

UNIVERSITY OF NAIROBI

**RESEARCH TITLE: DIPLOMATIC PRIVILEGES AND IMMUNITIES: A
CRITICAL ANALYSIS OF THE VIENNA CONVENTION ON
DIPLOMATIC RELATIONS (1961)**

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**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF
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DECLARATION

This Thesis is my original work and has not been submitted for a degree in any other University.

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This Thesis has been submitted for examination with your approval as University Supervisor.

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Mr. Martin NGURU

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DEDICATION

To my family and friends for their unending support and encouragement that enabled me to complete my Masters Program at the Institute of Diplomacy and International Studies (IDIS), University of Nairobi.

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ABSTRACT

The study examines the topic of diplomatic immunity and privileges. It attempts a critical analysis of the Vienna Convention on Diplomatic Relations (VCDR) of 1961. The study proceeds from the fact that the VCDR is the most global and universally accepted instrument ever instituted to regulate diplomatic conduct. This diplomatic law has facilitates bilateral diplomatic interaction for over fifty years but as this study points out in its research problem, there has been a discrepancy between the stipulations of the Convention and general practice in the field. This discrepancy, this study notes could be attributed to the weak provisions of the Convention which provides room for rogue diplomats to either engage in criminal activities or even personal aggrandizement ventures. The study further notes that in the face of the growing attention given to universal human rights, how tenable is the near-blanket immunity accorded to the diplomat? The study thus proceeds with the objective of examining the extent to which the VCDR facilitates diplomacy and the extent to which diplomats have violated provisions of this Convention and whether there have been challenges in the implementation of the VCDR. After an extensive examination of existing literature on the subject the study concludes that there is need for this study to fill the gap in literature as there is an inadequate pool of knowledge on the area under study. Aware of this fact, the study hypothesizes that the established regime of diplomatic immunities and privileges is effective in preventing diplomatic crime but the abuse of diplomatic immunity is as a result of weak legislation and that the lack of an enforcement mechanism in the VCDR has curtailed its implementation. The study therefore adopts the theory of functional necessity as its guide in studying and analyzing this treaty. The study relies to a large extent on secondary data and its analysis is therefore qualitatively done. After examining the purview of diplomatic immunities and privileges, the study zeroes in on the Vienna Convention on Diplomatic Relations upon which the study then makes an analysis. The study, in its conclusion, notes that the Convention has been a key document in the conduct of diplomacy and its value is attested to its universal acceptance and subsequent domestication in most countries. The value of the functional necessity theory is also underscored in the conclusion but the concept of personal inviolability, though useful for diplomacy to continue, is noted to be under scrutiny due to human rights concerns. The study also identifies certain provisions in the Convention which it notes as being vague thus subject to various interpretations or violations. The study singles out provisions on the diplomatic bag, the family and the various provisions on tax exemptions. The objectives of the study are therefore achieved whereby it documents numerous cases of diplomatic abuses but notes that the VCDR has to a large extent facilitated diplomatic relations between states. While noting the flaws in the current regime of diplomatic laws, the study recommends a re-evaluation of this regime to be in line with current international concerns on human rights but not to necessarily do away with immunities which have been key to diplomacy. The study also recommends a regular appraisal of the Convention to make it be responsive of any emerging issues in diplomacy while at the same time ensuring that diplomats are fully responsible for their actions when carried out in their private capacity.

LIST OF ABBREVIATIONS

VCDR-	Vienna Convention on Diplomatic Relations
ICT-	Information and Communications Technology
IGO-	Intergovernmental Organizations
MNC-	Multinational Corporations
ILC-	International Law Commission
UN-	United Nations
ICC-	International Criminal Court
AU-	African Union
EU-	European Union
NATO-	North Atlantic Treaty Organization
USSR-	Union of Soviet Socialist Republics
ICJ-	International Court of Justice

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CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 Background to the Study

The codification of diplomatic immunity laws to guide the interaction between states was meant to facilitate the smooth conduct as states sought global economic and geopolitical allies. Diplomatic relations between countries is now a central element in international relations and diplomatic agents of international relations. Acting in favor of their states' interests is a fundamental brick in building a peaceful internationalized world. Diplomatic immunity subsequently emerged as a well-established exception to that general international law principle of territorial jurisdiction which bestowed on a state exclusive reign within its boundaries.¹ That exception developed from the concepts of sovereign immunity, the concepts of independence and equality of states, and the existence of a specific rule of international law. It is one of the oldest and most accepted rules of international law dating many centuries back.²

Diplomatic immunity in international law is the freedom from a country's jurisdiction or coercive power granted to certain persons due to customary international law and/or through treaties. Diplomatic personnel have immunity for official actions taken during and after service, while consular staff only have the former.³ Different degrees of immunity also apply to other categories, such as officials of international organizations. The regime of privileges and immunities is founded chiefly on practical necessity, that is, the rules are perceived by states as necessary for the performance of the diplomatic functions. Herein lies the strength of the rules:

¹ See, Case Concerning US Diplomatic and Consular Staff in Teheran [1980] I.C.J Rep. 3. 61 I.L.R.504, 530.

² See, Preamble to the Vienna Convention on Diplomatic Relations 1961, U.N. Doc. A/Conf.20/13: "Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents";

³ Brownlie I.,5th Ed,(1998) Principles of Public International Law, Oxford University Press, p.358

Since every state is concurrently a sending and a receiving state, reciprocal interests are created which ensure constant compliance.

The Vienna Convention on Diplomatic Relations 1961⁴ was adopted at the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna in 1961 and it has subsequently become the focal point in defining and domesticating diplomatic immunity the world over. In Kenya, the Privileges and Immunities Act⁵ came into force in April 1970 to guide diplomatic engagements with foreign governments. The fact that a person may enjoy the privileges of immunity while others may not is a significant difference and one can question if the concept of diplomatic immunity is compatible with the principle ‘all peoples are equals before the law.’

1.2 Statement of the Research Problem

Based on the provisions of the Vienna Convention, diplomatic agents carry out duties assigned to them by the sending state within the framework of necessary security and confidentiality without being impeded by the authorities of the receiving state. This immunity, it may be observed, is not the personal prerogative of the agents but the immunity of their governments they represent. If, therefore, a diplomatic agent’s conduct proves to be injurious to normal relations between countries, it is the initial responsibility of the sending state to waive immunity or to recall such a diplomat failing which the receiving state is entitled to declare such diplomat *persona no grata* (person not wanted).

Whereas diplomats are inviolable when carrying out their functions, their behavior should befit their status as good ambassadors of their states, careful to portray a positive image that enhances

⁴ Harris, D.J, 6th Ed, (2004), Cases and Materials on International Law, Sweet and Maxwell Limited, p. 354.

⁵Kenya Law Reports, *Cap 179 Privileges and Immunities Act*, (National Council for Law, Revised Ed. 2012),date of assent: 3rd April 1970, date of Commencement: 6th April 1970

the stature of their country. To that end, they are required to act responsibly, respecting the laws and regulations of the host government and be mindful of the cultural differences. Above all, they are expected to steer clear of the internal affairs of the host state as anything to the contrary is deemed as violating the territorial integrity of the welcoming state. This is key in state interactions as chief among a state's foreign policy is the activity of diplomacy where diplomats are key instruments that enable states to achieve foreign policy objectives peacefully.

General practice of diplomacy has however pointed at a discrepancy between how diplomats should conduct themselves and their actual behavior in the field. Numerous cases of diplomats behaving dishonorably have risen, from drunken disorderly conduct to assault to the more serious crimes of murder, rape, arms, drug and human trafficking and subversive activities. These cases have been reported not just globally but also in Kenya. Such abuses may still be tolerable by the receiving state in the name of securing effective performance of diplomatic functions, if these abuses involve merely minor offences or crimes. But do receiving states and the international community have to tolerate personal inviolability and diplomatic immunity in case of serious crimes such as murder and conspiracy as well as war crimes and crimes against humanity?

The question therefore arises that, when a diplomat is exclusively immune from local criminal jurisdiction, what recourse do the victims have? Is the inadequacy of the established laws on diplomatic etiquette the reason for the apparent cases of diplomatic impunity? This study therefore attempts to examine the current regime of diplomatic privileges and immunities and identify challenges to the observance of diplomatic immunities in the face of growing violations.

1.3 Objectives of the Study

The general objective of this study is to find out how the current regime of diplomatic privileges and immunities facilitates diplomatic intercourse. The study has the following specific objectives:

- To examine the extent of the abuse of diplomatic privileges and immunities.
- To evaluate the relevance of the laws on diplomatic privileges and immunity to diplomatic conduct,
- To investigate the efficacy of the Vienna Convention and examine the challenges facing its implementation.

1.4 Literature Review

Diplomacy can be defined as the official activity of a given state's external relations in pursuing, through peaceful means, the objective and task of its foreign policy in protecting its rights and interests as well as those of its citizens abroad.⁶ Due to the increasing interconnectedness of states as a result of advances in ICT, it is vital for states to foster peaceful interactions. This is done through diplomacy. In this interaction between states for economic, political and even cultural reasons, rules of engagement are requisite.

Since states are recognized as equal under international law, rules of diplomatic immunity have to be accepted by both the sending and receiving state otherwise the international stage would be chaotic and full of grandstanding. As much as diplomacy has grown to encompass IGO, NGO, MNC and summit diplomacy, diplomatic exchanges at state level are still key components of

⁶ Malanczuk Peter, 7th Ed, (1997) *Modern Introduction to International Law*, Routledge, London, p. 123.

international relations and a *modus operandi*-in the form of diplomatic immunity-is still relevant.⁷

1.4.1 Defining Diplomatic Immunity

Wilson defines diplomatic immunity as a situation where members of diplomatic missions are shielded from legal processes.⁸ To him, this "shield"-diplomatic immunity-is broadly defined as "the freedom from local jurisdiction accorded under international law by the receiving state to foreign diplomats and to the families and servants of such officers." Privileges usually refer to the exemption from taxation and ordinary processes of law accorded to diplomatic personnel in a foreign country.⁹

In international law, the law on diplomatic immunities is to be found in the Vienna Convention on Diplomatic Relations of 1961. The Convention was the outcome of a UN Conference on Diplomatic Intercourse and Immunities 1961 and was based on a series of Draft Articles prepared by the International Law Commission (ILC). Accession to the Convention by states is almost universal with more than 191 states now party to the treaty.¹⁰ A great part of the Convention now reflects customary international law and it is clear that virtually all the disputes over diplomatic law can be resolved by reference to this treaty or the obligation contained therein.

⁷ Bayliss, J, and Smith, S., (Eds). (2005), *The Globalization of World Politics: An Introduction to International Relations*. Oxford: Oxford University Press, p. 30.

⁸ Wilson, R., *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 *Loy. L.A. Int'l & Comp. L. Rev.* 113 (1984). Available at: <http://digitalcommons.lmu.edu/ilr/vol7/iss1/5>

⁹ Ross M., "Rethinking Diplomatic Immunity : A review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *American University of International Law Review* 4,no.1, 1989,pp. 173-2.05

¹⁰ Bayliss, J., *The Globalization of World Politics: An Introduction to International Relations*. Oxford: Oxford University Press, p. 30.

Immunities can be divided into functional immunity (also known as immunity *ratione materiae* or subject-matter immunity) and personal immunity (also known as immunity *ratione personae* or procedural immunity). Immunity *ratione materiae* relate to conduct carried out on behalf of a state. This form of immunity is based on the notion that "a state may not sit in judgment on the policies and actions of another state, since they are both sovereign and equal".¹¹ For this reason, functional immunity does not attach to all conduct performed by state officials, rather it only applies to conduct carried out within the official capacity. However, immunity in respect of such conduct is permanent and cannot be waived by the state concerned, as it is the conduct itself and not the office bearer that forms the basis of that immunity. This form of immunity is more commonly raised in civil matters.¹²

Immunity *ratione personae* "provides complete immunity of the person of certain officeholders while they carry out important representative functions."¹³ In contrast to functional immunity, personal immunity is absolute covering both private and public acts committed by officials, but temporary (it only applies insofar as the person holds the office in question) and can be waived by the state concerned.

1.4.2 Theoretical Bases for Diplomatic Immunity

Various theories have been advanced to explain the concept of diplomatic immunity. Most prominent among these theories are the theories of personal representation, extraterritoriality and functional necessity. The personal representation theory enjoyed its greatest popularity during the eighteenth and nineteenth centuries. Under the personal representation theory, the diplomat assumes the role of the head of the sending state or of the sovereign power of that state.

¹¹ Cryer, R., (2007), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, p. 422.

¹² *ibid*

¹³ Akande, P., *International Law Immunities and the International Criminal Court*, 98(3) AJIL (2004), 407-433, at 413. 5

Schwarzenberger and Brown argue that because the diplomat is the "alter ego" of his ruler; he enjoys the rights and privileges which would be accorded his master by the receiving state.¹⁴ Personal representation has been criticized by Wilson, however, as being "altogether too wide and too fallacious for the business of conducting international business."¹⁵ The two major criticisms of this theory are that placing a diplomat entirely beyond the law of a host state merely because he personifies his sovereign defines too broadly the scope of that diplomat's rights; and the concept of personal representation is difficult to apply to modern systems of government. In a monarchy, for example, a diplomat would assume the role of his king. In a democratic form of government such as the United States, where sovereign power is divided among executive, legislative and judicial branches, however, it is difficult to ascertain exactly whose authority the diplomat represents.¹⁶

It is widely agreed that the primary purpose of diplomatic immunity is to facilitate international discourse. Therefore, the scope of such immunity should be narrowly drawn to govern activities promoting this specific purpose rather than extended in blanket fashion to cover all of the diplomat's activities in the receiving state. In applying "blanket" immunity to personal representatives of the sovereign state, however, the personal representation theory fails to limit the scope of diplomatic immunity adequately. The personal representation theory assumes that the diplomat personifies the supreme authority of the sending state. In a democratic state, however, supreme authority is not vested in one individual or a small group, but rather in separate and distinct branches. Therefore, this would result in individuals representing various

¹⁴Schwarzenberger, G., and Brown, E., 6th Ed, (1976) *A Manual of International Law*, p.79.

¹⁵ See Wilson.C, (1967), *Diplomatic Privileges and Immunities*. pp. 1-5 (discussing in detail the theory of personal representation);

¹⁶ *ibid*

groups of only limited authority in direct contradiction to the theory's premise of the diplomat personifying the sovereign.

The second theoretical justification advanced to justify diplomatic immunity is the theory of extraterritoriality. Under this rationalization, the diplomat legally resides on the soil of the sending state despite the fact that the diplomat lives abroad. Consequently, Vark points out, the foreign envoy is not subject to the law of the receiving state due to a lack of a local residence.¹⁷ Although this legal fiction received widespread support from international legal scholars and in judicial opinions, authorities have recently questioned and subsequently rejected the theory as a basis for a broad construction of diplomatic immunity.¹⁸ Problems stem from the vagueness of the term "extraterritoriality." For example, if diplomatic premises covered an entire section of a city, that part of the city would become untouchable by local law enforcement because it is not theoretically part of the territory of the receiving state.

According to the theory of functional necessity, the justification for granting immunities to diplomatic agents is based on the need to enable normal functioning of diplomatic missions and diplomats. This theory can be found in the legal basis of immunities in the Vienna Convention. As cited in the Preamble, "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."¹⁹ This theory therefore confers a certain minimum immunity on the diplomatic agent to perform his functions without hindrance. There is a deliberate link between granting immunities and performing the diplomatic functions.

¹⁷ Vark, R., (2003), "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes," *Juridica International*, VII, pp. 110-120.

¹⁸ *ibid*

¹⁹ See the Preamble, The Vienna Convention On Diplomatic Relations, Apr. 18, 1961,

Young discredits the theory as being too vague because it fails to indicate the limits to which immunities essential to "the accepted practice of diplomacy" are to be extended or, for that matter, what the accepted practice of diplomacy is.²⁰ Further, to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal. The functional necessity theory with its shortcomings however moves the emphasis from the individual and focuses instead on the functions of the diplomat. This is a realistic effort to extend only the immunity necessary to perform the diplomatic mission.

1.4.3 Development of Diplomatic Immunity

Kurizaki²¹ traces the development of diplomacy through history, from the Amarna diplomacy in the ancient Near East, to Greek, Roman, Byzantine and French diplomacy in the 17th and 18th centuries. He notes that while the history of diplomacy exhibits great deals of variability, the basic functions of diplomacy and their machinery have not changed. Indeed, the central features of diplomatic institutions have survived the fundamental shifts in the order and structure of international politics such as the surge of nationalism and democracy and the incorporation of non-European countries in the international system.

Ross²² notes that initially, the primary concern in diplomatic conduct was the freedom and safety of envoys. Diplomatic travel, according to him, needed to be free of the many basic dangers that could present themselves- from attacks by hostile forces to problems posed by difficult terrain. The inviolability of the diplomat therefore became an important requirement. Hugo Grotius writing in the 17th century averred that "the security of ambassadors outweighs any advantage

²⁰ Young, E., (1964), "The Development of the Law of Diplomatic Relations," *British Yearbook of International Law*, pp. 141-167.

²¹ Kurizaki, S., (2011) "A Natural History of Diplomacy," *When Diplomacy Works*, Texas A&M University, pp. 1-46.

