the receiving State[4]. Facilities are defined as those courtesies extended to the diplomatic mission to enable it to carry out its functions smoothly.[5]

The premier international instrument providing for diplomatic privileges, immunities and facilities is the 1961 Vienna Convention on Diplomatic Relations (VCDR). However, granting privileges and immunities to diplomatic envoys is an old customary norm of international law. The Convention, which came into force in 1964, *inter alia* codified the customary law on privileges, immunities and facilities and sets out the rights and obligations of the sending and receiving states. The VCDR enjoys virtually a universal participation having attained, by 2004, a membership of 181 states parties. Kenya acceded to it in July 1965 and transformed it into the Privileges and Immunities Act (Chapter 179). The Act, which became effective from 6 April, 1970 consolidates the law on diplomatic and consular relations by giving effect to certain international conventions, the principal of which are the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (VCCR). It also consolidates the law relating to immunities, privileges and capacities of international organizations of which Kenya is a member and of certain other bodies.[6]

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[3] Lord Gore-Booth. (ed). *Satow's Guide to Diplomatic Practice*. (Fifth Edition). London. Longman. 1979 p 120.

[4] Makumi Mwagiru. *Diplomacy: Documents, Methods and Practice*. Nairobi. Institute of Diplomacy and International Studies. 2004.

[5] Ibid.

[6] See the introduction to the Privileges and Immunities Act (Cap 250) of the Laws of Kenya. Rev. 1984.

Kenya now has diplomatic relations with most of the member states of the United Nations. It maintains thirty-five diplomatic missions in other countries and is host to 83 diplomatic missions of other countries and 19 consulates.[7] In addition, the country hosts 46 international organizations including the United Nations Office in Nairobi (UNON), and agencies of the United Nations and other international inter-governmental and non-governmental organizations operating in the country under host country agreements.

Diplomatic privileges, immunities and facilities often generate controversy because of the manner in which they are applied. They often conflict with the rights and freedoms of citizens of the receiving state. Kenyan nationals have on occasion found themselves disadvantaged and prejudiced by diplomatic privileges and immunities because they exclude the diplomat from the jurisdiction of domestic law. Yet as a party to the VCDR and the VCCR, Kenya has a duty to fulfil its treaty obligations by ensuring that the Conventions are implemented to the letter. At the same time, however, the government has, as a matter of national interest, an inherent responsibility to protect the liberties of its subjects. In order to satisfy the diplomatic community on one hand, and nationals on the other, the government must engage in a rather delicate balance between diplomatic privileges and immunities and the interests of its nationals. This implies that the administration of diplomatic privileges and immunities can pose a challenge to any country.

The objective of this study is to critically examine the extent to which Kenya has been successful or otherwise in the administration of diplomatic privileges, immunities and facilities. The study will examine whether and to what extent attempts have been

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[7] See the 2001-2002 Directory of Diplomatic Corp and International Organizations. issued by Protocol Division of the Ministry of Foreign Affairs of Kenya. Nairobi. Government Printer. Nairobi.

made to reconcile and balance these privileges, immunities and facilities with the interests of citizens. In this respect, challenges encountered in their administration will be identified and possible solutions suggested.

Statement of the Research Problem

Diplomatic immunity is an exception to the exercise of domestic jurisdiction. Jurisdiction concerns the competence of the state to affect people, property and circumstances within its territory by its municipal law.[8] The immunities from criminal, civil and administrative jurisdiction granted to diplomatic agents have few exceptions and yet they continue to enter into various types of contracts with natural persons with attendant possibilities for disputes. Notwithstanding, Kenya as a receiving state is obliged to provide certain privileges, immunities and facilities to diplomatic missions, diplomatic agents and international organizations and their internationally recruited personnel. Failure to do so as provided by the VCDR would not only be a violation of international law, but would also invite reciprocity.

The fact that privileges, immunities and facilities have a bearing on the rights of citizens and places certain responsibilities for the host state makes the whole phenomenon rather complex. The state is compelled to put in place appropriate legal and administrative mechanisms to accord these entitlements and is at the same time expected to protect the interests of its own nationals. Receiving states thus have the arduous challenge of seeking to a strike a balance between diplomatic entitlements on one hand and the interest of nationals on the other. In this regard, states have adopted divergent interpretations of the VCDR and established systems of administering them with a view

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[8] Ian Brownlie, *Principles of International Law*, (4th Edition). Oxford. Oxford University Press. 1990. p 291.

to ensuring that they comply with obligations under international law while simultaneously protecting the interests of their nationals.

Bearing this in mind, the research problem of this study is to establish the extent to which Kenya has been successful or otherwise in administrating diplomatic privileges, immunities and facilities. It critically examines the legal and administration measures taken by Kenya in the implementation of the VCDR. It also examines how the rights of the citizen have been taken into account in the administration of diplomatic privileges, immunities and facilities.

Objectives of the Study

The principal objective of this study is to establish the extent to which Kenya has succeeded or otherwise in the administration of privileges, immunities and facilities. In order to achieve this objective, the study will examine the rationale and fundamental principles of diplomatic privileges, immunities and facilities. A critical analysis of legal and administrative measures will also be undertaken with a view to establishing how effective they have been, including whether or not they have taken into account the interests of individual and corporate citizens.

Hypotheses

The study examines the following hypotheses;

1) Kenya has to a great extent been successful in the administration of diplomatic privileges, immunities and facilities;
2) Kenya's administration of diplomatic privileges, immunities and facilities has weak legal and administrative frameworks for the implementation of the VCDR; and,

3) Kenya's courts have not proactively protected the interests of Kenyan nationals in cases involving diplomatic missions and or their agents.

Literature Review

This section will examine some literature drawn from publications including scholarly books and academic journals. It is pointed out that there are currently no academic publications that deal in detail with Kenya's administration of diplomatic privileges, immunities and facilities. The literature reviewed therefore provides general theoretical perspectives and analysis of the VCDR as practiced in other countries.

Diplomatic privileges, immunities and facilities can be examined through the international society approach advanced by such scholars as Wight, Bull, Vincent and Vattel. The international society theory recognizes both states and individuals as members of the international society. The relevance of this theory rests in its emphasis of sovereign equality of states bound by the need to coexist which induces them to be interdependent. The exchange of diplomatic privileges, immunities and facilities is a mark of that interdependence which in turn contributes to coexistence of states possessing legal sovereign equality.

The international society approach, according to Wight[9] arises from the notion that that international relations ought to be understood as a society of sovereign states. Bull, argues that the society of states shows many of the characteristics of a smaller society, even if it is a society of an anarchical kind. [10] In his view, the international society approach curves itself a place between classical realism and classical liberalism

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[9] Robert Jackson & George Sorensen. *Introduction to International Relations Theories and Practices*. Oxford. Oxford University Press. 2003. p 141.

[10] Evan Luard. (Ed). *Basic Texts in International Relations: The Evolution of Ideas About International Society*, New York. St. Martin's Press. 1992. p577.

and views the principal actors in inter-state relations as statespeople who are specialised in the practice of statecraft. Statecraft is considered an important element in human activity which encompasses amongst others, foreign policy, military policy, trade policy, diplomatic communication, negotiations and signing of agreements.[11] The approach thus emphasises philosophy, history and law in international relations analysis. However, some scholars such as Manning predicate the existence of this approach to the practice of international law that emerged from relations among states.[12]

Vattel, a Swiss philosopher, diplomat and legal expert whose theories laid the foundation of modern international law and political philosophy[13] expressed the view that there can exist an international society of states, but which can only be limited and pluralist, constructed around the goal of coexistence and embodying an ethic of difference. This society of states comprises independent and legally equal members of society, coexisting on the basis of freedom to promote their own ends subject to minimal constraints, with the predominant value being the maintenance of order and the preservation of liberty.[14] Thus, according to Vattel, international law is directly focused on the legal regulation of a plurality of independent states and centrally concerned with establishing the conditions for coexistence as in the codification of the law of diplomatic practice or the creation of means of dispute settlement by mediation, conciliation or arbitration.

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[11] Ibid. p 142.

[12] B.A. Robertson. "Probing the Idea and Prospects for International Society" in B.A. Robertson. (Ed). *International Society and Development of International Relations Theory*. New York. Continuum. 2002. p 3.

[13] Emmerich de Vattel found at www.wikipedia.org/wiki/Emmerich_de_Vatel. accessed on 12th April. 2005.

[14] Andrew Hurrel. "Vattel: Pluralism and Its Limits" in Ian Clark and Iver B. Neumann (Eds). *Classical Theories of International Relations*. New York. Palgrave. 1996. p 233.

According to Vattel, the natural law which applies to individuals must necessarily undergo some modifications in order to apply to the society of states. He locates three categories of law. First is the necessary law of nations, being 'pure' natural law as seen within the context of the law of nations. This category cannot be directly enforced in the relations between states. Secondly is the voluntary law of nations, being modified and enforceable law of nature. This category facilitates recognition of states as equal, free and independent of each other. The third category is the arbitrary law of nations which proceeds from the will and consent of nations and which is established either by express engagements, by compact and treaties or by custom to which states have given their tacit consent.[15]

Bull adopts Vattel's three rules with slight modifications. The first rule is what he refers to as fundamental or constitutional normative principles of world politics whereby states arrogate themselves the rights of competence as members of the international society and principal actors in world politics. Secondly are rules made by the members of the international society setting out minimum conditions for their coexistence. They are a complex of rules that prescribe the behaviour appropriate to sustain the goal of carrying out undertakings under the principal of *pacta sunt servanda*. These rules establish the 'equality' of all states in the sense of enjoyment of rights of sovereignty. Third is a complex of rules concerned with regulation of cooperation among states – whether on universal or on a more limited scale above and beyond what is necessary for mere coexistence.[16]

[15] Ibid. pp 236-237

[16] Evan Luard. (Ed). *Basic Texts in International Relations: The Evolution of Ideas About International Society*. New York. St. Martin's Press. 1992. pp 593-596.

Attina names the three fundamental rules as social principles, international law norms, and rules of the game or operational rules. When social principles are formally taken by governments they take the form of norms of international law. A significant contribution by Attina is the recognition of new social principles traditionally regarded as domestic matters such as humanitarian affairs, human rights, and environmental conservation that provides an avenue for intervention regardless of sovereignty.[17] In his later writings, Bull also held the view that the common good of humanity could be advanced by going beyond the common interests of governments in international society.[18] This thinking was not entirely new. Notwithstanding his pluralist thinking, Vattel had already argued that in the event of oppression and plea for assistance, foreign powers could intervene by assisting the party which appeared to them to have justice on its side. He also held that one state owes to another state whatever it owes to itself. To him, if a state stands in real need of its assistance, another state can grant it if it can do so without neglecting the duties it owes to itself.[19]

Most writers seem to agree that the current justifications for diplomatic privileges are the personal representation and functional necessity theories and historically, the extraterritoriality theory. According to Shaw[20], the special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system. Francoise de Calliers tended to incline

[17] Fulvio Attina. "International Society. Cleavages and Issues". in B.A. Robertson. (Ed). *International Society and Development of International Relations Theory*. New York. Continuum. 2002. pp 212-213
[18] B.A. Robertson. "Probing the Idea and Prospects for International Society" in B.A. Robertson. (Ed). *International Society and Development of International Relations Theory*. p 7.
[19] Andrew Hurrel. . "Vattel: Pluralism and Its Limits" in Ian Clark and Iver B. Neumann (Eds). *Classical Theories of International Relations*. p 244
[20] Malcolm N. Shaw. *International Law* (Fourth Edition).Cambridge. Cambridge University Press. 1998

towards the older theory of extraterritoriality, while keeping in mind the functional necessity approach. He argues that ambassadors, envoys and residents of the diplomatic mission should be exempt from search by magistrates and officers of justice of the receiving state being looked upon as the house of the sovereign whose ministers they are.

Mwagiru[21] discusses the three explanations and says that the exterritoriality doctrine was discarded because it was a 'fiction' that was factually wrong. The representational approach explained only the privileges and immunities for those acts the diplomatic agent performed officially. It did not explain why the diplomatic agent was immune for all actions, whether official or non official. Mwagiru further explains that the function rationale also emphasized the need to protect the dignity of the diplomatic agent as being central to the performance of diplomatic functions.

Berridge has similar arguments in relation to extraterritoriality and the personal representation theories. He points out another short-coming of the personal representation theory as the paradox of the privileges and immunities given to the diplomat which often are higher than those given to his sovereign when he is visiting. According to Brownlie,[22] the existing legal position does not rest on any particular theory. To him, the question is related to the double aspect of diplomatic representation and the wider and overlying elements of functional privileges and immunities of diplomatic staff and their premises. Gardner[23] concurs saying that the functional theory combines well with the representational theory in its recognition that for diplomacy to be effective, practical protection is needed.

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[21] Makumi Mwagiru. *Diplomacy: Documents, Methods and Practice*, Nairobi. Institute of Diplomacy and International Studies. 2004.
[22] Ian Brownlie. *Principles of International Law*. (4th Edition). Oxford. Oxford University Press. 1990.
[23] Richard K Gardner. *International Law*. London. Pearson Longman. 2003.

Denza[24] demonstrates how the functional approach influenced the content of the Vienna Convention on Diplomatic Relations. She points out that the functional necessity theory is apparent in the establishment of exceptions relating to the diplomat's private holding of real property in the receiving state and his professional or commercial activities there. In relation to privileges, the approach is evident in all exceptions established to the basic principle of exemptions from taxes. According to Denza, the adoption of the VCDR marked the progressive development of custom and resolved points where practice conflicted. She analyses each article or group of articles in the context of the previous customary international law, the negotiating history, ambiguities or difficulties of interpretation and subsequent state practice.

One of the points highlighted by Mwagiru is that in civil proceedings, a diplomatic agent is considered to have waived his immunities in the event of a counter claim. He explains that this rule is meant to emphasize that diplomatic agents should not use their privileges and immunities as a sword. Concerning the privileges and immunities of the diplomatic mission, Mwagiru observes that there is controversy about whether or not the host state should require authority to enter the diplomatic premises if a crime is committed within a diplomatic mission or if an emergency such as fire arises. He cites the US Embassy bombing incident in Nairobi in 1998 when Kenyan security agents were denied access to it. According to him, the trend is to insist on the absolute character of the inviolability rule.

[24] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*. (Second Edition). Oxford. Oxford University Press. 1998.

Klabbers[25] concentrates on privileges and immunities of international organizations on the basis of the Convention Relating to Privileges and Immunities of the United Nations. He first discusses the theoretical basis for the privileges which essentially are similar to those of diplomatic missions and its staff. Klabbers does not agree with the view that an internationally recruited member of an international organization can enjoy diplomatic privileges and immunities if based within his or her own country. He argues that it would be unthinkable for one to require protection against his own state.

Higgins[26] comments on a report relating to abuse of diplomatic privileges and immunities in the United Kingdom. The report was made against the backdrop of public outrage in the United Kingdom over the inability of the government to legally enter the Libyan Bureau in London following a series of violations, including the fatal shooting of a policewoman outside the bureau. A parliamentary committee argued that the inviolability of the mission stood even in the face of manifest abuse. It also found that the immunity of a diplomatic agent from criminal jurisdiction had no exception. These concerns bring to light the serious challenges that privileges and immunities can pose. The solution proposed by the parliamentary committee was amendments to the VCDR which Higgins disagrees with. She argues that to avoid acts of terrorism or crime being committed from the premises of a diplomatic mission, the answer does not lie with amending the Convention. Rather, it requires close coordination between the various parts of government and international security cooperation.

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[25] Jan Klabbers. *An Introduction to International Institutional Law*. Cambridge. Cambridge University Press. 2002.

[26] Roselyn Higgins. "Editorial Comments: The Abuse of Diplomatic Privileges and Immunities and Recent United Kingdom Experience". *American Journal of International Law (AJIL)*. Volume 79. Issue No 3. 1985. pp 641-651.

Similar sentiments are expressed by Ben-Asher[27] who argues that the occasional abuse of diplomatic immunity rules is largely offset by the continuing need for them. As to how to minimize the adverse implications of abuse of privileges and immunities on human rights, the solution, in his assessment does not rest in radical reform. Rather, it lies in devising and utilizing suitable dispute settlement and reparation mechanism.

A commentary that is important to this study relates to an International Court of Justice (ICJ) order concerning the *United States Diplomatic and Consular Staff in Tehran: Phase of the Provisional Measures.* Gross[28] analyses the decision of the court in the case, which had been instituted by the USA following the takeover of the American Embassy on 4 October, 1979 requesting for orders for interim measures of protection. The ICJ unanimously emphasized the special duty of the host state to protect. The Islamic Republic of Iran was ordered to immediately ensure that the premises of the United States Embassy, chancery and consulate be restored to the possession of the United States authorities under their exclusive control and to ensure their inviolability and effective protection under international law.

The study enters the debate on privileges, immunities and facilities through the international society theory. This approach recognizes both states and individuals as members of the international society and emphasises coexistence among the legally equal members of the society of states on the basis of freedom to promote their own ends with minimal constraints.[29] Arising from this notion, states should accord diplomatic missions

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[27] Dror Ben-Aher. "Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions" A thesis submitted in partial fulfilment of LLM programme at Harvard University. Harvard Law School. 2000. available at www.law.harvard.edu/academics/graduate/publications/papers accessed on 13 February. 2006

[28] Leo Gross. "The Case Concerning the United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures" *American Journal of International Law*. Volume 70. Issues No 2. 1880. pp 395-410

[29] Andrew Hurrel. "Vattel: Pluralism and Its Limits" in Ian Clark and Iver B. Neumann (Eds). *Classical Theories of International Relations*. New York. Palgrave. 1996. p 233

and their agents, privileges, immunities and facilities without neglecting the duties they owe to their own citizens.

Theoretical Framework

The international society approach recognizes both states and individuals as members of the society through the pluralist and solidarist views respectively. To the pluralist, international society confers rights and obligations on states while individuals only have rights given to them by the state. As such, the respect of sovereignty and non-interference always come first. The solidarist on the other hand stresses the importance of individuals as the ultimate members of the international society. Based on this view, there is both a right and duty for states to conduct intervention in order to mitigate extreme cases of human suffering.[30]

Coexistence is the centrepiece of the international society approach. The first stage in this advancement consists of the application of Hobbe's arguments about the differences between domestic and international life that; states are less vulnerable than individuals and have less fear of sudden death; that they are unequal in power and resources; and that, if they are rational, they will be less tempted to destroy each other than individuals in a state of nature and will be able to develop at least minimal rules of coexistence based on self-interest and rational prudence.[31] The fundamental aspects of the international society theory that make it relevant to this inquiry include sovereign equality of states, principle of *pacta sunt servanda*, principle of non-interference in

[30] Robert Jackson & George Sorensen. *Introduction to International Relations Theories and Practices.* Oxford. Oxford University Press. 2003pp 144-145

[31] Andrew Hurrel. "Society and Anarchy in International Relations". in B.A. Robertson. (Ed). *International Society and Development of International Relations Theory.* New York. Continuum. 2002. pp 25-26

domestic affairs, and the responsibility to provide assistance to one another in order to facilitate coexistence.

The international society is theoretically predicated on some 180 plus independent sovereign states, linked by such omnilateral institutions as the United Nations and international law. Both international law and the United Nations assume that sovereign states are equal *de jure* as Vattel said, a dwarf is as much a man as a giant. Diplomatic relations are conducted between states and official arenas, like international organizations and international courts are largely reserved to states.[32] Thus, sovereigns accredit ambassadors to each other and to international organizations on the basis of equality,[33] and therefore privileges, immunities and facilities are to be accorded on similar basis. Through the international society approach, diplomatic privileges, immunities and facilities can be seen as part of the voluntary law of nations that is undertaken in good faith (*pacta sunt servanda*). Diplomatic privileges can also be understood as one of the methods in which states assist each other in order to enhance coexistence which is at the heart of the international society approach.

The international society paradigm can further be used to explain why diplomats should not interfere with the internal affairs of their countries of accreditation while at the same time providing justification for interference in certain instances such as grave violation of human rights and humanitarian situations. The fact that this paradigm holds a state responsible to protect the rights and interests of its people also provides an explanation for states not to compromise the interests of their citizens in the process of

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[32] Christopher Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", *European Journalof International La,* Vol. 4 , No 4, 1993, available at http://www.ejil.org/journal/Vol4/No4/art2 accessed on 26 September, 2006

[33] Adam Watson, "The Practice Outruns the Theory" in B.A. Robertson, (Ed). *International Society and Development of International Relations Theory*, New York, Continuum, 2002, p 147

administration of privileges and immunities, but instead to ensure that the two are balanced. In effect, the international society approach explains why states must accord diplomatic missions and diplomatic agents privileges, immunities and facilities, but with strict adherence to the functional necessity principle in order to ensure that the rights of its citizens are not impinged in the process.

Justification of the Study

Most of the reviewed literature concerning privileges, immunities and facilities are to a large extent confined to governing principles and practice in western countries. Little work has been in relation to their administration in specific countries, more so, in respect of Kenya. In view of this, the study will result in findings not hitherto published and will contribute to literature on the subject.

