

TITLE

DIPLOMATIC IMMUNITY

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BY

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DEDICATION

TO DANA (KETTY) MOM AND DAD.

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## CONTENTS

	<u>PAGE</u>
DEDICATION .....	(i)
ACKNOWLEDGEMENTS .....	(ii)
ABBREVIATIONS .....	(iii)
TABLE OF CASES .....	(iv)
TABLE OF STATUTES .....	(v)
INTRODUCTION .....	(vi)
CHAPTER I: HISTORICAL DEVELOPMENT OF DIPLOMACY AND AND DIPLOMATIC LAW.....	
Definition .....	1
Why is diplomacy necessary? .....	2
The Historical Development of Diplomacy ...	4
Why and how law came into Diplomacy .....	6
CHAPTER 2: DIPLOMATIC PRIVILEGES AND IMMUNITIES .....	
Background to the Vienna Convention on Diplomatic Relations 1961 .....	12
Persons entitled to Diplomatic Privileges and Immunities .....	14
Immunities of Diplomatic Agents .....	15
Inviolability of Residence and Property .....	17
Immunity from Criminal jurisdiction .....	18
Immunity from Civil jurisdiction .....	21
Waiver of Immunity from jurisdiction .....	24
Privileges of Diplomatic Agents .....	25
Customs duties and gaggage search exemption .....	28

CONTENTS (CONTD)

	<u>PAGES</u>
CHAPTER 3: THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES	
Introduction .....	34
The violation of the premises of Embassy .....	36
The use of Diplomatic immunity as a cover for peacetime intelligence gathering activities international law - Espionage..	43
The abuse of the Diplomatic Bag .....	46
Kidnapping of Diplomats .....	49
Conclusion .....	52
CHAPTER 4: Recommendations for the Future reform of the law of Diplomatic Immunity .....	54
Diplomatic Ceremonial and Protocol .....	55
CONCLUSION: .....	63
Footnotes to Chapter 1 .....	70
Chapter 2 .....	70 - 72
Chapter 3 .....	73
Chapter 4 .....	75
Bibliography .....	76

ABBREVIATIONSTABLE OF CONTENTSBOOKS AND PERIODICALS:

1. A.J.I.L. .... American Journal of International law.
2. B.J.I.L. .... Brooklyn Journal of International law.
3. B.Y.I.L. .... British Yearbook of International law.
4. I.C.L.Q. .... International and Comparative law Quarterly.

CASES:

- W.L.R. .... Weekly Law Reports

OTHERS:

- F.A.C.R. .... Foreign Affairs Committee Report
- I.C.J. .... International Court of Justice
- I.L.C. .... International Law Commission
- P.C.I.J. .... Permanent Court of International Justice.
- V.C. .... Vienna Convention
- V.C.D.R. .... Vienna Convention on Diplomatic Relations.

TABLE OF CASES:PAGE

1. <u>Agbor V. Metropolitan Police</u> (1969) IW.L.R. 703	.....	17
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2. (The) Convention on the Prevention and Punishment of crimes against internationally protected persons.
3. Diplomatic Immunities Act. Cap. 179
4. Diplomatic Relations Act 1978 (U.S.A.)
5. Diplomatic Privileges Act. (U.K.)
6. The statute of the International Court of Justice.
7. The United Nations Convention on the Law of the Sea, 1982
8. The Vienna Convention on Consular Relations of 18th April, 1961.
10. The Vienna Convention on the Representation of states in their Relation with international organisations - 1975
11. The Vienna Convention on Special Missions 1969
12. The Vienna Convention on the Law of Treaties 1969



INTRODUCTION

It is impossible to deny the importance of diplomacy in strengthening a nation's power, not only in external but also in internal affairs.

Diplomacy, which is the management of international relations by negotiations, is the product of long-established state practice evidenced not only by that practice, but also by the legislative provisions and judicial decisions of national law. The termination of the Second World War, set in motion the most spectacular evolution of nations which the world has ever witnessed. It brought with it radical changes in the political structure of states, in their relations with one another, in the sudden mass creation of independent entities, and a flood of personalities new to world diplomacy. The emergence of many new states to roles of responsibility in world affairs, and the growth of multilateral diplomacy through such institutions as the U.N. have inevitably resulted in the proliferation of diplomatic contact.

Diplomatic relations are governed by rules of international law, it is inherent, therefore to say something about the latter. International law is looked upon by states as governing their relationship interse: for instance, it offers an answer to the majority of international disputes, for example the dispute between U.S. and Iran, it is because of this that international law can be said to be an interraction of the political with the legal aspects of daily life. Modern international law is a fairly recent phenonema, it has its origins in the Europe of the Sixteenth and Seventeenth Centuries, although communities of states regulated by law had previously existed in Europe, e.g. Greece, it is for reasons apparent from subsequent world history, the law created to govern the diplomatic, commercial, military and other relations of the society of christian states forming the Europe of that time that forms the basis for the present law.

This paper's principal thesis is the importance of diplomatic privileges and immunities. However, before this can be tackled, a brief look at Diplomacy must be given. Diplomacy normally involves the exchange of permanent diplomatic missions, and similar permanent, or at least regular representation is necessary for states to give substance to their membership of the U.N. and other major intergovernmental organisations. In the beginning, diplomatic relations were conducted on a bilateral basis, but today multilaterality has become one of the characteristics of modern diplomacy. Improvements in the means of transport and communications demand a more multilateral solution of international problems. In the past, multilateral diplomacy came to the fore above all in post-war years, when the belligerents were forced to have recourse to peace conferences. Diplomacy, at such times took on a collective aspect, but exceptionally and only temporarily e.g. treaty of Westphalia 1648, and the Vienna Congress 1815.

In the 19th Century, states began to feel the necessity of settling common legal, economic and technical problems through discussions with one another, and in many cases realized the convenience of setting up permanent organs to deal with them. Once these organs had been established, and the envoys sent, the question arose as to how they were to be protected, this led to the formulation of the Diplomatic privileges and immunities. This then brings us to the crux of the matter of this paper, i.e, the fundamentals of the Diplomatic privileges and immunities.

These immunities granted to diplomatic agents are to permit them to fulfil their important mission without hindrance by the local authorities; and allows diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. These privileges and immunities recognized by the law of nations and by reciprocal practice were codified and completed by the Vienna Convention of 18th April, 1961. which is agreed to be largely confirmatory of existing customary law on

the one hand, and on the other, constitutes a progressive development of the law.

The convention does not effect rules of customary law governing 'questions not expressly regulated' by its provisions, and of course, states are free to vary the position by treaty and tacit agreements based upon subsequent conduct, thus customary international law will continue to govern questions not expressly regulated by the convention. It is because of this that custom and usage can be said to have played a central role in the development of our modern law of diplomacy.

To be able to achieve the main objective of this paper, that is, making an exposition of the diplomatic privileges and immunities, the text has been divided into four chapters and a conclusion, each dealing with a different aspect of diplomatic law which is then compounded into one single whole in the conclusion. The first chapter traces the development of diplomacy and diplomatic law through the years; defines what is meant by the term diplomacy, what role custom, usage and tradition have played in shaping it, the role of diplomacy in enhancing international co-operation is also looked at. Quite prevalent in this chapter is the question of what influence international law has had on diplomacy. This chapter ends by stating what the sources of our modern law of diplomacy are and introduces the four Vienna Conventions.

Chapter two is designed on the major part to bring out the importance of the Vienna Convention on regulating diplomatic intercourse between states. Due to the diversity of the subject, not all the articles of the convention could be looked at, it is only those articles dealing with the specific privileges and immunities vital and incidental to this text that were considered. The leading incidence of Diplomacy is to be found in article 2 of the convention which provides that:

"The establishment of diplomatic relations between states, and of permanent diplomatic mission, takes place by mutual consent.."