²² Ross, M., (1989), "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *International Law and Policy*, pp. 173-190.

which accrues from a punishment.”²³ Similar arguments were advanced by Pufendorf who noted that the diplomat was a principal component of the Law of Nations since his role was ‘to win or preserve peace’ which was a common and natural goal.²⁴ The guidebook *Law of Nations* (or *le Droit des Gens* in its original form), written by Emer de Vattel in 1758 served as the guide to diplomatic practice for close to 200 years.

Envoys were sent with the power to speak or negotiate on behalf of a Kingdom. Harming them showed a willingness to harm the kingdom itself-an institution that was prevalent in medieval and renaissance Europe. This understanding and the desire for peace began the tradition of letting diplomats move about unbothered. It was not until the Diplomatic Privileges Act of 1708,²⁵ passed by the English legislature, that the world saw its first attempt to actually codify common law on diplomatic immunity. For the first time, diplomats (in England at least) did not have to fear sudden and drastic changes in their legal status on the whim of a ruler.

Diplomatic immunity was well established by the end of the seventeenth century, evolving as one of the principles of equality of states and immunity of the sovereign, who was said to embody the state. Just like Satow put it, “immunity...is not a personal immunity but in reality the immunity of the sending state.”²⁶ By the twentieth century, the rationale behind diplomatic immunity had significantly changed. The notion that an individual personified the state by divine order had waned with the increasing secularization of the society. Nevertheless, the principle of immunity did not change. The Peace of Westphalia of 1648 had heralded the growth of diplomacy which also meant a development of the doctrine of diplomatic immunity.

²³ As cited in Ogdon, M., (1937), *The Growth of Purpose in the Law of Diplomatic Immunity*,” *The American Journal of International Law*, 31.3 pp.449-465.

²⁴ Ibid

²⁵Noonan, M., L., (2013). "Removal of Diplomatic Immunity in the Extraordinary Rendition of Abu Omar – Can It Be Done?" Student Scholarship Paper 278, http://erepository.law.shu.edu/student_scholarship/278

²⁶ Satow E., 5th Ed.,(1979) *Satow's Guide to Diplomatic Practice*, Lord Gore-Booth, London, p.13

According to Hazel Fox, diplomatic immunity as applied now is given as recognition of the sovereign independent status of the status of the sending state and that of the status of the public nature of the acts which render them not subject to the jurisdiction of the receiving state and as protection to the diplomatic mission and staff to ensure their efficient performance of functions free from the interference from the receiving state.²⁷

1.4.4 The Principle of Personal Inviolability

The principle of personal inviolability is the oldest established rule of diplomatic law which has a close relation to diplomatic immunity. In the course of historic development, the scope of personal inviolability became absolute regardless of the severity of concerned offenses.²⁸ During the Vienna Conference that adopted the Vienna Convention, there was very little discussion on the draft article concerning personal inviolability and Article 29 provides that “a diplomat shall not be liable to any form of arrest or detention and the receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”²⁹

According to Vark, the Article itself makes no effort to define or explain the concept or extent of inviolability. This implies that personal inviolability is a physical privilege in nature and thus it is distinct from diplomatic immunity from criminal jurisdiction.³⁰ Regarding the inviolability of mission premises; there is no express reservation for action in cases of emergency. It is therefore clear that with personal inviolability, a diplomatic agent may not be arrested or detained in any

²⁷ Fox H., 2nd Ed., (2008) *The Law of State Immunity*, Oxford, p.701

²⁸ Vark, R., “Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes,” *Juridica International*, VII, pp. 110-120 at www.juridicainternational.edu/ accessed on 7/08/2014.

²⁹ Vienna Convention on Diplomatic Relations of 1961, Article 29.

³⁰ Rene Vark, ‘Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes,’ *Juridica International*, VII, pp. 110-120 at www.juridicainternational.edu/ accessed on 7/08/2014.

circumstances whatsoever. The police may arrest such a person in good faith, but when they learn that the person is entitled to personal inviolability, the police should release him immediately.

There have been a few situations where personal inviolability has not been respected. For instance, in Teheran (Iran) on November 4th 1979, the Embassy of the United States of America (U.S.A) was invaded by militant students and all 66 diplomats and citizens of the Embassy were seized as hostages because they wanted the U.S to return the Shah to them for trial for crimes committed against the citizens during his reign. This as a result affected the diplomatic relations between Iran and the U.S.A.³¹

1.4.5 The Vienna Convention on Diplomatic Relations, 1961

The Vienna Convention has emerged as a key international law tool for diplomatic conduct the world over and is the reference point when examining the concept of diplomatic immunity. An examination of its provisions reveals an attempt to temper the facilitation of diplomacy with allowing the individual diplomat some freedoms.³² Diplomats are not liable to be sued, unless the particular action falls into one of the three exceptions listed in article 31(1) Of course diplomatic agents may be sued in respect of a matter claimed to fall within one of the three exceptions. If the diplomatic agents are sued, they do not have to claim immunity because they have already it.

First, there are definitions of some traditional functions of the diplomatic mission such as representation of the sending state in the receiving state.³³ Second, certain rights of the receiving state are defined, including the rights not to approve the prospective head of mission, to declare,

³¹ I.C.J Reports ,United States Diplomatic and Consular Staff in Teheran (1980)p.3 Para 67 and 76

³² Kurizaki, S., (2011) "A Natural History of Diplomacy,"

³³ VCDR, 1961, Article 3.

without explanation, any member of the diplomatic staff a *persona non grata*,³⁴ and to set a limit to the size of the mission.³⁵ Third, the receiving state is under a duty to protect the mission's premises and its communications, including the diplomatic bag, and to provide full facilities for the performance of the mission's functions.³⁶

Turning to privileges and immunities under the 1961 Convention, these may be divided into two categories; first, those immunities providing that the mission's premises and documents are inviolable. Those immunities are believed to be absolute. Second, the immunities of the diplomatic agents, their families, the subordinate staff, and their families; the person of the diplomatic agent is inviolable and s/he cannot be arrested or detained. The inviolability of the agent is the oldest and most fundamental immunity. The diplomatic agent is also immune from the criminal, administrative, and civil (subject to limited exceptions) jurisdictions of the receiving state. There seems to be no exception whatsoever to the immunity from criminal jurisdiction. An accredited person is not exempt from the obligation to obey local law and is subject to an express duty to respect the domestic laws of the receiving state. However, in the absence of a waiver by the sending state, the protected violator of a domestic rule will be immune from the local jurisdiction to enforce it.³⁷

While critiquing the Convention, Vark notes that it makes no attempt to distinguish crimes according to their gravity and that there is also no unified definition of different degrees of crime. He observes that in this state of affairs, it is up to national laws of individual states to classify crimes which in itself are open to multiple interpretations.³⁸ According to Adjin-

³⁴ Ibid, Article 9

³⁵ Ibid, Article 11

³⁶ Ibid, Articles 22-25.

³⁷ Ibid, Articles 29-41.

³⁸ Vark, R., 'Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes,' *Juridica International*, VII, pp. 110-120 at www.juridicainternational.edu/ accessed on 7/08/2014.

Tetty,³⁹ the law governing diplomatic relations is not devoid of antidotes for immunity abuse. She argues that the law on diplomatic relations does not provide a satisfactory solution to curb problems related to the abuse of diplomatic immunities and privileges by diplomats. The law fails to provide a balance between the interests of the sending and the receiving states. Farhangi⁴⁰ asserts that the Convention deviates from functional necessity by insisting more on individual necessity rather than focusing on the functionality of the immunities and privileges. It can therefore be noted that the immunity under the Convention is too broad and should be narrowed down according to the type of mission and function of a diplomat.

It can be argued that by addressing the abuse of diplomatic immunity by creating a new and more restrictive interpretation of the Vienna Convention has the advantage of working within the existing framework of international law. According to Dreier,⁴¹ “while the concept of diplomatic immunity remains an important underpinning of peaceful diplomacy, it is time with exponential growth of the diplomatic corps, that we reexamine the procedures and policies implicit in the doctrine of diplomatic immunity.”

1.4.6 Kenyan Diplomatic Law on Immunities

In Kenya, the Privileges and Immunities Act (Cap 179)⁴² gives the force of the Kenyan Law to the relevant provisions within the Conventions. This applies to all foreign diplomatic and consular missions, whether or not the state represented by the mission is a party to the Conventions, and International Organizations gazetted under the Act. Nevertheless, there is an exemption whereby immunities and privileges are contained in specific agreements between

³⁹ Adjin-Tetty, E., (1991), *Abuse of Diplomatic Privileges and Immunities*, M.A, York University pg. 32.

⁴⁰ Farhangi, L.S, (1986), *Insuring Against Abuse of Diplomatic Immunity*, Stanford Law Review , 38.

⁴¹ Dreier, D., (1997) *ILSA Journal of International and Comparative Law*, Vol. 4 University of California, p.627

⁴² Kenya Law Reports, *Cap 179 Privileges and Immunities Act*.

individual organizations and the Government. For instance, Shelter Afrique enjoys several privileges under such arrangements.⁴³ International bodies like the United Nations (UN) just like other entities such as the International Criminal Court (ICC), negotiate diplomatic rights for their staff under special arrangements. It should however be noted that Ambassadors and High Commissioners enjoy higher level of diplomatic immunity compared to other consular staff.⁴⁴

1.4.7 Current Trends in Diplomatic Immunity

A diplomat enjoys a wide range of privileges and immunities based on customary as well as Conventional international law. According to Tunku Intan Mainura, the privileges and immunities enjoyed by diplomats enable them to exercise their duties and functions without any interference by the authorities of the receiving state. However, recently, we have had cases of diplomats showing adverse trend to disregard the law and invoke their diplomatic immunity to escape from legal responsibility.⁴⁵ Maginnis argues that although most scholars agree that some form of diplomatic immunity is necessary, the doctrine has historically been criticized. This is because diplomats enjoy absolute immunity for their official and private acts while on assignment in the receiving state.⁴⁶

Like earlier stated, the purpose of these privileges and immunities is not to benefit individual but to ensure the efficient performance of their official missions. It is more of a courtesy/customary law extended to foreign diplomats to work freely in any foreign land. Mc Donough highlights that common complaints regarding diplomatic immunity involves misuse of privileges to evade parking tickets and fines. Violations of law by diplomats are not only limited to traffic offences

⁴³ Ibid. Part IV section 9

⁴⁴ Aluanga-D., “*Diplomatic Immunity or Diplomatic Impunity?*”, Standard Newspaper, 14th August 2012

⁴⁵ Mainura Tunku, I (2003), *Practice of Diplomatic Immunities and Privileges*.

⁴⁶ Maginnis, V.L, (2003) Limiting Diplomatic Immunity: Lessons Learned From the 1946 Convention on Privileges and Immunities of the U.N, *Brooklyn Journal of International Law*, pp.35-48.

but may also extend to serious breaches of the law including drunk driving, drug smuggling and assaulting citizens of the receiving state.⁴⁷

While of the view that the Vienna Convention should be amended, Adjinn⁴⁸ and Mc Donough⁴⁹ suggested that each country is required to purchase insurance against the criminal acts of its diplomats within the receiving state. They also suggested the isolation of offending nations, development of a fund by host nations to compensate victims of diplomats of sending states and suing offending diplomats in their sending state.

This study notes that although there is numerous literature on the history of diplomacy, the evolution of the concept of diplomatic immunity and the various violations of diplomatic immunity that span the whole world, the literature on the effectiveness of laws on diplomatic immunity as practiced is still descriptive and is limited in scope. This study has therefore identified a literature gap with regards to the expediency of diplomatic immunity laws.

1.5 Hypotheses

The study seeks to test the following objectives:

- The established regime of diplomatic immunities and privileges is effective in preventing diplomatic crime,
- The abuse of diplomatic immunity is as a result of the weakness of the VCDR,
- The lack of an enforcement mechanism internationally has incapacitated the VCDR.

⁴⁷ Mc Donough Michael B.,(1997)*Privileged Outlaws: Diplomats, Crime and Immunity*, 20 Suffolk Transnational Review 475,

⁴⁸ Adjinn-Tettey, E., (1991) *Abuse of Diplomatic Privileges and Immunities*, M.A, York University, pg37.

⁴⁹ Mc Donough Michael B. ,(1997)*Privileged Outlaws: Diplomats, Crime and Immunity*, 20 Suffolk Transnational Review 475,

1.6 Theoretical Framework

This study is guided by the theory of functional necessity of diplomatic immunity. Ogdon,⁵⁰ one of the proponents of this theory avers its acceptance that was largely a reaction to the unlimited immunity historically granted to diplomats. The functional necessity theory justifies immunity for the purpose of allowing diplomats to conduct their business. Accordingly, diplomatic immunity protects the diplomat's ability to carry out that work efficiently. The privilege does not, however, afford protection and benefits to the diplomat as a person. If a diplomat acts outside of the normal sphere of conducting inter- national relations, a question arises as to whether immunity still applies.

Ross⁵¹ observes that current administrative and judicial construction of diplomatic immunity illustrate that diplomats themselves are immune from prosecution even when committing criminal or tortuous acts outside of their prescribed functions. A critique of this construction of the functional necessity theory distinguishes the treatment of the individual diplomat from that of the diplomatic process. In theory, diplomatic immunity originated to protect the process of furthering relations between nation states. The current focus of immunity on the individual diplomat is therefore unsound. The assertion that the diplomat cannot function efficiently without immunity implies that the diplomat will at times be found on the wrong side of the justice system and therefore the need for a shield to ensure that he is not prosecuted and 'persecuted' in order to conduct international relations.

⁵⁰ Ogdon, M., (1937), *The Growth of Purpose in the Law of Diplomatic Immunity*,

⁵¹ Ross M., "Rethinking Diplomatic Immunity, A review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *American University of International Law Review* 4,no.1, 1989,pp. 173-2.05

1.7 Justification of the Study

This study is justified on both academic and policy grounds. The study is firstly an academic contribution to the literature on international law, international relations and especially in the area of diplomatic immunities and privileges; it will be a reference point to students and scholars seeking a better understanding of the relevance of diplomatic immunities in the face of blatant abuse by diplomatic agents in Kenya. Its valuable contribution in filling the gap in knowledge on the discourse on whether diplomatic immunity laws should be re-examined will facilitate a clearer understanding of this topic while providing useful insights to future research on the topic.

Secondly, the study will make a significant contribution to policy making in suggesting ways of addressing loopholes in local diplomatic law and how to seal such loose ends that may be used by rogue diplomats.

1.8 Research Methodology

The study will rely on primary and secondary data. Primary data will be collected from Ministry of Foreign Affairs (MFA) staff and diplomatic staff who will form the population and sample size. The research instruments will be questionnaires and interviews. The data collected will be qualitatively analyzed which will complement secondary data collected from books, journals, pamphlets and magazines.

1.9 Chapter Outline

The study is divided into five chapters, chapter one, is an introduction to the study and includes: background to the study; the statement of the problem; the objectives of the study; the research questions; the methodology used, theoretical framework, hypotheses and the literature review.

Chapter two looks at the historical background of diplomatic immunities in the world. For an understanding of the current status of diplomatic immunity, a closer attention has to be paid to the events and arguments leading to the establishment of this regime. Chapter three is a review of the Vienna Convention on Diplomatic Relations (VCDR) while Chapter four is a critical analysis of the relevance and effectiveness of laws on diplomatic immunity as contained in the VCDR. Chapter five consists of conclusions and recommendations of the study.

CHAPTER TWO: HISTORICAL BACKGROUND OF DIPLOMATIC IMMUNITY

2.0 Introduction

Diplomatic immunity has been a facet of diplomatic relations for countless years, and is regarded as one of the oldest branches of international law. Envoys have since time immemorial been specifically chosen and sent in order to deliver messages, receive replies and report on any news from foreign States. These functions ensured the development of special customs on the treatment of ambassadors and other special representatives of other states. That a State rules over all persons and things within its territory also constitute one of the basic principles of international law. However, states have over time accepted limitations upon their jurisdiction to give room for foreign nationals to operate within its territory uncurtailed. One of these limitations is the special legal status of diplomatic representatives. Under customary international law, diplomatic envoys are granted certain privileges and immunities from the normal legal processes of the state to which they are accredited. This chapter examines the growth of this practice through the ages in order to fully grasp the challenges in its usage in the modern era.

2.1 The Origin of Diplomatic Immunity

The concept of diplomacy evolved by the time of the Greek and Roman civilization and their main focus was on the personal safety of the diplomat as well as his freedom to travel in order to ensure good relations with different kingdoms, tribes and clans.⁵² It became clear that the inviolability of the diplomat was a safeguard mechanism and a breach would result in negative consequences, often resulting in a hostile approach. Nicolson notes that “*res diplomatica*,” which initially meant the vocation that examines and interprets official documents, came to indicate the

⁵²Hanrahan, N., (2005), *A History of Diplomatic Immunity and the Development of International Organization Immunity*, CAIO, Pg. 2.

management of intergovernmental affairs.⁵³ This indicates that one of the fundamental functions of diplomacy at the time is the medium of communication between governments authorities via “diplomas”-which were documents exchanged between governments allowing intergovernmental intercourse.