Research Methodology

Although secondary data will be of some benefit, this study will for the most part rely on primary data. The primary data will facilitate discussion on Kenya's administration of diplomatic privileges and immunities. The main mode of collection of primary data will be by way of interviews with government officials who coordinate the administration of diplomatic privileges and immunities. It will involve the Protocol and Legal Divisions of the Ministry of Foreign Affairs (MFA) and the office of the Attorney-General. Other departments that are targeted are the Kenya Revenue Authority (KRA) and the Diplomatic Protection Police Unit (DPPU).

Secondary data will involve library research and will include text books, law reports, periodicals, newspapers, magazines, seminar papers, summit reports and other sources such as the internet. This data is useful in examining the historical developments,

theoretical perspectives, practices of other states, the rationale for privileges and immunities. It also serves as reference in the analysis of the primary data.

Chapter Outline

Chapter One of this study sets out the research framework and introduces what the research is all about. It gives a concise idea about the research problem and the expected achievements. Chapter Two examines their philosophical or theoretical rationale and discusses the legal bases for the application of the relevant provisions of the VCDR by states This Chapter also introduces Kenya's relevant organs in the administration of diplomatic privileges, immunities and facilities. Chapter Three entails a comparative analysis of the administration of privileges and immunities focusing on areas deemed to pose challenges.

Chapter Four examines Kenya's practice. It is primarily concerned with collection and collation of primary data on Kenya's administration of diplomatic privileges immunities and facilities. Chapter Five comprises a critical analysis of the data collected with a view to facilitating informed opinion on the validity or otherwise of the assumptions of the study. The validity or other wise of the assumptions of the study as well as suggestions on the way forward will be part of the conclusions to be carried in Chapter Six.

CHAPTER TWO

PRIVILEGES, IMMUNITIES AND FACILITIES AND ORGANS OF THEIR ADMINISTRATION

Introduction

This chapter discusses briefly the genesis and evolution of privileges, immunities and facilities with special attention being given to the rationale for according them. It is intended to facilitate a better appreciation of the importance of diplomatic privileges and immunities in diplomacy. The historical perspective will be followed by a discussion of the theoretical justifications for according privileges, immunities and facilities to diplomatic missions and agents. The chapter will also examine the theoretical approach to Kenya's treaty practice and discuss the concept of administration of diplomatic privileges, immunities and facilities. This will be followed by an overview of the organs of the administration of privileges, immunities and facilities.

Historical Foundations of Diplomatic Privileges, Immunities and Facilities

Nearly all states today are represented in the territory of foreign states by diplomatic missions. These diplomatic missions tend to be permanent in nature, although the officials who run them as representatives of the state often change from time to time. Every state wants its own diplomats operating abroad, and its own diplomatic bags, embassies and archives to receive those protections that are provided by international law.

Granting privileges, immunities and facilities to diplomatic missions and envoys is an old customary norm of international law. It is traceable to the origin of the practice of resident diplomacy among the states of renaissance Italy which later expanded to

become a fixture of political life amidst the novel conditions of the seventeenth-century Europe.[1] As the exchange of permanent ambassadors between the states of Europe gradually became the norm, it came to be accepted in state practice that even where there was evidence than an ambassador had engaged in conspiracy or treason against the receiving sovereign, he was immune from the criminal and civil jurisdiction of the receiving state.[2]

Ambassadors during this period were not ordinarily provided with allowances for their upkeep although they were, as much as now, expected to uphold the integrity of their sovereign. Because of this state of affairs, those who lacked adequate private means often found themselves obliged to enter into business in the territory of the receiving state or worse still, fall into debt with consequential embarrassment to the sending state. Governments therefore found it necessary to enact laws expressly providing for diplomats.[3]

Apart from the person of diplomatic agent, embassy premises have also historically enjoyed diplomatic privileges and immunities. A receiving sovereign was, by the second half of the seventeenth century, required to abstain from enforcing its laws on diplomatic premises. While the use of embassy premises to grant asylum was widespread, there were few cases in which protest by receiving states were followed by forcible entry and seizure of fugitives.[4]

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[1] H M A Keens-Soper & Karl W Scheweizer (eds). *Francoise de Callieres, The Art of Diplomacy*. Lanham. University Press of America. 1983. pp 20-21.
[2] Ibid. p 118
[3] Lord Gore-Booth (ed). *Satow's Guide to Diplomatic Practice*. (Fifth Edition). London. Longman. 1979. p. 121.
[4] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*. (Second Edition). Oxford. Oxford University Press. p. 113.

In late nineteenth and early twentieth centuries, lawyers in Europe and the United States of America took an interest in the codification of diplomatic law. This development was prompted by the belief that it would improve the practical conduct of international affairs. There was, around this time, a series of codifications, of which the two most important were the Havana Convention on Diplomatic Officers, signed in 1928 and the Harvard Research Draft Convention on Diplomatic Privileges and Immunities. However, fourteen Latin American states only ratified the former while the latter only had persuasive authority and did not lead states to modify their domestic law. In 1949, the International Law Commission (ILC) inscribed the codification of diplomatic law on its agenda, marking the beginning of progress towards the adoption of the Vienna Convention on Diplomatic Relations, which is the most important instrument on diplomatic privileges, immunities and facilities. The conference, which adopted the Convention took place on 18 April, 1961 and was attended by 81 states and specialized agencies of the UN and the International Court of Justice (ICJ).

The adoption of the Vienna Convention resulted from three underlying reasons, which are spelt out by Berridge.[5] There was a need to modernize the law of diplomacy because circumstances had changed considerably from when they evolved. Some embassies were exploiting the looseness in the existing rules to engage in flagrant intervention in the internal affairs to the receiving states, while others were being subjected to undue embarrassing situations. Secondly, the international community realized that rules based merely on custom and courtesy did not have sufficient sanction of law. It was thought that putting them in the form of a treaty would address the

[5] G R Berridge, *Diplomacy: Theory and Practice*. London. Prentice Hall/Harvester Wheatsheaf. 1995 p 21-22

problem. Thirdly, there was a strong feeling among the established states that the international law on diplomacy needed the formal acceptance of newly independent states of Asia and Africa.

The successful conclusion of the Vienna Convention on Diplomatic Relations placed the law regarding diplomatic privileges and immunities on an entirely different footing. The text took careful account of all pertinent issues including customary rules and conflicting interests of governments. The overwhelming acceptance of the treaty by the international community is a clear testimony of the integrity of its provisions. It is now common practice that even where a state involved in a dispute over privileges and immunities is not party to the Vienna Convention, the matter will be argued entirely on the basis of the Convention. And although diplomats abroad have continued to face risks such as violence, kidnapping, and attacks on embassy premises, the instances of breach of its provisions by governments are very rare.[6]

The Place of International Organizations

The concept of an international community made up of sovereign states is the basis of this study. Contemporary international law presupposes this structure of co-equal sovereign states. Diplomatic relations among sovereign states are a typical example of the horizontal structures in the traditional system of international law. From this perspective, diplomatic privileges, immunities and facilities can be viewed as a reserve for sovereign states. Over the years, however, states have created numerous regional and global organizations. This raises the question about whether, and in what form, such organizations should be granted diplomatic privileges, immunities and facilities.

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[6] Lord Gore-Booth (Ed). *Satow's Guide to Diplomatic Practice*. (Fifth Edition). op. cit. p. 108

The international society approach presupposes that the mere existence of a large number of international organizations does not necessarily signal a change in the structure of the international system. International organizations are viewed as being no more than an arena for the interaction of their members. However, states have also transferred a considerable number of functions and powers to them.[7] They frequently entertain permanent official representations with international organizations in which they are members. Indeed, in some cases, formal relations between organizations and non-members exist. There are, for instance, over 130 missions accredited to the European Community while it has established over 50 missions with non-members.[8] To the extent that these institutions become actors in their own right and exercise some measure of authority and control, they can be seen as a new dimension in the international community. Sovereign states have established these organizations and given them limited authority to do certain things for the interest of the states themselves. To facilitate their effective functioning, the states have through various instruments allowed the granting of diplomatic privileges, immunities and facilities to the organizations to which they are members. Some of these instruments are the Convention on the Privileges and Immunities of the United Nations, the General Convention on the Privileges and Immunities of the Organization of African Unity, and the Protocol on the Privileges and Immunities of the European Union.

International organizations can be viewed within the international society framework as being part of the international community. However, they are part of the

[7] Christoph Schreuer. "The Waning of the Sovereign State: Towards a New Paradigm for International Law", European Journal of International Law, Vol. 4. Issue No. 4. 1993, available at www.ejil.org/journal/Vol4/art2 accessed on 24 October, 2006.
[8] Ibid

international community as instruments by which states pursue their interests. Thus, by extending privileges, immunities and facilities to an international organization, a state will, by extension, be facilitating other states to pursue their own interests. With respect to international organizations, this study proceeds from the premise that inter-governmental organizations are entitled to privileges, immunities and facilities subject to the governing instruments.

Rationale for Privileges, Immunities and Facilities

Three theories underpin the practice of granting privileges and immunities to diplomatic agents: extraterritoriality, representative character, and functional necessity. The first and the oldest is the theory of extraterritoriality. However, modern practice has adopted the functional necessity and to some extent, the representative character theories as the correct rationale for diplomatic privileges, immunities and facilities.

The theory of extraterritoriality also known as exterritoriality historically provided an attractive simple explanation for the special status of embassy chanceries and official residences of diplomatic agents. On the basis of this school of thought, the areas where diplomatic premises stood were considered as part of the territory of the sending state. According to Grotius, ambassadors were, by legal fiction considered to be outside the territory of the state where they were residing.[9]

The notion of exterritoriality had a serious weakness in that it gave diplomats the impression that even when outside the embassy premises, they could be judged only by their own sovereign's law, a notion which is politically inconceivable. In addition, during the 19th century, writers started to emphasize that the fact that the receiving state

[9] Lord Gore-Booth, *Satow's Guide to Diplomatic Practice*, (Fifth Edition), op. cit. p. 107.

had no powers of law enforcement within mission premises did not mean that crimes or legal transactions occurring in inviolable premises must be deemed to have occurred in the territory of the sending state.[10]

The representative character theory, which is also known as the representational theory holds that the sovereign of the sending state warrants special treatment of its diplomats and embassy because they act as its representatives and thus its personification.[11] This theory is based on the notion that the representative is standing in the stead of the prince and therefore should be treated as if the sovereign himself was conducting diplomacy. The use of the flag or crest, and the high status accorded to ambassadors lent credence to this theory.

The representative character theory has been challenged on a number of grounds. Firstly, the development of customary diplomatic law provided diplomats with privileges which were not identical with, and were sometimes even more excessive that those customarily extended to individual rulers on visits abroad. The second problem relates to the fact that sovereign states are equal which would render the fact that the receiving sovereign has to yield to another equal sovereign unreasonable.[12] In addition, the theory failed to explain why diplomatic agents enjoyed privileges and immunities for all actions, whether official or non-official.[13]

The failure of the representative character theory to satisfactorily explain diplomatic privileges and immunities gave rise to the third and most persuasive theory of

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[10] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, (Second Edition). op. cit. p. 113.
[11] Richard K Gardener. *International Law*. London. Pearson Longman. 2003. p 347.
[12] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, (Second Edition). op. cit. p. 113.
[13] Makumi Mwagiru. *Diplomacy: Document, Methods and Practice*. Nairobi. Institute of Diplomacy and International Studies. 2004. p 60.

functional necessity. It suggests that the rationale for diplomatic privileges, immunities and facilities lies in the fact that they are necessary for the performance of diplomatic functions. This rationale is cited in the preamble of the VCDR which states that the "purpose of such privileges and immunities is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing states." The functional necessity approach is also evident in Article 34 of the Convention. The essence of this theory is that diplomatic privileges and immunities are not for the benefit of the individual, but are availed for the sole purpose of facilitating the operations of the mission.

Not all scholars find the functional necessity approach as sufficient. Klabbers,[14] for instance is concerned that functional necessity means different and indeed contradictory things to different people. He asserts that the determination of the functional needs of an organization is essentially in the eye of the beholder. Some scholars argue that this theory teamed up with representative character theory to reject the early theory of extraterritoriality and that the two in fact form the modern rationale for diplomatic privileges and immunities.[15] Between the two, however, the functional necessity is the more dominant and relevant rationale.

Functional necessity and personal representation theories fit well into the international society approach on which this study is based. States and international organizations with juridical capacity together with their respective personnel are the main actors. The privileges, immunities and facilities are accorded for the sole purpose of

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[14] Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge, Cambridge University Press, 2002, pp 149-150.
[15] Dietrich Kappeler, Makumi Mwagiru & Josephine Odera, *Diplomacy: Concept, Actors, Process and Rules*, IDIS Monograph Series, No. 1 (1996), p 8, Also Ian Brownlie, op. cit, p 331.

enabling the diplomatic missions to function effectively in the performance of their mandate, which is to represent the government of the sending state in territory of the receiving state.

The Relevance of Theories of International Law to Kenya's Treaty Practice

Diplomatic privileges, immunities and facilities are anchored in the Vienna Convention on Diplomatic Relations. They form part of the branch of international law known as diplomatic law. This section considers the theories of international law that inform the implementation of the law of diplomatic privileges, immunities and facilities by Kenya. The main competing schools in this respect are the natural law and positivist schools and the monist versus dualism approaches.

Natural Law Versus Positivist Schools of Thought

In international law, natural law has been defined as referring to the law that is common to all nations because it exists everywhere through instinct, not because of enactment.[16] It presupposed that law was the automatic consequence of the fact that men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society.[17] Naturalists hold that it is of no advantage to fortify universal peace by agreements or treaties, as it would neither add anything to which men were not already bound by nature nor make the obligation more binding.[18] According to Emmerich de Vattel, international law consists of application of the necessary natural law of nations, it is necessary because states are absolutely obliged to

[16] Robert John Araujo. "International Law: The Wisdom of Natural Law", *Fordham Urban Law Journal*, Volume 28, Issue No 6, p 175 +, available at www.questia.com accessed on 17 May, 2006.
[17] Peter Malanczuk. Akehurst's *Modern Introduction to International Law*, London. Routledge, 1997, p 15.
[18] George A Finch. *The Sources of Modern International Law*, Buffalo N Y. William S Hein. 2000, p17.

observe it.[19] In essence, the law of nations as espoused by naturalist has the force of law and is not dependent on the consent of states.

As opposed to natural law, positivism asserts that law is largely man made and varies from time to time and from place to place according to the whim of the legislator. Applied to international law, positivism looks at the behaviour of states as the basis of international law. The legislative, executive and judicial organs of the state power must craft, enforce, and interpret statutes before a system is said to exist. The notion of enduring rights as manifested in the law of nature, according to them, plays little role in the making of policy.[20] To positivists, norms of international law may derive only from the will of states and most of them come into being through agreements among states. The binding force of these norms rests on the principle of *pacta sunt servanda*[21] which is considered a rule of customary law that ensures that treaties are honoured. Modern definitions of international law appear to take a positivist approach. It has for instance been defined as;

> "... those rules for international conduct which have met general acceptance among the community of nations. It reflects and records those accommodations which, over centuries, states have found it in their interest to make ... It is made up of precedent, judicial decisions, treaties, international conventions and the opinions of learned writers..."[22]

Considering the two schools of international law, the positivist school offers a better explanation of the law relating to diplomatic privileges, immunities and facilities.

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[19] Li Haopei. "Jus Cogens and International Law" in Wang Tieya (Ed). *International Law in the Post-Cold War: Essays in memory of Li Haopei*, London. Routledge. 2001.

[20] James H Wolf. *Modern International Law: An Introduction to the Law of Nations*. Upper Saddle River. Prentice Hall. 2002. pp 1-2

[21] Giorgio Gaja. "Positivism and Dualism in Dionysian Anzilotti" in the *European Journal of International Law*, Volume 3. Issue No 1. 1992. p 123. available at www.ejil.org/journal/Vol3/No1/art7 accessed on 17 May. 2006.

[22] Marjorie M Whiteman. *Digest of International Law*, Washington DC., US Government Printing Office. 1963. p 2.

The codification of the customary law relating to diplomatic privileges and immunities in the VCDR which, requires ratification or accession attests to this. The requirement for ratification or accession implies that the VCDR does not bind states automatically. Under the natural law perspective the VCDR would be binding on states without the necessity of accession or ratification. Like other states parties, Kenya's obligations under the VCDR are based on the country's consent expressed through accession. In this regard, positivism is the relevant legal theory that applies to the international law relating to diplomatic privileges, immunities and facilities, not only in Kenya, but also in other jurisdictions.

Relationship with Municipal Law (Monism Versus Dualism)

Monism and dualism are the two contending theories that explain the relationship between international law and municipal law. Monism is closely related to the natural law school. It holds that principles of law whether national or international constitute a single body of rules. Its logic rests on the assumption that the human desire for order requires fusion of international law and municipal law.[23] Monism is also based on the Grotian notion that much of international law follows the precepts of natural law.[24] It takes the form of an assertion of the supremacy of international law even within the municipal sphere.[25]

Dualism on the other hand is closely related to positivism and postulates that international and municipal law are two interrelated, but separate legal codes. The main

[23] James H Wolfe. *Modern International Law: An Introduction to the Law of Nations* .op cit p 13

[24] A.F.M.. Maniruzzaman. "State Contracts in Contemporary International Law: Monism Versus Dualist Controversies" *European Journal of International Law*. Volume 12. Issue No 2. 1998. p 309. available at www.ejil.org/journal/Vol12/No2/120309 accessed on 17 May. 2006

[25] Ian Brownie. *Principles of International Law*. (Fifth Edition). Oxford. Oxford University Press. 1998. p 32.

reason for this is that the source of municipal law derives from statutes enacted by national legislatures while international law reflects on inchoate custom and state practice.[26] In his analysis, Anzilotti[27] argues that national courts, which are set in municipal systems, resolve disputes between subjects of municipal law on the basis of rules which are also part of municipal law. They would not, however, take decisions based on rules of international law because such rules only regulate relations between states and give rights and duties only to states. In this regard, in order for norms of international law to have the force of law at the domestic level, they must be incorporated into municipal law through legislation.

The implementation of international law in many countries is informed by dualism. In an English case, Lord Atkin held that international law has no validity save in so far as its principles are accepted and adopted by domestic law.[28] Most countries in Africa also subscribe to a dualistic approach.[29] Kenya's treaty practice has not been clearly articulated. By and large, ratifications or accessions have not been followed up by the transformation of treaties to municipal law, thus giving an impression of dominance of the monist approach. In other cases, however, such treaties, including the VCDR have been followed up by a transformation processes. Based on this state of affairs, dualism provides the linkage between international law provisions on diplomatic privileges, immunities and facilities and Kenya's municipal law.

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[26] James H Wolf. *Modern International Law: An Introduction to the Law of Nations*. op cit. p 14.
[27] Giorgio Gaja. Positivism and Dualism in Dionysian Anzilotti" in the *European Journal of International* op cit.
[28] *Chung Chi Versus The King*. (1956) 23 International Law Reports (ILR). 217
[29] Peter Takirambudde. "The Rival Strategies of SADC & PTA/COMESA in Southern Africa". in Daniel C. Bach. *Regionalisation in Africa: Integration and Disintegration*. Bloomington. Indiana University Press. 1999. p 155.

Contextualization of the Concept of Administration

Using international society as the analytical framework, diplomatic relations are established between states which are also the dominant players in international organizations. Diplomatic privileges, immunities and facilities are necessary for the effective performance of diplomatic functions by diplomatic missions. Since the object of these diplomatic entitlements is diplomacy, the two cannot be divorced from one another. This section argues that the administration of diplomatic privileges, immunities and facilities can be contextualized within the wider and more challenging business of management of diplomacy and diplomatic service.

Although many states may have diplomatic relations without exchanging diplomatic missions, the existence of diplomatic missions abroad is nonetheless central to the conduct of an effective foreign policy. Hence having diplomatic missions abroad is generally not just an option, but a mandatory requirement for a functional diplomacy to operate.[30] The matters of the management of foreign policy and of the diplomatic service require a clear and deliberate policy and its effective implementation. This is because the implementation of foreign policy is best achieved where there is an effective and efficient management of the diplomatic service. Where this does not exist, or is weak, there will be corresponding difficulties of implementation of foreign policy.[31] Whatever the case, the fundamental question would always be whether the diplomatic service is performing effectively and efficiently.

[30] Makumi Mwagiru. "Issues. Problems. and Prospects in Managing the Diplomatic Services in Small States". *The Fletcher Forum of World Affairs*, Vol. 30 No 1. Winter 2006. pp 198-199.
[31] Makumi Mwagiru. "The Missing Link in the Study of Diplomacy: Illustrations from the Management of the Diplomatic Service and Foreign Policy in Kenya". A Paper presented at the African International Studies Association Conference on the theme: *The Enhancement of the Study of International Relations in Africa*. Nairobi. 26-27 May. 2006.

The management of the diplomatic service entails the study and analyses of diplomatic policies in certain areas of diplomacy including administering foreign policy, administration of diplomatic service such as posting policy, training policy, relationships among the different organs of diplomacy, implementing strategic plans and prioritization of foreign policy. Thus diplomatic service requires the involvement of Foreign Service officers with other non-Foreign Service officers in order to provide opportunities for broadening experience and capacities by permitting the injection into the service of administrative, clerical, secretarial and technical capacities.[32]

In order to situate the administration of diplomatic privileges, immunities and facilities in the context of management of diplomacy and diplomatic service, the necessity to facilitate the functions of diplomatic missions and international organizations must be understood as emanating from the receiving state's foreign policy. This presupposes that a state will consider that granting diplomatic privileges immunities and facilities is in its foreign policy interest. Consequently, foreign services officers based at home will be concerned with the administration of diplomatic privileges, immunities and facilities in liaison with other public officers. In this respect, this function of administration would fall within the management of diplomatic service and implementation of foreign policy. Its primary purpose is to ensure that the relevant international law provisions are implemented with a view to ensuring that diplomatic missions and international organizations in its territory are able to function effectively.