No country is obliged to receive diplomatic representatives of foreign states; however, refusal would serve to place it outside the international community, hence practically all really important states do receive the diplomatic missions of all other states. At the end of this chapter, a brief look at the abuses of diplomatic immunity is introduced.

Chapter three is a case-study of the abuse of the diplomatic privileges and immunities. The diplomatic bag has grossly been abused by the diplomats as well as the use of the mission premises for acts of terrorism. A wide range of examples are drawn from countries such as Kenya, Iran, Libya, the U.K, U.S, and others. The essence of this chapter is this: The immunities are granted to empower diplomats to carry out their duties efficiently without the local authorities being able to prejudice their actions. On their side, the diplomatic agents have certain obligations towards the states that receive them - hence all action tending to influence by indirect means the internal politics of the country, such as seeking secret information, may be considered a grave dereliction of duty. As will be seen later, there has been a great departure from the provisions of the convention both by the diplomatic agents as well as the receiving state.

From this point naturally flows the next question, in view of the widespread contravention of the convention, should we not reform it, either by limiting some of the powers conferred on the diplomats by virtue of holding that office? This is the basic premise where chapter four takes off. This question of the amendment of the Vienna Convention riddles through and through the debates of the ILC, and inspite of the hesitancy of states to come out and advocate for it openly, it can said that alot of progress has been made by the ILC in this area, especially with respect to the position of the diplomatic bag accompanied by the courier. The progress and

codification of law is by no means complete, and diplomatic law is by no means an exception.

The conclusion is a compendium of all the information from the four chapters. In compiling this work, I make no great claim to originality, it was merely my attempt to assemble and analyse significant material and present it in convenient form for ease of reference by those who are interested in the topic of diplomatic privileges and immunities. In the face of the fast changing international relations, one must look at the documents governing diplomatic law not as complete in themselves, but merely as being the standard texts; which ought to enhance our appreciation of the law relating to diplomatic law, given the fact that the basic idea of diplomacy has undergone and continues to undergo development in relation to its subject, methods and aims.

CHAPTER ONEHISTORICAL DEVELOPMENT OF DIPLOMACY AND DIPLOMATIC LAWDEFINITION

Diplomacy is the art of resolving international difficulties peacefully. It is also the technique or skill which reigns over the development in a harmonious manner of international relations. Art and techniques obey conventions and rules. The ritualistic aspects of diplomatic activities have always been striking.<sup>1</sup> Diplomacy can also be said to be the application of intelligence and tact to the conduct of official relations between the government of independent states, extending sometimes also to their relations with vassal states.<sup>2</sup> Without going any further it is important to point out that it is difficult to get a good definition i.e. one that is concise, illuminating and generic, this fact is manifested when one compares the definitions given by different scholars. According to one scholar,<sup>3</sup>

"Diplomacy brings to mind the idea of international negotiation, the maintenance of external relations, the administration of the national interest of peoples and their governments in their material contact be it peaceful or hostile. One could almost call it the applied Law of Nations."

Yet to others, thinking in terms of diplomatic planning, say that diplomacy is:

"the formulation of strategy aiming at achieving national interests in the international field, and carrying out of this strategy by diplomats."<sup>4</sup>

Whatever the definition adopted, today in speaking of diplomacy, one has the relations between states in mind. Outside of this, international practice is already beginning to take note of cases of diplomatic action on the part of the great international organisations.

The very essence of diplomatic law lies in the fact that states have come to realise that persuasive argument applied skilfully and sensitively at the right time, achieves a better result than persuasion too obviously backed by threat of force, in a couple of cases, the latter method may provoke resistance and finally lead to war. Diplomacy should and must be distinguished from foreign policy. The latter is actually formulated by governments, in order to carry this out i.e. its policy, the government will need to manage and adjust its international relations by applying different forms of pressure, success of which depends on the real power behind them. This power must be real and is usually the reserve of governments, however, this is only true in certain circumstances. Under normal circumstances, states do conduct international intercourse by negotiation, it is this act of deliberation and negotiation that is called diplomacy. It was a mark used by 'civilized' nations to desist from having international relations governed by force. Thus the field in which diplomacy became operative lay between power, politics and civilised usage, and is always the same, what differed were the methods of application which varied with the political conventions of each age.<sup>5</sup>

#### WHY IS DIPLOMACY NECESSARY

The diplomatic profession like any other profession has its own particular exigencies. The object of diplomacy is to make use of peaceful and practical methods of conciliation to tighten the bonds of friendship with allied governments to develop friendly relations with neutral countries, and to command the respect of hostile governments.<sup>6</sup> In this immense task of consolidating peace the function of heads of diplomatic missions may be classified under the the following four terms: representation, information, negotiation and protection. The notion of representation constitutes the primary element. Heads of governments cannot deal directly with one another on all questions of interest in international relations.

They therefore need to maintain representatives charged with the task of negotiating in their names. These representatives have traditionally been called 'diplomatic agents'. The Vienna convention (article I) designates them as 'Heads of Mission', The former term covers both the head of mission and diplomatic staff attached thereto. The Head of the mission is charged, first of all, to make understood his government's policy and if possible, obtain its acceptance by the state where he resides, thus ensuring the maintenance of friendly relations between the two countries. In the mutual exchange of political views and good offices he wards off differences which could cause conflict between the two states, watches over and safe guards the person and the interests of his national and encourage commerce and shipping.

Diplomacy deals with political, economic, and cultural relations between governments as well as the protection of their nationals. It also constitutes the normal occupation and routine of the representatives of the 126 independent states spread over the universe. Diplomatic agents and consuls are not in the traditional nature of their duties, spies. All action tending to influence by indirect means the internal politics of the country, such as seeking secret information, maybe considered a grave dereliction of duty.<sup>8</sup>

Thus it would be impossible to deny the importance of diplomacy in strengthening a nations power, both in external and internal affairs. It is seen as a vehicle for carrying out political, economic, social and legal transactions through authorised agents. Diplomatic intercourse between states enables them to achieve a sense of understanding and compromise. Diplomatic interstates relations aims at the peaceful co-existence of all states regardless of their social and economic character.<sup>9</sup> Thus diplomacy can be said to be as necessary in law as international law in so far as it l helps in enhancing international peace and co-operation.



THE HISTORICAL DEVELOPMENT OF DIPLOMACY.