The accounts of Thucydides clearly retell the entrenchment of the practice of diplomacy and a fairly complex system of immunity accorded to diplomats.⁵⁴ On one such account, the hegemonic city-state of Athens demanded Melos (a colony of Sparta) to surrender. The Athenian envoys argued that Melos should submit to the demand because Melos was weaker not only than Athens who controlled the sea but also weaker than other islanders. In response to a Realpolitik argument, the Melian commissioners, appealing to the justice and moral that are embodied in the laws of nations, argued that they should not be forced to surrender just because they are weak.⁵⁵

This early practice of diplomatic immunity implied that the envoy was in some way the personal representation of the state and for this reason enjoyed a very special status. Ogdon’s historical account cites examples of the reverence diplomats attracted: Homer refers to ambassadors as “messengers of Zeus and men. Eustathius considered them a medium between humans and the divine while Cicero notes that ambassadors should “be esteemed as sacred and venerable as to go unharmed, not only as between allies, but also when confronted with the weapons of the enemy.”⁵⁶ According to Elgavish⁵⁷, protection of envoys was achieved in several ways. Firstly, a specific appeal by the dispatcher to the recipient was sent. This was usually attained by sending a letter to the receiving State requesting that someone watch over the envoy so that no one would

⁵³Nicolson, H., (1963), 3rd Ed, *Diplomacy*, Oxford University Press, London, pg 8.

⁵⁴Thucydides, (1972), *History of the Peloponnesian War*, Penguin, London, pg 19.

⁵⁵Ibid

⁵⁶Ogdon, M., (1937), The Growth of Purpose in the Law of Diplomatic Immunity,” *The American Journal of International Law*, 31.3 pp.449-465.

⁵⁷ Elgavish, D., “Did Diplomatic Immunity Exist in the Ancient Near East?” (2000) *Journal of the History of International Law*, pp. 73-89.

interfere with their mission, and in return the sending State promised special benefits. Secondly, protection could be achieved by international agreement in that detention or murder of the envoy would lead to the cancellation of international agreements and the receiving State would suffer the consequences. Thirdly, it could be done by providing escorts as a means of defense. In order to protect the messengers, escorts were provided by the receiving State.

The Roman version of diplomacy was guided by the maxim “Those who seek peace must prepare for war.” Campbell⁵⁸ observes that the quest for a *pax Romana* drove the Empire to expediently use diplomacy in its territorial expansionist policy. He notes that the *legatus*- that is the envoys-and the concept of diplomatic immunity were used and abused based on whims of the Roman Senate which was the custodian of foreign relations while also running the war effort. There was therefore little advancement of diplomatic immunity under Roman expansionism as it placed its military strength ahead of peacetime diplomatic niceties which were deemed impediments to surefooted military victories. Hanrahan⁵⁹ notes that the concept of diplomacy under Roman civilization focused on the personal safety of the diplomat as well as his freedom to travel in order to ensure good relations with different kingdoms, tribes and clans. It is evident that the inviolability of the diplomat was a safeguard mechanism and a breach would result in negative consequences, often resulting in a hostile approach.

The rights of diplomats was however sacred and of universal application during this period. Frey observes that these rights were derived from the *jus naturale* (natural law) and *jus civilis* (civil law)⁶⁰ which were combined into the *Corpus Juris Civilis* (Codified Civil Law). For instance the laws made it an offence to infringe on an ambassador’s inviolability and any such infringement

⁵⁸Campbell, B., (2001), “Diplomacy in the Roman World (c.500 BC-AD 235).”*Diplomacy & Statecraft* 12 (March): 1–22.

⁵⁹Hanrahan, N., (2005), *A History of Diplomatic Immunity*,

⁶⁰ Frey, L., and Frey, M., (1990), “The Bounds of Immunity: The Sá Case. Politics, Law, and Diplomacy in Commonwealth England,” *Canadian Journal of History*, pp. 35- 57.

was considered a legitimate cause of war.⁶¹ Any assault on a diplomat of the enemy was deemed an offence against *jus gentium* (law of the nations). Under this regime, diplomats performed a variety of tasks in the Roman Empire, which included negotiating treaties of trade, alliance and demanding restitution for any failure to comply with treaties.

Hugo Grotius' discourses during this time points to the increasing debate on how to treat envoys. He wrote that there were two inherent rights of ambassadors abroad, namely the right of admission into the receiving State and the right to freedom from violence.⁶² Grotius disagreed with other scholastic reasoning that immunity was based on natural law through necessity. However, he ultimately concluded that immunity was based on natural law. Grotius stated that the security of ambassadors outweighed any advantage which may have been derived from the punishment of his crimes and his safety would be compromised if he could be prosecuted by any other than the State who sent him.

2.2 Westphalian Diplomacy

The establishment of permanent missions was found only in the 15th century Europe. Before that time all over the world not only in Europe, but places in South East Asia, the Islamic countries of West Asia, missions were set on a temporary basis and the mission would leave as soon as the purpose was fulfilled irrespective of whether it was of an economic, political or cultural matter.⁶³ The Italians were the first to recognize the advantage of having a permanent mission in the neighbouring capitals and Venice sent its first permanent representative to Genoa in 1455 to represent their interest. By the beginning of the 1500s the main European countries

⁶¹Ibid

⁶²Ogdon M., (1937), The Growth of Purpose in the Law of Diplomatic Immunity," *The American Journal of International Law*, 31.3 pp.449-465.

⁶³Sen B., (1988) *Diplomatic Handbook of International Law and Practice*, Martinus Nijhoff publishers, New York, pg 6.

such as England, Spain, Germany and France had their representative in each of the respective countries. This concept was defined as “a regularly accredited envoy with full diplomatic status sent...to remain at his post until recalled, in general charge of the interests of his principal.”⁶⁴

By the onset of the Thirty Years’ War in 1618, the spread and formation of resident ambassadors and permanent diplomacy was largely complete, and nearly all European powers maintained permanent diplomatic representatives with all other powers in the sphere of their interests.⁶⁵ It was the Byzantines who taught the diplomatic practice to Venice, and the Venetians in turn set the pattern for other city-states in Italy. Byzantians utilized intelligence in its diplomatic manipulation. Italians then perfected the system of the acquisition and transmission of political information in coping with the changing security outlook. Over centuries, the Italian system spread throughout Europe in the sixteenth century, and as Wiseman⁶⁶ puts it, resident ambassadors and permanent embassies gave the modern diplomacy its signature. The Thirty Years’ War had the disastrous effect upon European diplomacy because ambassadors ended up engaging in espionage and subversion instead of seeking to cultivate peaceful relations between States.

The century following the treaties of 1648 has been termed the foundation era of the “modern” state and “classic diplomacy. “The changing framework of international relations brought about by the Treaty of Westphalia heralded a shift towards a European system of resident diplomacy that forced existing structures and techniques to adjust. In this light, the core period of this thesis has often been termed the “Age of Louis XIV,” as France was considered the leader in the development of diplomatic intercourse and diplomatic immunities under King Louis the XIV.

⁶⁴O’Brien, J., (2001), *International Law*, Cavendish, London, pg 297

⁶⁵Mattingly, G., (1937), “the first Resident Embassies: Mediaeval Italian Origin of Modern Diplomacy.” *Speculum*, pp.423–439.

⁶⁶Wiseman, G., (November, 2005), “PaxAmericana: Bumping into Diplomatic Culture,” *International Studies Perspectives* pp. 409–430.

Francois de Callières, who served as a diplomat during the reign of Louis XIV and published *The Art of Diplomacy* in 1716 put emphasis on the art of negotiation and the principles of *raison d'état*. He advanced the ideas of Cardinal Richelieu's on diplomatic thought and practice that was pivotal in the emergence of the French system under Louis XIII.⁶⁷

The seventeenth and eighteenth centuries saw the emergence of an international system that was composed of principalities and republics who were closely intertwined through civilization, religion, law and political practice, and who were considered to be equal in sovereignty though different in power. It had evolved out of an increasing political, commercial and cultural interaction and out of the attempts to balance Europe through a system of competing alliances. This era of classical diplomacy towards the end of the 17th century saw Louis XIV of France replace the Habsburg of Spain as the leading power leading to an increasing French influence in the conduct of diplomacy.⁶⁸

The impact of the French system on the method and practice of European diplomacy was so profound that French gradually replaced Latin as the language of diplomacy during these two centuries. While French diplomats used French on their treaties in the 17th century, it was at the negotiations leading to the Treaty of Utrecht in 1714 following the war of the Spanish succession that the imperial diplomats first employed French in the agreements which they concluded with France. Thereafter, the French language, along with the French system, was adopted by European powers as the standard diplomatic procedure.⁶⁹ It was not until the Diplomatic Privileges Act of 1708, passed by the English legislature that the world witnessed the first

⁶⁷Keens-Soper, M., (2001) "Callières." Berridge, G., Keens-Soper M., and Otte, T., Eds, *Diplomatic Theory from Machiavelli to Kissinger*, Palgrave, New York, pp. 46-68.

⁶⁸Roosen, W., (Spring, 1970), "The Functioning of Ambassadors under Louis XIV." *French Historical Studies*, pp. 311-332

⁶⁹Ibid

attempt to actually codify common law on diplomatic immunity.⁷⁰ This law prohibited the prosecution, arrest, and imprisonment of ambassadors and their servants and recognized the importance of facilitating peaceful interactions through granting of certain immunities. The US Congress passed similar legislation in 1790. Under that law it was an offense to arrest ambassadors and their servants.

Holsti observes that the Westphalian state principles of territoriality, authority, sovereignty power and legitimacy underlay the concept of diplomatic immunity and continued to govern diplomatic relations up to the First World War.⁷¹ This period leading up to the Great War heralded a significant recognition of diplomats as agents of their governments. By this time Vattel's *le Droit des Gens* had given way to foundational laws on diplomatic immunity established under the Vienna Convention of 1815. This Convention realized the necessity of diplomatic immunities and served as the precursor to the 1961 and 1963 Conventions on diplomatic and consular immunities.⁷²

By the twentieth century the rationale behind diplomatic immunity had significantly altered. The notion of the monarch as the personification of the state by divine order had waned with the increasing secularization of society. Nevertheless, the principle of immunity for diplomats remained intact. Now, the prevalent principle justifying diplomatic immunity is that of functional doctrine. As Hazel Fox argues, twentieth century diplomatic immunity was given only as recognition of the sovereign independent status of the sending state and of the public nature of the acts which rendered them not subject to the jurisdiction of the receiving state; and as

⁷⁰Hanrahan, op cit.

⁷¹Holsti, K., J., (2004), *Taming the Sovereigns: Institutional Change in International Politics*, Cambridge University Press, Cambridge, pg. 19

⁷²Emer de Vattel (1916), Charles Ghequiere Fenwick, ed., *Le droit des gens (The Law of Nations)*, Carnegie Institution of Washington, p. xxx, retrieved 4 May 2011.

protection to the diplomatic mission and staff to ensure their efficient performance of functions free from interference from the receiving state.⁷³

This functional thinking gave rise to an argument for a check on the excesses of diplomats and the need to harmonize laws on the practice of diplomacy. This theoretical shift was also happening at the same time as there was further expansion in industrial development and closer connectivity due to modern means of transport and communication. This in turn called for universal binding rules to regulate the laws regarding diplomats, as the European countries no longer were isolated from trade and commerce

In 1927, the League of Nations Committee of Experts for the Progressive Codification of International Law drew up a report that analyzed the existing customary law of diplomatic privileges and immunities. The Havana Convention on Diplomatic Officers in 1928 brought the Latin American states together.⁷⁴ The report was intended as a provisional instrument until a more comprehensive codification could be achieved. The preamble of the Havana Convention states that diplomats should not claim immunities which are not essential in performing official functions. This led to the growing popularity of the functionalist approach.⁷⁵ Another important document was the Harvard Research Draft Convention on Diplomatic Privileges and Immunities in 1932 (“the Harvard Convention”) which tried to make a distinction between functional immunity and private immunity but as Frey notes, creating this distinction aided in identifying when immunity could be relied upon. However, this only applied to lower staff, since diplomats have absolute immunity against criminal prosecution.

⁷³Fox, H., (2008), 2nd Ed, *The Law of State Immunity*, Oxford University Press, Oxford, p. 701.

⁷⁴Frey and Frey, (1990), “The Bounds of Immunity: The Sá Case. Politics, Law, and Diplomacy in Commonwealth England,” *Canadian Journal of History*, pp. 35- 57.

⁷⁵ *ibid*

The establishment of MOFA concentrated the responsibility of diplomacy such as formulation of policy and the control of diplomatic agents. Its institution under the French diplomatic renaissance developed and gained wide European acceptance so much so that the Foreign ministry now was now solely in charge of inter-state interaction.⁷⁶ The incorporation of other countries in this diplomatic practice met with its challenges. For instance, there was opposition to this western domination of diplomacy. The deep historical, linguistic and cultural ties among European countries had led to a homogeneous diplomatic law and practice which was alien to developing countries just emerging from years of colonial domination by these same European countries. Furthermore, the change in the sovereign power from the monarch who had dominated much of the 17th and 18th centuries being the head of state and head of government to a parliamentary democracy which vested much power and authority in a freely elected government shifted diplomatic intercourse from the elite to government representatives who were now required to carry out state duties in reference to a foreign policy that required parliamentary approval.⁷⁷

2.3 Theories of Diplomatic Immunity

The evolution of diplomatic law through the seventeenth to the twentieth centuries hinged on philosophical arguments and scholarly articulations that were advanced by such scholars as Vattel, Callières, Oppenheim, Grotius and Satow among others. This change in viewpoints coincided with changing structure of the state. The initial theories of extraterritoriality and personal representation which had for long explained and justified diplomatic intercourse had to therefore give way to new thinking. Diplomats could no longer be termed as representatives of

⁷⁶Nicolson, (1963), 3rd Ed, *Diplomacy*, Oxford University Press, London, pg 8.

⁷⁷Holsti, K., J., (2004), *Taming the Sovereigns: Institutional Change in International Politics*, Cambridge University Press, Cambridge, pg. 19

an absolute monarch; neither would they get away literally with murder. Inviolability had to be tempered with a measure of functional necessity. This new theorizing had undergone centuries of change and metamorphosis:

The basis of the initial theory of personal representation was that diplomats received immunity as if they were the foreign sovereign. This was out of respect and avoided any form of conflict as the sending State was pleased. In other words, a diplomat's immunity arose because he was an extension of the ruler sending him. The representative was treated as though the sovereign of that country was conducting the negotiations, making alliances or refusing requests. Proponents of this theory included Vattel, Grotius, Wicquefort, and Bynkershoek.⁷⁸ Evidence of the widespread applicability of this theory was in *The Schooner Exchange v McFaddon*, where the Court held that, by regarding the ambassador as the sovereign's representative, it ensured their stature and that if they were not accorded exemptions, every sovereign would cast a shadow on his own dignity when sending an ambassador to a foreign State.⁷⁹

The theory of extraterritoriality gradually gave way to the theory of personal representation which was propagated by authors such as Emmerich de Vattel and James Lorimer was based on the Roman practice that stated that a man took his own land's law with him when he went to another land.⁸⁰ According to this theory the offices, property and homes of diplomats and even their persons were to be treated, throughout their stay, as though they were on the territory of the sending State. Any crimes committed by the members of that embassy could not be lawfully prosecuted in the receiving State. This theory soon developed and extended to the staff and family of diplomats with emphasis that an ambassador's house and person are not domiciled

⁷⁸Berridge, G., 3rd Ed, (2005)*Diplomacy: Theory and Practice*, Macmillan, New York, pg 46.

⁷⁹ Ibid

⁸⁰ Schwarzenberger, , G., and Brown, E., 6th Ed, (1976) *A Manual of International Law*, p.79.

in the receiving State, but in the sending State and therefore not subject to the laws of the receiving state.⁸¹

After centuries of applying the theories of extraterritoriality and personal representation, the theory of functional necessity grew as a result of the inadequacies of the two and due to the changing circumstances both in the state structure and the international system. The two theories had been criticized for being vague and not taking into account the fact that the diplomat is not an absolute individual or office but subject to the sovereign who was no longer an exclusive aristocracy but a representative democracy. There had to be checks on the occupation of the diplomat to accord him the privileges necessary for the performance of his duties while at the same time checking any impunity.

Functional necessity therefore emerged as the counter theory aims not only at allowing the individual diplomat to function freely and effectively, but also ensuring the efficient functioning of the diplomatic process as a whole. This requires the fullest protection be given even if the diplomat goes beyond his function. This is based on the idea that immunity is necessary and recognized for the efficient functioning of the diplomat.

This theory gained impetus due to the expansion of permanent resident embassies. It is incorporated in the VCDR as the dominant theory in the preamble providing the theoretical argument to the immunities and privileges provided according to those functions performed by the diplomat in his official capacity. When performing an official task, diplomats need to be able to move freely and not be obstructed by the receiving State. They must be able to observe and report with confidence without the fear of being reprimanded. This immunity may be understood

⁸¹ Cryer, R., (2007), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, p. 422.

to mean that diplomats may break the law of the receiving State in order to fulfill their functions. Grotius stresses that an ambassador must be free from all coercion in order to fulfill his duties. Vattel placed the greatest emphasis on the theory in order for ambassadors to accomplish the object of their appointment safely, freely, faithfully and successfully by receiving the necessary immunities.⁸² It should be however noted that the functional necessity theory is not exclusively used in modern diplomatic law but is complemented by the theory of personal representation.

2.4 Modern Diplomatic Immunity

Fox notes that the process towards a universal law on diplomatic immunity gathered momentum with the production of the Harvard Convention in 1932.⁸³ In 1957, following the United Nations General Assembly Resolution 685, the International Law Commission (ILC) accepted the task of preparing a draft Convention on Diplomatic Relations. The ILC later requested information and comments from all governments in order to receive input and draft an efficient document. The ILC draft was eventually prepared and presented at the United Nations General Assembly Conference which deliberated and approved this draft in 1961 held in Vienna, Austria.