[32] William Barnes and John Morgan Heath, *The Foreign Service of the United States: Origins, Development and Functions*, Washington DC, Washington Historical Office, Bureau of Public Affairs, Department of State, 1961, p 306.

Kenya's Key Organs in the Administration of Privileges, Immunities and Facilities

Soon after independence, Kenya acceded to the VCDR in July 1965 and thereafter enacted the Privileges and Immunities Act (Chapter 179). The Act, which became effective from 6 April, 1970 consolidates the law on diplomatic and consular relations by giving effect to certain international conventions, the principal of which are the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (VCCR). It also consolidated the law relating to immunities, privileges and capacities of international organizations of which Kenya is a member and of certain other bodies.[33]

Due to the diverse nature of diplomatic privileges, immunities and facilities their administration in Kenya is undertaken by multiple government agencies. Other organs are also involved directly or indirectly.

The Ministry of Foreign Affairs (MFA)

The Kenyan Ministry of Foreign Affairs is the lead government agency on all matters relating to diplomatic privileges, immunities and facilities. The mandate of the ministry according to Presidential Circular No. 1/2005 includes foreign missions in Kenya, treaties, conventions and agreements, diplomatic privileges and immunities and protocol matters. Each of these matters either directly or indirectly relate to privileges, immunities and facilities. Several departments in the ministry are one way or another involved in these processes. Although the most important of these are the protocol department and the legal division the responsible authority is ultimately the permanent secretary.

The permanent secretary is the chief executive of the ministry. S(he) coordinates all activities of the ministry including issues relating to privileges, immunities and

[33] See the introduction to the Privileges and Immunities Act (Cap 250) of the Laws of Kenya. Rev 1984.

facilities. However, s(he) does not on a day-to-day basis deal with such matters. The responsible departments, mainly the protocol department and the legal division deal with the matter on a daily basis and only refer to the permanent secretary in case of complications that require policy direction. Occasionally, reference may be made to the minister for foreign affairs. This is in situations of serious concerns between the government and the diplomatic mission that is deemed to require political intervention.

The protocol department is the point of contact between diplomatic missions and the ministry and the rest of the government. It coordinates and facilitates the administration of privileges, immunities and facilities. It does this by processing registration documents, tax exemptions, registration of motor vehicles, approvals for purchase of property and work permits amongst many others.[34] While a number of these entitlements such as registration of diplomatic agents can be processed to completion by the protocol department, many must, of necessity be coordinated with other relevant ministries and departments.

The established practice is for all diplomatic missions and privileged international organizations to engage government departments and ministries through the protocol department. Whenever, diplomats have issues relating to their privileged status, they contact the protocol department, even if the issues may be relating to another department. Likewise, government ministries and departments have to contact the missions through the ministry's protocol department. The protocol department plays the role of coordinating the activities of other government ministries and departments in the administration of privileges, immunities and facilities.

[34] Ministry of Foreign Affairs of Kenya, http://www.mfa.go.ke/protocol2.php#15, accessed on 26 September, 2006

The legal division interprets the law relating to diplomatic privileges, immunities and facilities. The division works closely with the protocol department, especially where interpretation of certain relevant legal provisions is necessary. The division also coordinates the resolution of disputes affecting privileged entities in Kenya, and in this respect liaises with the office of the attorney-general, legal practitioners and diplomatic missions. This function includes preparing, where necessary, witnesses in the case of disputes that end up in court. Where necessary also, the division prepares executive certificates confirming the diplomatic status of an individual or entity.

Diplomatic Protection Police Unit (DPPU)

Under the VCDR the receiving state must provide is protection. Although security has traditionally been provided by the Kenya Police, no special police unit dedicated to diplomatic missions and diplomats was created until 2005. Arising from consultations between the government and the diplomatic community, the diplomatic protection police unit was created with the mandate to provide protection for diplomatic missions and their agents. Eventually, the DPPU services will be extended to consulates located outside Nairobi such as Malindi and Mombasa.[35]

The DPPU, which has over 500 officers, is based at Gigiri where the United Nations Office and several diplomatic mission chanceries and residences are located. Among the roles of the unit are patrolling the neighbourhoods of chanceries and diplomatic residences, responding to distress calls by diplomats and assisting with security for functions hosted by diplomatic missions. The unit has a liaison officer based at the ministry of foreign affairs to facilitate coordination with other government

[35] The future plans of extension of the DPPU services to Mombasa and Malindi was disclosed by the Commissioner of Police during a briefing to the National Defence College participants at the Police Headquarters on 18 May 2006.

ministries, particularly the MFA, and with the diplomatic missions and international organizations on security issues.

In view of the special nature of diplomatic missions and agents, officers who serve in the DPPU receive specialized training in addition to regular training. They receive training on the basic provisions of the VCDR especially with respect to the privileges and immunities of diplomatic missions and diplomatic agents and the country's obligation to guarantee them. The training focuses on empowering the officers to provide security without having to violate these privileges and immunities.

The Kenya Revenue Authority (KRA)

The Kenya Revenue Authority (KRA) was established by an Act of Parliament, Chapter 469 of the laws of Kenya, which became effective on 1st July 1995. It has the responsibility of collecting revenue on behalf of the government much of which is in the form of taxes, customs duties and excise. The authority has five departments three of which have functions that may affect diplomatic missions and their agents. These departments are the domestic taxes department which amongst others is responsible for value added tax (VAT), the customs services department whose mandate include customs duties and excise, and the road transport department.

Value Added Tax (VAT) is a tax on consumer expenditure introduced in Kenya in January 1990 as a measure to increase government revenue through the expansion of the tax base, which hitherto was confined to sale of goods at manufacturing and importation level under the sales tax system. VAT is levied on consumption of taxable goods and services supplied or imported into Kenya.[36] The authority approves applications by

[36] Kenya Revenue Authority, http://www.kra.go.ke/vat/vatchecker.php, accessed on 26 September, 2006

diplomatic missions and international organizations for VAT exemption or requests for VAT refunds.

The primary function of the customs department is to collect and account for customs and excise taxes in accordance with the Customs and Excise Act (Cap 472). Some of the taxes collected include import duty, excise duty (both on imports and local), and VAT on imports. Other taxes collected by the department on an agency basis include, import declaration form/preshipment inspection fees, and fees on motor vehicle permits.[37] The department administers exemptions for diplomatic missions and diplomatic agents. These exemptions are provided for under Part A of the Fourth Schedule to the Act. Excise duty is imposed on specific local and imported goods. In respect to imports, the tax is collected at the time of importation together with other import taxes like import duty and VAT. Some of the goods that are subject to payment of excise duty include wines and spirits, beer, bottled water, soft drinks and cigarettes.[38] Similar to the other exemptions, KRA administers exemptions from this tax in liaison with the ministry of foreign affairs.

The road transport department undertakes registration and licensing of drivers and all motor vehicles and trailers in the Kenya under the Traffic Act (Chapter 403), the Second Hand Motor Vehicle Purchase Act (Chapter 484), and the Transport Licensing Board Act (Chapter 404). It is amongst others responsible for licensing and issuance of original and duplicate driving licenses and conversion of foreign driving licenses to

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[37] Customs and Excise Act (Cap 472) of the Laws of Kenya. Part A of the Third Schedule entitled 'Special Conditions'.

[38] Kenya Revenue Authority. http://www.kra.go.ke/customs/aboutcustomsandexcise.html accessed on 26 September. 2006.

Kenyan driving licences. Thus the department is critical in facilitating diplomatic missions to operate their motor vehicles in Kenya.

The Communications Commission of Kenya (CCK)

The Communications Commission of Kenya (CCK) was established in February 1999 by the Kenya Communications Act of 1998. It regulates telecommunications, radio communication and postal services. This responsibility involves functions including licensing telecoms and postal/courier operators, regulating tariffs for monopoly areas, establishing interconnection principles, managing the radio frequency spectrum, and formulating telecommunication numbering schemes and assigning them to network operators.[39]

All diplomatic missions and other privileged entities wishing to be allocated such radio frequencies and the use of VSAT facilities must apply to the CCK which considers and allocates them at some fee to cover administrative and operation costs. The application is submitted through the ministry of foreign affairs.

The Nairobi City Council (NCC)

Apart from some consulates located in Mombasa, all diplomatic missions and international organizations that enjoy diplomatic privileges, immunities and facilities are located in Nairobi. This makes the Nairobi City Council a key stakeholder on issues touching on diplomatic missions and their agents.

The Nairobi City Council raises its revenue from land rates and rents, parking fees and other services. Many diplomatic missions own or lease property from which rates

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[39] Communications Commission of Kenya. http://www.cck.go.ke/about_cck/ accessed on 26 September. 2006

are ordinarily payable to the NCC. Missions also use parking spaces for which a fee in normal circumstances is charged. The NCC is, in this respect, responsible for administering waivers of rates as appropriate and allocation of parking spaces for diplomatic and consular personnel. The role of allocating parking spaces and determining the appropriate use for land use rests with the city engineer and the city surveyor. The role of collecting revenue including parking fees and rates is performed by the city revenue officer. These offices act in liaison on issues relating to diplomatic missions and diplomatic agents.

The Courts of Law

Kenya's legal system is based on the 1963 constitution, the Judicature Act of 1967, and common law. Customary law, to the extent it does not conflict with statutory law, is used as a guide in civil matters concerning persons of the same ethnic group.[40] The system consists of the Court of Appeal, which has final appellate jurisdiction, and subordinate courts. The high court consists of the Chief Justice and judges, who are appointed by the president. The high court has both civil and criminal jurisdiction, serving as an appellate tribunal in some cases and as a court of first instance in others. Lower courts are presided over by resident magistrates and district magistrates.

The law courts adjudicate over cases in which they have jurisdiction involving diplomatic missions and their agents. Ordinarily, the court first determines whether it has such jurisdiction before continuing further on a case. Closely associated with the law courts are law practitioners that provide legal advice and legal representation to the diplomatic missions and international organizations. The role of the law practitioners is particularly important as it contributes to the evolution of the court's interpretation of the

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[40] Saleemi N.A. & Ateenyi. T.K., *Elements of Law Simplified.* Nairobi. N.A. Saleemi Publishers. 1992.p 19.

relevant statutes and practice. This is because as in many Commonwealth countries, Kenya's judicial system is adversarial.

The Citizens

Although not involved directly, the country's citizens both natural and juridical persons are actors in the administration of diplomatic privileges, immunities and facilities. Citizens interact on a day-to-day basis with privileged entities. In many cases, they engage in commercial transactions in which the citizen is the supplier of goods and services. For instance, many diplomatic missions rent residential and chancery premises from local property owners and have to sign tenancy agreements in that respect. They also hire the services of support staff locally. Occasionally, these contracts may be violated leading to disputes in which the involvement of the ministry of foreign affairs, and the courts become necessary.

CHAPTER THREE

A COMPARATIVE STUDY OF THE ADMINISTRATION OF DIPLOMATIC PRIVILEGES, IMMUNITIES AND FACILITIES

Introduction

The previous two chapters dealt to a large extent with theoretical concepts that are relevant to the study. This chapter conducts a comparative study of the administration of privileges, immunities and facilities by different countries focusing on those whose administration and practice are challenging. The selection of issues to be focused on takes into account the fact that the whole subject of inquiry is fairly wide and thus may not wholly be adequately covered by this study. The chapter will, however begin by distinguishing the privileges, immunities and facilities and discussing the principle of reciprocity which is a key element in diplomacy.

Distinguishing Privileges, Immunities and Facilities

It has been pointed out in Chapter 1 that diplomatic privileges, immunities and facilities are granted to enable diplomatic missions and their agents to carry out their functions effectively. These privileges, immunities and facilities are codified in the Vienna Convention on Diplomatic Relations (VCDR). Some scholars argue that a distinction between immunity and a privilege is not easy to define because the terms are often used interchangeably.[1] This view is not entirely accurate. While the VCDR does not expressly distinguish between privileges, immunities and facilities, they are closely related as they are all targeted at meeting a common objective of facilitating diplomacy.

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[1] Lord Gore-Booth. (ed). *Satow's Guide to Diplomatic Practice*. (Fifth Edition). London. Longman. 1979 p 120.

However, the three terms are clearly distinct from one another and therefore should not be confused.

In general, a diplomatic privilege denotes some substantive exemption from laws and regulations of a receiving state.[2] Diplomatic privileges relate to fiscal exemptions that include exemptions from taxation in the receiving State.[3] The VCDR sets out privileges for the mission and diplomatic agents. Under article 23, the mission premises are exempt from taxation. The diplomatic agent enjoys several exemptions including from social security provisions (article 33), taxation (article 34), public service and military obligations (article 35), customs duties (article 36 (1)) and, personal baggage inspection (article 36).

Immunity on the other hand does not imply any exemption from substantive law, but merely confers procedural protection from its enforcement processes in the receiving state.[4] The concept chiefly refers to exemptions from criminal, civil and administrative jurisdiction of the receiving state.[5] Among the immunities accorded to the diplomatic mission are inviolability of the mission premises and the mission archives specified by articles 22 and 24 of the VCDR. Article 27 of the VCDR guarantees the inviolability of the mission's official correspondence and diplomatic bag. The person of diplomatic agent and his property and documents are inviolable under articles 29 and 30. Diplomatic agents also enjoy immunity from civil and criminal jurisdiction.[6]

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[2] Ibid
[3] Makumi Mwagiru, *Diplomacy: Documents, Methods and Practice*. Nairobi. Institute of Diplomacy and International Studies. 2004. p 60.
[4] Lord Gore-Booth. *Satow's Guide to Diplomatic Practice*. op. ct.
[5] Makumi Mwagiru, *Diplomacy: Documents, Methods and Practice* op. ct.. p 60.
[6] Article 31 of the VCDR.

Facilities are defined as those courtesies extended to the diplomatic mission to enable it to carry out its functions smoothly.[7] Article 25 of the VCDR requires receiving states to accord full facilities for the performance of the mission. Facilities would refer to those requirements expected of receiving states, which can neither be defined as privileges nor immunities. According to Holsti, these facilities include protocol services which sometimes appear ceremonial, but in many ways serve to reduce frictions that could potentially lead to poor relations and communications between governments.[8] Some facilities spelt out by the VCDR include freedom of the mission and its agents of communication and travel within the territory of the receiving state, and the obligation of the receiving state to provide them with security. Other facilities that are not mentioned in the Convention include protocol services and special registration identities for mission and agents' motor vehicles.

Countries generally have internal legislation that transform the VCDR, th VCCR and other instruments that provide for the privileges and immunities o international organizations. However, the regimes of privileges and immunities do no apply in exactly the same way to international organizations and international civil servants as they do to diplomatic missions and their members. Organizations such as the United Nations and the African Union are ordinarily granted privileges and immunities on the basis of specific protocols. Other organizations are accorded diplomatic treatment on the basis of host country or headquarters' agreements negotiated and executed between individual organizations and hosting countries.

[7] Makumi Mwagiru, *Diplomacy: Documents, Methods and Practice*, op. ct.
[8] K.J. Holsti, *International Politics: A Framework for Analysis*, (Seventh Edition). Englewood Cliffs NJ. Prentice-Hall International, 1995, p 135

The Principle of Reciprocity

Prior to the coming into force of the VCDR, national legislation in many countries provided for exemptions subject to reciprocity.[9] This principle is a common threat that runs through all aspects of diplomatic privileges, immunities and facilities. It is argued that reciprocity forms a constant and effective sanction for observance of nearly all the rules of the Convention as every state is both a sending and a receiving state.[10] In some way, representatives of countries abroad are hostages. For the most part, failure to accord privileges, immunities or facilities to diplomatic missions or their members is likely to be met by counter-measures regardless of how minor the denied privilege or immunity may be.

Under the Australian Diplomatic Privileges and Immunities Act of 1967, for example, any privileges and immunities may be withdrawn from a particular mission on the basis of reciprocity. This applies where the relevant privileges and immunities provided to a mission of Australia in an overseas country are less than the privileges and immunities granted under that the Act to that country's diplomatic mission in Australia.[11] Section 4 (1) of the Canadian State Immunity Act provides that diplomatic missions and consular posts of any foreign state, and persons connected to them are to be accorded treatment comparable to the treatment accorded to the Canadian diplomatic missions and consular posts in that foreign state. Section 4 (2) of that statute makes it clear that this

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[9] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations.* (Second Edition). Oxford. Oxford University Press. 1998. p 149.
[10] Ibid, p 2
[11] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June. 2006)" available at www.dfat.gov.au/protocol guidelines/02 accessed on 15 June. 2006.

principle applies to the administration of duty and tax relief privileges. [12] In the United States, all tax benefits are subject to adjustment as necessary on the basis of reciprocity.[13] Under Section 3 of the Diplomatic Privileges Act 1964, the United Kingdom may restrict any immunities and privileges if it appears that they are greater than those granted to a mission of the United Kingdom in another state.[14] The South Africa has a similar provision.[15]

The principal of reciprocity works well where countries have representation in each other's territory. It is not practically possible to apply it where there is no exchange of representation and only one is represented in the other country's territory. The principle also does not work in respect of international organizations which have no capacity to give diplomatic privileges or immunities. This is because of their non-state character and the fact that they do not "have their own territory or population, but are always located in the midst of the territory and population of a state".[16] For such organizations, the extent of privileges, immunities and facilities are negotiated between the individual organization and the hosting state.

[12] Department of Justice of Canada. State Immunity Act (S-18). available at http://laws.justice.gc.ca/en/F-29.4/240984 accessed on 17 June, 2006

[13] United States Department of State. "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers". Reviewed/Updated on 3/23/2006. Para 2.16 available at http://www.state.gov/ofm accessed on 17 June. 2006

[14] Martin Dixon. *Textbook on International Law* (Fifth Edition). Oxford. Oxford University Press. 2005. P 193

[15] Republic of South Africa. Diplomatic Immunities and Privileges Act. 2001(Act No. 37. 2001). Section 10

[16] Jan Klabbers. *An Introduction to International Institutional Law*. Cambridge. Cambridge University Press. 2000. p 153

Administration of Privileges

Exemption from Taxation

Article 23 of the VCDR exempts the sending state and the head of the mission from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased other than such as represent payment for services rendered. This does not apply to such dues and taxes payable under the law of the receiving state by persons contracting with the sending state or the head of the mission. Under Article 28 of the VCDR, the fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxation.

Members of the diplomatic mission including members of their families also enjoy the privilege of exemption from dues and taxes, personal, real, national or municipal taxes.[17] There are, however, three categories of taxation where a diplomat is not entitled to tax exemption. The first category relates to taxes for which administrative arrangements for exemption are difficult. The second category relates to activities that are extraneous to the diplomatic agent's activities as a representative of another country such as where the subject matter relates to estate or succession duties levied by the receiving state. The third exception relates to dues and taxes on private income including that from commercial undertakings. It is for each state party to give a precise interpretation of tax exemption under the VCDR or other allied instruments in terms of its own local taxation system.

The Australian Diplomatic Privileges and Immunities Act of 1967 and the Consular Privileges and Immunities Act of 1972 give the relevant Vienna conventions the force of law in Australia. However, the Australian Tariff Act 1921 also applies in the

[17] Articles 34 and 37(1) of the VCDR.

administration of the exemptions for diplomatic missions, international organizations and their personnel especially in respect to goods attracting excise and import duties. Except in the case of fuel, exemption from excise duty is only available at the time the goods are released by Customs from licensed excise premises. Excise in respect of fuel is paid, but diplomatic missions or consular posts can claim refunds on their behalf or on behalf of eligible individuals.[18] In making application for exemption from excise and import duties, diplomatic missions, consular posts and eligible staff are required to acknowledge and agree to several conditions stated in the requisite form. These conditions include that the goods are not intended for trade, that they are intended for official or personal use of the accredited diplomatic or consular staff, and that the goods are not sold within two years or three in the case of motor vehicles.

Under the Indirect Tax Concession Scheme (ITCS), diplomatic missions and consular posts may seek refunds of Goods and Services Tax (GST) and related indirect taxes on goods and services. The ITCS makes tax exemptions available on the basis of reciprocity where broadly comparable range of tax concessions is granted to Australian overseas missions and posts.[19] The ITCS and GST cover several services including mail, telecommunication, electricity, gas, protection of premises, and removal of goods services. They also cover the acquisition of alcohol and tobacco products purchased from duty free or bond stores, fuel and locally manufactured motor vehicles. Acquisitions not covered include regular maintenance of property, insurance services, travel services, hotel accommodation and restaurant services. Residential leases do not attract GST.

[18] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June. 2006)" available at www.dfat.gov.au/protocol guidelines/02 accessed on 15 June. 2006.
[19] Ibid

Commercial leases for office accommodation attract GST, but missions may claim a refund where bilateral reciprocal arrangements exist. Premises specifically designated for diplomatic use and are leased through the National Capital Authority (ACT) do not attract GST.