The rules of international law governing diplomatic relations were the product of long-established state practice evidenced not only by that practice, but also by the legislative provisions and judicial decisions of national law.<sup>10</sup> Nearly all states today are represented in the territory of foreign states by diplomatic envoys and their staffs. Such diplomatic missions are of a permanent character, although the actual occupants of the office may change from time to time. This institution of legation is consequent upon the development of some hundreds of years. It is actually through the institution of diplomatic representation that interstate relations have been conducted. Hence it can be said that representation by diplomats, constitutes one of the principal machinery of international intercourse and interaction. The history of permanent and temporary diplomatic mission dates only far back as from 17th century, the rights, duties and privileges of diplomatic envoys however, continued to develop according to custom in the early 18th century through the 19th century and only ripened into a common understanding on the subject during the congress of Vienna 1815.<sup>11</sup>

However, as early as the 13th century, the Italian Republic especially the Republic of Venice kept representatives stationed at one another's capitals for the better negotiation of their international affairs. Later during the 15th century, these republics started keeping permanent representatives in other European states, as in the case of Spain, Germany, France and England, even in antiquity, where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law, but by religion, ambassadors being looked upon as sacrosanct. This was particularly true of the Papal states, which sent apocrisiari or responsales to deal with matters that only concerned the church. The Greek city states had special missions between themselves even as early as the 5th century B.C. Thucydides,

a Greek Historian speaks of diplomatic relations among Greeks, and the treatment of ambassadors which was always preferential. The Romans not only respected the foreign envoys, but also saw to it that there was no interference with the person and property of foreign ambassadors. Special missions being sent to and from Rome.<sup>12</sup>

After the break-up of Alexander's empire there was free movement and interaction of the Asian states, this necessitated the creation of diplomatic relations amongst the emergent states. The Islamic countries of West Asia, particularly during prophet Muhammed's life, sent emissaries to countries such as Egypt, Persia and Ethiopia to carry out functions such as negotiation of peace treaties, or the exchange of prisoners of war at the conclusion of a Holy War - Jihad. The growth of and development of diplomacy amongst European states was greatly facilitated by the break-up of the Holy Roman Empire. Before this there was hardly any need for development nor was there any room since the Roman Empire had conquered and swallowed up the entire civilised World in Europe.

The rise of modern diplomacy can be said to fall into two periods: the first being, the period between antiquity and the middle ages ending in the 15th century. This was the era of non-permanent, adhoc embassies. The conclusion of special treaties, as in the 1520 treaty signed between the king of England and the Emperor of Germany, made it an inherent necessity to states to keep permanent legations in one another's courts.

What had been set into motion by the disintegration of the Roman Empire, reached its peak in the French Revolution of 1789, which ushered in a new era of spectacular industrial development such that states could no longer live in isolation. It became an inherent necessity to states to seek agreement on some universally binding rules regarding the rights and privileges of foreign diplomats, it was largely because of this that regular relations was established between European states.

As can be seen, a diplomat and his protection were of vital importance to the growth of diplomacy in international law. Hugo Grotius, a leading jurist, said of accredited envoys that;

"There are two maxims in the law of Nations relating to ambassadors which are generally accepted as established rules. The first is that ambassadors must be received and second that they must suffer no harm."<sup>13</sup>

The growth of diplomacy after this was fast. In the post revolutionary Europe, the ascendancy of new objectives began to eclipse earlier values. The acceptance of an established monarchical order gave way to the growing will to overturn the status quo. The international struggle for power brought into play collective national energies which could be more effectively harnessed by constitutional methods and a cabinet government rather than by the rule of the 'prince'. Although skill in classical methods continued to command respect and acceptance, it became evident that diplomacy should now be exercised in the interest of the nation as a whole. After the first World War, the conviction was asserted that diplomacy should be made more open to and also more accessible to public scrutiny and appraisal. This is how law came to be an integral part of diplomacy.<sup>14</sup>

#### WHY AND HOW LAW CAME INTO DIPLOMACY

It was actually due to developments in diplomatic practice in 1815, that rendered it necessary to get a new, and more extensive codification and formulation of the laws and usages as to diplomatic envoys, which was achieved in the Vienna convention on Diplomatic Relations, signed on April 18, 1961. The preamble to the Vienna convention is a clear articulation of this:<sup>15</sup>

"The states parties to the present convention Recalling that peoples of all nations from ancient times have recognised the status of diplomatic agents:-

Having in mind the purpose and principles of the charter of the United Nations concerning the sovereign equality of states, the maintenance of international peace and security, and the promotion of friendly relations among nations, believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social system:

Realising that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states; Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provision of the present convention. Have agreed as follows...."

The preamble has two importance functions. The first one being the view of the participating states on the theoretical basis of diplomatic immunities; and secondly to make explicit the relationship between the convention and customary international law. What really plagued the men at Vienna was the question of "functional necessity" theory which in essence meant that it was impossible for a diplomatic agent to carry out his duties unless he was accorded certain immunities and privileges. This is the subject matter of Articles 22, 29, 30, 41 of the convention. In a nutshell, these articles stipulate that the person and property of a diplomat are inviolable and that he is not subject to both criminal and civil jurisdiction of the receiving state; the full text will be dealt with later.

The convention is given effect in Kenya by the Diplomatic Immunities Act;<sup>16</sup> In the United States it is given effect by Diplomatic Relations Act 1978 and in the United Kingdom by the Diplomatic Privileges Act. In recent times the Vienna Convention is mainly governed by draft articles of the ILC. The most recent and articulate stand concerning the convention was taken by the ICJ,<sup>17</sup> the judges felt that the convention only partially codified the law of diplomatic relations since some of its provisions cannot definitely be attributed to customary international law. Pursuant to this they stated that customary international law will continue to govern questions not expressly regulated by the convention, and described the rules of diplomatic law as:

"a self-contained regime which, on the one hand, lays down the receiving states obligation regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other hand, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving state to counter such abuse."<sup>17</sup>

The above quotation is only an elucidation of what had already been stated in the preamble to the convention. The first part concerning privileges and immunities is evident in state practice and is as old as man himself. The institution of legation has always been known to exist between states, Oppenheim<sup>19</sup> feels that records are full of examples of legations sent and received by the oldest nations - the Greeks had it as early as the 5th Century B.C. As per the second part concerning the abuse of the privileges and immunities conferred on the diplomats, a great controversy still rages.

As long ago as 1949, the ILC a U.N. organ had selected the subject of diplomatic intercourse and immunities as one of the topics whose codification was both desired and feasible. After thorough preparation by the ILC, the Secretary General of the U.N. convened the Vienna conference at which the convention of 18th April 1961 was drafted; and came into operation on 24th April 1964. The rules followed by states as regards diplomatic relations, as well as the the recognised privileges and immunities of diplomats, as already stated, were built up empirically in the course of centuries and have been strengthened by reciprocal practice. In 1961 following a resolution adopted in 1952 by the General Assembly of the U.N., the Vienna conference studied the problem of diplomatic intercourse and privileges and approved the text of a convention which represents the contractual basis of diplomatic relations between states which are parties to the convention. It is likely that this document will in future govern relations between all states even though they may not all be signatories to it.<sup>20</sup>

It has already been said that diplomacy embraces the political, economic, social and even cultural relations between governments, outside this,

there exists other forms of international cooperation. Numerous organisations have been commissioned, often under the aegis of the U.N. to act by international conventions on behalf of all or a large number of governments on political, military, administrative, economic or social questions of general interest. On the other hand, certain great powers, having a special sense of responsibility in view of their political and economic capacity and positions of leadership, have assumed a directing or managerial role in the work of peaceful world co-operation sponsored by the U.N. They participate in accordance with the forms of their national governments, and traditions, with more or less extended participation to diplomatic personnel. The U.S. traditionally directed by the department of state, established such important organs as the U.S. information Agency (U.S.I.A.) and Agency for International development(AID) in view of matters of information as of economic assistance to under-developed countries.<sup>21</sup>.

In 1958, the U.N. General Assembly invited the ILC to consider the subject of relations between states and intergovernmental international organisations. Conventions were held in 1968, 1969, 1970 & 1974 which looked into the question of what rules should govern non-diplomatic agents and representatives? The permanent character of trade commissioners was also tackled. It came to light that no special rules of international law had developed to govern such, but rather that such rights and privileges are the subject matter of specific bilateral agreements or simply as a matter of courtesy. However, today improvements in means of transport and communications demand more and more multi lateral solutions, for today there are a few problems which only affect the relations between two single countries. Thus multilaterality has become one of the characteristics of modern diplomacy.