The Vienna Convention was considered to be a success in that by 1985, 145 member states had acceded to it; ten years thereafter this number had increased to 174 member states. The formulation of the Vienna Convention was a reaction to the absolute immunity granted to diplomats throughout the ages.⁸⁴ Further, it sought to standardize the practice of diplomatic officers and missions in the receiving state. In addition, the preamble of the Vienna Convention states that one of the purposes of immunities and privileges is “*not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions as representing*

⁸²Harris, D.J, 6th Ed, (2004), Cases and Materials on International Law, Sweet and Maxwell Limited, pg 48.

⁸³ Fox, H., 2nd Ed., (2008) *The Law of State Immunity*, Oxford, p.701

⁸⁴ Hoffman, J., (2003), “Reconstructing Diplomacy,” *British Journal of Politics and International Relations*, vol, 5, pp.495- 536

states”. Furthermore, the preamble recognizes the theory of functional necessity as the dominant theory.

Thus, the focus shifts from the *individual* to his *function* in the mission. A question that can be raised is whether diplomatic representatives adhere to this concept, especially when there are other Articles in the Vienna Convention that counter this. Moutzouris⁸⁵ argues that although the Vienna Convention reflected a paradigm shift from the initial theories to functional necessity, the latter cannot exist in isolation. The preamble complements both these theories. Similarly, the Vienna Convention signifies the rejection of the extraterritoriality theory and states that this theory was an “*unfortunate expression*” that would have led to many errors and to legal consequences that would be “*absolutely inadmissible.*”⁸⁶ It should be noted that since the VCDR is the subject of chapter 3 it just suffice here to note briefly on the pronouncements of this new diplomatic law.

Its inception in 1961 signified general worldwide agreement as to the rules of engagement by diplomats the world over. For the first time nations from various linguistic, historical and political backgrounds agreed to the rules that will govern interactions between them. Unlike before when the rules were set by a class of European countries, the VCDR though borrowing heavily from this Eurocentric diplomatic immunity law took cognizance of the growing need to reshape diplomatic law to harmonize relations among different capitals across the globe. The Vienna Convention clarifies that diplomats are exempt from jurisdiction of the local courts only during their mission, but are not exempt from the law of the State.⁸⁷

⁸⁵ Moutzouris, M., (2011)“Sending and Receiving: Immunity Sought by Diplomats Committing Criminal Offences,” Rhodes University, pg 46.

⁸⁶ Ibid

⁸⁷Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

It further grants many fiscal privileges, but also limited customs exemptions which many envoys abuse and use as a way to increase their salaries. Other countries at the same time denoted that custom exemption is based on international comity rather than law. According to Denza, there are six provisions that may be singled out as marking significant developments of previous customary international law principles.⁸⁸ Article 22 deals with the inviolability of mission premises. The Convention does not clearly state the ambit of inviolability of missions, but the implications of inviolability and provision of emergency or abuse may justify the receiving state's entry onto the premises. Article 27 deals with the protection of all forms of diplomatic communication. Examples are the use of wireless transmissions and the fact that diplomatic bags are not searched by the receiving state. Article 31 looks at settled exemptions to civil jurisdiction in order to ensure the minimizing of abuse by diplomats. Article 34 looks into the basic principle of exemption from domestic taxes in all cases with some exceptions to taxes on private income and property arising in the receiving state, indirect taxes and charges levied for services rendered. Article 37 proved the most difficult to resolve in view of great diversity of approach by the parties to the Convention. This Article deals with the treatment of junior staff of diplomatic missions and families. The study, in its critique of the VCDR, will attempt to examine the abuses of this privilege by officials who exploit the weak enforceability of the exemptions to this rule.

This new law came at a time of increased economic expansion and the geopolitical positioning of the cold war. Further advancements in information, communication and technology facilitated an exponential growth of the diplomatic corps as many nations sought to take advantage of this new regime to achieve crucial foreign policies of capitalistic growth or communist expansion. While the VCDR was codifying laws on state to state diplomacy, a new phenomenon was emerging as

⁸⁸ Ibid.

a result of co-operation between states in a globalizing world: international organizations. At the outset, international organizations did not require privileges and immunities since they did not have a political mandate, but by the 19th century international immunities first appeared, even though international organizations only began to increase after the Second World War.⁸⁹ Maginnis notes that even the Dumbarton Oaks proposal for the UN Charter did not include any provisions for immunity and privileges, as it was understood that not all officials needed immunity but this changed when international organizations with a political mandate began to emerge, many officials were immediately granted diplomatic immunity because it was a convenient and stable model.⁹⁰ The UN, NATO EU, AU among others emerged during this post-WWII era.

The Preparatory Commission of the UN proposed the drafting of the Convention on the Privileges and Immunities of the UN. This Convention was necessary to help implement Article 105 of the UN Charter that allows for immunities and privileges. Immunity is divided into four groups. The first group includes high-level personnel; the second to fourth groups include the organization itself, the officials of the UN and experts on mission. Article 18 of the UN Convention describes the immunity given to officials of the organizations. It must be noted that there is a distinction between permanent representatives, who are stationed at the UN headquarters throughout the year, and temporary representatives, who are sent for particular sessions or conference of the UN.⁹¹ Under provision 15 of the UN Headquarters Agreement, permanent representatives are accorded similar status to that of diplomats accredited to the sending State. Temporary representatives, on the other hand, enjoy only limited exemption from

⁸⁹ Maginnis, (2003), *Brooklyn Journal of International Law*, 48,1010.

⁹⁰ Ibid.

⁹¹ Ling, Y., (1976) "A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents," *Washington & Lee Law Review*, vol 33, No. 91, pp 87-101.

criminal jurisdiction in the receiving State; limited to official functions and not entitled to immunity to civil jurisdiction.⁹²

As a consequence of the high incidence of political acts of violence directed against diplomats and other officials, the General Assembly of the UN adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (CPPCPP) in 1973. The foreseen offences are primarily murder, kidnapping, attacks upon the person, violent attacks upon official and private premises, and any threats or attempts to commit any of the above offences. Nations ratifying the prevention and punishment Convention make these crimes punishable with appropriate penalties, which take into consideration the gravity of the offence and either extradite offenders or apply the domestic law. Where there is a threat to the safety of a diplomat, such as a mob attack or kidnapping, the receiving state should provide special protection, like an armed guard or bodyguards.

2.5 Key Principles of Diplomatic Immunity

2.5.1 Personal Inviolability

The principle of personal inviolability is the oldest established rule of diplomatic law which has a close relation to diplomatic immunity. In the course of historic development, the scope of personal inviolability became absolute regardless of the severity of concerned offenses.⁹³ During the Vienna Conference that adopted the Vienna Convention, there was very little discussion on the draft article concerning personal inviolability and Article 29 provides that “a diplomat shall not be liable to any form of arrest or detention and the receiving state shall treat him with due

⁹² Ibid

⁹³ Vark, R., (2003), “Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes,” *Juridica International*, VII, pp. 110-120.

respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”⁹⁴

According to Vark, the Article itself makes no effort to define or explain the concept or extent of inviolability. This implies that personal inviolability is a physical privilege in nature and thus it is distinct from diplomatic immunity from criminal jurisdiction.⁹⁵ Regarding the inviolability of mission premises; there is no express reservation for action in cases of emergency. It is therefore clear that with personal inviolability, a diplomatic agent may not be arrested or detained in any circumstances whatsoever. The police may arrest such a person in good faith, but when they learn that the person is entitled to personal inviolability, the police should release him immediately.

There have been a few situations where personal inviolability has not been respected. For instance, in Teheran (Iran) on November 4th 1979, the Embassy of the United States of America (U.S.A) was invaded by militant students and all 66 diplomats and citizens of the Embassy were seized as hostages for 444 days because they wanted the U.S to return the Shah to them for trial for crimes committed against the citizens during his reign. This as a result led to the severance of diplomatic relations between Iran and the U.S.A.⁹⁶

2.5.2 Jurisdiction

Jurisdictional immunity entails that persons with immunity cannot be brought before the courts for any illegal acts or offences committed while in the receiving State during the period of their functions. This extends to all jurisdictions whether civil, administrative or criminal. Thus, a

⁹⁴ Article 29 of the Vienna Convention on Diplomatic Relations of 1961

⁹⁵ Rene Vark, (2003), “Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes,” *Juridica International*, VII, pp. 110-120.

⁹⁶ I.C.J Reports ,United States Diplomatic and Consular Staff in Teheran (1980)p.3 Para 67 and 76

diplomatic agent who commits an illegal act in the receiving State cannot be prosecuted in the local courts as the courts would be “incompetent to pass upon the merits of action brought against such a person.”⁹⁷ The rationale behind criminal jurisdiction is to prosecute and punish those who commit illegal acts or offences. Immunity from criminal jurisdiction of a diplomatic agent, provided in Article 31, means that the diplomat cannot be brought before the criminal courts of the receiving State for illegal acts or offences committed in that State during his stay, which is contrary to the very ethos of the rule of law and justice.

2.5.3 Reciprocity

Reciprocity, or the fear of retaliation by other states against one's own diplomats, is a motivation to extend diplomatic immunity to other state's diplomats. States do not want to subject diplomats to the foreign laws of the receiving state, so nations grant other nations' diplomats immunity in exchange for the same immunity for its own diplomats.

Granting rights and privileges of diplomatic immunity based on the principles of reciprocity between states is absolutely necessary in order to develop friendly relations among nations, irrespective of the constitutional system of social and cultural systems. Reciprocity does not intend to meet the interests of individuals, but rather to ensure the implementation of tasks diplomatic and to avoid any tit-for-tat measures incase negative measures are meted out to a state's officials in another state.

⁹⁷Larschan “The Abisnito Affair: A Restrictive Theory of Diplomatic Immunity?” (1987-1988) 26 *Columbia Journal of Transnational Law* 283

2.6 Conclusion

Diplomatic immunity is one of the earliest principles of international law, dating back to antiquity. Its development was due to various social functions and bonds between States. The main bonds ensuring immunity and privileges were religion, culture and language. The Roman ideas and habits of immunity have been firmly established and have formed the basis of modern practices. Immunity was based on natural law making diplomats sacred. The establishment of resident embassies was the genesis of modern diplomacy and crystallized three theories that influenced the rationale for diplomatic immunity. There have been several attempts to codify customary practice of diplomatic immunity culminating in the Vienna Convention in 1961. This Convention ensured only that the functional necessity theory is prominent and that immunity would be granted in order to protect the functions of the diplomat and ensure he could perform them free from interference.

Furthermore, it limited absolute immunity, especially with regard to civil matters and classified diplomats according to their official functions. These changes helped decrease immunity for civil jurisdiction, but left it absolute for criminal jurisdiction. Although the Vienna Convention is considered the source of international law it is evident that there are still practical difficulties in implementing it. The embassy is protected against entry by the receiving State and is the perfect instrument to harbor terrorists and criminal offenders. Diplomatic bags are one of the main areas of abuse. Since there is nothing in the Vienna Convention to regulate the use of diplomatic bags, diplomats smuggle anything, from drugs to people, in them. Personal inviolability of diplomats has two aspects, one in that they cannot be detained or arrested; and the other that they cannot be prosecuted in a court of law. Whereas international organizations have multiplied since WWII thus necessitating the creation of an international organization immunity law, traditional

interstate diplomatic intercourse will still be a feature of diplomacy and there is need for this intercourse to be governed by rules that are efficient and effective.

CHAPTER THREE: A REVIEW OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

3.0 Introduction

The Vienna Convention on Diplomatic Relations of 1961 could be said to be a watershed moment in the evolution of the laws on diplomatic conduct. This Convention was a global effort at instituting laws on diplomatic conduct that would be applicable not just in Europe but to all countries, whose number was steadily growing as a result of decolonization. There had been no clear law on diplomatic law with the existing laws a result of customs and traditions that grew out of centuries of interaction among European countries. This customary law was found in various treaties that were agreed upon among the European countries and even among the scholarly work of various authors such as Callières, Hugo Grotius among others who impacted heavily on the evolution of theories on diplomatic immunity which is the province of chapter two.

The institution of the Vienna Convention on Diplomatic Relations (VCDR) in 1961 was the culmination of a long process and practice of diplomacy which had its origin in the diplomatic exchanges among European countries. The dramatic change in the face of global politics that resulted in the rapid addition of hundreds more countries that were under colonialism especially after the end of the Second World War meant that the conduct of diplomacy could no longer be the preserve of a handful of European countries but would now grow to include these new state entities from diverse linguistic, historical and political backgrounds.

This process coincided with tremendous developments in information communication and technology fields with the resultant effect being that there was now faster connectivity among

people and nations and diplomacy could no longer be that rigid engagement between linguistically similar states that shared a common heritage but had to now take into account rapid changes in global politics. The rules of the game had also now to be aligned to be acceptable to these new states seeking to achieve competing foreign policies. This desire and resolve to create a regime of diplomatic law acceptable and sufficient for the reciprocal exchange of envoys and general diplomatic discourse saw concerted efforts at supplanting the previous protocol laws that had governed diplomacy in Europe for centuries. The Treaty of Vienna of 1815 had to now be replaced with a more universal diplomatic law.

3.1 Towards the Vienna Convention

It was recognized that to ensure the implementation of diplomatic relations required a standard regulation containing the legal principles and provisions about diplomacy that can be used as guidelines for the diplomatic relations in order to perform optimally and efficiently. Through the 16th to 17th centuries, such rules were initiated and agreed upon among European monarchical regimes whose diplomatic interaction was to later form the basis of the global laws on diplomatic conduct. The regulation about the diplomatic relations started to be discussed at the Vienna Congress in 1815 which finally agreed on a diplomatic rank classification. The Congress of 1815 identified three distinct groups of representatives; ambassadors, ministers plenipotentiary, and *chargés d'affaires*.⁹⁸ Then, the rule was amended by a protocol "Aix-La-Chapelle" which further defined rules of protocol to be followed by these officials. The relationships between states were naturally on the basis of generally accepted code of international law, and consequently diplomacy enjoyed the highest prestige.⁹⁹

⁹⁸ O' Brien, J., (2001), *International Law*, Cavendish, London, pg.41.

⁹⁹ Denza E., (2009) *Diplomatic Law –Commentary on the Vienna Convention on Diplomatic Relations*, UN, New York pg.1

Before these milestone conferences and conventions, there was the Treaty of Westphalia of 1648. This treaty had a significant impact on the conduct of diplomacy as it established the territorial state as the basis of interaction in the international system. The state was given physical boundaries which delineated its boundaries and defined the jurisdiction of the government in that particular state which could not be overridden by another state's government. This meant that states were legally equal in an international system which ensured that sovereignty of states was now inalienable and a right accorded to a certain territory. This Westphalian conceptions on state units which have land boundaries created the basis for the concept of recognition in diplomacy meaning that a new state was only deemed legal if it was accepted to be part of the existing body of states.¹⁰⁰ The establishment of diplomatic relations was an indicator of this recognition as it was the start of existing state-new state interaction. Furthermore, the emphasis placed on "territorial integrity" by default meant that jurisdiction in that state was the exclusive responsibility of a system of government whose formation was subject to zero interference by the governments of the other states. Diplomacy therefore had to be done between states with the denominator being non-interference in the affairs of the receiving state. Diplomats, though enjoying immunity necessary to carry out functions of the sending state had to be aware of this fact.

The concept of recognition also introduced the practice of bilateral relations between countries whereby the beginning of relations between states was first of all based on the new state meeting the conditions of statehood and key of these was a defined territory and presence of a government to govern the new nation. Recognition was symbolically done by the signing of a bilateral treaty which was subsequently followed by each state sending and receiving diplomats

¹⁰⁰Morgenthau, HJ, Revised Edition, (1993), *Politics among Nations*, New York: McGraw-Hill Inc, pg.254.

to each country's administrative capitals. These diplomats had to be aware of the territorial jurisdiction enjoyed by the receiving state even though they were accorded special privileges to facilitate these bilateral relations between the states. Consequently, this became the practice in much of Europe after the Treaty of Westphalia. Diplomatic relations were through the principle of recognition which then led to multiple bilateral diplomatic international relations through much of Europe between the 17th and 19th centuries.

The Hague Peace Conferences of 1899 and 1907 as earlier mentioned, reached agreements on several important Conventions in the conduct of international politics though on a basic level. They are therefore considered to be the first important official efforts at codifying certain aspects of international law. Dhokalia argues that these conferences helped to amplify the efficacy of having codified rules international law in general and diplomatic law in particular.¹⁰¹

The journey towards a new regime of diplomatic immunities and privileges was jumpstarted with the apparent failures of the League of Nations to maintain peace upon its inception by the Treaty of Versailles in 1919. Morton argues that the failure of the Committee of Experts for the Progressive Codification of International Law to “*to draw up a provisional list of the subjects of international law, the regulation of which by international agreement appeared most desirable and realizable.*”¹⁰² This committee had been mandated by the Assembly of the League for this task and its failure and the general failure of the League itself was an indictment of its weak ability to maintain peace globally.

Denza observes that the Havana Conference of 1928 dealt more intensively with the issue of diplomatic privileges than the Vienna Congress in 1815 or the Protocol of Aix-la-Chapelle, and

¹⁰¹ Dhokalia, P., (1970) *The codification of public international law*, Manchester University Press, Manchester, pg. 37.