An important aspect in the Australian administration of tax exemption is the fact that reciprocity is strictly observed. The second is that they are subject to strict conditions, which to a great extent are in keeping with article 34 of the VCDR. With a few exceptions, exemptions are not at the point of sale or acquisition. GST payments are refunded on application using appropriate forms based on a minimum invoice of Australian $ 200. A key departure from other jurisdictions is that tax exemptions are administered directly by the Australian Taxation Office. In many countries, tax exemption requests are submitted to the ministry of foreign affairs for processing or for transmission to the tax authorities.

The United States tax exemption system is generally comprehensive and less cumbersome as most of the exemptions are at the point of sale. There is no additional burden of having to seek reimbursements. In addition, except for exemptions from property tax, others on all other goods and services are administered centrally by the office of foreign missions (OFM). Like in other cases, reciprocity takes centre stage in determining the range of tax exemptions to be given to any diplomatic mission.

The administration of diplomatic privileges, immunities and facilities in the United States of America is undertaken by the OFM pursuant to the 1982 Foreign Missions Act (22 USC 4301). The OFM administers the diplomatic tax exemption programme (DTEP) which provides sales, gasoline, and utility tax exemption to eligible

foreign missions and their personnel on the basis of reciprocity.[20] Tax exemptions are administered by use of tax exemption cards which provide point-of-sale exemption throughout the United States. The system provides immediate relief from taxes without the administrative burdens, costs, and delays commonly associated with reimbursement systems.

Where a sending state does not provide full tax exemption to the US mission and personnel in its territory, the OFM is at liberty to restrict or withdraw completely tax exemption to that state's mission and diplomatic personnel in the United States. To accomplish this, benefits provided by tax exemption cards may be extended or restricted in a number of ways. A blue stripe on a tax card indicates full exemption from taxes on the purchase of all goods or services. If there is a minimum purchase amount restriction, it will be specified in a yellow stripe. The card may also limit the applicability of the tax exemption to, or from, certain categories of goods or services and this will likewise be specified in a yellow strip on the face of the card.

There are two types of tax exemption cards: the mission tax exemption card and the personal tax exemption card. The mission card are issued to two designated representatives of a mission for purchases strictly for official use and purchased in the mission's name. The personal exemption cards are issued for the sole benefit of the individual identified and pictured on the card. Personal Tax Exemption Cards are not valid for exemption from taxes on telephones, other utilities, or gasoline purchases whose exemptions are processed separately and strictly on the basis of reciprocity.

In accordance with the VCDR and the VCCR, property held in the name of a foreign government for use as its chancery, chancery annexes, consulates, or as the

[20] United States Department of State. op. ct. Para 2.1.

residence of the chief of mission or the career head of a consular post enjoy exemption from all national, regional, and municipal dues and taxes.[21] Without a bilateral arrangement, property tax exemption is not generally granted in respect of residences owned by foreign governments used to house members of diplomatic missions or international organizations. For the tax exemption to apply, the property must be in the name of the mission. The exemption does not include exemption from charges for services such as collection of refuse or any other separately identified charges for specific commodities or services that may appear on the tax bill. Property tax exemptions are handled by the jurisdiction where the property is located. These primarily are the New York City, District of Columbia, Maryland and Virginia states.

The system of administration adopted by Switzerland for international organizations and permanent missions to the United Nations in Geneva is similar in some respects to the US system, but less comprehensive. Permanent missions, heads of mission and senior diplomatic staff have exemption from paying VAT for goods and services rendered. Although this exemption is to be received at the point of sale, not all shops always do so, thus triggering the reimbursement process. Reimbursement can only be done under exceptional circumstances and is limited to once a year for an official and twice a year for the mission. There is only one shop set aside exclusively for tax-free purchases (*magasin hors taxes*) set up in December 1995 to enable persons with diplomatic status to purchase duty-free goods for their personal use. Persons entitled to use the duty-free shop (heads of mission, diplomatic agents and foreign delegates of states or of international organizations attending international conferences) must show their personalised customer cards in order to access it.

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[21] Ibid Para 7.8

The key Swiss agency in the administration tax exemptions is the department of foreign affairs working in liaison with the federal customs administration and the United Nations Office in Geneva. Tax exemption cards in respect of petrol for official use are issued to permanent missions and international organizations. Goods intended for official use may also be imported tax-free provided that such goods are not sold or otherwise transferred within three years of their importation. Tax free importation is subject to submission of application to the directorate of customs in Geneva. Heads of mission and diplomatic agents receive similar treatment as that accorded to the mission. They are exempt from tax on petrol for their private motor vehicles registered in their names. They may also import free of tax household goods once within a period of five years of taking up appointment. The duty free goods may not be subsequently disposed of without prior permission of the directorate of customs of Geneva and prior payment of import duties.[22]

Exemptions in relation to motor vehicles

Issues relating to motor vehicles including purchase, disposal, insurance, and even parking are heavily regulated in many countries. There are generally no marked differences in the manner in which the privileged purchase and operation of motor vehicles are administered. Diplomatic missions and personnel are permitted to import or purchase motor vehicles for official and personal use respectively. However, in most cases, conditions, based on reciprocity apply.

In Australia, diplomatic missions may directly import, duty-free a reasonable number of vehicles for official use. However, if such vehicles are acquired from car dealers who remove them from customs bonded warehouses or where the vehicles are

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[22] The Swiss Department of Foreign Affairs, "Practical Manual of the Regime of Privileges and Immunities and Other Facilities", available at http://www.onu.admin.ch/geneva_miss/e/home/guide.p.html accessed on 1 July, 2006.

locally manufactured, goods and service tax (GST) or luxury car tax (LCT) will be paid. GST and LCT are refundable where reciprocal arrangements exist. Accredited diplomatic staff and consular officers may import or purchase under privilege one vehicle for personal use. The officer may, if accompanied by a dependant who is a licensed driver, import or purchase a second motor vehicle. The conditions that apply to vehicles imported or purchased for official use and for personal use are similar.[23] In the United States, tax exemptions apply in the purchase or lease of motor vehicles for either official or personal use. However, prior authorization by the OFM is necessary.[24] Heads of diplomatic missions and diplomatic personnel accredited to Switzerland are permitted to import or purchase two motor vehicles free of import duties for their personal use once every three years. In Australia and Switzerland, the motor vehicle may be disposed of free of duty after expiry of three years from the date of importation or purchase. Any disposal either through sale or gift within the period of three years requires payment of taxes. The United States calculates fees and surcharges, if any, using a reciprocal formula utilized by the sending state towards the US mission and diplomatic personnel.

The immunity of diplomatic agents from the civil and administrative jurisdiction of the host state is to some extent circumscribed in the area of motor vehicles. For instance, in Australia, diplomatic and consular vehicles are not exempt from the requirements of the Motor Vehicles Standards Act, which relates to safety standards. Registration of motor vehicles cannot be done before first obtaining the approval of the federal office of road safety. The registration is also subject to renewal every 12 months

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[23] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade, "Protocol Guidelines (Amended June, 2006)" op. ct.

[24] United States Department of State. "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers" Para 2.14.

on verification that they still meet the requisite standards.[25] Contrary to the practice in Australia, in Switzerland, registration of motor vehicles belonging to diplomatic missions and diplomatic personnel are essentially without restriction provided documentation providing all the technical data is availed. The vehicles are also not subject to periodic inspections, but may only be sold to similarly privileges persons or institutions unless first adjusted to the Swiss conditions.[26] The United States does not also give restrictions in relation to roadworthiness of the motor vehicles. The OFM does not in this respect require motor vehicle inspections for purposes of registration or sale. It is the owners' responsibility to maintain their motor vehicles in good condition.[27]

In all the three countries no exemptions are given with regard to insurance coverage. In the case of Switzerland, no vehicle can be admitted to road circulation until an insurance certificate has been submitted to the authority responsible for registration. The insurance policy must cover damages to third parties including all bodily injuries and material damages for a minimum of CHF 5 million.[28] Insurance is also mandatory when applying for registration of a motor vehicle with the OFM. In a circular to all the chiefs of mission at Washington, in June 1981, Acting Secretary of State Walter J. Stoessel, Jr., called their attention to areas of concern regarding compliance with the compulsory liability insurance not only for motor vehicles, but also vessels, or aircrafts owned, leased

[25] Australian Government, Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June, 2006)" op. ct. para 7.6 – 7.8
[26] The Swiss Department of Foreign Affairs. "Practical Manual of the Regime of Privileges and Immunities and Other Facilities" op. ct.
[27] United States Department of State. "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers" Para 3.8
[28] The Swiss Department of Foreign Affairs. "Practical Manual of the Regime of Privileges and Immunities and Other Facilities" op. ct.

or furnished for the regular use of diplomatic missions, and their families.[29] Failure to maintain insurance coverage may result in the imposition of surcharges or fees on the foreign mission employing the uninsured motorist. The minimum acceptable limits to liability coverage are US$ 300,000 combined single limit or split limits of US$ 100,000 personal injury per person.[30] Insurance is also mandatory in the Australian practice.

Administration of Immunities

Inviolability of mission premises

One of the most important immunities of a diplomatic mission has always been inviolability of its premises ostensibly in order to enable it to operate without constraint either from the receiving state's government or from other elements.[31] Article 22 (1) of the VCDR states without exception, that the premises of the diplomatic mission are inviolable. The agents of the receiving state may not enter them, except with the consent of the head of mission. In addition the receiving state is under a special duty to take all appropriate steps to protect the premises against any intrusion or damage. According to article 22(3), the inviolability also extends to the mission premises, their furnishings, and means of transport. These facilities are immune from search, requisition, attachment or execution. Premises are defined under article 1 as the 'buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission'.

[29] Marian Nash Leich. "Diplomatic Missions" *American Journal of International Law*. Volume 75. Issue 4. 1981. p 939.
[30] United States Department of State. "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers" op. ct. para 3.6.
[31] G.R. Berridge. *Diplomacy: Theory and Practice*. London Prentice Hall/Harvester Wheatsheaf. 1998. p 25.

The net effect of the inviolability provisions is that diplomatic missions are immune from the legal and administrative jurisdiction of the receiving state which has a duty to ensure that such is maintained at all times The inviolability of diplomatic premises, however, is not a license for it to be used without due regard to the laws of the receiving state. Under article 41 of the VCDR, the premises of the mission must be used in a manner compatible with the functions of the mission. Thus, the challenge member states face is how to balance between complying with the obligation to ensure inviolability of the diplomatic premises on one hand and ensuring that the premises are used in a manner compatible with diplomatic functions. The administration of immunities is largely hinged on the interpretations accorded to these provisions by the administrative and judicial authorities of member states. The examination of the administration of immunities will, apart from administrative interpretations also include consideration of judicial decisions.

The idea that a mission, simply by buying or renting premises, could establish a complete 'no-go' area for the local police or any other authority has become a matter of concern to some countries. The United Kingdom parliament, in particular, was compelled by this concern to pass the Diplomatic and Consular Premises Act 1987.[32] In broad terms, this legislation requires the consent of the Secretary of State for any land to be put to use for embassy or consular premises, such consent being open to withdrawal consistent with international law. Although this gives a measure of control, it does not allow violation of premises being used for purposes of the mission. This was established in the case of *Westminister C.C. versus Government of Iran.*[33] After the killing of a policewoman in

[32] Richard K Gardner. *International Law*. London, Pearson Longman. 2003. p 252.
[33] Rebecca M.M. Wallace. *International Law* (Fourth Edition). London. Sweet & Maxwell. 2002. p 126.

April 1984 by shots fired from the Libyan Peoples Bureau, a report by the foreign affairs committee *inter alia* found that inviolability of premises is not lost even by the perpetration from them of unlawful acts.[34]

The interpretation and practice in the United States is not substantially different. Rather than take an action contrary to article 22 and 23 of the VCDR, the US authorities have preferred taking other options available in dealing with missions considered to have been using the mission premises for activities outside the diplomatic function. In 1981, when the United States became concerned by a 'the general pattern of unacceptable conduct by the Bureau of the Libyan Peoples' Jamahiriya" in Washington, it asked the Libyans to close the People's Bureau, and to consider on the basis of reciprocity, the appointment of a third state to entrust custody of its property.[35]

The United States department of state has also sought to keep reminding heads of mission to exercise their discretion in ensuring that the mission premises are put to use for purposes of the mission only. For instance in a circular diplomatic note dated 2 February 1973, the Secretary of State advised heads of mission not to use the mission premises for social events in support of charity. In another note dated 2 November, 1993 heads of mission were advised in regard to hosting functions, to conform to applicable fire regulations, facility capacity limits, and regulations and prohibitions governing conduct of public gatherings such as the prohibition against serving alcohol to persons under the age of 21. Another note dated 15 may, 2002 advised that the United States interpreted article 41 of the VCDR to mean that mission premises may not be leased or

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[34] Rosalyn Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience", *American Journal of International Law*, Volume 79, Issue No. 3 1985, p641.
[35] Marian Nash Leich, "Diplomatic Missions" op. ct., pp 937-938.

rented for social events or used for events which are not related to diplomacy, including using the embassy chancery for a fee to host wedding receptions or other private events.[36]

The "appropriate' steps to protect the premises of the mission may imply that a receiving state will exercise its discretion in determining the level of security taking into account the extent of risk to the premises. Provisions to protect missions from attacks including making insults are common. For instance, a United States legislation makes it a criminal offence to display a flag or placard intended to intimidate or ridicule foreign diplomatic envoys or interfere with performance of diplomatic duties within 500 feet of an embassy premises except under a police permit.[37] The British practice has been willing to pay on an *ex gratia* basis all claims for damage to inviolable premises. In 1973, the British government made compensation for damage caused by a car bomb explosion to the High Commission of Nigeria, although the high commission premises were not the target.[38] Australia may also consider making such payments, but only where motivated violence should occur, and the protection provided should fail due to unusual circumstances and if, as a result, the properties owned by a mission or post were damaged.[39]

In Australia, the protective security coordination centre (PSCC), which comes within the portfolio of the attorney-general's department, has responsibility for coordinating the protection of diplomatic and consular premises and personnel. The PSCC liaises with the relevant police authorities, security agencies and the government

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[36] Copies of the circular diplomatic notes available at the Department of State website. www.state.gov/ofm accessed on 19 June. 2006.
[37] Lord Gore-Booth. (Ed) *Satows' Guide to Diplomatic Practice*, New York. Longman. 1979. p 111.
[38] Ibid.
[39] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June. 2006)" op. ct. para 13.4.

departments in order to assess the level of threat. It then tasks the Australian Protective Service (APS) to provide physical protection to missions and posts where it is deemed necessary. On their part, missions are expected to provide themselves with such security measures like perimeter security, entry controls, and duress and intruder alarms.[40] The responsibility of the United States government to protect foreign missions and resident foreign diplomats is shared between the department of state, the secret service, and the local police agencies. The level of protection afforded is typically a function of police activity as exemplified by uniformed presence, roving patrols, and marked police vehicles. In Washington DC, the uniformed division of the secret service under the direction of the Secretary of the Treasury provides protective service for missions based on the request of the secretary of state on consultation with the secret service which undertakes threat level assessment. The protection of foreign missions for the rest of the country is the responsibility of the secretary of state who has contracting and reimbursing authority, but no resource of his own to provide such protective services.[41]

In relation to litigation, some countries have adopted the view that a diplomatic mission has no legal personality of its own since it is nothing more than an organ of the accrediting state. In Switzerland, a head of mission who executes a lease agreement is deemed to be acting on behalf of the sending state. In the event of a dispute, the sending state will be notified of the case through the Swiss embassy in that country of impending litigation.[42] The mission of the sending state will not be directly involved. The idea of

[40] Ibid. Para 11.1- 11.2.
[41] US Secretary State's Advisory Panel on Overseas Security "Protection of Foreign Dignitaries and Missions in the United States(The Inman Report)" available at http://www.fas.org/irp/threat/inman/part09.htm accessed on 19 June, 2006.
[42] The Swiss Department of Foreign Affairs, "Practical Manual of the Regime of Privileges and Immunities and Other Facilities" op. ct.

circumventing the immunity of diplomatic missions arises from the notion that there is no rule in international law that imposes any obligation on the legally competent state to grant absolute immunity from jurisdiction to a foreign state. If a foreign state fails to respond to summons, judgement in default will be entered and communicated through the diplomatic channel. The mission may, however act on behalf of the state it represents, either through one of its members, or through an attorney or a proxy with the necessary power of attorney.

Several countries, particularly in western Europe including the Netherlands, Switzerland and Germany approach immunity for diplomatic missions from this perspective particularly in relation to contractual obligations. Issues relating to locally engaged staff also fall under this category. A similar position is taken by Australia whose Foreign States Immunities Act states that a foreign state is not immune in a proceeding concerning the employment of a person under a contract of employment that was made in Australia, or was performed partly or wholly within Australia.[43] Cases in which Kenya has been successfully sued directly in some of the mentioned countries for actions of its missions abroad will be examined in Chapter Five.

Inviolability of the Diplomatic Bag

Although the importance of the diplomatic bag for documentary communication has widely been supplanted by use of radio, fax and coded computer files, it still has considerable importance for conveying secret equipment and materials. The VCDR contains specific provisions for the protection of the confidentiality of the contents of the diplomatic bag. According to article 27(3) of the VCDR, the diplomatic bag shall not be

[43] Australian Government, Protocol Department of the Ministry of Foreign Affairs and Trade, "Protocol Guidelines (Amended June, 2006)" op. ct. para 9.1.

opened or detained. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use. The diplomatic courier is also inviolable and is not liable to any form of arrest or detention. Other than the diplomatic courier, the diplomatic bag may be entrusted to designated diplomatic couriers *ad hoc* or to the captain of a commercial aircraft scheduled to land at an authorised port of entry. In such a case, the couriers *ad hoc* will enjoy limited immunities but the captain will not.

Although the Convention prescribes what the content of the diplomatic bag should be, it does not make any provisions for interfering with it even if there are grounds to suspect it is being abused.[44] Moreover, what may constitute 'articles' intended for official use has not been defined and thus its determination has seemingly been left to individual member states. Given these facts, it is inevitable that countries will have different views on what constitutes articles for official use and by extension what the diplomatic bag should carry. For instance the Swiss and German authorities refused to allow a Soviet truck containing nine tons of articles to be treated as a "diplomatic bag".[45]

Some states have made reservations to the provisions relating to the diplomatic bag to the effect that if they have serious grounds to believe a bag contains unauthorised matter, they will require the sending state to either open it for inspection or return it to its place of origin if not prepared to allow inspection.[46] This is hardly surprising. In recent years, the provisions on the sanctity of the diplomatic bag have been the cause of grave concern to many states. Indeed, there have been several examples of the bag being used

[44] Lord Gore-Booth. (Ed) *Satows' Guide to Diplomatic Practice*. op. ct.. p 117.
[45] Thomas M Frank (Ed). "The Thirty Sixth Session of the International Law Commission" *American Journal of International Law*. Volume 79. Issue 3. 1985 p 757.
[46] Richard K Gardner. *International Law*. op. ct.. p 358.

to smuggle drugs, weapons, art treasures and even individuals into or out of the receiving state.[47] The United Kingdom resorts to scanning diplomatic bags on specific occasions where there are strong grounds for suspicion, and a member of the relevant mission is invited to be present.[48]

As things stand, there is no rule that permits the use of such devices as x-rays, geiger counters, sniffer dogs and stethoscopes, and what sanctions to apply if the use of such devices revealed unacceptable content such as human beings, nuclear material, toxic chemicals, drugs, weapons and other material that have no relevance to the official function of diplomatic mission. Generally, countries would carry out inspection if there are no visible external marks to the effect that a container is a diplomatic bag. The fact that there were no such visible marks on a container that was being used in the attempted abduction from the United Kingdom of a former Nigeria government official legitimised its opening by UK customs officials.[49]

In an effort to address the controversies surrounding the administration of the diplomatic bag, the International Law Commission adopted draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier in 1989. Among the proposed articles is one that allows, subject to there being a serous reason to suspect the abuse of the bag, for a request to be made to a sending country to open the bag for inspection.[50] However, no agreement on amendment of the Convention to incorporate these proposals has been reached.

[47] Martin Dixon. *Textbook on International Law*, op. ct., p 190.
[48] Ian Brownlie, *International Law*, (4th Edition). Oxford. Oxford University Press. 1998. p 358.
[49] Rebecca M.M. Wallace. *International Law*, op. ct., p 128.
[50] Ibid.

Inviolability of the Diplomatic Agent

The inviolability of the person of a diplomatic agent is the oldest established rule of diplomatic law.[51] Article 29 of the VCDR, like article 22, first confers 'inviolability' to the diplomatic agent and then defines in greater detail what it means. The inviolability has two aspects: the duty of the receiving state to refrain from exercising sovereign rights and in particular, law enforcement rights, and the positive duty to treat the diplomatic agent with due respect, and to protect him from physical interference by others with his person, freedom, or dignity.