The role of treaties in diplomatic law must also be brought out. In point of fact, the treaty is the main instrument which the international community possesses for the purpose of initiating or developing international co-operation.

and whose object is the imposition of binding obligations on the states who are parties to it. Treaties make up the bedrock on which diplomacy is built, since for any state to have the capacity to either send or receive envoys, it must have reached some agreement with the other state it purports to have diplomatic relations with, thus the two are concomitant facts of the same reality.<sup>22</sup>

Our modern diplomacy is a fairly recent phenomena governed by fairly recent conventions - viz - the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1962. Vienna Convention on the representation of states in their relation with International Organisation 1975. The Vienna convention on special missions 1969. In addition to these, other instruments help to enhance the legal validity to the law of diplomacy as is inherent in the Vienna Conventions on the law of treaties 1969, and the U.N. Convention on the law of Sea, 1982. Recent events have, however, showed that there are many legal lacunae which are not amply and sufficiently covered by the conventions. It has been felt that technological development in the means of communication as also the growing abuse of the privileges and immunities, appeared to make existing international agreements inadequate, it was felt that there was room for some degree of elaboration or amplification. The amplifications of these rules already embodied in the relevant International Conventions in the light of modern state practice could serve to alleviate the uncertainty which still persisted and which often gave rise to practical problems.<sup>23</sup>

In conclusion one can therefore say that diplomacy has played a leading role in bringing together all nations of the world in what has been called "the international law of co-operation." Friedmann in looking at the changing structure of international law, states that such relations are no longer essentially a matter of diplomatic interstate relations, but affects groups and individuals and reaches into many domains of social and economic life. Traditionally diplomatic interstate relations aims at the peaceful co-existence of all states regardless of their social and economic structure.

To this has been added modern needs and development and many new areas expressing the need for positive co-operation which has to be implemented by international treaties and in many cases permanent organisations.

In the present day, international society attempts at legal regulation on a universal level, occur principally in three spheres: The first being the international organisations of security from annihilation by War; second, the international organisation of certain aspects of communications, health and welfare; third, there is the tentative beginning to control the conservation of resources by international co-operation and organisation. But disparity of standard systems and values is too great to make an effective international organisation possible in fields such as the protection of human rights as formulated in the U.N. Declaration of human rights in December, 1948. International law is still a developing phenomena, diplomatic law not being an exception thereto. It goes without saying therefore, that if ever there was a time when a serious work was needed providing practical guidance to diplomatic and consular officers, it is in the world we live in today. In spite of the progress of communications, the multiplicity of contacts between nations and broadcasting of news by radio, television and the press which keeps diplomatic missions more fully informed than in the past and allows them to adapt their actions more promptly and more accurately to the changing circumstances of international politics, diplomatic action remains the same. The basic requirements for the professional diplomat remains unchanged, even though the setting of the diplomatic profession continues to evolve.



## CHAPTER TWO:

### DIPLOMATIC PRIVILEGES AND IMMUNITIES

#### BACKGROUND TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961

The period after the Second World War ushered in many radical changes in all fields of social science. However, among the most important changes which occurred, and which is of utmost concern to this text, is that of the development of high level diplomacy.<sup>1</sup> As opposed to the First World War period, before 1914, all the emphasis was on the ambassador or Minister, who has under him the diplomatic and non-official personnel, the post-war period, which began with ILC signing of the United Nations Charter in 1945, laid emphasis on the diplomatic mission, the ambassador's position being relegated only to a secondary standing, viz as head of the mission. Looking back into History, one sees that the first Multilateral treaty of international law which dealt with diplomatic intercourse was signed at the congress of Vienna in 1815. It took almost a century and a half before the nations came together and adopted the Vienna Convention on Diplomatic Relations, 1961, which began its activities in 1949. The problem of diplomatic intercourse and immunities was included among the topics which it was considered desirable and feasible to codify and in 1953 it was given priority by the commission.

In 1953, the ILC, appointed Professor A.E.F. Sandstrom as special rapporteur, and in the following year he put forward an outline of a convention, accompanied by an explanatory commentary. A draft article concluded by the ILC in 1958 served as a basis for the work of the Vienna Conference in 1961. The U.N. conference on Diplomatic Intercourse and Immunities met at the Neve-Hofburg from March 2nd to April 14th 1961, with delegates from eighty-one states represented. The conference was held in Vienna at the invitation of the Austrian government, who wished to establish a link between the conference and of the Vienna conference, congress 1815 it was indeed problems arising from the Second World War i.e. frequent and rapid changes in the relations of states, which brought the realisation to the Vienna Conference, that international law could transform any practice that is disputed up to the time of signing the treaty into a rule of law.<sup>2</sup>

It is because of this that it has been asserted that the Vienna Convention on Diplomatic Relations is undoubtedly the most important document on the subject that exists, besides being a landmark of the highest significance in the codification of international law. In spite of the fact that diplomacy may develop in other directions, and also in spite of the fact that some of its provisions have been the subject of a lot of criticism and controversy, the approved text is still highly satisfactory and lays down standards that are very relevant to present-day conditions.

Briefly under the 1961 convention, diplomatic agents and their families are considered inviolable and immune from the criminal and, subject to minor exceptions, civil jurisdiction of the receiving states. In principle, they are exempted from all dues and taxes with exceptions such as indirect taxes included in the price of goods and taxes on private immovable property. They also enjoy exemption from customs duties given for articles for the official use of a diplomatic mission or the personal use of the agent or members of his family forming part of his household.<sup>3</sup> The objectives of this privileged treatment granted to foreign envoys and their staff is twofold: on the one hand, it is taken as a token of respect for the sending state; and, secondly, on the other hand, it is to ensure that foreign envoys are able to function in the receiving state without fear of pressure of any kind. It is with the latter that we are greatly concerned. This is what is otherwise called the 'functional theory' of immunity of diplomatic envoys; the very principle on which the jurisdictional immunity of a diplomatic envoy is based, in that he should be free to perform official business on behalf of his country, without disturbance, interference, or interruption. This principle applies as to cast a shield of inviolability over the legation premises, all property held for the better fulfilment of the envoy's mission, and means of transport<sup>4</sup> - i.e. Article 22 of the Vienna Convention. The draftsmen felt that the convention was so fundamental not only to the growth of diplomacy, but also touched on the very core of human relations worldwide, and therefore incorporated it into being the first

chapter of the diplomatic code of the United Nations Charter; Chapter one of the U.N. Charter dealing with the purposes and principles - states in Article 1 (2) that: the purposes of the U.N. are "To develop friendly relations among nations...."<sup>5</sup>

However, events that occurred in the last few years have upset the international public by various attacks on persons entitled to special protection under international law. Such acts of atrocities directed at diplomats includes kidnapping, killing and even hijacking of planes by some terrorist groups. The query is, what can the international society do to ensure that the diplomats privileges and immunities are uninhibited and that there is a conducive atmosphere for them to discharge their obligations to the sending country in their various postings?

#### PERSONS ENTITLED TO DIPLOMATIC PRIVILEGES AND IMMUNITIES.<sup>6</sup>

Diplomatic privileges and immunities are founded on customary practice of many years. Ambassadors and their staff are deemed to act independently of any local pressure in negotiations carried on behalf of a foreign state; they are to be protected from any attack or harassment, they should also be accorded the means of free communication with their own governments. It is because of the above that diplomats are essential to the conduct of relations between independent sovereign states. To augment these rules of comity, it is added a basis of reciprocity, which has proved a most effective guarantee of observance of the rules. Any government that fails to accord privileges and immunities to a diplomat within its territories, knows that it risks not only, collective protect by Corps Diplomatique in its own capital, but, also faces, reprisals against it's own representatives by the government whose diplomatic agent it has injured. Diplomatic privileges are also extended to the family members of a diplomat. The domestic servants of a diplomat are also treated, the same way the other employees of the Embassy are treated, they do also enjoy the privileges and immunities of a diplomatic agent.