¹⁰² Morton, J., (2000), *The International Law Commission of the United Nations*, Columbia, University of South Carolina Press, pg. 4.

yet it failed to give a complete outline of the privileges of the diplomats and the rights and duties that are to be conferred on the receiving and sending state, nor did it reflect the current practices or regulations.¹⁰³ She further notes that codification among states of immunities and privileges of diplomatic agents were not noticeable until the Havana Convention of 1928 drawn up among the states of the Pan-American Union—but this did not well reflect current practice either in its terminology or its rules. More influential was the Draft Convention drawn up in 1932 by the Harvard Research in International Law which however failed to gain international acceptance.¹⁰⁴

Due to the Second World War and the failure of the League of Nations to prevent it, states realized that there was a need for the establishment of a new international organization. During the final years of the Second World War, the Dumbarton Oaks Conference took place, which met from August to September 1944 in Washington D.C. In 1945 the San Francisco Conference reviewed and agreed on the proposals of the previous conference, which resulted in the formation of the United Nations Charter at the end of the Conference. The United Nations General Assembly immediately adopted Resolution 94 (I) regarding the progressive development of international law and its codification at its first session in 1946.¹⁰⁵ This eventually led to the formation of the International Law Commission (ILC) in 1948- a subsidiary organ of the UNGA to assist it in technical work regarding issues of international law.

The ILC prioritized diplomatic immunities and privileges and consultative forums eventually led to various drafts which had the input of various countries. By 1958, the ILC had built general consensus on the framework on diplomatic law which could only become international law if

¹⁰³ Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

¹⁰⁴ Maginnis, V.L, (2003) *Limiting Diplomatic Immunity: Lessons Learned From the 1946 Convention on Privileges and Immunities of the U.N*, *Brooklyn Journal of International Law*, pp.35-48

¹⁰⁵ *Ibid*

agreed upon in a Convention. Eighty one States took part in The United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna from 2 March to 14 April 1961 and the Convention was signed on 18 April 1961.¹⁰⁶ The Convention further adopted the Optional Protocol concerning Acquisition of Nationality, the Optional Protocol concerning the Compulsory Settlement of Disputes, the Final Act and four resolutions annexed to that Act. All these resolutions (VCDR) became effective on the 24th of April 1964 after the 22 ratifications that were necessary to enact the Treaty were gathered in order to fulfill Article 51 of the Convention.¹⁰⁷

3.2 The Mission of the Convention

The ILC, in its commentary on the draft articles of the Convention, recognized that the extraterritoriality and representative character theories had influenced the development of diplomatic privileges and immunities.¹⁰⁸ Moreover, the Commission recognized the emergence of the functional-necessity theory as a justification for privileges and immunities necessary to enable the mission to perform its functions. In the commentary, however, the Commission expressed its intent to rely solely on the representative-character and functional-necessity theories. By using this commentary as the basis for writing the preamble, the Conference incorporated the representative-character and functional-necessity theories as the bases for the privileges and immunities afforded by the Convention.¹⁰⁹ It was therefore recognized that diplomatic conduct had to be conducted on the basis of functionality of the mission and the sent

¹⁰⁶ Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

¹⁰⁷ Sinclair, I., (1987) *The International Law Commission*, Cambridge, Grotius Publications Limited, pg .5.

¹⁰⁸ See The ILC, *Report of the Commission's Tenth Session*; *supra* note 16, at www.un.org/law/ilc/ at 16-17.

¹⁰⁹ *Ibid*

diplomats who were solely acting on the representative authority of the government in the sending state.

Since its inception, the VCDR has gained universal recognition as the basic law on diplomatic conduct. It currently has more than 190 signatories, signifying its preeminence and invaluable contribution to the peaceful conduct of relations among states. Brown argues that the Vienna Convention on Diplomatic Relations sets the ground rules for all states that are signatory to the Convention to regulate the conduct of all diplomats actions and their mission while Denza avers that the Preamble to the Convention highlights that the main intention of the diplomatic immunities is to promote friendly relations among States and to ensure that the immunities and privileges granted to the diplomat is for the purpose to carry out the functions and instructions of the diplomatic mission in the receiving State and not for their own personal profit and agenda.¹¹⁰

The Convention allows the diplomat to perform his duties and provide information on political, social and humanitarian conditions in the receiving state in a seamless interaction between state officials of the sending state and security, customs and immigration officials in the receiving state. The Vienna Convention is the ultimate multilateral treaty agreement in the field of international law, giving all states that are signatory to it surety and clarity in regards to diplomats. The practicality of the Convention provides safety and continuous diplomatic relations between foreign states and their respective missions. The missions work runs smoothly due to the Vienna Convention and in the seldom case of an abuse of the diplomatic privileges, a false picture is portrayed about the regulations when in fact its operation runs efficiently on a permanent level.

¹¹⁰ Brown J., (1988), "Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations"37 (1) *International & Comparative Law Quarterly* pp.63-71, Denza, E., E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

The Convention has endured over 50 years of tumultuous international politics, first with the Cold War posturing between the US and the USSR and then the globalization effect that has put in doubt the relevance of the traditional diplomat in a world where interactions can be conducted noble ICT platforms.

3.3 Key Provisions of the VCDR

The treaty is made up of 53 articles that provide comprehensive guidelines on the establishment, maintenance and termination of diplomatic relations on a basis of consent between independent sovereign States. Denza, in her comprehensive commentary of the Convention notes that the VCDR specifies the functions of diplomatic missions, the formal rules regulating appointments, declarations of *persona non grata* of a diplomat who has in some way given offence, and precedence among heads of mission. It sets out the special rules—privileges and immunities—which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments. It makes provision for withdrawal of a mission – which may take place on grounds of economy or physical security – and for breach of diplomatic relations which may occur in response to abuse of immunity or severe deterioration in relations between sending and receiving States.¹¹¹

For the purposes of this study, a closer attention is paid to the provisions regarding functional immunities and privileges accorded to diplomats in their conduct of diplomacy though it is appropriate to mention the structure of this VCDR as concluded in Vienna. As pointed out, it consists of 53 articles and 2 optional protocols dealing with the acquisition of citizenship and the imperative to resolve disputes, each consisting of eight to ten articles. The Convention provides a

¹¹¹ Denza, E., E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

complete framework for the, maintenance, and also the termination of diplomatic relations. Briefly, the articles in the Vienna Convention can be mapped into several sections including first of all the regulations on the establishment of diplomatic missions, the rights and the appointment and submission of credentials heads of diplomatic missions which is found in Articles 1-19; the regulation of immunity and privilege for diplomatic missions, including a variety of tax exemptions found in Articles 20-28; the setting of the immunities and privileges granted to diplomats and other staff specifically limited to Articles 29-36. The Convention also contains a regulation of immunity and privileges for family members of diplomatic agents and service staff who work on them and a regulation guiding the signing, accession, ratification and entry into force of the Convention.¹¹²

The Vienna Convention also divided the diplomatic staff of a foreign mission roughly into three categories, namely: the diplomatic agent which refers to the head of mission or a member of the diplomatic staff of the mission. For instance, ambassador, attaches; administrative and technical staff and the service Personnel: it can consist of clerks, messengers, security guards, chauffeurs and cooks. The latter two types of personnel are usually local people which are employed by the embassy. This study focuses on the first type of personnel whose functioning in the host state is mainly controlled by the VCDR.

3.3.1 Inviolability

Historically, personal inviolability of the diplomatic agent has been viewed as the fundamental principle from which has been derived all diplomatic privileges and immunities. Satow had theorized that personal inviolability refers to that elevated level of immunity accorded to a

¹¹² See articles 37-47 and 48-53 of the VCDR.

diplomat that to a private citizen due to his function and therefore it is the duty of the government to which diplomatic agents are accredited to take all necessary measures to safeguard the inviolability of diplomatic agents and to protect them from any act of violence or insult.¹¹³ This opinion was generally agreed upon and as Kunz observes the receiving states are under an international obligation to grant special and extraordinary protection to diplomatic agents. This principle was codified in article 29 of the 1961 Vienna Convention on Diplomatic Relations thus:

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

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

Article 22 confirms the inviolability of mission premises – barring any right of entry by law enforcement officers of the receiving State and imposing on the receiving State a special duty to protect the premises against intrusion, damage, disturbance of the peace or infringement of dignity. It states;

¹¹³ Satow, E., ., 5th Ed.,(1979) *Satow's Guide to Diplomatic Practice*, Lord Gore-Booth, London, p.13

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

2. *The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*

3. *The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.*

Even in response to abuse of this inviolability or emergency, the premises may not be entered without the consent of the head of mission. Article 24 ensures the inviolability of mission archives and documents – even outside mission premises – so that the receiving State may not seize or inspect them or permit their use in legal proceedings.

Fenwick observes that the person of a public minister is sacred and inviolable and that whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world. He further notes that diplomatic representation is viewed to have important properties which require that diplomatic representatives be entitled to the highest respect.¹¹⁴ According to Oppenheim, inviolability goes beyond the set rules on inviolability to includes even principles which he lists as; 1) immunity of domicile, 2) exemption from criminal and civil jurisdiction, 3) exemption from subpoena as a witness, 4) exemption from local police regulations, 5) exemption

¹¹⁴ Fenwick, C. G., (1965) *International Law*, Appleton-Century-Crofts New York, pg. 48.

from taxes, 6) the Right of Chapel, and 7) the right of self-jurisdiction as to the envoy's retinue.¹¹⁵

Personal inviolability of the diplomat under the Vienna Convention therefore is intended to facilitate the smooth conduct of diplomatic duties by the agent without threat of any legal harm. This primary immunity highlights the influence of the functional necessity theory in constituting this modern diplomatic law. As observed by the International Court of Justice in the case concerning United States Diplomatic and Consular Staff in Tehran, "...the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an effective instrument for co-operation in the international, and for enabling states.....to achieve mutual understanding and to resolve their differences by peaceful means....."¹¹⁶ This Tehran case shows the importance of diplomatic personnel having diplomatic immunities and rightly so. The diplomat needs to be free from political persecution and act independently from the receiving state without any fear.

Another area coming under the inviolability principle is the diplomatic bag which is supposed to travel unhindered to and fro between the mission abroad and the home state. Article 27 of the Convention guarantees free communication between a mission and its sending State by all appropriate means, and ensures that the diplomatic bag carrying such communications may not be opened or detained even on suspicion of abuse. Given the purposes of diplomatic missions, secure communication for information and instructions is probably the most essential of all immunities. McClanahan faults the Convention for failing to delimit the size and weight of the

¹¹⁵See in Oppenheim, (1955), 8th edition, *International Law*, ,p.687-757

¹¹⁶See Scharf, P., M., and Williams, P., (2010), *Shaping Foreign Policy Shaping Foreign Policy in Times of Crisis: The Role of International Law and The State Department Legal Adviser*, Cambridge University Press, New York, Pg. 75.

bag which exposes the provision to abuse by unscrupulous officials out to gain financially through importation of vehicles and other heavy machinery.¹¹⁷

However, The reason why even building materials are sanctioned to be inside the diplomatic bag is because that often sending states prefer to build their own buildings to reduce the likelihood of listening devices being planted for purposes of espionage. The inviolability of the diplomatic bag therefore signifies the distinctiveness between the receiving and host state in their diplomatic exchanges as this cannot be possible if the two parties already know the position or contents of diplomatic correspondence between their governments. The receiving state is under an obligation to ensure that the communication between the mission and the sending state run smoothly, freely and secretly. Article 27(3) stresses the importance of the right to confidential communication above all other. It makes it clear that as long as it has to do with documentation and information regarding the mission and its objectives, these packages and documents are inviolable. There needs to be a balance, however, between the right to free communication and keeping the contents confidential and free from any form of inspection. The lack of inspection of diplomatic material has led to a number of abusive behavior among some diplomats with regards to the contents of the diplomatic bag. Espionage has thrived and the smuggling of contraband such as drugs and guns. It has also been used for serious criminal activities such as human trafficking, drug smuggling, weapon smuggling and even the transport of radioactive material.

An incident of kidnapping and abusing the status of the diplomatic bag occurred in 1964. Inside an Egyptian diplomatic bag found at the airport in Rome was a former Israeli citizen who had been an interpreter at the Egyptian Embassy in Rome. The Israeli was found to be drugged and gagged inside the Diplomatic bag after authorities found the bag to be grumbling, which resulted

¹¹⁷ McClanahan G.V.,(1989), *Diplomatic Immunity: Principles, Practices and Problems*, Hurst: London, pg 114.

in the Italian Government declaring two Egyptian Diplomats *persona non grata*.¹¹⁸ In the United States in 1983 two Diplomats from Guatemala were responsible for the kidnapping of the spouse of a former El Salvador ambassador to the United States. \$1.5 million was demanded for her release after the wife was abducted from her residence in Florida. The State Department arrested the two diplomats involved contra to diplomatic immunity and negotiated the express waiver from the Guatemalan Government.¹¹⁹

3.3.2 Immunity from the Legal Process

The most important consequence of the personal inviolability of diplomatic agents is their right to exemption from the jurisdiction of the receiving state in criminal matters. The immunity of a diplomatic agent in this regard is absolute; he cannot be tried or punished by the local courts of the country to which he is accredited. The VCDR provides for diplomats to be exempt from the legal process of the host state but with specific exceptions. Article 31 paragraph 1 of the Convention states that:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

¹¹⁸ See Farhangi, L.S., “Insuring against Abuse of Diplomatic Immunity; Lessons Learned From the 1946 Convention on Privileges of the UN,” *Brooklyn Journal of International Law*, pp.35-48. , Wilson, R., Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations, 7 *Loy. L.A. Int'l & Comp. L. Rev.* 113 (1984). Available at: <http://digitalcommons.lmu.edu/ilr/vol7/iss1/5pg.> 136.

¹¹⁹ *Ibid.*

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

Denza comments that article 31 establishes diplomats' immunity from civil and criminal jurisdiction –with precise exceptions to immunity from civil jurisdiction where previous State practice had varied. Immunity from jurisdiction–like other immunities and privileges.¹²⁰ There was general agreement that the diplomat needs some leeway to perform his duties without fear of his person and therefore these provisions were appropriate. The diplomat is therefore functionally equipped with immunity *ratione materiae* which relate to conduct carried out on behalf of a State and which cannot be arbitrarily waived but rather is permanent so long as that diplomat is legally sanctioned to carry out diplomatic functions on behalf of the home government.

In the context of diplomatic protection, the legal fiction that allows a state to espouse the claim of one of its nationals has been subject to criticism and held to be irreconcilable with the current state of the law. The position of the individual under international law today is very different from the early 20th century. Individuals are increasingly recognized as subjects of international law and would thus no longer need protection by their national state, thus rejecting the mechanism provided by the legal fiction. Yet diplomatic protection continues to be indispensable where the concept of state responsibility bestows upon the receiving state the duty to uphold the safety of diplomats to ensure that the legal processes of the host state are not applied to the diplomat in regard to his official functioning.

¹²⁰ See Denza E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

Under the VCDR the diplomat is immune from arrest and detention. He, together with his household is immune from criminal jurisdiction though with exceptions. They are also immune from civil and administrative jurisdiction but this immunity can be waived if they initiate the legal process themselves. A diplomat and members of his family forming part of his household are not obliged to give evidence as witnesses. This is to ensure that the diplomats do not misuse their immunities.

Immunity from criminal jurisdiction therefore implies that diplomats are exempt from any form of punishment or legal consequences, the only remedy that the state does have, however, is to declare the diplomatic agent a *persona non grata*. Rudd observes that diplomats enjoying full diplomatic immunity may not be arrested, detained, and searched or their property entered without their expressed consent.¹²¹ The police nonetheless may still stop offending officials even if they are entitled to full immunity in cases of issuing traffic citations, or attempting to interview or obtain consent to search. It needs to be kept in mind that although it is possible to institute criminal proceedings against a diplomat once his immunities have been lifted or once the individual is no longer a diplomatic agent, it is difficult to succeed with these proceedings in the sending state. The difficulty alone with trying to get witnesses to appear in court from another country is almost an impossibility nor would those witnesses be forced to appear in court for they can hardly be considered to be in contempt.

The Vienna Conference agreed that the meaning of “official acts performed in the exercise of his functions” is limited to acts done on the instruction of the government of the sending state only, and does not include acts performed in the course of his duties. Denza argues that the interpretation and meaning of the wording is left to the local courts but it is accepted that a

¹²¹ See Rudd J., L., (2008), DiplomaticImmunity, “Legal Digest”pp.12-36.

member of the diplomatic mission can rely on his immunity only if proven that his act was an official act done on the instruction of the sending state.¹²²

Regarding tax and custom duties, the Vienna Convention stipulates in Article 28 that “the fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes” although the heads of mission are exempt from this as provided for in Article 23;

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

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

With regards to general tax exemptions, Article 34 of the Vienna Convention regulates Income Tax and Capital Gains Tax. It states that “a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:-- a) indirect taxes of a kind which are normally incorporated in the price of goods or services; b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39.”¹²³

Articles 36 and 41 were deemed necessary for the limitation of the abuse of the immunity accorded to diplomats and their families regarding their commercial transactions. In regards to

¹²² See Denza E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

¹²³Article 34 of the VCDR.