No exceptions are given for inviolability. However, there are circumstances where there is general agreement that the person of a diplomatic agent can be subjected to law enforcement processes. It is, for instance generally accepted that the inviolability of a diplomatic agent does not preclude his being expected to submit to search either manually or by X-ray device as a condition of carriage by air. This is the practice in the United Kingdom and the United States of America. In 1982, the United Kingdom secretary of state informed all diplomatic missions in London that airlines were fully entitled to refuse to carry any passenger who is unwilling to be searched. Missions were encouraged to comply in the interest of general safety.[52]

In practice, most of the difficulties suffered as a result of diplomatic immunity by the general public in the receiving state arise from driving and parking by members of diplomatic missions. The largest category of serious offences involving diplomats, according to records published by the United Kingdom Foreign and Commonwealth Office in their 1985 review of the Vienna Convention was driving under the influence of

[51] Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, op. ct., p 181
[52] Ibid p 218.

alcohol or drugs.[53] Traffic related issues have been a cause of tension and acrimony between diplomatic communities and their host cities. A good example is an incident in 1997 in which New York traffic police arrested Russian and Belarus diplomats for being drank and disorderly and issued them with a parking ticket. Belarus contested bitterly arguing that the action violated international law and demanded an apology. However, New York mayor Rudi Giuliani instead demanded an apology from Belarus and Russia, expulsion of the two diplomats and payment of penalties resulting from disobeyed summonses relating to traffic offences. The summonses totalled 828 for Belarus diplomats and 14,437 for Russian diplomats.[54]

Because of the traffic related violations, states have taken the liberty to, in several ways subject diplomatic agents to their traffic laws and regulations. The requirement for compulsory third party insurance is one such measure. It provides an avenue under which diplomatic agents can be held responsible for damages without necessarily interfering with their diplomatic function. A Belgian court in 1970 held that under the Belgian law on compulsory motor vehicle insurance, a plaintiff could bring a direct action for indemnity for damage and or other loss following an accident alleged to have been caused by the driver of the Embassy of Madagascar.[55] In the United Kingdom, insurance companies are not allowed by law to hide behind the immunity of their diplomat clients.[56]

States also require diplomats to accept to take breath tests and even other medical examination to determine whether or not they were driving under intoxication. The

[53] R. Higgins, "UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges". op. ct.
[54] Refet Kaplan and Walden Siew. "Immunity No Longer Means Impunity for Diplomats" *Insight on the News* Volume 13 issue 4. February 3 1997. p 24. available at www.questia.com/PM.qst?action accessed on 15 June, 2006.
[55] *Bonne and Company X Versus Company* Y. 69 ILR 280.
[56] *Dickinson V Del Solar*. (1930) 1 KB 376.

practice in the United States is for police to ask drivers entitled to inviolability to submit to a breath test for their own safety. The state department explained to diplomatic missions that the object is not punitive, but preventive as it serves to protect both the driver and the possible victims of drunken driving.[57] This is also the case in Australia where the police have authority to request a driver to submit to a breath screening test.[58] The Australian practice, like the American case demand that persons holding diplomatic immunity pay any fines resulting from on-the-spot infringement notices, unless it is their intention to contest the notice. The department of foreign affairs and trade does not intervene with local authorities to seek cancellation of traffic infringement notices. Licence demerit points are also kept in relation to moving vehicle violations. In the United States, a twelve point accumulation within a two-year period will cause a licence to be suspended and the State Department may request for the recall of the violating diplomat.[59] In Australia, once a diplomatic agent attains a total of seven points, the head of the mission will be notified and if some infringements are considered serious, a request to withdraw the person from Australia may be made.[60]

A source of legal disputes between diplomatic agents and citizens of a host state is lease contracts. Due to the nature of the diplomatic service, diplomatic agents are often transferred to headquarters or other duty stations before their lease agreements expire. Others may damage the property because they are unfamiliar with the use and maintenance of domestic equipment in the foreign country. Countries like Switzerland

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[57] Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* op. ct., p 219.
[58] Australian Government, Protocol Department of the Ministry of Foreign Affairs and Trade, "Protocol Guidelines (Amended June, 2006)" op. ct. para 8.2.3.
[59] United States Department of State, "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers" op. ct. para 3.19.
[60] Australian Government, Protocol Department of the Ministry of Foreign Affairs and Trade, "Protocol Guidelines (Amended June, 2006)" op. ct. para 8.2.1.

recommend to diplomatic agents to ensure that diplomatic clauses are incorporated in the lease agreements. Many states are however hesitant to intervene in rent related disputes unless such intervention is aimed at assisting their citizens who are usually the landlords, in pressurising diplomatic missions to ensure payment of any dues. This is because lease agreements may be considered commercial contracts which create obligations for the parties.

Where a suit has been filed against a diplomatic mission or agent, it becomes necessary to prove the diplomatic immunity in court. This creates difficulty for the diplomatic mission or agent since by appearing in court even for purposes of pleading diplomatic immunity, there will be implied admission of the jurisdiction of the court, and therefore the diplomatic mission or diplomatic agent becomes bound by the court's decisions. Many commonwealth countries have resorted to the use of a certificate issued by the minister for foreign affairs to prove to the court that a defendant in a suit has diplomatic immunity and therefore cannot be subjected to its jurisdiction. For Canada, such certificate is issued pursuant to Section 11 of the Foreign Missions and International Organizations Act. For Malta, the provision is found in Section 9 of Diplomatic Privileges and Immunities Act (Cap 191) of 1966.[61] Section 9 (3) of the South African Diplomatic Immunities and Privileges Act says that if in any proceeding in a court of law any question arises as to whether or not any person enjoys any immunity or privilege under the Act, a certificate issued under the authority of the director-general stating any fact relating to that question will be a *prima facie* evidence to that fact.

[61] Diplomatic Privileges and Immunities Act (Cap 191) of the Laws of Malta. available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol.5/chapt 191.pdf accessed on 1 July. 2006

Administration of Facilities

Freedom of Communication

Free and secret communication between a diplomatic mission and its sending government is, from the point of view of its effective daily functioning, probably the most important of all the diplomatic facilities accorded under diplomatic law. Without this facility, the mission would not effectively carry out its main functions of negotiating with the government of the receiving state and reporting to headquarters.[62] The right of diplomatic missions to free and secure communication for official purposes is guaranteed by article 27 of the VCDR. The diplomatic mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. It may also, subject to the consent of the receiving state, install and use wireless transmitters.

Although the installation and use of radio transmitters is subject to consent of the receiving state, there seems to be no requirement for subjection of the mission on receiving that consent to local laws and procedures such as submission to inspection. This, however, does not licence a mission to disrespect local laws and regulations. After all, articles 4 (1) and (3) impose a duty on the mission to respect those laws and the consent is subject to conditions which must be complied with. 'Free communication' does imply exemption from appropriate charges, but rather absence of prohibitions or restrictions. This is especially so with regard to telephone or other communication services.

In general, states ordinarily grant licenses to set up wireless transmitters, but conditions and processes differ. The United States in 1979 gave guidance in the context

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[62] Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* op. ct., p 165.

of approval of a request by Senegal to install and operate a radio transmitter/receiver. This was aimed at addressing various associated problems including interference with other United States users, interference with other embassy radio facilities and visual obstruction by antennae. The United Kingdom practice does not require missions to seek express permission or even to notify its authorities on installing a transmitter. The UK also argues that the sending state has the responsibility of applying the provisions of international telecommunication Conventions.[63]

The Australian government requires diplomatic missions to make applications through the protocol branch, but the licence is issued by the Australian Communications Authority. Approval would ordinarily be given on the basis of reciprocity. However, physical constraints and procedural requirements of the relevant State and local government have to be met.[64]

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[63] Eileen Denza. *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* op. ct., p 178.
[64] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June. 2006)" op. ct. para 5.4.2.

CHAPTER FOUR

KENYA'S PRACTICE IN THE ADMINISTRATION OF DIPLOMATIC PRIVILEGES, IMMUNITIES AND FACILITIES

Introduction

Chapter Three contained a comparative examination of the administration of diplomatic privileges, immunities and facilities among selected countries. This chapter focuses on Kenya and essentially involves an explanation of the obtaining situation as narrated by relevant officials of the government agencies that have a role to play in the processes.

Kenya hosts the largest diplomatic community in Eastern Africa. It comprises 83 diplomatic missions headed by ambassadors or high commissions, 4 headed by charge d' affaires and 1 headed by a trade commissioner. In addition, there are 19 consulates and honorary consulates and 46 international organizations, which enjoy diplomatic privileges, immunities and facilities. The diplomatic missions are wide ranging in sizes. In some cases, they include the military components and development agencies. For example, missions of the United States of America, Germany and United Kingdom, have a large number of diplomatic personnel ranging between 60 for Germany and 130 for the United States. The other missions have diplomatic staff ranging from 3 to 20 depending on several factors such as the level of bilateral relations, and levels of development. Of the international organizations, the United Nations Office (UNON), which includes the headquarters of two United Nations agencies, UNEP and UN Habitat, have over 1800 internationally recruited staff. Overall, Kenya hosts over 3000 persons that enjoy

diplomatic privileges, immunities and facilities. It is difficult at any given time to have an exact static figure of the number of such persons because of the high mobility rate.[1]

Several basic documents guide Kenya's administration of diplomatic privileges, immunities and facilities. However, the most important ones are the Vienna Convention on Diplomatic Relations (VCDR), and the Vienna Convention on Consular Relations (VCCR), both of which have been transformed under the Diplomatic Privileges and Immunities Act (Chapter 179 of the Laws of Kenya). Other conventions on privileges and Immunities to which Kenya is a state party, notably those relating to the United Nations and the African Union also apply. In addition, there are host country agreements (HCA) entered into with other international organizations that form the basis for their enjoyment of diplomatic status. The Conventions and the HCAs must, however, be given the force of law legal notices by the minister for foreign affairs under the Privileges and Immunities Act.

Obtaining Diplomatic Status

By virtue of the VCDR and the VCCR, diplomatic missions and consulates automatically acquire diplomatic status on their establishment in Kenya. Apart from the mission, the privileges and immunities also apply to persons working in the missions. These persons are divided into several categories namely: the heads of mission, diplomatic staff, administrative and technical staff, service staff and private servants. The head of mission and the diplomatic staff are also referred to as diplomatic agents.[2]

[1] Information provided by the Acting Deputy Chief of Protocol, Ministry of Foreign Affairs on 16 July, 2006

[2] Article 1 of the Vienna Convention on Diplomatic Relations

In order for the receiving state to provide the necessary diplomatic entitlements, it is necessary that it is aware of the arrival of new diplomatic agents. Article 10 of the Vienna Convention on Diplomatic Relations provides that the ministry of foreign affairs of the receiving state, or such other ministry as may be agreed, shall be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission. In the case of Kenya, notifications of appointment of diplomatic staff are made to the protocol division of ministry of foreign Affairs including the title of the appointment and the staff category. The names of diplomatic agents are included in the directory of diplomatic corps and international organizations that is published regularly by the ministry. Privileged status begins from the time of notification if an officer is already in the country or on arrival to take up the post. It ends on notification of completion of, or recall from a tour of duty. Other factors that may lead to cessation are if the diplomatic agent is declared *persona non grata* under article 9 of the VCDR, or dies.

Notification is important in the administration of diplomatic privileges, immunities and facilities in a number of ways. It formally marks the beginning and end of diplomatic privileges and immunities for the concerned officials. It also enables the receiving state to compile, and accurately determine the number and personal details of such persons. This makes it possible for the host state to organize itself administratively in order to provide the necessary privileges, immunities and facilities. Notifications also serve the purpose of demonstrating mutual respect between states.

Unlike diplomatic missions and their personnel, international organizations and their internationally recruited personnel in Kenya do not automatically enjoy diplomatic

privileges, immunities and facilities. The power to accord diplomatic status to such international organizations vests in the minister for foreign affairs. Under section 9 of the Privileges and immunities Act, he may by order, declare an organization, to the extent specified in the order, to have the immunities and privileges set out in Part I of the Fourth Schedule and to have the legal capacities of a body corporate. The minister may also confer on any persons who are representatives of the organization or holders of high offices within the organization or employed on behalf of the organization, to the extent specified in the relevant order, immunities and privileges set out in Part II of the Fourth Schedule. Any order made under this section is to be framed such that it does not confer upon any person immunities or privileges greater in extent than those which, at the time of the making of the order, are required to be conferred on that person in order to give effect to the relevant agreement. This is important because privileges, immunities and facilities accorded to international organizations and their personnel are negotiated and agreed on in host country agreements (HCAs).

HCAs may be entered into with different types of organizations. Under section 9 of the Privileges and Immunities Act, it may be signed with an inter-governmental organization of which Kenya is member. Under Section 11, such agreements may be signed with the government of a foreign state, a recognised agency of such a government, and an internationally recognised foundation or other body. This practically open-ended categorization has led to conclusion of HCAs with many types of organizations including research, educational, and religious based non-governmental organizations, thus making the administration of privileges, immunities and facilities more challenging.

Despite the apparent weakness of the legislation, the signing of host country

agreements with international non-governmental organizations began to take root from mid 1980s. Hitherto, such agreements were reserved for inter-governmental organizations. Even the enactment of the Non-governmental Organizations Act of 1990 did not help to stem the desire by NGOs to sign HCAs because of the better prospects offered by such agreements. These prospects include the enhanced status of the organization, tax exemption privileges, and immunity from legal process.

Although the prerogative of conferring privileges, immunities and facilities is vested in the minister, the process in respect of international organizations requiring to sign HCAs involves the cabinet and other agencies that are concerned with the administration of such privileges, immunities and facilities. The practice has been for a sponsor minister, usually the minister for the time being responsible for the activities being undertaken by the organization, to ask the cabinet to approve the signing of a HCA with that organization. Once such approval is issued, the ministry of foreign affairs, through its legal division drafts the HCA and circulates it to other relevant ministries including that of finance, the attorney-general and the ministry of immigration for comment. Upon incorporation of the comments received, the agreement, subject to the concurrence of the organization is signed. The HCA is then given legal effect by means of a legal notice. A HCA will amongst others grant juridical personality to an organization and spell out the privileges, immunities and facilities accorded to the organization and specified personnel.[3]

[3] Information provided by the Acting Head of Legal Division. Ministry of Foreign Affairs on 18 July. 2006.

Application of Reciprocity

Chapter Three established that notwithstanding the provisions of the Vienna Convention, reciprocity is an important component in the determination of the extent of privileges, immunities and facilities that states accord to each other's diplomatic missions. The principle of reciprocity is likewise recognized by Kenya's law. Under section 13 of the Privileges and Immunities Act, 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.

Reciprocity is an important phenomenon in a wide range of social interactions. This is especially true with respect to the study of interactions between national leaders.[4] Reciprocity presupposes that the behaviour of each actor at a given time will be affected not only by the value he gives to various outcomes but also by his expectations about how the other is likely to act in the future, especially in reaction to his own behaviour. The actor is expected to base reciprocation not solely on the most recent actions of the other, but on a comparison of the other's recent actions with his own recent actions.[5]

Within the context of diplomatic privileges, immunities and facilities, reciprocity implies that a state will, in making any decision or action, take into account recent actions of the state to which that decision or action is targeted, likely reactions, and possible effects on the desired goals. The state will also take measures to respond to or reciprocate any decision or action whether positive or negative that another state takes towards it. In

[4] Martin Patchen, "Comparative Reciprocity During the Cold war". *Peace and Conflict Journal*, Volume 3, Issue No 1, 1997. p 37
[5] Ibid. p 39

essence, reciprocity is about exchange of treatment on the basis of sovereign equality.

Analysis shows that Kenya has not been keen to exercise reciprocity in the strict sense. Most privileges, immunities and facilities are provided without much regard to how Kenyan missions are treated in the territories of sending states. One of the few exceptions is in the area of work permits which are issued automatically on the basis of reciprocity and pursuant to an agreement that allows dependents of diplomats to work in the receiving state. Such agreements exist with the United Kingdom, Canada and the Netherlands.

Administration of Privileges

Exemption from Taxation

Diplomatic missions and international organizations together with their diplomatic personnel are exempt from paying several types of taxes. Save where there is application of reciprocity, all exemptions granted to diplomatic missions and diplomatic staff are similar. However, those granted to international organizations are as specified in the applicable host country agreements and their related Legal Notices. The taxes include land rates, land rents, stamp duties, and value added tax and duty free importations.

Diplomatic missions are exempt from payment of land rates, which municipal authorities levy on occupiers of property within their jurisdiction. The exemption is generally granted to all diplomatic missions, although reciprocity is emphasized in the Act.[6] The Rating Act (Chapter 267) gives the local authorities the power to set the tax rates and they are allowed to choose a valuation rate of up to 4 per cent of the value of the property without central government approval. Property tax administration is also the

[6] Section 13 of the Diplomatic Privileges and Immunities Act (Chapter 179).

responsibility of local authorities. They are responsible for the construction and maintenance of the tax roll, the valuation, the assessment, tax billing, collection, enforcement, appeals and tax payer service.[7] The local authority can use in-house staff, other government departments or the private sector to assist in any or all of theses functions. From 14th March, 2005, the Kenya Revenue Authority began collecting land rates on behalf of the City Council of Nairobi.[8]

The Nairobi City Council hosts all embassies, high commissions, and international organizations in Kenya. Approximately 49 per cent of the Council's income is from rates paid by residential and commercial property owners. The council waives payment of the rates by diplomatic institutions on the recommendation of the ministry of foreign affairs. Where a mission is erroneously served with a rates bill, it may submit it to the ministry of foreign affairs, which in turn liaises with the Council in rectifying the mistake. The rationale for exempting diplomatic missions and international organizations from land rates is that it is classified as a tax and not a charge or a fee for services rendered. This is in spite of the fact that such tax contributes to the local authority's capacity to provide necessary services to its residents, including the diplomatic entity itself.

Another tax which diplomatic institutions and personnel are exempt from is value added tax (VAT). The challenge, however, is how to ensure that the privilege is administered efficiently. In this regard, close coordination between the ministry of foreign affairs and the Kenya Revenue Authority in sharing information and processing

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[7] World Bank, "Property Taxation in Kenya: Role of Property Taxes Within Local Authorities in Kenya" http://www1.worldbank.org/publicsector/decentralization/June2003Seminar/Kenya accessed on 9 October, 2006.
[8] Notice to this effect available at http://www.revenue.go.ke/notices/noticemsalandrates310105.html accessed on 9 October, 2006.

of applications is critical. A direct exemption from payment of VAT on telephone, telex and fax facilities is granted by the commissioner of VAT on an annual basis to diplomatic missions, heads of mission, and to members of diplomatic and administrative staff. Missions are, in this respect, required to submit details of the officer's addresses including land registration numbers, telephone, telex and fax numbers to the protocol department. On verification of the details, the protocol department forwards them to the commissioner of VAT. The same procedure applies for electricity and security services. However, in the case of security services, a copy of the agreement with the security firm should in addition be submitted. As opposed to the refund system which applies to other goods and services, exemptions with respect to telephone, and electricity are approved upfront. Hence, the issue of refunds does not arise.

The Commissioner of VAT has a department concerned exclusively with privileged institutions and persons. Several forms are used for different commodities. These include the VAT exemption form, PRO 1A form, PRO 1B form and PRO 1C form. Although they serve different albeit related purposes, these forms bear many similarities. The VAT exemption form is used to apply for authority to purchase services and locally manufactured goods free of VAT while PRO 1A form is used to apply for authority to purchase or import duty-free liquor and tobacco. The PRO 1B form is used to apply for authority to purchase or import duty-free all other types of goods and PRO 1C form is dedicated to the disposal of vehicles purchased duty-free.

All the forms are launched at the protocol division where they are examined to ascertain the authenticity of the diplomatic status and eligibility of the applicants. The protocol division will, on satisfying itself that the application is in order, stamp the

document and forward it to the VAT department or customs and excise department as appropriate. The VAT and customs and excise departments will subject the application to further professional scrutiny including ensuring authenticity of the registration of the disclosed suppliers and the correctness of the value of the declared goods and the applicable exemptions. The authority is then granted by endorsing the document as appropriate, thus allowing the diplomatic agent or mission to purchase or import a particular item or pave way for the payment of refunds where the purchase had already been made.

In order to avoid abuse, a number of conditions and restrictions apply. For instance, quantities for alcohol and tobacco products that may be obtained VAT or duty-free are restricted. A mission may purchase up to 40 bottles of spirits and 180 bottles of wines per quarter. It may also purchase a reasonable quantity of beers and tobacco per quarter. The reasonableness is determined by the protocol and KRA personnel on the basis of the explanation provided by the applying mission. However, since what is reasonable is subjective, the entitlements to the diplomatic missions and their personnel in respect of alcohol are vague.[9] Thus, the restrictions may not effectively address the envisaged mischief of abuse of the privilege.

The possible abuse of the privilege of exemption from VAT could, be addressed by the clear indication in all the forms that the authority to purchase or import goods tax-free is not transferable to any other person or body without prior written permission of the VAT or Customs authorities. This requires the state to have well-maintained and updated records and ability to monitor and control transactions relating to property

[9] Information provided by protocol officer at the protocol department during an interview on 17th July, 2006.

acquired free of VAT. However, although copies of the application documents are shared among the relevant organs, they are susceptible to loss and destruction because of lack of sufficient automation. The heavy reliance on paperwork, also mean that application processes take long to finalize.

Exemptions in Relation to Motor Vehicles

The regulation of exemptions in respect of motor vehicles is intensive. Diplomatic missions, heads of mission, and other members of the diplomatic staff are exempted from several requirements including payment of motor vehicle registration fees, road licence fees (until its removal in July, 2006), and driving licence fees. What is debatable is whether these payments are taxes or fees charged for services rendered. While motor vehicle registration and road licence fees may be considered as taxes, driving licence fees can be considered as a fee charged for the rendering of a service. From this perspective, it is in order if diplomatic agents would be required to pay driving licence fees. However, such would be a departure from the practice obtaining in other countries.