IMMUNITES OF DIPLOMATIC AGENTS

These are the immunities accorded to the agent personally and includes personal inviolability and immunity from criminal, civil and administrative jurisdiction. Privilege denotes some substantive exemption from laws and regulations, such as those relating to taxation or social security; Whereas immunity does not imply any exemption from substantive law, but confers a procedural protection from the enforcement processes in the receiving state.<sup>7</sup> The diplomatic agent is legally bound to respect the laws and regulations of the receiving state (provided that these do not infringe his privileges and immunities). He is not exempt from the obligation to obey the local criminal law or the duty to pay his debts, or to seek local planning permission before rebuilding his residence, or from local regulations regarding the maintenance, and insurance of his vehicle when he decides. But if he breaks any of these laws, he cannot be arrested or detained by the executive authority of the receiving state; and he cannot be tried, sued or made to testify before the judicial authority of that state.

Article 29 of the Vienna Convention deals with the personal inviolability of a diplomatic agent. This is of all the privileges and immunities of missions and diplomats, the oldest established and the most universally recognised. In ancient Europe, it can be traced back to the Religious protection accorded among the Greek heralds who were sent as emissaries to states in war, and later, to envoys who undertook peacetime missions. In Britain what necessitates the custom of diplomacy being made into law, was the incident involving a Russian Ambassador who was dragged from his coach and brought before the judges by very angry creditors. The British government quickly apologised to the government of Russia, this led to the founding of The Act of Anne 1708, otherwise known as The Diplomatic Privileges Act. Article 29 has two aspects as regards the personal impregnability of a diplomatic agent: "He shall not be liable to any form of arrest or detention." This can be taken to mean that the diplomatic

agent is immune to any action by the law enforcing/ment officers of the receiving state. The second aspect is that of a special entry of protection: "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." With regard to the second issue, many states have created special offences in regard to attacks on diplomatis, or to offences against diplomats with especially severe penalties.

The glaring lacuna here is that, the Vienna convention does not make the creation of special offers or penalties compulsory; nor does the convention on the prevention and Punishment of crimes against Internationally protected persons,<sup>8</sup> include Diplomatic agents., which however, obliges state parties to "make these crimes punishable by appropriate penalties which take into account their grave nature." What is considered appropriate is however still open to debate. "The crimes" include murder, kidnapping, other violent attacks and threats, and attempts to commit such attacks, for example in the evidence of a threat to the safety of a diplomat, the sending state may demand that receiving state should provide armed guard as special protection. This was the case/1970 of the kidnapping of the /i: German Ambassador to Guatemala, Count Von Spreti. The Guatemalan government had refused to accept illegal demands made by the kidnappers, this led to the murdering of the Count. The German government felt that Guatemala had failed to provide protection to their diplomat. The international Community was outrageous but still contended that, granted, a receiving state must give protection to diplomatic agents, it however, precluded the states surrendering to demands made by kidnappers.

Article 29, is therefore only a restatement of existing customs. Even in antiquity, the diplomatic envoy, in time of peace was universally held as sacrosanct.

It was only during the 16th Century that the inviolability of the ambassador was firmly established as a rule of customary international law.<sup>9</sup> It was at this time that the earliest treaties on diplomatic law were enacted.<sup>10</sup> How this provision of the Vienna convention has been abused will be discussed the next chapter.

#### INVIOIABILITY OF RESIDENCE AND PROPERTY

This runs simultaneously with inviolability of diplomatic agent, and is also a long establishment in Customary International Law - whose exact scope cannot be fathomed. Article 30 of the Vienna convention can, and has been construed to mean that, the diplomatic agent and his property enjoy free use of his premises and property without any undue or external pressures of the receiving states - most of the latter states in practice apply their regulations to foreigners or diplomats in such a way that they do not experience practical difficulties. If any state did not do so, it could be argued that it was failing its duty under Article 25 to "accord full facilities for the performance of the functions of the missions." In the Agbor V Metropolitan Police Commissioner," The Court of Appeal held that the Executive was not entitled to exercise their special duty of protection so as to evict without prior application for a court order. It went further and stated that the state had no right to use their law because <sup>occasio h. 20</sup> inconvenience to diplomatic agents.

Article 30, goes further and states that the papers and correspondence, and the property of a diplomatic agent shall also enjoy inviolability. In the case of his property the inviolability does not apply where there is an exception to his immunity from civil jurisdiction provided that the execution can be levied without infringing the inviolability of his person or residence such that it is possible to tow-away an obstructing vehicle belonging to a diplomat under the same conditions as an official embassy car. The inviolability of a diplomatic property does not mean that he is exempt from the laws and regulations of the receiving state regarding exchan

He must respect the laws and regulations of the receiving state, Article 41.

IMMUNITY FROM CRIMINAL JURISDICTION.<sup>12</sup>

In the 16th and 17th Centuries, the state practice was that if a diplomatic agent or ambassador was charged with conspiracy or treason against the receiving state, nothing could be done to him - that is to say, he was still immune from criminal jurisdiction of that state. He cannot be tried or punished by the local courts. However, in the case of a serious criminal offence, the receiving state may declare the diplomat, a persona non-grata, and once this has been done, the sending state is under an obligation to withdraw him. Article 31 of the Vienna convention provides that "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving states"

This proviso also extends to the families of diplomats; that they shall enjoy jurisdictional immunity in the receiving states, whose courts therefore are not competent to pass judgment on them. This privilege, even though contested in certain circumstances, has a long tradition behind it and is generally recognised in every country. The word immunity is employed in the Vienna Convention, in those cases in which the judiciary intervenes and the recognition of exemption from local law and jurisdiction is implied.

In the 15th and 16th centuries, many theories were put forward by text writers to explain both the legal position of diplomats and the fundamental of their privileges and immunities. Three theories were advanced by the International Law Commission in its commentary on Article 18; namely the extraterritoriality theory; the representative character theory and lastly, the functional necessity theory. The commission was guided by the functional necessity theory in solving problems on which practice gave no clear pointer while also bearing in mind the representative character of the head of mission and of the mission itself. The extraterritoriality theory and the

representative character theory are really not taken into consideration in modern times there is no doubt that in the past it had enormous influence in defining diplomatic privileges and immunities. It is in the teaching of Grotius that we find the idea which was developed later on by doctrine: the paragraph reads as follows:

"My unqualified conclusion, therefore, is that the rule has been accepted by the notions that the common custom, which makes a person who lives in foreign territory subject to that country, admits an exception in the case of ambassadors. Ambassadors as if by a kind of fiction are considered to represent those who sent them. In consequence, by a similar fiction they are, as it were, extra territorium, and thus are not bound to the civil law of the state within which they are living."<sup>13</sup>

It's worthwhile to note that Grotius was only speaking figuratively. However, later, writers were able to unite every privilege and immunity in a single theory and reconcile the principle of the territoriality of laws with the exceptional status of diplomats. In the present century, it was realised that a new legal basis had to be found and the expression itself is gradually being abandoned even though it is sometimes still used. Montell Ogden, author of the most important work on the basis of diplomatic immunity, concludes that

"With all difference to the role which the fiction of extra-territoriality played in the formative period of the law, and recognising that the term fairly aptly described the position of the Seventeenth Century ambassador, it may be safely concluded that the fiction does not furnish a sound reason for immunity, that if conflicts with recognized usage, produces undesirable results, is misleading and cannot be relied upon as a fact in determining what the law is. Finally it may be added that it is of no value to states today that are interested in moulding the law to fit social and economic needs."<sup>14</sup>

The representative character theory bases the privileges and immunities on the idea that the diplomatic mission personifies the sending state.