Article 36 of the Vienna Convention exemptions from customs duties and inspection, the court case of *Artwohl v United States*¹²⁴ illustrates how the diplomats profited from the exemptions. In Latin and South America the ambassadors of American missions were asked to regulate the sale of goods on members of its own mission when the import and export of goods were sent back and forth to the United States.

Denza argues that this was necessary as diplomats had lucrative business deals in regards with shipping over cars from Latin and South America back to the United States, as there was no imported duty tax to be paid. In the *Artwohl* case the decision of the ambassador who imposed restrictions and regulations was challenged, but the court confirmed the ruling of the ambassador since it was in his discretion to ensure that if these regulations and restrictions were not adhered to it could tamper the international relations that the mission had with the receiving state. It was therefore vital to the mission in Brazil that all its members were free from suspicion of profit making schemes and other impropriety.¹²⁵

3.3.3 The *Persona non grata* Principle.

The Vienna Convention provides for a host state to declare a diplomat *persona non grata* in the event of grave violations of diplomatic privilege and immunity. This basic principle that the receiving state has the power to expel the sending diplomat without even providing reason has been present from a very early stage in diplomatic practice. It is the most effective form of defense to a receiving state that has foreign diplomats that are abusing their privileges and immunities to an extent that is unacceptable to the receiving state. Justifications for such actions are; if the diplomat has acted inappropriately and has violated social norms and antisocial

¹²⁴ILR(1970), 56 :518.As quoted by Denza in her exposition of Article 36.

¹²⁵ Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

behavior, or where he abuses his immunity for criminal offences.¹²⁶ Another reason is where the diplomat acts hostile towards the state and jeopardizes the security of the state. Another might be where the state declares diplomats *persona non grata* for retaliation purposes, to put pressure on another state to negotiate. The declaration results in that the person is no longer recognized by the receiving state as a member of the mission and any acts that are committed after the declaration may be faced with legal proceedings. The diplomatic functions of the individual are terminated and unless he is a permanent resident or national he is recalled back.¹²⁷

Article 9 of the VCDR states that;

1. The receiving state may, at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is a persona non grata or that any other member of staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his/her functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving state.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under Para 1, the receiving State may refuse to recognize the person concerned as a member of the mission.

These provisions can be viewed as amicable solutions to the eventual end of diplomatic relations without resort to negative reciprocity measures that can escalate into hostile actions. This can also be a safe way out for a diplomat whose conduct in the host state is deemed untenable to normal diplomatic exchange with the host government.

¹²⁶ Feltham R.G, 7th ed (1998), *Diplomatic Handbook* Longman: London, pg. 8.

¹²⁷ Ibid.

A waiver of immunity, though provided for in Article 32 of the Convention is rarely used as sending states usually do not want to abandon their diplomats to the criminal or civil jurisdiction of the receiving state. Ross, however, argues that the sending state holds the power to still prosecute the offending diplomat in its own state, if it does not choose to waive the immunity.¹²⁸ The problem with diplomats escaping liability is first of all in the process to serve him with court proceedings, because of the inviolability the receiving state cannot do this. Once the diplomat's objective has ended in the receiving state it does not mean that the diplomat leaves immediately to the sending state but may take up another appointment with a third state where he would receive new inviolability. Another problem is the vast expenses that the plaintiff has to carry to ask willing witnesses to travel to the sending state to testify; after all they cannot be compelled to do so. This makes civil claims in the sending state not practical. The same can be said in the case of a criminal case. The diplomat cannot be extradited to the sending State, nor can witnesses in the receiving state be compelled to travel to the sending state to testify in court about the misconduct of the diplomat. The only other solution is for the sending state to waive the diplomat's immunity and to consent to the arrest of its diplomat in the receiving state.

3.3.4 Provisions for Amendment

The VCDR did not include specific provisions for amendment but as Zeidman argues, the Convention can be reshaped to suit current demands. She recommends two possible methods for amendment. The first proposal is for the Convention to be amended by using the mechanism provided for in the United Nations Charter.¹²⁹ This would require a vote of two-thirds of the Convention signatories. This method of amendment is consistent with

¹²⁸ Ross, M., "Rethinking Diplomatic Immunity : A review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *American University of International Law Review* 4,no.1, 1989,pp. 173-2.05

¹²⁹ Zeidman, A.,(1989), *The Abuse of the Diplomatic Bag: A Proposed Solution*, UN Documents, New York.

the drafters' intent that the principles of the United Nations Charter be considered in examining the Vienna Convention. This argument was supported by the Vienna Convention Preamble, "The States Parties to the present Convention . . . (have) in mind the promotion of friendly relations among nations" ¹³⁰ A second possible method is the one found in the Vienna Convention on the Law of Treaties which affirmed the modern practice of amending multilateral treaties by another multilateral treaty which comes into force only for those states which agree to it. ¹³¹

3.4 Conclusion

The Vienna Convention is explicit that it is imperative to all diplomats to obey these principles of international law on the conduct of diplomacy. The Convention delineates two types of immunities necessary for this inter-state interaction by limiting immunities accorded to the diplomat for the functioning of the mission. His official duties are exempt from interference from the host state and he is therefore deemed inviolable for his official acts. This principle of personal inviolability predetermines the general immunity from the legal processes of the host state so that the diplomat and members of his household are excluded from the civil and criminal jurisdiction of the host state. Under this Convention, there is also the concept of state responsibility which requires the receiving (host) state to accord the diplomat unfettered entry and exit of him and the diplomatic bag while at the same time ensuring that the physical premises are sacrosanct.

In this new age of human rights, the VCDR has come under increasing scrutiny which places on each individual personal liability for all his actions. As variously cited in this chapter, the

¹³⁰The Preamble of the Vienna Convention.

¹³¹ See Article 40 paragraph 1 and 2 of the Vienna Convention on The Law of Treaties, 1969.

Convention has loopholes which have allowed certain rogue diplomats to misuse its ambiguous provisions to engage in crimes such as human and drug trafficking, illegal business transactions and general crime. This behavior normally affects citizens of the host state leading to public outcry at the assumed special treatment accorded to diplomats. This study therefore concludes by stating that though the VCDR has laid the foundation for diplomatic practice, it still has shortcomings which have to be addressed for the Convention to be fully functional. A detailed critique of the Convention has been spared for the next chapter where an in depth examination of the Convention will take place.

CHAPTER FOUR: A CRITICAL ANALYSIS OF THE VCDR, 1961

4.0 Introduction

The principle of diplomatic immunity is a long established component of international law that bestows upon the diplomat and his immediate family exemption from the jurisdiction of local courts and other government systems on their actions as carried out on behalf of their home governments. The formulation of diplomatic immunity laws under the VCDR was a vindication of the importance of facilitating peaceful reciprocal relations between states that is essential for the conduct of political economic and social interactions between states. The VCDR was a culmination of centuries of diplomatic exchanges among European countries whose practice and the theorizing by European scholars had a major impact on the concept as a whole. The shift from focusing on the individual as the focus of immunities and privileges in the VCDR signaled a new approach to functionally equip the diplomatic mission and its diplomats with the necessary leeway to perform their duties.

While these laws on diplomatic immunity have been widely accepted as necessary for the conduct of diplomacy, the apparent abuse of this immunity by rogue diplomats and the seemingly lack of countermeasures in this law has fostered a growing debate as to the flaws of the VCDR and the need to review it. It is important to note that the mission of the Convention was to create a uniform law to acceptable to all nations and ensure diplomats are not hindered in state transactions on behalf of their states. As a result of civil and criminal violations of various provisions of the Convention and a general shift in the international criminal and human rights law, certain provisions of the VCDR have appeared inadequate to address these concerns. This

chapter points out the various shortcomings of this diplomatic law in view of the current circumstances and evaluates its relevance to the conduct of diplomacy.

4.1 Rethinking Functional Necessity

According to the theory of functional necessity, diplomats require some form of good will and latitude from the host country in order to carry out their duties. This theory recognizes the fact that traditionally, the principle of sovereignty and territorial integrity preclude foreign interference in the internal affairs of another country. Diplomats therefore essentially require express authority from the host government that enables them to represent the sending state in peaceful interactions between states. This is only to help them to carry out their functions and it is not an end in itself. The VCDR, in its preamble noted that the theories of personal representation and functional necessity would form the basis of the new legal dispensation with regard to diplomatic protection.¹³² These two theories have been criticized for their inadequacies which create loopholes for misinterpretation and misuse by rogue diplomats.

Ogdon notes that in case a diplomat acts outside of the normal sphere of conducting inter-national relations, a question arises as to whether immunity still applies.¹³³ He observes that the administrative and judicial construction of diplomatic immunity illustrate that diplomats themselves are immune from prosecution even when committing criminal or tortuous acts outside of their prescribed functions. A critique of this construction of the functional necessity theory distinguishes the treatment of the individual diplomat from that of the diplomatic process but despite the fact that the VCDR reflected the international concern of giving unlimited immunity to all classes of diplomats it left loopholes for diplomats to take advantage of the

¹³²Preamble, the VCDR, 1961.

¹³³ Ogdon, M., (1937), The Growth of Purpose in the Law of Diplomatic Immunity," *The American Journal of International Law*, 31.3 pp.449-465

general nature of provisions to commit crimes of a civil and a criminal nature. The stated purpose of the Convention was to enable diplomatic missions to represent their sending state. The approach of the VCDR, borrowing heavily from the theory of functional necessity, places exclusive jurisdiction of the diplomat on the sending country, ignoring the fact that his activities will in essence involve interactions with citizens and officials of the host country-interactions which are prone to conflict due to the nature of their work.

It has therefore been argued that the functional necessity set the wrong premise for the establishment of diplomatic immunities and privileges. Bradlow avers that diplomats, while carrying out their duties, have obligations under international law and should be held accountable when they violate them and that sovereigns and any other entities that derive their authority from the sovereigns should not be above the rule of law and should therefore not have absolute immunity.¹³⁴ Bradlow further argues that as much as immunity accorded to diplomats is essential, this should be met tempered with responsible actions by such diplomats. On the other hand, Barker recognizes the noble intention of using the functional necessity approach to establishing immunities but criticizes the blanket immunities accorded to the diplomat and more so the immediate family of the diplomat.¹³⁵ He notes that this is unwarranted as it is only the diplomat carrying out the functions of the sending state and not the entire family. Therefore, according to him, the drafters of the VCDR watered down the functionality of the functional necessity theory which in the end provided avenues for misuse.

It should be noted that the primary advantage of this functional necessity is that it is adaptable and safeguards against excessive demands for privileges and immunities. In its practicality, it

¹³⁴ Bradlow, D., (April 1998) "The Accountability of International Organizations to Non-State Actors," *American Society of International Law Proceedings*, 92, 359.

¹³⁵ Barker J., C., *International Law and International Relations* (2000) Continuum: London.

restricts immunity to the functions of the diplomat rather than giving him absolute immunity. A disadvantage is that it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function. Generally, diplomats should not commit criminal acts or act in a manner unbefitting of their status just because they have been given some privileged position in a foreign country where some might be tempted to view themselves as higher mortals than the citizens of the host country.

Despite the apparent fallibility of this theory, its core vision remains sound, with which diplomats cannot perform their duties without some form of facilitating mechanism from the host state and this is important in the global network of diplomatic interactions between states which are seeking peaceful co-existence among themselves. The theory is still relevant to diplomatic discourse but there is need for realignment with current trends in human rights and international security concerns.

4.2 Enforceability of the VCDR

According to Article 31(1) of this Convention, diplomatic agents enjoy complete immunity from the legal process of the receiving state although there is no immunity from the jurisdiction of the sending state. Article 41(1) on the other hand provides for a diplomat violating the immunity laws to be sent back home or a waiver of immunity can be done (Article 32) in case of grave violations. These provisions were the two extremes in the regime of immunities. Charney notes that the main weakness of the Vienna Convention is its failure to provide an adequate deterrent against violent conduct, as a result of the wide scope of immunity given to diplomats and the erroneous application of the functional necessity theory.¹³⁶ He notes that the Convention makes

¹³⁶Charney, J., I., "The Impact of the International Legal System of the Growth of International Courts and Tribunals" (1998-1999) *New York University Journal of International Law & Politics* 31,697.

no attempt to distinguish crimes according to their gravity and there is also no unified definition of different degrees of crimes. Because of this, Charney notes, it is up to national laws of individual states to divide crimes according to their gravity which is also disputable as there is no uniform measure of the gravity of crimes. The failure of a minimum national standard or an international minimum standard point to the vagueness of the VCDR as an effective tool for facilitating diplomacy.

Although the Vienna Convention can be considered a good source of international law it is evident that there are still practical difficulties in implementing it. The embassy is protected against entry by the receiving State and is the perfect instrument to harbor terrorists and criminal offenders. Diplomatic bags are one of the main areas of abuse. Since there is nothing in the Vienna Convention to regulate the use of diplomatic bags, diplomats smuggle anything, from drugs to people, in them. Personal inviolability of diplomats has two aspects, one in that they cannot be detained or arrested; and the other that they cannot be prosecuted in a court of law. With this type of immunity, diplomats, staff and families can commit all manner of crimes and in most cases not be punished at all, leaving the victim or the victim's family with no sense of justice. It seems that the Vienna Convention allows for unrestrained license for diplomats, staff and their families to do what they want without consequences.

The Vienna Conference in 1961 was unable to bring about an agreement about the definition of "members of the family of a diplomatic agent forming part of his household" as these members also enjoy the same immunity and privileges as the Diplomat. This is in line with Article 37(1) which states that;

The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 29 to 36. Each state has its own unique interpretation of the meaning “family.” It has however been accepted that the diplomats spouse and his minor children will always be included in that definition of “family.”¹³⁷

A pointer to the ineffectiveness of the VCDR is the blatant violations of its key provisions, a key reference point being the 1984 Libyan Embassy case in London. The incident involved at least three types of abuse; abuse of the diplomatic premises, abuse of the diplomatic bag, and abuse of the diplomatic status - all of which seem to have unconditional immunity under the 1961 Vienna Convention. British authorities who entered the premises of the Libyan embassy after its evacuation found weapons and forensic evidence indicating that the shots that killed the police woman actually came from the embassy. Following the severance of diplomatic relations between the UK and Libya, diplomatic bags leaving the embassy with its departing staff were not searched or scanned despite a possible reliance on Libyan reservation to the relevant Article of the Vienna Convention. There is strong reason to believe that the murder weapon was in one of those bags. The diplomatic status played a particular significant role as the Libyans leaving the embassy were not arrested despite the strong probability that one (or more) of them was responsible for the killing.¹³⁸ This incident raised serious doubts about the VCDR’s provisions on immunity to curtail rogue behavior by diplomats and facilitate diplomatic conduct between states.

¹³⁷ Barker J., C., *International Law and International Relations* (2000) Continuum: London.

¹³⁸ See Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

The hypotheses adopted in Chapter one as the basis of this study states that “the established regime of diplomatic immunities and privileges is effective in preventing diplomatic crime.” While noting that this regime has enabled diplomats to functionally carry out their duties, numerous instances have been documented to show that this regime to some extent has not been effective in deterring diplomatic crime. Some diplomats and their family members have always been quick to cite diplomatic immunity as a reason for them not to be arrested or prosecuted when suspected of such crimes. The inadequacies in the VCDR have thus sparked debate as to the possibility of amending the weak provisions and introducing stringent measures against such violations.

4.3 The Regime of Immunities

According to the theory of functional necessity, immunities are granted to diplomats in order to enable them to carry out their *functions* without unwarranted interruption from the state officials of the receiving state. The fact the VCDR took cognizance of this theorizing and reject in total or partially the theories of personal representation and extraterritoriality speaks volumes as to the evolution of the concept of diplomatic immunities. Various provisions in the Convention gave the diplomat considerable immunity, most important among them being articles 22,24,29 on personal inviolability,³¹ on the immunity of the diplomat from civil and criminal immunity.

4.3.1 The Principle of Inviolability

Inviolability is the foundation of diplomatic privileges and immunities. Inviolability of the person is one of the first principles of diplomatic law that has remained prominent. The inviolability of premises was confirmed soon after the establishment of permanent missions. It is reinforced by the immunities from jurisdiction of the receiving state given by virtue of

diplomatic law. It has been said that inviolability demands, as a prerequisite, immunity from jurisdiction. Kaczorowska argues that the word “inviolable” as used in Article 29 of the VCDR is used not only to convey that the diplomat is free from arrest and detention in the receiving state, but also that there is an onus on the receiving state to treat the diplomat with due respect and to take measures to ensure the safety of the diplomat at all times¹³⁹ the fear of reciprocal action has ensured that countries hosting diplomats generally accord diplomats the security due them as per the VCDR. Furthermore, the diplomat may not be tried or punished and this principle is a firm foundation in the customary international law. This inviolability principle extends to the inviolability of the premises and even the communication channels and more specifically the diplomatic bag.

To illustrate the failure of diplomats and their families to adhere to this cardinal rule of diplomatic immunity was when Manuel Ayree, 19 year-old son of the third attaché to the Ghanaian delegation committed rape, sodomy, assault and other crimes in New York City between 1980 and 1981.¹⁴⁰ After Holmes (one of his victims) and her boyfriend identified Ayree while walking in the street months after her rape, the investigating officer, Pete Christiansen, arrested Ayree. Jane Doe (another victim) further identified him in a line-up and the police began the paperwork for prosecution. After being identified as the son of the Ghanaian diplomat he was released and all charges dropped, owing to his diplomatic immunity. The State Department’s only remedy was to declare him *persona non grata* and expel him from the US. Holmes was reported as saying “A man raped me and he got away with it, because he is not a citizen and

¹³⁹Kaczorowska (2010), *A Public International Law*, Routledge, pg.402.