Diplomatic agents who are married and accompanied in Kenya by their spouses may import two cars free of customs duty and VAT. If they are single, or are married but not accompanied by their spouses in Kenya, then they are entitled to one duty-free car. Replacement of such motor vehicles can be authorised by the protocol department in the case of irretrievable loss through theft or accident, or irreparable malfunctioning. In the case of uneconomical or irreparable malfunctioning, a certification from the ministry of public works or the automobile association of Kenya is required. For international organizations, the applicable host country agreement and the relevant legal notice set out the conditions for purchase and disposal of motor vehicles. The practice has been to

allow for disposal after four years from the time of purchase, or earlier if the motor vehicle is lost due to theft, accident or irreparable malfunctioning.[10] Taxes are payable unless the motor vehicle is sold to a similarly privileged entity or person. This condition is necessary as a measure against possible use of the privilege to engage in trade in motor vehicles without paying the requisite taxes.

Diplomatic agents are required to observe the laws and regulations governing the use of motor vehicles as set out under the Traffic Act (Chapter 403) and other statutes. This is especially so because of the need to ensure road safety and payment of compensation where there is an accident. It is mandatory for all motor vehicles, including those belonging to diplomatic missions and international organizations and their personnel to have third party insurance policy in accordance with the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405).[11] As such, evidence of the insurance policy must be presented during application for the registration of the motor vehicle.

On completion of their tour of duty or in the event of transfer of an entitled member of staff of an international organization to another country, automobiles imported into Kenya under diplomatic privileges may be permanently exported. The commissioner of customs and excise requires notification of such permanent exportation. Where such is given in advance, arrangements are made to facilitate the movement of the vehicle through customs control. In this regard, the relevant diplomatic mission is expected to provide all necessary details to the protocol department including date and

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[10] Ministry of Foreign Affairs. A Guide to Diplomatic Privileges and Immunities in Kenya, paragraph 22.
[11] Ibid, Paragraph 11.

port of exportation, the name of the export vessel or flight number, name of shipping agent, details on the vehicle and the details of the privileged officer.[12]

Although the administration of parking for diplomats is a big issue in many cities, especially those with high number of diplomats such as New York, Washington DC, Geneva and London, it is not considered as pressing matter in Nairobi. An explanation for this could be the fact that most embassies and international organizations occupy their own premises and are located outside the central business district. According to the Ministry of Foreign Affairs, exemptions from parking fees are granted on the basis of one parking bay per mission.[13] However, records at the Nairobi City Council offices indicate that there is no uniform allocation of parking bays. For instance while the Australian High Commission, Cyprian Embassy, Colombian Embassy and the Embassy of the Democratic Republic of Congo each has one parking bay the Ugandan High Commission and the Libyan Embassy have 3 each and the Tanzanian High Commission has two.[14]

According to the city engineer, the council allocates parking bays to diplomatic missions as recommended by the MFA.[15] The MFA however only forwards applications as received from diplomatic missions and privileged organizations to the council for consideration. The council is under no obligation to grant additional free parking bays. Hence, the apparent lack of uniform treatment of diplomatic missions as far as parking is concerned can be attributed to the absence of a clear policy within the Nairobi City Council and the absence of adequate consultation and coordination with the ministry of foreign affairs.

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[12] Information provided by protocol officer at the protocol department during an interview on 17th July. 2006.

[13] Ministry of Foreign Affairs. A Guide to Diplomatic Privileges and Immunities in Kenya. Paragraph 10.

[14] Records examined at the city engineer's office. Nairobi City Council on 21 July. 2006.

[15] Information provided by an engineer at the city engineer's office. Nairobi City Council on 21 July. 2006.

Administration of Immunities

Inviolability of Mission Premises and Diplomatic Agents

The inviolability of diplomatic missions and diplomatic agents is a well established principle under the VCDR. In the case of international organizations, the principle is usually enshrined in the applicable host country agreements. The maintenance of inviolability of diplomatic missions and international organizations and their diplomatic personnel is the responsibility of a number of government agencies including the MFA, the judiciary and the law enforcement authorities. To a great extent, these agencies tend to view the inviolability of missions and their agents as sacrosanct. In practice, they go to great lengths in ensuring that the principle is maintained.

The provision of security protection for diplomatic missions and diplomatic agents is the responsibility of the diplomatic protection police unit (DPPU), which is a unit of the Kenya Police. The unit is made up of about 500 police officers recruited from different specialised units in the police force including the general service unit and the anti-stock theft police unit.[16] Some have also been deployed directly into the unit from the Police Training College. Prior to their deployment, the officers are trained on how to handle privileged persons and on basic provisions of the VCDR. The officers benefit from lecturers from relevant officials from the ministry of foreign affairs. For purposes of provision of security, the DPPU has divided Nairobi into two sections; the northern and the northern sections.[17]

Because of the relatively large diplomatic community in Nairobi, the DPPU cannot maintain its presence in diplomatic premises. They will only perform patrol

[16] Information provided by the Commissioner of Police, during a call on him by the NDC Course 09/2006 on 17 May, 2006.
[17] Information provided by the Police Spokesman, Kenya Police on 19 July, 2006.

duties, respond to distress calls, and maintain a presence where there is credible suspicion of an imminent security risk. Missions are encouraged to either hire security services from private security firms or arrange to bring their own security personnel.[18] However, any firearms held by them must be licensed in accordance with the Firearms Act (Cap 114). Prior to certification being issued, any such firearms or ammunition being imported, will on arrival at the port of entry be held by government security personnel. They are only released on production of valid permit, which is applied for through the Protocol Department.[19]

The Kenya law enforcement agencies face several challenges in relation to diplomatic missions and their agents. One of these is the arising dilemma where a crime is being committed or suspected to be taking place within diplomatic premises. Since access to such premises is subject to the authority of the head of mission, the law enforcement authorities have often found it difficult to get such authority. One such example is when the Kenya law enforcement authorities were not allowed to have access to the former US embassy premises when it suffered terrorist attacks on 7th August, 1998.[20] Another challenge has been obtaining the support of diplomatic missions in prosecuting criminal cases in which diplomatic missions or diplomatic agents are the complainants. Even where diplomatic agents are needed to testify in support of the prosecution's case in order to obtain convictions for perpetrators of crime such as robbery and theft at the work place or residences, diplomatic missions generally decline to waive diplomatic immunity of their diplomatic personnel for purposes of appearing in court as

[18] Information provided by the Acting Deputy Chief of Protocol on 17 July, 2006.
[19] Ministry of Foreign Affairs. A Guide to Diplomatic Privileges and Immunities. Paragraph 15.
[20] Makumi Mwagiru. *Diplomacy: Documents, Methods and Practice*. Institute of Diplomacy and International Studies. 2004. p 60

witnesses.[21] Accordingly, criminal cases in which privileged entities and persons are the victims are rarely prosecuted.

The Approach of the Courts

In civil cases, the courts have generally been reluctant to entertain cases against diplomatic missions and international organizations for want of jurisdiction. Consequently, many cases in which these entities are defendants are dismissed at preliminary levels. For instance in a case in which a former employee of the International Centre of Insect Physiology and Ecology (ICIPE), an organization that enjoys diplomatic privileges and immunities in Kenya, filed a suit against ICIPE for breach of contract of employment, the court, even without addressing itself to the facts of the case, dismissed the suit with costs because of the defendant's immunity from legal process.[22]

Where a case has been filed in court, it may become necessary to ascertain whether a person or an institution enjoys diplomatic immunity. Article 22 of the VCDR places on the receiving state a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. The receiving state must also ensure that these premises are not subjected to search, requisition, attachment or execution. The import of this is that it is the state's responsibility to ensure that the diplomatic mission's immunity from legal process is not compromised. This raises the question regarding the instruments at the government's disposal to carry out this responsibility, hence the idea of an executive certificate. In view of the clear separation of

[21] Acting Head of Legal Division. Ministry of Foreign Affairs. 18 July. 2006
[22] Ruling by Judge M.G. Mugo in High Court of Kenya at Nairobi. Civil Case No. 1737 of 2002. Gerard *Killeen V International Centre of Insect Physiology and Ecology*. delivered on 27th May. 2005. found at www.kenyalawreports.or.ke accessed on 1st March. 2006

powers, the government is ordinarily reluctant to intervene in matters before courts of law, including those involving diplomatic missions and their personnel. However, the Privileges and Immunities Act provides an opportunity for the executive to influence the court process if the question as to whether or not a person is entitled to diplomatic immunity arises. It stipulates that the Minister may in such a case issue a certificate relating to the question as conclusive evidence of the fact.[23]

Although the law provides for it, executive certificates are seldom used. One of the cases in which it has been resorted to is *Arbanus Mutiso Versus Susan Cavanagh.*[24] Ms Cavanagh who had been an official of the United Nations Development Programme, Kenya Office, was sued for defamation by Mr. Mutiso, a locally engaged member of staff of UNDP who had been suspected and prosecuted for theft at the work place. Mr Mutiso was acquitted of the charges prompting him to sue Ms. Cavanagh for causing him to be considered in the eyes of the public as dishonest and a thief. The minister for foreign affairs issued a certificate confirming the diplomatic status of Ms Cavanagh as at the time the alleged offence was committed. The minister's certificate was based on the fact that the act for which the respondent was sued was performed in the course of official diplomatic duty.

The issuance of an executive certificate raises the question of how to adduce the evidence before the court. This issue is challenging. because of two main reasons. Suits filed against diplomatic missions or diplomatic personnel do not, usually, incorporate the government. Secondly is that diplomatic missions or agents are reluctant to enter appearance even for purposes of pleading immunity. This arises from the apprehension

[23] Section 16 of the Privileges and Immunities Act. (Chapter 179).
[24] High Court of Kenya in Nairobi Civil Suit Case No. 149/2004. *Arbanus Mutiso versus Susan Cavanagh.* (Case is on-going)

that such an act would be tantamount to submission to the jurisdiction of the court. Thus, sometimes it becomes necessary, depending on the gravity of the case, for the attorney-general to be enjoined in proceedings in order to present the executive certificate. This took place in the case of *Mutiso versus Cavanagh* essentially because the United Nations declined to enter appearance to argue out the diplomatic immunity of its former officer. The reason advanced by the UN for this position was that an appearance would amount to submission to the court's jurisdiction which would violate the organization's diplomatic immunity.

Some aggrieved parties have attempted to institute cases directly against foreign governments for civil cases in which their missions or diplomatic agents are defendants. Even then, the courts are still reluctant to accept jurisdiction. This was demonstrated in the case of *Edna S. Ouma versus the Government of the Arab Republic of Egypt.*[25] The plaintiff was a Kenyan landlord who rented residential property to the Embassy of Egypt for residential purposes of one of its diplomatic staff. She filed the case claiming damages against the government of Egypt for destruction occasioned by the diplomatic staff to the demised premises. The court dismissed the case for want of jurisdiction. Courts in other countries consider tenancy matters to fall within the jurisdiction of local courts. The main reason for this is that such tenancy agreements are commercial arrangements that are usually governed by the laws and regulations of the receiving state. An Ontario Housing and Rental Tribunal[26] in considering a case filed against the Kenya

[25] High Court Civil Case No. 160 of 2004. *Edna S. Ouma Versus the Government of the Arab Republic of Egypt* (unreported)
[26] Ruling of the made by the Ontario Housing and Rental Tribunal in *Wilfred Bokman Versus Kenya High Commission in Ottawa*. Court File No. EAL 36474. Information from the Ministry of Foreign Affairs.

High Commission in Ottawa for damage to rented property went ahead to award damages to the plaintiff based on the notion that it had jurisdiction.

Whether the case is filed against the mission or against the sending state, Kenyan courts would be bound by the case of *Ministry of Defence of the Government of the United Kingdom versus Ndegwa.*[27] The respondent in this case had filed a suit jointly and severally against the appellant and another person, one Stuart Brown who was a member of the British army, for damages for negligence arising out of a motor vehicle accident involving motor vehicle which was being driven by Brown. The appellant entered appearance and filed an application seeking for an order to strike out the proceedings against it on the ground that the government of the United Kingdom as a sovereign, had not consented to be sued in the Kenyan court and was entitled to immunity. The application was dismissed with costs, thus necessitating the appeal. On consideration of arguments from both sides, the court held *inter arlia* that it is a matter of international law that Kenyan courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived. Such persons and institutions were specifically mentioned as including foreign sovereigns or heads of state and government, foreign diplomats and their staff, consular officers and representatives of international organizations such as the United Nations and the then Organization of African Unity. Since the appellant had neither waived its immunity nor consented to submit to the jurisdiction of the courts of Kenya, the appeal was allowed. The court's interpretation in this case, however brings out the possible confusion of sovereign immunity and diplomatic immunity.

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[27] Court of Appeal at Nairobi, Civil Appeal No. 31 of 1982. *Ministry of Defence of the Government of the United Kingdom versus Ndegwa.* Ruling by Hancox JJA and Chesoni Ag JA on March 18, 1983, available at www.kenyalawreports.or.ke accessed on 1st March 2006

Mediation Services by the Ministry of Foreign Affairs

The immunity from legal process and the reluctance of diplomatic missions and personnel to submit to the jurisdiction of the court makes the issue of alternative dispute resolution mechanism pertinent. Rather than accept legal process to be served on them, diplomatic missions often refer process servers to the ministry of foreign affairs for receipt.[28] The legal division ordinarily studies the process and may offer advice to both the advocate of the plaintiff and the diplomatic mission on the appropriate course of action. The situation of the ministry is, however, more complex as both sides expect assistance in protecting their respective interests. This is where the need to strike a balance between the interests of diplomatic missions and personnel on one hand, and those of citizens must come into play.

In an attempt to ensure that the interests of both parties are protected, the legal division is usually willing to mediate the dispute with a view to reaching an amicable out-of-court settlement. The idea is to assist the parties to systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that accommodates the needs of both sides. The mediation processes have been successful to the extent that the diplomatic missions and diplomatic agents who would otherwise decline to appear in court have seen it as an acceptable dispute settlement mechanism. However, it raises several pertinent issues which will be analysed further in Chapter Five. These issues revolve around the appropriateness of mediation for the resolution of disputes. They include aspects of mediation such as the necessity for mutual consent, choice of a mediator, neutrality of the mediator, implementation of the resultant resolution, and whether the objective of the process is a settlement or a resolution.

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[28] Acting Head of legal division, ministry of foreign affairs on 18th July, 2006.

Handling of the Diplomatic Bag

The diplomatic bag is ordinarily not subjected to search or inspection in keeping with the VCDR. Concerned staff of diplomatic missions have been issued with special passes that allow them access to the airports in order to collect the diplomatic bags. Diplomatic missions are expected to use the facility in accordance with article 27 of the VCDR. In this respect, the packages constituting the diplomatic bag are required to bear visible external marks of their character. In addition, the diplomatic bag may contain only diplomatic documents or articles intended for official use.[29]

Like in other jurisdictions, the phrase "articles intended for official use" has led to the diplomatic bag being used to import into the country a wide range of items considered as official supplies. These may include furniture, office equipment, hardware and, supplies for official ceremonies. There is therefore no restriction on the size of the diplomatic bag, which sometimes may be in the form of containers. There is no rule that permits the use of such devices as x-rays and sniffer dogs. The practice is that where the diplomatic bag is a container, it is, at the port of entry let to pass through the scanning process, which all containers go through. However, it can neither be opened for inspection nor detained. The diplomatic mission is also expected to make a declaration through the protocol department to customs officials on the content of the diplomatic bag in order for it to be released free of customs duty.[30]

The personal baggage of a diplomatic agent is not subject to inspection, unless there are serious grounds for presuming that it contains articles whose import or export is prohibited by law or controlled by the quarantine regulations. Such inspection is

[29] Information provided by an engineer at the city engineer's office. Nairobi City Council on 21 July. 2006.

[30] Ibid.

conducted in the presence of the diplomatic agent or of his authorized representative. In this exercise, the office of the chief of protocol, customs officials and law enforcement agencies work together with a view to ensuring that the dignity of the diplomatic agent is not unnecessarily compromised in the process. There has not been serious violation of the diplomatic bag by diplomatic missions or international organizations in Kenya.

Administration of Facilities

Freedom of Communication

Facilities accorded to diplomatic missions under the VCDR include the protection of free communications for the official use of the mission. As already indicated, the diplomatic bag is one of the key media of communications between the diplomatic mission and the sending state. The freedom of communications is partially guaranteed through the immunity granted to the diplomatic bag.

Telecommunication and radio communication are increasingly becoming important modes of instant contact between missions and their head offices. The Communications of Commission of Kenya regulates the communications sector. Its role includes examination of and approval of applications for licences to operate wireless radio communications equipment. In the case of diplomatic missions and international organizations, applications for radio communications are made to the CCK through the Ministry of Foreign Affairs. The ministry forwards the applications to the CCK, which then carries out ground surveys to verify the provided information and to determine the appropriateness of the location and the radio equipment intended to be used. On satisfactory conclusion of the survey, a licence to operate the radio communication

facility is awarded gratis. This is however on the condition that the equipment is not being used for commercial purposes.[31]

Licenses are renewed gratis on an annual basis. No service charges are levied for direct communications. The licences are granted strictly on a reciprocal basis or, in the case of international organizations, in accordance with the applicable host country agreement. Kenya's missions abroad do not operate radio communications with headquarters. Granting the licenses gratis and subject to reciprocity ensures that Kenya will be accorded similar treatment as and when it decides to set up such facilities in the other country. This means that Kenya could withdraw a licence to a diplomatic mission whose government refuses to grant it such a licence.

[31] Information provided by the Acting Deputy Chief of Protocol on 17 July. 2006.

CHAPTER FIVE

CRITICAL ANALYSIS OF KENYA'S PRACTICE IN THE ADMINISTRATION OF PRIVILEGES, IMMUNITIES AND FACILITIES

Introduction

The objective of this study is to establish, through a critical analysis, the extent to which Kenya has succeeded or otherwise in the administration of diplomatic privileges, immunities and facilities. It proceeded on the basis of three assumptions: that through its legal and administrative structures, Kenya has to a great extent been successful in the administration of privileges, immunities and facilities; Kenya's legal and administrative frameworks for the administration of diplomatic privileges, immunities and facilities are weak; and, that Kenya's courts have not proactively protected the interests of Kenyan nationals in cases involving diplomatic missions and or their agents. This chapter builds upon the preceding chapters to make conclusions on Kenya's administration of diplomatic privileges, immunities and facilities.

Chapter One establishes the international society as the theoretical basis of the study. This theory recognizes both states and individuals as members of the international society and emphasises coexistence among the legally equal members of the society of states on the basis of freedom to promote their own ends with minimal constraints.[1] Arising from this notion, states should accord diplomatic missions and their agents, privileges, immunities and facilities without neglecting the duties they owe to their own citizens.

[1] Andrew Hurrel, "Vattel: Pluralism and Its Limits" in Ian Clark and Iver B. Neumann (Eds). *Classical Theories of International Relations*. New York. Palgrave, 1996. p 233

Chapter Two establishes "functional necessity" as the reasonable rationale for privileges, immunities and facilities. It also defines the concepts of administration and examines the different roles played by the relevant organs. It also argues that Kenya's treaty practice is largely in keeping with the positivism and dualist theories. Chapters Three and Four narrate, the administration of diplomatic privileges and immunities in other jurisdictions and in Kenya respectively.

This chapter seeks to find out whether or not Kenya's administration of privileges, immunities and facilities is in conformity with the international society theory on which this study is based. It examines whether or not Kenya's practice amounts to assisting other states 'without neglecting the duties it owes itself'.[2] The analysis also examines the extent to which Kenya's administration of diplomatic privileges, immunities and facilities is within the bounds of the functional necessity rationale.

The Legal Framework of the Administration of Diplomatic Privileges, Immunities and Facilities

A sound legal framework is essential for any administration to be effective whatever the object of that administration. The relevant international law instrument in this study is the Vienna Convention on Diplomatic Relations. Host country agreements (HCAs) concluded between the government and individual international organizations are also pertinent. Although several legislation directly and indirectly come to bear in connection with privileges, immunities and facilities, the Privileges and Immunities Act (Chapter 179) is the single most important legislation because it transforms the VCDR, the VCCR and other instruments such as the Convention on the Privileges and Immunities of the United Nations.

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[2] Ibid. p 224

At the time of accession to the VCDR, Kenya did not enter any reservation. However, the Act is selective on the articles of the VCDR which should be applicable in Kenya. Section 4 (1) states that the articles of the VCDR contained in the First Schedule to the Act shall have the force of law in Kenya. The First Schedule identifies them as Articles 1, 22 to 24 and 27 to 40. Several fundamental articles have impliedly been excluded. These are articles 2 to 21 and 41 to 53.