Originally it was linked to the theory of the ambassador as representative of his prince abroad, any injury he suffered being considered an affront to his sovereign. This theory also springs from the quotation from Grotius. Later on it was modified, and it began to be held that the ambassador represented the sending state. The preamble to the Havana Convention of 1928 recognises that:

"Diplomatic officers do not in any case represent the person of the Chief of State but only their government"

None of the representative character theories provides an entirely satisfactory explanation since they are often illogical or inapplicable. But even though the ILC was guided by the functional necessity it also bore in mind the representative character of the head of the mission and the mission itself. The text that was finally adopted in Vienna did not completely discard this theory and the preamble recognizes the diplomatic mission "as representing states."

The functional necessity theory corresponds more closely to the first stage of the international intercourse in which there is a marked attempt to reduce the number of diplomatic privileges granted to diplomatic agents and, above all, to the other members of the diplomatic mission. By linking the granting of privileges and immunities to the performance of functions, and refusing them when no such link exists, doctrine and practice is able to avoid certain abuses. Like the other theories, the functional necessity theory however is not altogether satisfactory and can give rise to restrictive interpretations which might be detrimental to international relations.

It need only be said that the theory which differentiates between the official and private activities of a diplomatic agent, refusing privileges and immunities in the latter case, springs from the functional necessity theory. In spite of its shortcomings, the functional necessity theory was considered highly suitable and was indeed used by the international law commission in solving problems on which practice was still unsatisfactory, and it was

considered the basic theory by the Vienna Convention on Diplomatic Relations. Thus it can be said that the law ensures EN MASSE complete immunity of the diplomatic agent from any legal process, but not immunity from the law.<sup>16</sup>

#### IMMUNITY FROM CIVIL JURISDICTION<sup>17</sup>

Immunity from civil jurisdiction was established much later after criminal jurisdiction. The magnificence of the unexpected in the lifestyle of an ambassador was not supported by allowance from the sending sovereign, ambassadors were often obliged to incur debts, or engage in trading, to obtain money to pay for the necessary display. Embarrassing incidents led to the enactment of legislation to put the position beyond doubt. The immunity from civil and administrative jurisdiction of a diplomat is restated in article 31. This immunity in a certain sense, is the most important privilege enjoyed by a diplomatic agent owing to the high number of cases submitted to municipal courts. Unlike the criminal immunity, the civil immunity is not absolute, since the Vienna Convention enumerates cases in which the diplomatic agents can be prosecuted in local courts. Existing national law and the rule of most courts however, seem inclined to favour absolute exemption. Historically, immunity from civil jurisdiction derives from the personal inviolability of the diplomatic agent. The Act of Anne (1708) was enacted as a consequence of the arrest of the Russian Ambassador in London in July 21, 1708. The incident was most embarrassing because arrest for debt was then lawful in England. Those responsible for the arrest were remanded before the privy council and condemned and the court held that "by the law of nations, neither an ambassador nor any of his train or comites, can be persecuted for any debt or contract in the courts or that kingdom wherein he is sent to reside."

However, article 31 lays down three important exceptions to civil immunity, such exceptions were not previously admitted in common law countries:

(1) A real action relating to private immovable property situated in the territory of the receiving state, unless the diplomatic agent holds it on behalf of the sending state for the purposes of the mission.

To determine what 'real action' is, one has to look to civil law. In common parlance, it simply means an action where ownership or possession of immovable property is claimed.

(2) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; Diplomats, especially consuls get involved in matters of succession in an official capacity, - if a national of his own state dies in receiving state, leaving money to other nationals in his own state, the diplomat may become involved in the distribution of the estate, or in claiming on behalf of his government for taxes owed, or for the estate itself, as 'bona Vacantia'. If there's no heir(s) either by will or intestacy; the diplomat enjoys immunity as usual. But any involvement in a private capacity in matters of succession, on the other hand, is not part of his functions, hence the interests of the receiving state in ascertaining jurisdiction over all parties involved in a succession question is regarded as paramount.

(3) An action relating to any professional / commercial activity exercised / by the diplomatic agent in the receiving state outside his official functions

Article 42, prohibits a diplomat from exercising in the receiving state for personal profit, any professional or commercial activity. A diplomat may disregard the prohibition on professional or commercial activities. The fact that immunity from civil jurisdiction does not extend to professional or commercial activities make it easier for the wife or daughter of a diplomat to practice her own profession or to take a job in the receiving state.

State practice is to discourage diplomatic family members from taking employment either to reserve it for its own nationals, or due to scarcity of employment, or for social reasons e.t.c.

A diplomatic agent is immune from any measures of execution. Even if his government waives his immunity from jurisdiction, the resulting judgement cannot be enforced unless there's a separate waiver, except in the three exceptions to jurisdiction. The diplomat enjoys immunity from execution. If any judgement is obtained against a diplomatic agent in respect of any private business activity, it can be enforced as long as it does not infringe his personal inviolability or that of his residence. His business stocks might be siezed, but his house cannot be entered. No bankruptcy proceedings can be instituted against him; He is also not bound to give evidence at an inquest or to give evidence as a witness in any legal proceedings. To wrap it all up, the diplomatic agent is exempt from any legal obligation in the matter.

Article 42, it has been asserted, merely creates a moral obligation and may be considered redundant, since it is in article 31, that we find the real operative article. Even though national legislations may forbid the exercise of professional or commercial activities incompatible with diplomatic functions, the agent may abusively take advantage of his privileged situation, and in such a case it is necessary to consider the local courts competent. It would make more sense if the sending state also forbids its agents from exercising other functions incompatible with their privileged states, and established the penalties for those who infringe them. Should the receiving state feel that the diplomatic agent has overstepped the limits permitted by international law, it can declare him persona-non-grata.

In addition to Article 31 (2) - "A diplomatic agent is not obliged to give evidence as a witness" one can also say that the rule in the Vienna Convention corresponds to internationally accepted practice; according to which a

diplomatic agent cannot be obliged to bear witness in court, even though he should, whenever possible co-operate with the local authorities. The Havana Convention (1928) on diplomatic officers states clearly that diplomats "May refuse to appear as witnesses before the territorial courts."

The convention on consular Relations, is more explicit and states that "in criminal cases the prosecution or the defence may request attendance of consular agents at the trial as witnesses." John Bassett Moore mentions the case of the Netherland's Minister at Washington who, in 1856, was requested by the secretary of state to appear in court to give evidence regarding a homicide committed in his presence. He had refused. Representations were made to the Netherlands government by that of the United states, which, while admitting that in virtue of international usage and the law of the United States, the Minister had the right of refusal, appealed to the general sense of justice of the Netherlands Government. The latter, however, declined to give the desired instruction, but authorized the Minister to make his declaration under oath, and he accordingly offered to do so at the department of State, adding that he could not be submitted to cross-examination. The offer was declined. Thus, one sees that as a consequence of his immunity from local jurisdiction, a diplomatic agent cannot be obliged to give evidence either in civil or criminal proceedings. If a diplomatic agent could be compelled to be a witness and this would consequently involve disrespect of his personal inviolability - a judge or a lawyer might be able to force him to disclose confidential documents or information. Article 31 of the convention recognizes the diplomatic agent's right not to give evidence, but article 32 makes it possible for him to waive his immunity, thus permitting him to offer his collaboration in clearing up a problem.