¹⁴⁰ Ashman, C., and Trescott, P., (1987), *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes!* Acropolis Books Ltd: Washington D.C, pg. 22

*because he is a relative of a diplomat. He claimed he has the right to rape me and I, as an American citizen, am not given the right to get justice.”*¹⁴¹

Another classic case to illustrate the abuse of the inviolability principle is the Iran hostage crisis where fifty two Americans and citizens were held hostage for 444 days by militant students. The siege at the embassy, which lasted from November 4 1979 to January 20 1981, brought into focus the responsibility of the receiving state to enforce the inviolability of the embassy premises, the diplomat and his family and even the property. After a series of failed rescue attempts by the US military, the crisis only ended with diplomatic efforts by Algeria.¹⁴²

Closer home, there have been cases of Kenyan diplomats violating the diplomatic immunities accorded to them. A case in point is the Kenyan diplomat who was accused of enslavement of her domestic servant which called into question the inhumane treatment meted out by diplomats. Another diplomat was also accused of rape attempts which called to question the moral and ethical conduct by diplomats. In Kenya Dr. Wilcox Chijioke, a Nigerian diplomat was accused of having brutally attacked his wife. A US diplomat had to leave the country hurriedly after allegedly being involved in a traffic accident which led to the death of a Kenyan.¹⁴³ All these incidences point to the VCDR which is supposed to regulate diplomatic conduct. In all these cases, the diplomats went relatively unpunished yet there were victims of their actions.

The question here is how did these incidents affect the diplomats’ functions? Family members who do not respect local laws and commit unlawful acts knowing that they can be protected against prosecution should not be entitled to such privileges and immunities and is it not

¹⁴¹ Ibid

¹⁴² See Scharf, P., M., and Williams, P., (2010), *Shaping Foreign Policy Shaping Foreign Policy in Times of Crisis: The Role of International Law and The State Department Legal Adviser*, Cambridge University Press, New York, Pg. 75.

¹⁴³ See New York Post, [nypost.com/.../ny-based-kenya-diplomat-enslaved-her-maid/lawsuit-accessed on 12/08/2014](http://nypost.com/.../ny-based-kenya-diplomat-enslaved-her-maid/lawsuit-accessed%20on%2012/08/2014).

necessary. Barker suggests that abuse occurs where the diplomat is subject to substantive law, but when he breaks it; the receiving state has no jurisdiction over him. The fact that the receiving state is not entitled to enforce its jurisdiction against a person because of his immunity is due to the existence of two distinct but related concepts: inviolability and immunity from jurisdiction. The ICJ, in its commentary about this crisis had noted the significance of according diplomatic immunities as a key factor in the continual peaceful interaction among states.¹⁴⁴ This crisis eventually had negative ramifications for Iran-US relations and is yet to show signs of improvement.

Farhangi observes that Article 41(which obligates diplomats to obey the local laws of the receiving state) is not enforceable for the simple reason that the diplomat enjoys civil and criminal immunity, and hence the diplomat cannot be held accountable. He argues that reading this Article in conjunction with custom regulations, it means that diplomats may not import goods for either their personal benefit or official use; goods that are prohibited by law in the receiving country, goods such as alcohol or tobacco. He however notes that there is an inconsistency within Article 36 and Article 30, as Article 36 provides the right to have the possession searched in the case that there are serious grounds to believe that the personal baggage may contain articles that are prohibited by law from entering or leaving the country.

Denza contends that this is contrary to Article 30 which states clearly that the personal property of the diplomat is inviolable.¹⁴⁵ In addition, she notes, Article 36 provides that all diplomatic *personal* bags or luggage will undergo a screening even in the case where there is no reasonable suspicion at all in regards to prohibited or dangerous objects, when the bag or luggage either

¹⁴⁴ Barker J., C., *International Law and International Relations* (2000) Continuum: London.

¹⁴⁵ Denza E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

accompanied or unaccompanied enters an aircraft. Consequently, every time a diplomat travels, his personal luggage and the diplomatic bag will be searched but the search will be conducted by agents of the airline and not of the receiving state. If the diplomat refuses then the luggage and other piece of items that the diplomat initially wanted to travel with will have to be returned to its place of origin.

4.3.2 The Diplomatic Bag

Despite the advancements in technology that provide a faster means of delivering information between diplomats and their foreign Affairs Office, diplomats still use the diplomatic bag as a basic means of communication. The VCDR provides for this communication channel in Article 27. The diplomatic bag is usually accompanied by at least a diplomatic courier who is given protection from the sending state to deliver the bag to the mission in the receiving state. Fetham notes that the diplomatic courier enjoys personal inviolability during his travels to the receiving state or through a third state to the mission at all times and may at no time be arrested or detained while the diplomatic courier is accompanying the diplomatic bag.¹⁴⁶ He, however, is required to have the necessary visa to travel from state to state. Diplomatic bags that are properly identified and have the correct markings are equally inviolable when in transit through a third state. The diplomatic courier is frequently a full time employee in the sending state's Foreign Affairs Ministry and the courier needs to be provided by his Ministry with a certificate to indicate his status and the number of diplomatic bags he is accompanying.

The ILC, in its commentaries on the diplomatic bag notes that Article 27(3) which sanctions communication via the diplomatic bag is a necessary component of the inviolability and

¹⁴⁶ Feltham, R.G, 7th ed (1998), *Diplomatic Handbook* Longman: London, pg. 8.

confidentiality of the mission.¹⁴⁷ However, the ILC notes that in exceptional circumstances where this is abused, could be opened with the permission of the Ministry of Foreign Affairs of the receiving State and in the presence of a representative of the diplomatic mission concerned. This could be done because “*diplomatic bags were regularly used for extremely undesirable purposes, illicit traffic in diamonds or in foreign currency, for instance.*” Some of the ILC members seemed to know that “*traffic in dangerous drugs was blatantly conducted under cover of the diplomatic bag*”. Concerns arose that even the fiction of smuggling vital parts of atomic bombs might eventually become an actual fact.

Abuse of this bag pointed to the poor legislation under the VCDR on the state of the bag. For instance, what would be the size of the bag? The lack of definition subjected this to abuse. Some countries, in an attempt to curb illegal use of this bag sought to introduce electronic screening measures that however brought into question these measures which were viewed as an intrusion into the inviolability of the bag. To show the extent of the abuse of this bag Roberts cites where in 1964, Italian customs authorities at Rome airport, in the course of passing a diplomatic bag destined for Cairo through detector devices, designed to show the presence of explosives, metal or drugs, found out that the bag was emitting moans.¹⁴⁸ On opening the bag, they found a drugged Israeli who had been kidnapped. A similar incident took place at London’s Stansted airport in 1984 when customs officers discovered a former Nigerian Minister (Ummaru Dikko) in an unconscious state packed in a large crate together with a doctor supposed to take care of him during the undesirable journey. The Nigerian diplomatic service hoped to circumvent British extradition procedures by that means but it failed to furnish the crate with the visible external marks of its diplomatic character as required by the Vienna Convention. After the airport

¹⁴⁷Text available: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_1_1958.pdf accessed on 7/08/2014.

¹⁴⁸Roberts, I., (2011) Sixth Edition, Satow’s Diplomatic Practice, Oxford University Press, pg. 38.

authorities became suspicious about the content of the crate, they consulted the Foreign Office which gave the advice that in the absence of lead or wax seals the crate could not be considered as a diplomatic bag and, as a consequence, it could be opened and subjected to a more thorough inspection. This calls into question the use of the diplomatic bag. The failure to specify its size and the apparent immunity of the bag became a perfect excuse for the Nigerians to violate this important provision of the VCDR. The fallout from this affair saw Nigeria, Britain and Israel engaging in a diplomatic war of words which led to Nigeria and Britain reducing diplomatic contact.¹⁴⁹

In this new era of terrorism threats to countries and threats to the global aviation industry, the diplomatic bag as provided for under the VCDR is susceptible to use by rogue regimes and their agents to threaten world travel and overall security. The ambiguities of the Vienna Convention on the size of the bag, and the screening of such bags provide some haziness that has been easily exploited. This study has therefore proved the hypothesis that the weaknesses in the VCDR have facilitated the abuse of its provisions by errant diplomatic officers. This however, in the case of provisions on the diplomatic bag and even the other provisions, does not negate the reality that the VCDR has to a large extent facilitated diplomatic intercourse between states which can at times be understated due to the prominence to which such violations are presented in the global media and documented to be cited as a general trend adopted by diplomats.

4.4 The Regime of Privileges

“Privileges” can be defined as a benefit or right to do something that others have no right to do, while “immunities” can be defined as the exemption from local jurisdiction. Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a

¹⁴⁹ Ibid

legal basis, while only some privileges are based on law and others are a matter of courtesy.¹⁵⁰

The fact that some privileges have become analogous to cash cows where diplomats take advantage of them for their personal benefit has also cast doubt on why the VCDR granted such privileges in the first place. The five privileges established in the Vienna Convention are exemption from taxation,¹⁵¹ custom duties and baggage inspection,¹⁵² exemption from social security obligation,¹⁵³ from personal and public services,¹⁵⁴ and exemption from giving evidence.

This regime has constantly come under scrutiny when diplomats and their accompanying family members abuse these privileges and when found on the wrong side of the justice system often claim immunity. Most notable among these provisions is Article 36 which allows diplomats and all members accorded immunity and privileges to transport goods without any customs regulations or even taxation. This has created a loophole where staff are known to profit from clandestine commercial transactions. Family members are also known to abuse the privileges accorded to them by virtue of having familial relations with the diplomats.

4.5 Diplomatic Immunity vs. Human Rights

The VCDR renders the diplomat's person inviolable, and this was recognized as necessary for functional purposes. Article 39 lays down that personal privileges and immunities begin when the person entitled enters the receiving state on his way to take up his post. This conception of functional immunity bestows on the diplomat some freedoms upon his appointment. If the diplomat is in the territory when he is appointed, the said privileges and immunities begin when his appointment is notified to the Ministry of Foreign Affairs. Privileges and immunities attached

¹⁵⁰ As cited by Barker J., C., *International Law and International Relations* (2000) Continuum: London, pg. 67.

¹⁵¹ The VCDR, Article 28,

¹⁵² Ibid, Article 36.

¹⁵³ Ibid, Article 33.

¹⁵⁴ Ibid, Article 35.

to diplomatic status continue during the entire period for which the status is recognized by the receiving state.

Brownlie criticizes the Convention for being vague on 'official acts' performed by the diplomat who suggests that it would have been possible and prudent that a distinction be made between official acts which are open to the local law and those which cannot be prosecuted. The former category would deal with dangerous driving in an official car, having an accident while on official business, while an example of the latter would be a contractual promise made in negotiations for a concession with a legal person in private law.¹⁵⁵ Whereas the *persona non grata* principle is provided in the Convention for diplomatic conduct deemed unbecoming for diplomats, this is not always a useful remedy to diplomats who blatantly commit crimes and who eventually don't face the full force of the law.

This portrays the VCDR as a step back when various international legal instruments are moving forward with useful pronouncements on human rights, rights of domestic workers and the equality of all before the law. For instance, the adoption of the Universal Declaration on Human Rights, sometimes called the "International Bill of Rights," and a series of follow-up and rights-specific multilateral treaties, rapidly established the prominence of international human rights law. Hence, international human rights law is a relatively new creature underpinned by various treaties signed, for the most part, after the end of the Second World War. The fact that there is now an International Criminal Court that not only handles crimes against humanity committed by states but also by private citizens points to a tightening of any loopholes individuals have in committing crimes and building defenses around their status as state officials or military officers.

¹⁵⁵Brownlie, I., *Principles of International Law*, pg.56.

Whereas the diplomatic community views immunity as a pre-condition for effective conduct of diplomacy in certain countries, the global community has increasingly viewed human rights as for all (*erga omnes*), inherent in each and every human being and are not subject to other laws. This peremptory norm (*jus cogens*) of international law has raised questions as to which between the personal inviolability of the diplomat and his family is more important than the enjoyment of human rights by all humanity. This question has grown stronger, begging for answers due to the deplorable crimes committed by diplomats.

That argument is a straightforward one: Since it is a “perfectly established” law that sovereignty or domestic jurisdiction cannot bar the requirement that no state can stand above the obligation to protect fundamental human rights, and since immunities are just an expression of such sovereignty, it logically follows that they, too, cannot impede the protection of human rights.¹⁵⁶ This approach, unlike the 'functional immunity' view discussed above, essentially addresses the representation theory: Even a state's borders cannot affect its human rights' obligations, so why should its representatives in foreign lands be immune? The logic of the limited “functional immunity” approach inevitably leads to the suggestion that the immunity of family members cannot be seen as necessary for the exercise of diplomatic functions. Does that mean that protection of family members should be abandoned altogether? Not in the collective sense but rather to institute measures for offenders to be held liable for their actions.

¹⁵⁶ Farahmand, J., (1989-1990), “Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses,” *Journal of Legislation* 16, 97.

4.6 Remedial Actions to Diplomatic Abuses

The 'functional remedies' approach - aiming at prevention, punishment, and remedies - is suggested by Benasher to fill the flaws in the implementability of the VCDR. This functional remedies approach is premised on three basic assumptions. First, the vast majority of protected persons do not abuse their position. Even where abuse occur it almost always takes the form of minor offenses such as illegal parking, and shoplifting. Minor offenses should not be disregarded but their negative effect on fundamental human rights is minimal. The second assumption is that preserving diplomatic immunities as formulated in the Vienna Convention is in the mutual interest of all states and will continue to be so. In support of the VCDR, Ben-Asher argues that the link, if any, between immunities and the number of serious crimes committed by protected persons is by no means clear.¹⁵⁷ The percentage of offenses among accredited persons seems small relative to the population as a whole. It is however important to note that the reputation of a country is at stake based on the conduct of a diplomat since he is supposed to present a good image of the sending state and the friendly relations between the two countries is largely hinged on his conduct while in his port of call.

In order to make the Convention relevant and responsive to human rights violations and any other abuses it has been argued that amendment of the Vienna Convention should be done to permit civil liability. Shapiro notes that this is because it is less likely to obstruct the performance of a diplomat's duties, will not generally limit the diplomat's freedom of movement, and would not trigger retaliation by the sending state.¹⁵⁸ Such an approach has its merits, particularly the deterrence and restitution it may bring with it. However, allowing civil lawsuits

¹⁵⁷ Ben-Asher, D., (2000), "Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions," Harvard Law School

¹⁵⁸ See Shapiro S., *Outcasting: Enforcement in Domestic and International Law*, available at <http://www.ilj.org/courses/documents/HC/2010Nov10.HathawayShapiro.pdf>.

against protected persons might be perceived by the sending state as a host-state-supported obstruction of diplomats' functions. Consequently, it might lead to some measures of retaliation. It must be remembered that the Vienna Convention does not protect administrative staff and their families acting outside their official duties from civil and administrative proceedings. Thus, suits may be brought by victims against these people, and diplomatic immunity is not a bar to such action. Shapiro further recommends the establishment of a special compensation fund - the idea of an "international fund designed to compensate the victim of diplomatic wrongdoing"¹⁵⁹ whose administration would require much international cooperation as well as admittance of fault on the part of the sending state.

Furthermore, to make payment from an international fund, some fault would have to be found by an international mediator. A domestic fund created for the same purposes by receiving states would suffer from the hazard of "prohibitively high" costs and lack of enthusiasm on the part of foreign ministries.¹⁶⁰ Despite that, it has its appeal: The actual number of fundamental human right violations is relatively small and it is the duty of the receiving state to ensure that adequate reparations are made when its citizens are suffering the consequence of laws adopted for the larger good. McClanahan notes that some states already follow that path, citing, for example, innocent victims of diplomatic immunities' violations in the UK having access to a Criminal Injuries Compensation Board.¹⁶¹

Farhangi, recognizing the flaws in the VCDR, points to the establishment of a compulsory insurance scheme for all diplomatic missions and the staff eligible for diplomatic immunities and privileges as a step in the right direction towards addressing abuses of these immunities and

¹⁵⁹ Ibid

¹⁶⁰ ibid

¹⁶¹ McClanahan, G.V.,(1989), *Diplomatic Immunity: Principles, Practices and Problems*, Hurst: London, pg 114.

privileges.¹⁶² The *Diplomatic Relations Act of 1978* requires each diplomatic mission in the US, its members, and their families to have insurance coverage. The Director of the Office of Foreign Missions in the State Department must "...establish (compulsory for missions to the US) liability insurance requirements which can reasonably be expected to afford adequate compensation to victims. This ensures that victims are able to claim and get compensation due to acts of omission or commission done by diplomats who abuse their immunities and privileges.

Arbitration - inter-state arbitration has been defined by the ILC as "a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted." Denza notes that the idea of compulsory arbitration has been suggested by some members of the ILC during the Vienna Convention draft preparations but was not included in the Convention or the Optional Protocol on Dispute Settlement.¹⁶³ Although amendment of the Vienna Convention is a difficult task, arbitration offers a number of advantages to all states. First, it is impartial, final and binding. Second, procedure is flexible. Furthermore, arbitration allows for appointment of specialist in the disputed field, in this case experts on diplomatic law and human rights. Arbitration can also be effective where a large number of claims must be settled, preferably in a confidential manner. Unlike the ICJ, private persons or corporations can be parties in international arbitration if its terms provide so. Arbitration can therefore accommodate the possible wish of victims to be directly involved in their claim. Seven, since parties to arbitration retain more control over various matters (e.g., composition of tribunal, formulation of the question to be submitted to arbitration, the law to be applied etc.); it reduces the uncertainty surrounding every prospective international case.