The selective application could theoretically have the effect of narrowing down, at least from a legal perspective, not only the scope of privileges, immunities and facilities to diplomatic missions and their agents, but also the in-built safe guards against abuse. In a legal system in which treaty practice is not clearly articulated, there is bound to be conflicting interpretations of the implication. Some would strictly adhere to the positivist approach which requires rules of international law to be transformed in order to have the force of law domestically. In the English case of *Commercial and Estates of Egypt versus Board of Trade*[3] Lord Atkin said that it is only in so far as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations. In effect, as far as British courts are concerned, "international law has no validity save in so far as its principles are accepted and adopted by domestic law"[4] From this approach, the exclusion of portions of a treaty from a legislation, which expressly transforms other portions of that treaty, could be interpreted as expressly excluding the unmentioned portions from having the force law domestically. Thus proponents of this argument would insist that only the articles of the

[3] *Commercial and Estates Co. of Egypt Versus Board of Trade*, (1925) 1 KB. 271
[4] *Chung Chi Versus The King*, (1956) 23 ILR. 217

VCDR that are specifically mentioned in the First Schedule to the Privileges and Immunities Act have the force of law in Kenya.

The opposing and more persuasive view is that the VCDR is in its entirety binding on Kenya notwithstanding the exclusion of some articles by the First Schedule to the Act. The principal reason is that in the absence of any reservation, a state is bound by all the provisions of a treaty which it has ratified or acceded to. Its corollary is that transformation of a treaty into municipal law is an internal matter that has no consequence on a state's obligations under that treaty. Transformation cannot be an alternative to reservation. Thus, since Kenya has acceded to the VCDR without any reservation, it is under an obligation to abide by all the provisions of the treaty despite the omissions within the First Schedule of the Act.

The fact that the VCDR applies to Kenya in its entirety makes the omission of several articles of the Convention is inconsistent with international law. The ommission is a result of an incompetent transformation process and could mislead technocrats, legal practitioners and even the courts on the country's obligations under the treaty. Being of prime importance in the administration of diplomatic privileges, immunities and facilities therefore, there is need for a review of the Privileges and Immunities with a view to incorporating all Article of the VCDR in the First Schedule.

Administrative Framework for Privileges, Immunities and Facilities

The ministry of foreign affairs is the focal government organ in this in the administration of privileges, immunities and facilities. Several other government agencies are involved, but to a lesser extent and include the Kenya Revenue Authority, the Nairobi City Council, and the law enforcement authorities.

Inquiries made, particularly at the Kenya Police and the Nairobi City Council, it emerged that little inter-agency interaction in relation to the administration of privileges, immunities and facilities ever take place. Although according to the ministry, such meetings take place as and when deemed necessary,[5] the other agencies were not acquainted with the ministry's views on several issues relating to diplomatic missions and their agencies. For instance, where a diplomatic mission applies for additional parking bays the NCC takes the forwarding note by the Ministry to be a recommendation.[6] As such, the Council simply provides the bay without asking for any fees.

Likewise, the fact that the law enforcement authorities rarely inspect motor vehicles bearing diplomatic registration stem from the wrong notion that diplomats cannot be subjected to domestic laws whatsoever. Neither of the organs had copies of the Vienna Convention on Diplomatic Relations and the *Guide to Diplomatic Privileges*, which is used regularly by the ministry's staff.

These are indicators of absence of appropriate co-ordination among the relevant organs. The cost of the failure to coordinate effectively can be enormous in terms of delays and man-hours spent either trying to figure out the appropriate courses of action or rectifying resultant blunders. Such state of affairs could impact on the health of diplomatic relations with sending states. It is therefore critical that the administrative mechanism takes cognisance of the fundamental place of formal and informal co-ordination where agencies work together, sharing competence, information and sense of purpose.

[5] Information provided by the Acting Deputy Chief of Protocol on 17 July, 2006.
[6] Information provided by the city engineer's office, Nairobi City Council on 21 July, 2006.

Informal coordination is a form of inter-agency co-ordination which occurs when "two or more officials of sense and good will check with each other on matters of mutual concern".[7] This sort of consultation takes place among officers of like interests and can never be drawn into an organization chart or be made effective by an administrative order. It happens among officers who because of their professionalism and desire to perform, do not allow themselves to be constrained by jurisdictional boundaries. For example, in a situation where a diplomatic mission is seeking exemption from payment of land rates. If the concerned officer at the ministry of foreign affairs calls the relevant officer at the Nairobi Town Clerk's office or the responsible officer at the Kenya Revenue Authority, co-ordination has taken place.

The personal factor in informal coordination is all-important. The more acquaintance an officer has, the more people he trusts and respects, the more the people who trust and respect him, the wider the areas of coordination by personal address.[8] This coordination occurs easily by phone or face-to-face and may cover issues ranging from policy matters to minor administrative points of procedure. In most cases, no written records are made.

Formal coordination refers to the more common and official mode of inter-agency coordination. It comprises several activities including task based inter-agency committees, ad-hoc inter-agency meetings and correspondences. They are formally established forms of coordination where bureaucratic procedure is adhered to. In many cases, written records of meetings are kept for follow-up. As opposed to the informal which is more person-to-person based, formal coordination is inter-institution based. It

[7] James L McCamy. *The Administration of American Foreign Policy*. New York. Knof. p 135
[8] Ibid. p 136

facilitates authoritative and rapid decision-making. For effectiveness, this sort of coordination should be present at all levels of administration including at the technical and policy levels and should be spearheaded by the key stakeholder agency.

There is evidence of some formal coordination and minimal informal coordination of the administration of diplomatic privileges, immunities and facilities. This was attested to by the fact that when appointments were being sought for interviews in this research, no official could provide reference to any acquaintance in another agency. Apart from correspondences, there are no other formal mechanisms for coordination except meetings convened on an ad hoc basis to address crises in this field.

Coordination of the administration of diplomatic privileges, immunities and facilities should be the primary concern of the ministry of foreign affairs. It should be at the forefront in the establishment of an inter-agency coordination mechanism which aims at ensuing that all agencies that are directly or indirectly involved in the process are moving harmoniously. Through the mechanism, the ministry of foreign affairs could provide guidelines to the other organs to facilitate informed dealings with the diplomatic community. As part of this coordination the Ministry should regularly review and update the *Guide to Diplomatic Privileges and Immunities in Kenya* and ensure that all relevant ministries and departments as well as diplomatic missions and entitled international organizations in Kenya have sufficient copies. Although, much of informal coordination depends on personal initiatives, the relevant agencies can take certain deliberate measures to encourage it. Such measures include providing communication facilities and organising joint social functions for officers from the different relevant organs.

Host Country Agreements

Host Country Agreements (HCAs) are the instruments by which international organizations in Kenya are able to attain diplomatic status. HCAs are signed between the government as represented by the minister for foreign affairs and the international organization, usually represented by its chief executive. Since they are negotiated, HCAs may differ from one another. Generally, they bestow legal personality to organizations in order for them to operate in Kenya. They also set out the privileges, immunities and facilities available to organizations and their internationally recruited staff.

There is no mechanism to determine the type of international organizations which can enter into HCAs with the government of Kenya. This could be attributable partly to the open-ended definition of the term 'organization' by the Privileges and Immunities Act and partly to the process for signing of HCAs. Section 11 of the Act, states that where the Government of Kenya has entered into an agreement with an external agency under which, in return for assistance or cooperation in works executed in, or services rendered to Kenya, the government may agree that the agency or persons in its service should enjoy immunities or privileges under the Act. An external agency for purposes of the Act is stated in Section 11 (4) as the government of a foreign state or a recognized agency of such a government or an internationally recognized foundation or other body. The definition of agency as including 'other body' makes it difficult to restrict the type of organizations eligible to sign host country agreements.

Many non-governmental organizations have been motivated to seek to sign HCAs despite the presence of the Non-Governmental Organizations Coordination Act (1990), that governs the registration and operations of NGOs in Kenya. This trend is encouraged

by the desire of NGOs to benefit from the enhanced privileges, immunities and facilities offered by HCAs.[9] Some of the benefits that accrue include unrestricted recruitment of expatriate staff, tax exemptions, immunity from legal jurisdiction, enhanced international recognition, and avoidance of the requirement for submission of annual returns under the NGO Coordination Act. Thus, it would not be surprising to see more NGOs lobbying to be accorded diplomatic status if the NGO Co-ordination Board attained higher levels of efficiency in management of NGO operations in the country.

Another contributing factor to the escalation of the conclusion of HCAs with non-governmental organizations is the possible compromise on the part of the government authorities. This can be explained by the fact that in the 1980s and earlier, the signing of HCAs was very restricted and almost non-existent in spite of the absence of a written policy to that effect. A flurry of HCAs was experienced from the latter part of 1980s that saw organizations such as the Aga Khan Foundation being accorded diplomatic status notwithstanding the fact that it provides services at exorbitant costs. Since there was no formal shift in the earlier unwritten restrictive policy, one could argue that the new trend was because of compromise by the political leadership in respect of some organizations whose HCAs.

The process towards the signing of HCAs compounds the situation. The established practice is for the ministry responsible for the activities being undertaken by the applying organization to present a memorandum to the Cabinet requesting for approval for the signing of a HCA with that organization. The cabinet's decision for the signing of a HCA is final regardless of whether or not that organization merits being accorded diplomatic privileges, immunities and facilities in the view of the ministry of

[9] Acting Head of legal division, ministry of foreign affairs on 18th July, 2006.

foreign affairs. In practice therefore, the ministry of foreign affairs has little control on the nature of non-governmental organizations that should qualify for this status.

The foregoing clearly shows that Kenya's legal and administrative criteria for according diplomatic status to international organizations are wanting. The process towards the signing of host country agreements is also absent. To resolve the problem requires amendment to the Privileges and Immunities Act. In particular, the definition of international organizations under section 11 should be amended so as to remove any ambiguity and restrict HCAs to inter-governmental organizations. Such a restrictive approach is buttressed by the international society theory which sees diplomatic privileges, immunities and facilities as a form of assistance exchanged between states. The inter-governmental organizations meet this criterion because their memberships are drawn from states.

Processing of Applications for Tax Exemptions or Refunds

Diplomatic tax exemption privileges in Kenya are fairly wide and compare well with those of other jurisdictions. However, the process of administering them is rather long and tedious thus effectively serving to limit the privilege. Unless there is a prior approval, there is no point-of-sale exemption from taxation as is the case with other countries such as the United States of America[10] and Switzerland. By and large, tax exemptions are accorded by way of refunds which some times take long because of several factors. Firstly, the processing system is not electronic hence requiring more manpower. Secondly, the processing requires the involvement of more than one government agency raising the need for coordination. A one-stop administration of tax

[10] United States Department of State. "Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers", Reviewed/Updated on 3/23/2006. Para 2.16 available at http://www.state.gov/ofm accessed on 17 June, 2006

exemptions such as in Australia[11] has the advantage of avoiding delays caused by bureaucratic processes that involve many agencies. Because the agency is the expert in that area of taxation, efficient and effective services are ensured. The use of one agency is therefore desirable for both the management and the diplomatic mission or agency. In the contrary, the management of inter-agency processes poses serious coordination problems. This is more so for Kenya where poor inter-agency coordination has been identified as a challenge in the administration of diplomatic privileges, immunities and facilities. The effectiveness of multi-agency administration is hinged on good coordination mechanisms characterised by both formal and informal approaches. Both are either lacking or inadequate in the Kenyan case.

Another problem is the absence of a limitation on the number of applications within a given time frame or restrictions on the value of the items for which tax refund is being sought. The practice in Australia is that goods and services tax (GST) payments are refunded upon application using appropriate forms based on a minimum invoice of Australian $ 200.[12] This helps to minimise the number of applications. The Kenyan practice allows applications even in respect of small invoices and receipts to the extent that some refunds are so small that the efforts of processing them cannot be reasonably justified. There are also no restrictions as to how many times one may submit such applications as is the case with Switzerland where applications are limited to once per year for diplomatic agents and twice a year for the diplomatic mission. The result is that

[11] Australian Government. Protocol Department of the Ministry of Foreign Affairs and Trade. "Protocol Guidelines (Amended June. 2006)" available at www.dfat.gov.au/protocol guidelines/02 accessed on 15 June. 2006.
[12] Ibid.

the protocol division gets overwhelmed by the huge number of applications at any given time, thereby contributing significantly to delays.

The exception to the tax refund rule is the few duty-free shops located at the international airports and at the United Nations premises in Gigiri. These shops are supposed to admit only eligible persons to purchase duty free goods in the same manner as the *magasin hors taxe*[13] of Switzerland. The administration of such shops has however proved a challenge in Kenya as they tend to be abused. Some duty free shops have been found or suspected of violating licensing terms that require them to sell merchandise exclusively to clients who are diplomatic agents. It was reported in a local daily that the Kenya Revenue Authority was investigating a report that a duty free shop had been selling goods meant for diplomats to members of the public from 2003 to May 2006 when it was raided by the KRA and the Kenya Anti-Corruption Commission.[14]

The apparent shortcomings in the administration of tax exemptions and refunds are largely a function of archaic technology. Modern technology brought about by information and communication technology could assist greatly. Point-of-sale exemptions with the use of electronic cards which could also be used as diplomatic identity cards would serve to reduce workload and increase efficient delivery of services. This would require the networking of the relevant agencies to facilitate processing of tax exemptions electronically. Where a tax exemption is not available at the point-of-sale, the presentation of an application should be subjected to certain benchmarks such as a minimum limit of invoice amount or a specified limited number of applications per year

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[13] The Swiss Department of Foreign Affairs, "Practical Manual of the Regime of Privileges and Immunities and Other Facilities". available at http://www.onu.admin.ch/geneva_miss/e/home/guide.p.html accessed on 1 July. 2006

[14] *Daily Nation* of Monday. July 17. 2006 p 18 Column 1

for each individual or mission. These measures would limit the workload for the processing officers and contribute to increased efficiency and effectiveness.

Interpretation by the Courts

A critical analysis of the perspective of the courts of law shows that they have adopted a conservative approach in the interpretation of the VCDR. With a few exceptions, they have exhibited a predisposition to avoid entertaining any dispute launched against a diplomatic mission or diplomatic agent in the absence of an express waiver of immunity. The approach by the Kenyan courts differs significantly from the practice of other countries where the courts are not constrained by immunity especially in relation to suits arising from commercial and contractual commitments, traffic related offences and employment of local staff.

It is argued that the courts' interpretation does not quite satisfy the international society theory which requires states not to abandon the responsibility of safeguarding the interests of citizens in the process of extending assistance to other states. Similarly, the courts' interpretation does not limit the scope of the privileges immunities and facilities enjoyed within the bounds of the functional necessity rationale. Thus, this section seeks to confirm the hypothesis that Kenya's courts have not proactively protected the interests of Kenyan nationals in cases involving diplomatic missions and or their agents.

The courts' view on the privileges and immunities of diplomatic institutions and agents is informed by the case of the *Ministry of Defence of the Government of the United Kingdom versus Ndegwa.* [15] In this case, the court of appeal stated that Kenyan courts will not entertain an action against certain privileged persons and institutions including

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[15] Court of Appeal at Nairobi, Civil Appeal No. 31 of 1982. *Ministry of Defence of the Government of the United Kingdom Versus Ndegwa*, Ruling by Hancox JJA and Chesoni Ag JA on March 18. 1983. available at www.kenyalawreports.or.ke accessed on 1st March. 2006

foreign sovereigns or heads of state and government, foreign diplomats and their staff, consular officers and representatives of international organizations such as the United Nations and the then Organization of African Unity (OAU) unless the privilege is waived. This view is demonstrated in the labour case of *Gerard Killeen and ICIPE*[16] and by a tenancy case of *Edna S. Ouma Versus the Government of the Arab Republic of Egypt*.[17] In both cases, the court declined to proceed to full hearing because of immunity of the defendants from civil jurisdiction. The cases were dismissed at the preliminary levels. The three cases show that the courts are generally hesitant to entertain disputes involving diplomatic missions and international organizations and their agents.

As illustrated by the *Ministry of Defence of the United Kingdom versus Ndegwa* the courts will not exercise jurisdiction even where a diplomatic agent violates laws and regulations, which they are expressly expected to adhere to. It is mandatory that adequate third party insurance policy in accordance with the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405), is maintained at all times in respect of motor vehicles in the possession of diplomatic missions and diplomatic agents.[18] In the event of an accident that results in damage, one would expect that the insurance company and the diplomatic agent would be held jointly and severally liable and that the insurance company would settle any consequent judgement debt. A Belgian court in 1970 held that under the

[16] Ruling by Judge M.G. Mugo in High Court of Kenya at Nairobi. Civil Case No. 1737 of 2002. *Gerard Killeen V International Centre of Insect Physiology and Ecology*. delivered on 27th May. 2005. found at www.kenyalawreports.or.ke accessed on 1st March. 2006
[17] High Court Civil Case No. 160 of 2004. *Edna S. Ouma Versus the Government of the Arab Republic of Egypt* (unreported and pending)
[18] Ministry of Foreign Affairs. A Guide to Diplomatic Privileges and Immunities

Belgian law on compulsory motor vehicle insurance, a plaintiff could bring a direct action for indemnity for damage or other loss against a diplomatic mission.[19]

The necessity for waiver, which the Kenyan courts insist on, is consistent with Article 32 of the VCDR. The exception to the requirement is where a privileged person or entity initiates the proceedings. A strict adherence to this position ensures that privileged persons are at all times encapsulated from the jurisdiction of the court including in contracts entered into in accordance with the laws of the receiving state and despite the presence of a breach. Thus, it can be argued that the position of the Kenyan courts is justified.

On the contrary, however, courts of many countries accord a narrow interpretation to immunities such that labour issues involving locally engaged staff, commercial transactions, traffic violations and tenancy agreements are excluded from its scope. Kenya has often found itself as a judgment debtor in this respect. In a case against the Kenya Embassy in Brussels[20] filed by a former member of its local staff, the Embassy claimed immunity relying on Article 31 of the VCDR. The industrial tribunal ruled that the dismissal of an employee is not an act, which benefits from judicial immunity. It argued that the act alleged to have been committed was one of management, which falls under private law, and therefore the tribunal had jurisdiction. In *Cleofas Ermoso Versus the Kenya Embassy in the Hague,*[21] the court held that it had jurisdiction because according to the employment contract, the plaintiff had been employed on "local terms".

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[19] Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations,* (Second Edition), Oxford. Oxford University Press. p. 235.
[20] Ruling made on 18 June, 2005 by the 3rd Chamber of the Brussels Industrial Court in the case of *Luc Nadin Versus Kenya Embassy in Brussels.*
[21] District Court of the Hague. Sub District Court Division. Cause List No 243321/01-177731. *Cleofas Ermoso Versus the Republic of Kenya*

The court interpreted this to mean that the parties had chosen to be bound by Dutch law as far as the employment contract was concerned. Although Kenyan Embassies are advised to, as much as possible, adhere to local labour laws and regulations in the employment local staff,[22] it does not imply automatic application of the local law. However, the embassy in this case had expressly committed itself to be bound by Dutch law. In relation to lease contracts, an Ontario Housing and Rental Tribunal[23] in considering a case filed against the Kenya High Commission in Ottawa for damage to rented property went ahead to award damages to the plaintiff based on the notion that it had jurisdiction. In each of these cited cases, the status of the Kenyan mission was of no consequence and the courts did not see the necessity for waiver of immunity.

The difference in interpretation of the VCDR by national courts calls for further analysis. This is important because such courts potentially offer the best fora for judicial application of international law, since they are easily accessible by individuals, and their decisions can be readily executed.[24] National courts also offer the best, and sometimes the only opportunity for individuals to invoke international law and participate in the process of shaping international law.

A comparative study of judicial attitudes towards the application of international law shows that judges, in general, refuse the application of international norms whenever they deem that such an application could impinge upon national interests.[25] However, their independence is limited on matters impinging on foreign affairs. According to

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[22] Ministry of foreign affairs. *Foreign Service Regulations (2000)*, Section L3(3), p 75

[23] Ruling of the made by the Ontario Housing and Rental Tribunal in *Wilfred Bokman Versus Kenya High Commission in Ottawa*, Court File No. EAL 36474.

[24] Henry G Schermers, 'The Role of Domestic Courts in Effectuating International Law', *Leiden Journal of International Law*, Issue No 3, Special Edition, 1990, pp 77-79

[25] Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', *European Journal of International Law*, Vol. 4, Issue No.2, 1993, available at www.ejil.org/journal/Vol4/No2/art2, accessed on 23 October, 2006

Benvenisti[26] the answer to the limitation of the national courts lies in analysing the position of the court within the state apparatus. He explains that although the judiciary answers the needs of citizens who look to it for the resolution of disputes and for the correction of problems, its value should also be examined from the perspective of the other branches of government. From this perspective, one would notice that while in the domestic sphere all branches of government stand to gain from judicial independence and judicial review, the situation is different with respect to foreign affairs.

The argument is that whereas government tolerates its own litigation losses since such defeats prove the overall soundness of the national legal system, it has no interest in a defeat in the name of the international legal order. Faced with an unenthusiastic governmental attitude towards judicial scrutiny over foreign affairs, the judiciary must succumb to the restriction of its powers.[27] According to this proposition, judges readily accept this dictate because in their view, this restriction of their powers protects the judiciary against intense confrontations with the government, whose officials may, in any case, refuse to comply. This analysis could explain the apparent 'judicial timidity' by Kenyan courts. Judges are reluctant to interpret the VCDR in a manner that is prejudicial to the wishes of the executive whose interest is to maintain good relations with other countries. Thus were the court to make a decision against a diplomatic mission in favour of a national, the executive would be disappointed as it could be seen as jeopardising the country's foreign policy objectives.