#### WAIVER OF IMMUNITY FROM JURISDICTION

The general opinion is that a diplomatic agent cannot on his own initiative, waive his immunity, since such immunity is not granted in his personal

interest, but exclusively in the interest of the sending state. This position was firmly endorsed by the Vienna Convention and is in harmony with the basic position adopted as regards privileges and immunity, namely that "The purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states."<sup>18</sup>

Article 32 of the Vienna Convention provides that "the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending state". This simply means that waiver of immunity belongs to the state and any waiver must therefore come from the state and not the recipient of immunity.<sup>19</sup>

#### PRIVILEGES OF DIPLOMATIC AGENTS.<sup>20</sup>

Five privileges accorded to diplomatic agents are specifically dealt with in the Vienna Convention i.e. firstly, Exemption from taxation; secondly, exemption from customs duties and baggage inspection; thirdly, exemption from social security obligations; fourthly, exemptions from personal and public services; fifthly, exemption from certain laws of the receiving state regarding the acquisition of nationality.

Exemption from Taxation is probably the most important of a diplomat's personal privileges. It was established under customary international law; and only varied in the exceptions which they admitted to the general principles in states. It is difficult to deduce general principles from the divergent and detailed provisions in tax law of different states. Articles 34, of the Vienna Convention now provides in general terms that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, and sets out a list of exceptions to the general rule. There appears to be three types of taxation where a diplomat is not entitled to exemption. These are described in the Vienna Convention as (a) indirect taxes of a kind which are normally incorporated in the

price of goods or services. Taxes in this category include purchase tax, value added tax, sales tax, airport tax. Some countries do in fact make arrangements under which a diplomat may escape paying sales tax as its local equivalent. The United Kingdom authorities make refunds in respect of value added tax or car tax on only three categories of purchase - Cars (to heads of mission only), spirits and fine furnishing. In each case the articles must have been manufactured in the United Kingdom. The tax is substantial in these three cases and the U.K. wish to encourage diplomats to buy a British-made article rather than take advantage of their exemption from customs duty to import foreign equivalents more cheaply.

The second category of tax which the diplomat must pay relates to activities which are extraneous to his proper activities in the receiving state. He must pay taxes on private immovable property in the receiving state 'unless he holds it on behalf of the sending state for the purposes of the mission.' Holiday homes and premises which are leased are on the other hand extraneous to diplomatic activities and therefore properly taxable.

The other exception is where the diplomat is liable to tax is 'estate succession or inheritance duties levied by the receiving state, subject to the provisions of paragraph 4 of Article 39.' Article 39 (4) in the special context of the death of a member of the mission deals with the question of export of his personal property (which must be permitted, with the exception of property acquired in the Country of the export of which was prohibited at the time of the death) and with estate duty. It provides that 'estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving state was due solely to the presence thereof the deceased as a member of the mission or as a member of the family of a member of the mission. These provisions taken together show the same functional approach to the question of tax exemption; the diplomat should not pay tax, or his estate be liable, in respect of matters which are a necessary part of his living and working in the receiving state.

But if he acquires a substantial fortune or holds property in the receiving state which has no relation to his functions, estate or succession duty is payable on it.

The third exemption to tax exemption which most clearly relates to matters which are not necessary part of diplomatic work in the receiving state is "dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving state." If the diplomat lets property privately or makes profit from investing on stock exchange in the receiving state, he is liable to pay tax on those profits. The last category of tax which the diplomat is liable to pay is the tax which is in reality in charge for a service. Article 34 lists among the exceptions to the general rule 'charges levied for specific services rendered.' The most frequent application of this exception is made liable to that part of local rates or taxes which relates to services rendered to the property, so under Article 34 the diplomat must pay such charges in relation to his residence. The finance exception listed in Article 34. "registration, court or record, fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23;" May be regarded as an example of the same principles. The dues described are, in general, not imposed in order to raise revenue but to cover the administrative cost of providing the service of registration of immovable property. Embassy premises are however, exempt from these dues.

Article 34 is of necessity cast in very general terms, and to ascertain the precise position it is necessary to examine the tax laws, or at least the information circulated to embassies in each state party to the convention. There are sometimes difficulties in applying the convention to a particular new law tax, and differences between sending and receiving states as to whether a particular tax has been correctly classed. In these cases it is usually necessary to exercise the purpose and nature of the particular tax, and it may also be helpful to ask whether on general grounds of principle described an exception may be justified because relief would be administratively



impractical, because the tax relates to essentially and extraneous activities or because the tax is in reality a charge for a service.

#### CUSTOM DUTIES AND BAGGAGE SEARCH EXEMPTION.<sup>24</sup>

There is a general agreement among writers on international law that diplomatic agents do not enjoy as of right immunity from the payment of customs dues upon their property.<sup>22</sup> According to Vattel, among the rights which are not essential to the success of embassies there are certain ones which, though not based upon a general agreement on the part of nations, are nevertheless annexed to the representative character by custom in many activities. Such is the privilege by which ministers are exempted from the payment of import or export duties upon property which they bring into or send out of the country. There's no necessity for this exemption, since the payment of those duties would not render the minister less able to perform his functions. If the sovereign is pleased to exempt him from them it is a courtesy, which the minister cannot claim as a right. Thus one finds that this privilege is a mere usage under customary international law; and has no legal validity. It should only apply to goods for the mission's use and for the diplomat's personal and family use. In enjoying this privileges, the diplomatic agent must conform to the rules and laws of the receiving state. Genat, calls freedom from customs "an integral part of the privilege of a diplomatic agent."<sup>23</sup> which has survived to our day despite abuses constantly denounced. Oppenheim on the other hand states that "As regards customs duties, International Law imposes no obligation of exemption therefrom." He adds 'in practice, and by courtesy, however, the Municipal Laws of many states allow diplomatic envoys, within certain limits, to receive free from duty goods intended for their own private use.'<sup>24</sup> In the U.K. the practice is that the customs privileges accorded to foreign diplomatic officers are of two kinds. The first kind is granted to all heads of mission in the country and consist of exemption from examination of baggage on first arrival and subsequently on production of a baggage pass, and delivery duty-free of imported packages for the personal use of the head of the mission and that of his family.

The second kind is granted to certain countries on a reciprocal basis and extends to certain members of diplomatic staffs only, viz; counsellors, secretary (ies) and attach'ees to embassies and legations. No quantitative restriction is placed on deliveries of imported dutiable goods to privilege officials, although it is expected that the quantities imported will not be excessive as to amount to abuse of privilege.

The United States position is slightly different from the British one - i.e. in looking at the Instructions to Diplomatic officers of the United States, 1927; it is stated that:

"It is common usage in international intercourse that to a diplomatic representative should be conceded the privileges of importation of effects for his personal or official use or for the use of his immediate family, without payment of customs therefore... The practice of the United States is to accord such privilege to Chiefs of missions and on a reciprocal basis to members of their staff."

Thus conclusively it can be said that it's clear that most countries allow free entry for articles destined for use in a foreign embassy, or for the use of the ambassador and his family, members of his staff, and their families: It is equally clear that this is a concession originally resting upon courtesy or comity, and in nearly all cases it is dependant on reciprocity. There is, however, wide divergence between the laws of the various states on this subject, both as to the classes of members of a diplomatic mission who are granted exemption, and as to the kind and value of articles in respect of which the exemption is granted. There is also wide variation from state to state in the way in which customs formalities are modified or waived in connection with the grant of exemption.

Despite the variations mentioned, however, and although the exemptions are by no means essential to the successful functioning of a mission, the practice of granting them is now so widespread and so firmly established that one might be tempted to ask whether the custom of granting concessions has not hardened into a rule of law.