¹⁶²Farhangi, L.S, "Insuring against Abuse of Diplomatic Immunity," op cit, pg. 56.

¹⁶³ Denza, E., 2 Ed, (1998), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* Clarendon Press, Oxford, pg 4.

Parkhill is of the opinion that diplomatic immunity should be more restricted and that diplomats should only enjoy immunity to official acts done in their official duty, just as their consular counterparts¹⁶⁴ Green suggests that the sending countries need to do more about the training and selection of diplomatic personnel.¹⁶⁵ It is also the sending state's responsibility to ensure that only diplomatic officials are sent that are fit and proper to represent their country.

Another alternative remedy could be the enforcement of protecting fundamental human rights over all other rights. Which would mean that even in the case where a diplomat enjoys immunity and violates a fundamental human right, then the diplomat would not be able to escape liability. It would further be advantages that before the credentials are presented to the sending state; an inquiry should be made in regards to the diplomat's criminal history. Other receiving countries can be contacted to investigate whether the diplomat has been accused of other misdemeanors.

4.7 Amending the Vienna Convention

The suggestions at introducing amendments to the VCDR is intended to make the Convention responsive to the issues of criminal conduct of diplomats especially in light of the new attention given to human rights. Farahmand notes that to achieve this, there must be an international agreement on an universal crime list which could include any violent behavior against another person, such as murder, assault, battery and one of the most problematic offences, driving while under the influence of intoxicating substances.¹⁶⁶ Further violations on the diplomatic premises could also be amended to ensure that the embassy is no safe haven where criminals hide after

¹⁶⁴ Parkhill J., S., (1998), "Diplomacy in the Modern World: A reconsideration of the bases for Diplomatic Immunity in the era of high-tech communication," *Hastings International & Comparative Law Review*, 21, 565.

¹⁶⁵ Green L C ,(1981), "Trends in the Law Concerning Diplomats," *Canadian Yearbook of International Law* 19, 132-155.

¹⁶⁶ Farahmand,J., (1989-1990), "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses," *Journal of Legislation* 16, 97.

committing crime. The increasing use of embassy premises for terrorist acts¹⁶⁷ and different forms of espionage has led to suggestions of amending Article 22.

Moutzouris notes that the Vienna Convention contains no provision for its amendment; however, Article 39 of the Vienna Convention on the Law of Treaties¹⁶⁸ creates as a general rule that treaties may be amended by agreement by the parties. In order for the amendments to be valid and effective, all signatory nations to the Vienna Convention must unite and agree to the amendments.¹⁶⁹ It may be extremely difficult to amend the Vienna Convention from a logistic perspective, but in the event that the interests of the various States are aligned it should not prove impossible, even in circumstances of the super-powers' general reluctance to agree on any amendments to the Vienna Convention.

Whereas the basis of the VCDR was the representative character and the functional necessity theories, the latter has been more prominently used as a reference point than the former. The criticisms leveled against this theory though justified in the face of the violations of the Convention's provisions, practice has shown that it is still a relevant theory, though a rethink as to its use in a modern world is in order. Moutzouris argues that there are three reasons for relying on this theory.¹⁷⁰ First, a diplomatic agent should be free to perform the duties of his state. She argues that this has two aspects, the degree of immunity given and the immunity necessary for the performance of his diplomatic function. Second, it permits the diplomat to perform *bona fide* functions in complete freedom and independence.

¹⁶⁷ The 1984 Libyan Embassy case in London is a case in point.

¹⁶⁸ Vienna Convention on the Law of Treaties 23 May 1969 Art.39

¹⁶⁹ Moutzouris, M., (2011) "Sending and Receiving: Immunity Sought by Diplomats Committing Criminal Offences," Rhodes University, pg 46.

¹⁷⁰ Ibid

However, would this theory still be valid if he committed crimes? And lastly, limiting diplomats' immunity to official functions has the effect of repudiating diplomatic immunity. These categories were formulated in the 1930s. Times have changed since then and although the first and last category, with reference to service and domestic staff, still apply today, there are diplomats who do not perform *bona fide* functions. Furthermore, the last category might promote the maintenance of the receiving State's internal public safety but at the cost of stripping away diplomatic immunity, even if it is only for private acts, which does not conform to state or international practice. Practice thus indicates the adequacy and reasonableness of immunity measured in what is necessary for the independent performance of the agent.

4.8 Conclusion

This chapter has examined the Vienna Convention on Diplomatic Relations of 1961 and specifically its provisions relating to diplomatic immunities and privileges. The Convention was a timely treaty that provided the framework for the conduct of diplomacy. Previous attempts though useful at the time, were not adequate to be used in a post WWII era which witnessed new states being added to the international community requiring a system of laws regulating diplomatic conduct and relevant as well for that particular time. The VCDR thus was a useful contribution to this. Looking at the provisions on diplomatic immunities and privileges, the convention mainly relied upon the theory of functional necessity to provide the inviolability scope of the diplomat and his family.

In analyzing this Convention, this chapter has found out that although the theory of functional necessity was apt in providing the basis for immunities, the diplomat's inviolability has been misused by some diplomats to commit crimes and escape justice by claiming diplomatic

immunity. The study has also found out that the principles of personal inviolability, jurisdiction and reciprocity though essential to diplomatic practice have to some extent not been sufficient to deter crime. For instance, the study has established that the diplomatic bag and the provisions regarding customs taxes have been grossly abused leading to a call for their re-evaluation. This theory has therefore proved the hypotheses that the poor enforcement mechanism and the weak provisions of the VCDR have been used unfortunately to commit crime. The study has however recognized the positive impact of the Convention to the conduct of diplomacy and notes that whereas the Convention left little room for amendment, there can still be room for a re-examination of the provisions of the Convention to make them watertight and ensure that diplomats are fully functionally equipped for their functions without creating loopholes for abuse.

CHAPTER FIVE: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary

This study set out to examine the regime of diplomatic immunities as set out in the Vienna Convention on Diplomatic immunities that was agreed upon in 1961 and came into force in 1964 after its ratification by the requisite 22 countries. This document, which is now part of customary international law sought to offer the diplomat an enabling atmosphere during his stay in the receiving state. It gave him exemptions from the jurisdiction of the local justice system and he can not be held criminally responsible or otherwise for acts done on behalf of his sending government provided he behaves responsibly and obeys the limits to his actions as provided. This study sought to (dis)prove the overall objective of seeking to find out how functional is the current international legislation on diplomatic immunities and privileges and whether the VCDR in its current format has created avenues for its violation by diplomats who fail to adhere to its provisions or more so take advantage of the grey areas to commit crimes and even engage in personal aggrandizement. The study therefore hypothesized that the current legislation facilitating the conduct of immunity is inadequate to curb diplomatic crime and that the VCDR's weak and vague provisions are to a large extent responsible for the numerous violations.

In its statement of the problem, the study attempted to examine the current regime of diplomatic privileges and immunities and identify challenges to the observance of diplomatic immunities in the face of growing violations. The study argued that there is a discrepancy between what ought to be the acceptable conduct of the diplomat as provided for in the provisions of the VCDR and the general practice on the field. After examining the current literature on the subject, the study concluded that there is indeed a gap in the literature on the subject and therefore for a better

understanding of the subject and to contribute to the scanty literature on the subject the study sought to proceed on the premise established in the VCDR which is the functional necessity approach. The study has relied to a large extent on secondary data and has qualitatively analyzed the data in chapter four and will therefore summarize the findings and give conclusions and recommendations.

The study examined the concept of diplomacy and diplomatic immunities and privileges and noted that the former has been around since humans were able to form a society while the latter has evolved gradually in tandem with the concept of diplomacy. As found out, neighbouring tribes or clans had to develop means in order to communicate with one another, in order to trade, exchange gifts, establish boundaries, and declare war or to reconcile and bring peace. It was logical that the messenger needed to be identified easily and that he would not pose any threat to the other tribe and that therefore this could not have been a warrior. The fact that for a messenger of peace was the representative of the leader of a community and killing him was akin to declaring war signified the importance of not harming that messenger for the sake of peaceful coexistence between tribes and communities. This concept developed and flourished. In the ancient Greek and Roman times their mythology confirms that the messenger of a King is a key person to the development of society and vital for neighbouring kingdoms to grow and develop.

The Greeks and especially the Romans incorporated this into their own society and laws. Often the King or his advisor would hand pick certain learned individuals from court that would represent the King and carry the Kings message across to the neighbouring border. The Romans codified the laws that were already then customary practice, and insured that any person or nation attacking the King's messenger has attacked the King himself. Throughout the centuries these customs continued and developed further. In the Middle Ages this was the most common

way to communicate with bordering nations not only in Europe but also in the Middle East, Asia and parts of Africa. Only very recently did the Italians come up with the idea that a more permanent establishment inside the neighbouring country is advisable and advantageous, initiating the practice of sending resident envoys to other countries. Since the means of communication were still very primitive and England at the time was a long journey, it became necessary to have a permanent representative in the country. Thus Diplomacy continued to grow and expand in Europe. The advancement of technology have since then made it much easier and simpler to communicate with one's representatives and to re-assign new tasks and duties that have to be performed.

Various scholars during this time made valuable contributions to the concept of diplomatic immunity and this led to the growth of various theories of diplomatic immunity most notable among them being the representative character and the extraterritoriality theories which held sway in between the sixteenth and nineteenth centuries. Scholars such as Emmerich de Vattel, de Callières, Hugo Grotius, Ernest Mason Satow, Wicquefort, and Oppenheim among others rationalized on the importance of having standardized approaches to the conduct of diplomacy and the immunities to be accorded to *legates*. This mainly European discourse was due to the fact that Europe's advancement in industrial growth was inspired by the revolution in science that was driven by the education system. Interactions among European states were therefore multilevel with military, economic and political necessities providing the impetus for diplomatic exchange.

This grew over time so much so that in the Nineteenth century diplomacy had undergone tremendous development. The transition from the Westphalian diplomacy to the Vienna of Congress of 1815 ensured a continuity and growth of the diplomat. During this time immunities

and privileges were hinged on mutual respect and diplomats were largely regarded as state officials who deserved all the safety due to a head of state though acts of espionage could lead to expulsion. Codification of laws on diplomatic immunity were general though the Vienna Congress of 1815 made the first solid attempt at instituting measures to enable the diplomat perform his functions. It presaged the later conventions on diplomatic and consular immunities in 1961 and 1963 respectively.

The study then examined the VCDR as the current -universally recognized- law on diplomatic immunities and privileges. Its inception was a culmination of deliberations of various International Law Commission drafts and the Harvard and Havana drafts. The study noted that the Convention allows the diplomat to perform his duties and provide information on political, social and humanitarian conditions in the receiving state in a seamless interaction between state officials of the sending state and security, customs and immigration officials in the receiving state.

The Vienna Convention is the ultimate multilateral treaty agreement in the field of international law, giving all states that are signatory to it surety and clarity in regards to diplomats. The Convention delineates two types of immunities necessary for this inter-state interaction by limiting immunities accorded to the diplomat for the functioning of the mission; firstly, the diplomat's official duties are exempt from interference by the host state and he is therefore deemed inviolable for his official acts. This principle of personal inviolability predetermines the general immunity from the legal processes of the host state so that the diplomat and members of his household are excluded from the civil and criminal jurisdiction of the host state. Secondly, under the Vienna Convention, there is also the concept of state responsibility which requires the receiving (host) state to accord the diplomat unfettered entry and exit of him and the

diplomatic bag while at the same time ensuring that the physical premises are sacrosanct.

5.2 Conclusions

The practicality of the Convention provides safety and continuous diplomatic relations between foreign states and their respective missions. For instance, the study has established that the Convention is the most solid law on diplomatic immunities and its significance is found in the fact that over 190 states have domesticated it and is therefore now also part of the domestic laws of these many nations. It has therefore laid the basis for diplomatic conduct which is essential for any global exchanges. The study concludes that the VCDR is still a relevant piece of legislation for the continuance of diplomacy and the cited shortcomings should not negate the fact that up to now, states have not found it necessary to replace this law with another. Nor have there been widespread withdrawals from this law. Whereas this is not a measure of its success, the fact that countries still refer to the Convention and even local laws on diplomatic immunity as pointed out in the Kenyan case point to a general approval of the Convention.

The study also concludes that the theory of functional necessity has to a large extent been useful in the granting of diplomatic immunities. The diplomat ought to be given the necessary freedom to carry out his official duties and should not be encumbered with unnecessary laws of the receiving state. This should not however mean that the diplomat can use these immunities with impunity in total disregard of his status as an esteemed envoy meant to present an appealing image of himself and the country he represents. The concept of personal inviolability as set out in the VCDR though useful provides room for abuse by diplomats. The study concludes that in

this age of absolute human rights for all means that violations of human rights by diplomats cannot go unpunished but there should be limits to its applicability.

The study further concludes that the failure to clearly spell out the provision on the diplomatic bag left room for multiple interpretations and therefore abuse. Examples were cited of such abuse. The importance of the diplomatic bag cannot be gainsaid but the absence of clear specifications as to its size and its screening has left it to be exploited for criminal activities. The poor screening mechanism have been interpreted differently for expediency purposes by different diplomats.

The concept of reciprocity has to a large extent ensured the successful implementation of the VCDR. This has meant that a positive tit-for-tat has meant that diplomats of the sending are treated the same way as the diplomats of the receiving state and vice versa. This has been complemented by the duty bestowed on the receiving state to be fully responsible for the diplomats on its territory. Though there have been instances of negligence like the attack of German diplomats in Guatemala in 1984 and the Iran hostage situation in 1979, receiving states have generally adhered to this responsibility.

The study concludes that the lack of a clear definition of familial relations to the diplomat and the privileges accorded to such members has contributed to the abuse of these provisions where the diplomatic entourage is large with some members just out to engage in private commercial acts with some even avoiding tax on such private activities.

It is also worth concluding that the objectives of this study have been achieved. The study has established that there is a substantial record of the abuse of diplomatic privileges and immunities with the errant officers and family members citing diplomatic immunity when found on the

wrong side of the law of the receiving state. The study has also evaluated the relevance of the laws on diplomatic privileges and immunity to diplomatic conduct and established that to a large extent they are relevant though there is need for more legislation on vague areas such as the diplomatic bag, the definition of the family, the regime on customs duties and taxes. The principle of personal inviolability also has to give way to a new interpretation due to human rights concerns and its blatant abuse. The VCDR's efficacy is without a doubt still relevant and just as has been pointed out the challenges facing its implementation has to be tackled.

5.3 Recommendations

This study makes the following recommendations; that there should be a re-examination of this Convention with a view to making constructive changes to its troublesome provisions. The most drastic change should be that the diplomat should not be able to claim diplomatic immunity in cases of basic human rights violations. In cases where there is suspicion of torture, enslavement, murder and rape the receiving state needs to have the jurisdiction to detain and question the diplomat about these allegations. The sending state needs to be informed of the allegations being brought against their diplomat, and that a court of law in the receiving state needs to determine whether enough evidence has been brought forward to prosecute the offending diplomat. If the court determines there is sufficient evidence to prosecute then the diplomat is to immediately lose all diplomatic privileges and immunities and be tried.

While this is necessary, it should not be lost that due diligence on the part of the sending state to carry out more background checks on their officials which they send abroad on diplomatic duty. Furthermore, the receiving state should be cautious not to use the pretext of human rights violations to harass or intimidate diplomats. One deterrent could be the principle of reciprocity

which prevents any discriminatory acts on the diplomat. Another deterrent could be the institution of special mechanisms and procedures to be followed by the diplomat in tackling cases of abuse of diplomatic privileges and immunities.

The diplomat should not have the power to raise the defense of diplomatic immunity nor should it be necessary to request a waiver from the sending state. The immunities need to be limited therefore to acts required for a diplomat to fulfill his official duties. If the court determines that there is not enough evidence for a conviction then it is in the interest of both the sending state to recall that diplomat or the receiving state to declare him/her *persona non grata*. A diplomat who has been suspected or involved in such dealings should not continue to represent the sending state or be a member to that mission. This is to deter diplomats from thinking that they are above the law.

Moreover, the amount of privileges and protection that the Vienna Convention has authorized the individual diplomat also needs to be addressed. Whereas Article 41 cautions the diplomat not to take advantage of the comprehensive immunities and privileges allowed him due to his status as the official representative of the sending state, perhaps it is more appropriate to stipulate more punitive countermeasures under the same article to stifle any wayward behavior. More power should be given to the receiving state over a diplomat that has breached a major violation of the local laws, which are also recognized as a severe contravention in the international community. It cannot be left open to the sending state only to decide on the future of their diplomat if he has committed a serious breach in the local laws of his mission. The abuse of privileges granted to diplomats has become common ground for corruption and one can see from these few examples that immunity for diplomats has many other problems still yet to be dealt with.

There should also be a regular appraisal of the Convention as a whole maybe after every ten or twenty years for obsolete provisions to be discarded and more prudent articles added to it. This regeneration mechanism would ensure that the Convention stays relevant through time. The fact that the Convention left little room for amendment means that this has to be addressed as well if the recommendation above has to be effected.

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