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[26] Eyal Benvenisti, "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Resolutions of their State'", *European Journal of International Law*, Vol 5, No 3, 1994 found at www.ejil.org/journal/Vol5/No3, accessed on 30 September, 2006

[27] Ibid

A commitment of the court to make decisions including those unfavourable to the government in respect of foreign affairs would be a mark of independence. This is particularly present in courts of established democracies whereby courts perceive themselves as custodians of the rights of the citizen and would like to project themselves as such. Such courts tend to interpret international law in favour of the individual. Kenyan courts tend to do the opposite. In both instances, however, the international society theory which requires states not to abandon the responsibility of safeguarding the interests of citizens in the process of extending assistance to other states is not quite satisfied. There is need for Kenyan courts to move towards an objective balance between the interests of the citizen and those of the diplomatic mission or diplomatic agent within the context of international society theory and the functional necessity rationale.

Alternative Dispute Resolution Service by the Ministry of Foreign Affairs

The legal division of the ministry of foreign affairs offers some alternative dispute resolution services for disputes in which diplomatic missions and international organization or their respective diplomatic personnel are parties.[28] Taking into account the reluctance of the courts to entertain cases involving such entities in the absence of waivers, the role of the division as an alternative dispute resolution agency becomes crucial. This is particularly so where the dispute arises from contracts that do not stipulate the means for resolution of disputes.

The argument that the division is a viable option hinges on the fact that institutions and persons with diplomatic immunities tend to listen to the ministry of foreign affairs as the ultimate government authority on issues touching on their affairs. Such entities also are not averse to dealing with the ministry partly because of their

[28] Acting Head of legal division, ministry of foreign affairs on 18th July, 2006.

confidence that the ministry would not subject them to undue embarrassment and partly because of the knowledge that the ministry could find ways of reciprocating if they do not cooperate. Consequently, the Legal Division has successfully mediated cases particularly those relating to employment.[29]

Despite its feasibility, there are formidable challenges to the ministry's dispute resolution. The ministry of foreign affairs has no legally instituted arbitration or mediation powers. The mediation service is simply an administrative measure in a desperate attempt to secure the rights of citizens while at the same time preserving the dignity of the privileged individual or entity. Additionally, there are no guidelines, written or otherwise, to govern the mediation processes and implementation of the outcomes. Considering these concerns, and bearing in mind the nature of disputes involved, it is necessary to determine whether mediation is, in fact, the appropriate dispute resolution approach by the ministry of foreign affairs. In this regard, this discussion distinguishes between mediation and arbitration and argues that mediation is a better approach for resolving disputes between privileged institutions or persons and citizens within the ministry's dispute resolution mechanism.

Mediation has been defined as the process by which participants, with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.[30] This definition suffices for the purpose of this study although certain aspects in it such as neutrality and settlement are subject to debate. Mediation is not a new phenomenon. People have always known that standing between two people in

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[29] Legal officer, legal division, ministry of foreign affairs 18th July, 2006.
[30] Joseph Jarret, "No Need to Muddle through Mediation", *Public Management*, Volume 80, Issue No 3, 1998, p 27, available at www.questia.com, accessed on 30 September, 2006

conflict can be helpful. What is new is that mediation has been rediscovered as a replacement for many of the present methods of addressing adversarial conflict.[31] It is now almost as common as conflict in international politics, with third parties becoming increasingly reluctant to allow disputes to escalate.[32] Indeed, an ever-increasing number of commercial disputes including business and contract differences, insurance coverage, lender and product liability, personal injury, and construction and real estate conflicts are being resolved through mediation.[33]

The peculiarities and distinctive features of mediation relate to the fact that it is not a quasi-legal process, nor is it extraneous to the parties' own conflict-management efforts.[34] It has several advantages which make it attractive in the resolution of disputes. It is a voluntary, nonbinding process where the mediator does not impose a decision, but helps the parties to reach their own agreement. Where the dispute involves a contract that does not contain a mediation provision, mediation will only occur if the parties agree to refer the case to the process. Because of its nonbinding nature, both parties retain the right to pursue other means of resolving the dispute. In addition, because of the informal, confidential and nonbinding nature of mediation, the management representative often plays a greater role in reaching a solution than in more structured legal processes, such as

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[31] Stephen K. Erickson and Marilyn S. Mcknight. *The Practitioner's Guide to Mediation: A Client-Centred Approach*. New York. Wiley. 2001. p 3

[32] Saadia Touval and William Zartman (Eds). *International Mediation in Theory and Practice*. Boulder CO. Westview Press. 1985. p vi

[33] John B. Bates Jr. and Bruse A Edwards. "The Pursuit of Compromise". *USA Today Magazine*. Volume 122. Issue No 2586. Society for the Advancement of Education. March 1994. p 38

[34] Jacob Bercovitch. *Resolving Conflicts: The Theory and Practice of Mediation*. Boulder CO. Lyne Rienner. 1996. p 4

arbitration or litigation where legal counsel is much more in control of the process and direction of the proceeding.[35]

Another advantage is that mediation may be substantially less costly than other dispute resolution mechanisms such as litigation or arbitration. It also offers an environment that reduces confrontation and encourages discussion where parties are oriented towards problem solving rather than position building. From a practical point of view, mediation process is relatively clear, simple and informal as procedures are devised by the mediator and parties to suit the parties' needs. Ultimately, it stands a chance of preserving a business relationship than litigation or arbitration where parties almost always find it extremely difficult to relate thereafter.

Apart from the stated advantages, it is argued that one of the obvious motives of disputants in seeking or accepting mediation is the desire for face-saving way out of conflict.[36] In such situations, negotiations through an intermediary may help protect a party's prestige. Since the desire for settlement implies the need to make concessions, the party may feel that concessions through a mediator is less harmful to its reputation and future bargaining position than conceding through a confrontational process.

As opposed to mediation, arbitration, despite being classified as a dispute resolution mechanism, has some common features with litigation. It is a process by which a dispute between two or more parties is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal)

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[35] Charles T. Autry, "Mediation: Effective Resolution of Contract Disputes", *Management Quarterly*, Volume 46, Issue No 3, 2005, p 10, available at www.questia.com, accessed on 30 September, 2006
[36] Saadia Touval, *International Mediation in Theory and Practice*, op. ct. p 254

instead of by a court of law.[37] Disputants in an arbitration present evidence and arguments to an impartial and independent third party who has authority to hand down a binding decision based on objective standards.[38] Like litigation, arbitration is decisive in outcome, and is enforceable by organized coercion if necessary. In both cases, decision-making and outcome are unilaterally controlled by a third party exercising some degree of accepted authority, whether emanating from the state or from the parties. In these processes, the parties surrender their ability to decide the outcome, leaving the decision on the merits to a third party who is not directly involved as a disputant.

Arbitration is not as highly formal as litigation although its is the most institutionalized of the extra-judicial dispute resolution options involving, 'private judges' appointed by the disputants or on their behalf.[39] The similarity it shares with mediation is that it is a private consensual means of resolving disputes. The arbitrator or arbitral tribunal derives its immediate authority from the parties' agreement to arbitrate. Although arbitration is consensual, the state provides the legal framework within which parties agree to arbitrate and in which arbitration takes place.[40] In Kenya, this legal framework is the Arbitration Act, Chapter 49.

The main advantage which makes arbitration desirable in the resolution of disputes between privileged institutions and their officers and citizens has to do with the fact that it is voluntary and consensual. However, other aspects of arbitration especially those that make it more of litigation than mediation such as the binding nature of its

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[37] Lord Hailsham (ed), *Halsbury's Law of England*, Vol. 2. (4th Edition). London. Butterworths. 1991. p 332

[38] Amazu A. Asousu. *International Commercial Arbitration and African States: Practice, and Institutional Development*. Cambridge. Cambridge University Press. 2001. p 12

[39] Amazu A. Asousu. *International Commercial Arbitration and African States: Practice, and Institutional Development*. op. ct.. p 12

[40] Ibid. p 13

decisions, the fact that coercive force can be used to enforce those decisions and the fact that the process is legally administered militate against its desirability among the privileged entities whose interest is to avoid being involved in a process whose result is legally binding. This is compounded by the fact that the privileged entity as a party would not have control over the decision of the tribunal. In effect, submission to arbitration would, to some extent, be tantamount to waiver of diplomatic immunity. As such, institutions and persons that have diplomatic privileges would prefer less litigious, less formal and non-binding dispute resolution processes that do not pose a risk their diplomatic immunity.

The disadvantages of arbitration as a possible dispute resolution mechanism in cases involving diplomatic institutions and persons makes the argument for mediation as a viable mechanism compelling. Mediation has more advantages that make it attractive particularly to diplomatic missions and diplomatic agents. Among these are that: it is voluntary, its decisions are non-binding, it is informal, and its processes and outcomes are controlled by the parties themselves. In addition, the diplomatic missions and diplomatic agents have confidence that their diplomatic immunity will not be prejudiced by the process. The citizen party and the mediator which, in this case, is the ministry of foreign affairs, would also find it acceptable as long as their respective interests are accommodated.

The desirability of mediation as the better dispute resolution mechanism implies that the legal division must be well equipped to successfully undertake the exercise. This is because success of any mediation process depends, to a large degree, on the knowledge, skills and ability the mediator possesses. S(he) acts as a catalyst for the

process, helping to reach agreement by identifying issues, exploring possible bases for agreement, explaining the consequences of not settling, and encouraging each party to accommodate the interest of the other.[41] The import is that the mediator must have the requisite training and skills to guide the parties through all the stages necessary for successful mediations including the pre-mediation activities, the mediation itself and the post-mediation activities which essentially comprise implementation.

The mediator must also understand the dynamics of mediation particularly the fact that his inclusion in the process turns the dyadic conflict into a triadic relationship. No mediator enters into such a relationship with altruistic reasons only. Whether individuals, organizations, or states, mediators enter a conflict system to do something about it, passively or assertively, and to promote or protect any interests they may have.[42] The mediator wants to affect the disputing parties and their attitudes, perceptions, and behaviours about the dispute and about the mediation. The disputing parties on the other hand want to affect the mediator in a manner in which the mediation will produce acceptable if not favourable outcomes.[43] Thus, since mediation is largely about influence, the legal division as a mediator should always be focused on influencing the process towards the Ministry's interest. This interest is to strike a balance between the diplomatic privileges, immunities and facilities and the rights of the citizen. The objective is to see to it that each party understands and willingly performs its obligations. This results in the maintenance of relationships that would otherwise be jeopardised by litigation.

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[41] John B. Bates Jr., "Mediation: The Pursuit of Compromise", op. ct.
[42] Jacob Bercovitch, *Resolving International Conflicts: the Theory and Practice of Mediation*, op. ct. p 4
[43] Peter J. Carnevale and Sharon Arad. "Bias and Impartiality in International Mediation" in Jacob Bercovitch. *Resolving Conflicts: The Theory and Practice of Mediation*. Boulder CO, Lyne Rienner. 1996. p 39

In seeking to influence the course of the mediation, the mediator must also bear in mind the need to have leverage over the disputing parties. Classically, leverage refers to the ability of the mediator to persuade the disputants to realise the importance of resolving their dispute by way of mediation. It also refers to the means by which the third party can persuade the disputants to accept his or her intervention. Thus, the traditional understanding of leverage is based on resources that the third party has such as economic, military and political powers.[44] In the case of the dispute involving the diplomatic institutions and persons, the ministry comes into the dispute with some leverage. As part of the executive arm of government, it commands respect from the citizen who looks up to the ministry as a guarantor of its interests especially in the face of inability to secure them through the court processes. As the government organ that deals with matters relating to diplomatic missions, international organizations and their agents, the ministry stands in a position of influence as it has the capacity to impose restrictions on these institutions. Since they largely depend on the ministry for their effective operations within the country, the privileged institutions would invariably be inclined to positively consider the position of the ministry.

It is clear from this discussion, that mediation is a complex process whose principles must be understood by the practitioner. It is essential that any officer who is intended to play the role of mediator is appropriately trained. Although the legal advisors in the ministry of foreign affairs are versed with both domestic and international law,[45] their training in the area of mediation is limited. This training s essential in order to equip the officer, particularly noting that mediation offers a good opportunity for the

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[44] Makumi Mwagiru, *Theory, Processes and Institutions of management*. Nairobi. Watermark Publications. 2000. p 132

[45] Acting head of legal division. Ministry of Foreign Affairs. 18th July. 2006.

possibility of striking a balance between the interests of the privileged institution and those of the citizen consistent with the international society theory.

CHAPTER 6

CONCLUSIONS

The sanctity of diplomats has been observed for centuries by means of diplomatic privileges, immunities and facilities. Diplomats enter the country of accreditation under privileged status and violating that status is viewed as a great breach of honour. Modern diplomatic, privileges, immunities and facilities evolved parallel to the development of modern diplomacy. In the seventeenth century, European diplomats realized that these entitlements were essential to doing their jobs and a set of rules evolved guaranteeing the rights of diplomats. The customary law on diplomatic privileges, immunities and facilities was subsequently enshrined in the 1961 Vienna Convention on Diplomatic Relations. Nowadays, diplomatic privileges, immunities and facilities as well as diplomatic relations as a whole, are governed by the Vienna Convention which has been ratified by almost every country in the world.

It is evident that diplomatic privileges, immunities and facilities are an integral component of diplomatic practice. They facilitate the effective functioning of diplomatic missions and entitled international organizations. They are buttressed by the international society theory's recognition of states as equal, free and interdependent. No country can accord them to its own diplomatic mission or diplomatic staff in another country regardless of the economic or political status it might have. States, both mighty and lowly are mutually dependent in the exchange of these necessary entitlements. And although this exchange is a sovereign act, states are ordinarily persuaded to grant them, not necessarily by bigger powers, but by their own desire to attract reciprocity.

The fact that diplomatic privileges, immunities and facilities are exchanged between states makes it possible to be examined throgh the prism of the international society theory. This theory recognizes the international system as comprised of states. Individuals are also recognised as members though largely drawing the legitimacy of that membership from states. The international society theory emphasises coexistence among the legally equal members of the society of states on the basis of freedom to promote their own ends with minimal constraints. Thus, in promoting coexistence and facilitating the freedom to pursue interests, states should on the basis of reciprocity and the relevant conventions, accord diplomatic missions and their agents, privileges, immunities and facilities. In doing so, however, states must not neglect the duties they owe to their own citizens. In effect, the interpretation of the VCDR from this approach should not be in a manner that is prejudicial to the citizens of the receiving state.

Diplomatic relations which form the basis of diplomatic privileges, immunities and facilities is between sovereign states and is a typical example of the horizontal structure in the traditional system of international law. However, international organizations have emerged as important players in the field of diplomacy. These organizations, particularly those whose membership comprise states fall in the international society theory and therefore justified to receive diplomatic treatment similar largely to those of diplomatic missions. These types of organizations can be seen within the international society theory because they are an arena for the interaction of their members and underline the inter-state nature of the traditional system. Thus, this study favours the grant of diplomatic privileges, immunities and facilities to inter-governmental organizations within the limits of the governing host country agreements.

The functional necessity rationale suggests that the underpinning of diplomatic privileges and immunities lie in the fact that they are necessary for the performance of diplomatic functions. The essence of this theory, which is already embedded in the VCDR is that diplomatic privileges and immunities are not for the benefit of the individual, but they are availed for the sole purpose of facilitating the operations of the mission. The functional necessity remains the most dominant and relevant rationale for privileges, immunities and facilities. Some scholars argue that this theory teamed up with the representative character rationale to reject the early rationale of extraterritoriality and that the two in fact form the modern explication of diplomatic privileges and immunities. Nevertheless, the functional necessity remains the most rational and therefore most persuasive.

States are compelled to extent diplomatic privileges and immunities for many reasons. From the international society perspective, states do so in the spirit of promoting coexistence and facilitating the freedom to pursue interests. From a strictly legal perspective, states do so as an obligation under international law. From a foreign policy analysis perspective, states are compelled by national interest considerations. The national interest consideration implies that states do not grant privileges, immunities and facilities for altruistic reasons, but because of expected returns. Since states desire to be facilitated by other states in the pursuance of their own interests, they will be obliged to extent diplomatic privileges, immunities and facilities by the need to attract reciprocity. Reciprocity therefore is a cardinal principle in this field.

There is no doubt that diplomatic privileges, immunities and facilities are critical elements for diplomatic relations between sovereign states. Their place in international

engagements is therefore secure as long as the international system is dominated by states. At the domestic level, however, diplomatic privileges and immunities have often not been positively embraced because of their tendency to encroach on the rights of citizens such as when it comes to immunity from legal process. The apparent conflicting obligations to accord these privileges, immunities and facilities on one hand and to protect the rights of citizens on the other have placed the state in a situation of dilemma. Thus, the state is constantly engaged, through its administrative and legal instruments, in a process of seeking to strike a balance between the two.

Diplomatic privileges, immunities and facilities as enshrined in the VCDR are wide ranging. For effective administration, many organs are involved though to varying degrees. The number of the organs involved also varies from country to country, depending on their respective administrative structures. Invariably however, these organs would include those that deal with law enforcement, taxation, protocol, legal matters, and labour amongst others. The multiplicity of organs makes the administration of diplomatic privileges, immunities and facilities a complex matter that requires coordination. Indeed, the success or otherwise of the administration will depend greatly on how well the various organs are coordinated both in the formal and in the informal sense.

Whereas states within the international society system extent privileges, immunities and facilities to missions and diplomats from other states, there are differences particularly in their administration. This is often a function of the interpretation of the VCDR or the principle of reciprocity. Some states tend to give restrictive interpretation of the VCDR such that the functional necessity justification is fully at play while others prefer giving a wider interpretation of the VCDR thus equally

widening the scope of the diplomatic entitlements. Other states have centralised systems of administration but others operate under decentralised systems. Still others have adopted advanced technology while many others continue to use slow menial systems of administration. These circumstances have attendant implications on efficiency and effectiveness.

From the analysis made in this study, Kenya administration of diplomatic privileges, immunities and facilities has many challenges. However, that the country hosts the largest number of diplomatic missions and diplomatic personnel in the region may give an indication of some successes. One would expect that the administration of these privileges, immunities and facilities is among the key consideration for determining the location of international organizations such as the United Nations. International organizations continue to find Kenya an attractive place to locate regional headquarters. There are, however still several factors which have inhibited effective administration.

The actual administration of privileges, immunities and facilities is the function of the Ministry of Foreign Affairs through its Protocol Division and to some extent, the Legal Division. Other organs also get involved in relation to other aspects such as tax exemption, law enforcement, and litigation. The critical analysis has established that a major shortcoming in the administration process is the lack of effective coordination mechanism among these relevant organs. This is demonstrated by the fact that the different relevant organs have diverse perceptions on the nature and extent of diplomatic privileges, immunities and facilities to be enjoyed by entitled persons and institutions as well as the remedies available in case of abuse.

There are no guidelines for other administrative functions including on the mediation services and on the criteria and processing of host country agreements. Much of these functions are subject to the discretion of the officers assigned to deal with them. In addition, the system of administration is highly menial making the processing of entitlements such as tax exemptions extremely slow. These shortcomings have undermined the effectiveness of the administration of diplomatic privileges, immunities and facilities. They validate the assumption that Kenya's legal and administrative frameworks in the administration of diplomatic privileges, immunities and facilities in are weak. Conversely, the shortcomings invalidate the assumption that Kenya has to a great extent, successfully implemented the provisions of the VCDR.

The court cases referred to in this study graphically demonstrates the divergent interpretations particularly on the question of jurisdiction. While diplomatic immunity in the perspective of the courts in Kenya is largely beyond question, it is greatly circumscribed through interpretation by courts in other countries. The interpretation by the courts in Kenya places aggrieved non-privileged parties at a disadvantage and confirms the hypothesis that the courts have not proactively protected the interests of Kenyan nationals in cases involving diplomatic missions and or their agents. The approach of the courts could be a function of several factors including their inclination to accept to be influenced by the executive whose interest is to ensure that the country's foreign policy objectives are not jeopardized. Another reason could be the apparent failure of the lawyers to put up strong cases in order to influence the courts' perspective especially considering the adversarial nature of the judicial system.

The alternative dispute resolution services within the legal division of the ministry of foreign affairs is a lucid attempt to address the injustices of immunity from legal process to citizens on one hand and the apprehension of diplomatic entities towards the legal process on the other hand. This study argues that the mediation service is a viable framework for resolving disputes between citizens and diplomatic missions, international organization and their respective diplomatic personnel. However, in view of the complexity of mediation as a practice, it is necessary that the ministry of foreign affairs ensures that its mediators are equipped with the requisite knowledge and skills.

In a nutshell, it is worth reiterating that diplomatic privileges, immunities and facilities are indispensable components of diplomatic discourse which may be exchanged within the framework of the international society theory. They will continue to occupy a central place in diplomacy for as long as states are the dominant players in world affairs and as long as diplomatic relations exists. They are tools which demonstrate the sovereign equality and mutual inter-dependence of states. Although the privileges, immunities and facilities are similar as they are based on the VCDR, the scope and manner of administration differs from state to state. Whatever the case, diplomatic privileges, immunities and facilities are not for the benefit of an individual, but they are granted for the sole purpose of ensuring that the diplomatic mission performs its diplomatic function effectively.

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