On the other hand, it is difficult to see how it can justly be ascertained that liability to pay customs dues is a hindrance to a diplomatic representative, and that being the case, the exemptions must be regarded as being still what they originally were - concessions based on international comity or courtesy - However, in 1961, the Vienna convention codified these rules of comity into being law and is governed by Articles 34 & 36.

Other privileges and immunities are there, I shall give only a cursory glance at them, because to go into details about them would be to open yet a new chapter. Diplomatic agents, their family members, junior staff and local nationals are exempted from social security. Articles 29-36 of the Vienna convention governs this. What forms part of a family is agreed upon by states.

Also of equal importance is the freedom of movement granted to diplomatic envoys - Article 26 is to the effect "the receiving state shall ensure to all members of the mission freedom of movement and travel in its territory:" the only exception being regulations concerning zones entry into which is prohibited or regulated for reasons of national security.

With regards to movement of communications Article 27 of the Vienna Convention

- Oppenheim stated: "It is.. clear that if their full and free intercourse with their home states through letters, telegrams, and couriers were liable to interference, the objects of their missions could not be fulfilled. In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home states."<sup>25</sup>

This privilege is perhaps one of the most vital of those required by and accorded to envoys. It enables them to receive instructions from their sending state and to send home reports of what they have done; said and observed. The privilege consists of the transmission without delay of the envoys' communications and the immunity of those communications from any form of censorship. The communications may be sent by post or telegraph, use of code

In a diplomatic bag or by courier; and the courier must enjoy a degree of freedom of movement similar to that of the ambassador himself. The privilege is in fact that of the ambassador, and it attaches to his messenger because it's necessary for the interest or convenience of the ambassador that his messages are passed freely and without delay. Hence messengers and couriers are said to be entitled to safe conduct and to freedom from interference with their persons or dispatches. When bearing official dispatches to and from foreign embassies, they are exempt from local jurisdiction even in third countries which they may have to traverse in the performance of their duties. The immunity of couriers and dispatches from all interference is of long standing. Phillimone, points out that the right of inviolability extends to whatever is necessary for the discharge of ambassadorial functions so that the ambassadors are inviolable; in particular, the ambassador's correspondence cannot be opened and inspected by the officials of the receiving state.

In conclusion, therefore it can be said that the decision whether a person is entitled to diplomatic status is for the Executive. These rights and privileges flowing from diplomatic status, if extended beyond the minimum necessary to enable an envoy to fulfil his mission, may be abused to the prejudice of other, unprivileged, individuals. It is therefore important to establish which privileges are rightly and properly granted as being based on rules of international law and founded on the necessity of avoiding evacuation with regard to diplomatic persons; such rights cannot lightly be withdrawn, if indeed they can lawfully be withdrawn at all time of peace. Other privileges can be shown to be based on nothing more than international courtesy, not amounting to binding custom, or administrative convenience. They often have no other basis than the mystique which surrounds the ambassadorial office. Recent events have, however, shown that there is widespread violation of diplomatic privileges and immunities. The person of the diplomatic agent has been abused. In 1980, the United States embassy staff in Teheran were subject to a lot of suffering, they were held hostages

in their embassy and holed there for a long time by Iranians. What happened caused a lot of worldwide outrage. This culminated in the United States bringing a claim on behalf of its citizens held in Iran before the International Court of Justice.<sup>26</sup>

More often than not, diplomatic agents do use their privileged position to completely disregard the law of the sending state. Many diplomats are found in gross misconduct, they violate traffic laws, do not honour their debts and in the U.K. and U.S. many diplomatic agents and even their family members are involved in rape cases, assault, shoplifting and many more petty and serious offences. The pathetic situation is reflected so much by one particular event that shocked the whole world; the shooting of a police constable Ms. Yvonne Fletcher in April 1984 (81) by Libyan Embassy officials in London. The gun that probably was used in the shooting had been smuggled in the diplomatic bag, and since it goes against the cardinal rules of international law, the bag could not be searched. This brings me to the next point, the abuse of the diplomatic bag by diplomat's agents. The bag has been used to kidnap persons wanted to answer charges in their respective countries - the Umaru Dikko affair.<sup>27</sup> It is my contention that a lot needs to be done in the area of diplomatic privileges and immunities. Diplomats, everywhere are abusing their rights: either because the powers they are given are too extensive, or because immunity is granted to persons who in actual fact do not need it e.g. the case of domestic servants of diplomatic agents and the subordinate staff of foreign embassies. I feel that strident measures should be taken when applying these privileges and immunities, this will be handled later in Chapter IV. The worst crimes so far that is related to the abuse of diplomatic immunity is espionage because the diplomatic agent as a member of the diplomatic mission is immune from local criminal jurisdiction. One of the main ways in which diplomats have made use of these immunities is to collect intelligence about the receiving state. The immunities and privileges attaching to the mission itself encourage clandestine intelligence gathering activities of the diplomatic staff. This is not yet a problem in the third world but in the

Western World and Eastern block countries, it is the order of the day. In short, it is my contention that some articles of the Vienna Convention should be reviewed; it is only when this is done that one can start talking about the privileges and immunities of the diplomatic agent being given not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states.

CHAPTER THREETHE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES.INTRODUCTION.

It has frequently been observed that there is generally good compliance with the law of diplomatic immunity because here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest. Virtually every state that is host to a foreign diplomatic mission will have its own embassy in the territory of the sending state. Every state wants its own diplomats operating abroad, and its own diplomatic bags, embassies and archives to receive those protections that are provided by international law. Honouring those same obligations vis-a-vis the diplomatic community in one's own country is widely perceived as a major factor in ensuring that there is no erosion of the international law requirements on diplomatic privileges and immunities.

Diplomatic law governs the conduct of relations between the representative organs of a state operating within the territory of another state, and the receiving state. Its purpose is to facilitate international diplomacy, balancing the pursuit of the foreign policy interests of the sending state with respect for the territorial sovereignty of the receiving state. Diplomatic immunity is an exception to the general rule of territorial jurisdiction. It allows diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. But it still contributes to the balancing of interests between the sending and receiving state; because immunity does not entitle diplomats to flout local laws.

There are many types of missions for the conduct of international diplomacy for example visits by heads of governments or other permanent officials e.t.c.

To a certain extent each type has become governed by its own specific body of diplomatic law, i.e. The U.N. Charter 1945, the convention on the privileges and immunities of the specialized agencies of the U.N., 1947 and many relevant bilateral agreements. But permanent missions established by states within each other's territory have become the mainstay of international intercourse. The 1961 Vienna Convention on Diplomatic

Relations is agreed to be largely confirmatory of existing customary law, and for about 15 years, it was generally fairly felt that the provisions of the Vienna Convention did indeed provide a fair balance between the interests of the sending and receiving states.

But in many of the major capitals of the world, it came to be felt that diplomats were abusing the privileged status given to their vehicles, and in particular parking illegally, causing obstructions and failing to pay traffic fines. This feeling was, of course, compounded in a country such as the U.S. which was also host in New York of the U.N. and important specialised agencies. By contrast, there was much less public awareness of traffic violations by the diplomatic community in London; e.g. from 1974 to mid 1984, there was an average of 71,000 cancelled parking tickets in London annually. The U.K. is a host to a fairly limited number of international organisations including the international maritime organisation. The privilege and immunities that they have been granted are limited and they have not been a major source of traffic or parking violations.<sup>1</sup>

Looking at the diplomatic abuse of privilege and immunities in the U.K., cases of shoplifting and other offences were rampant in London. In the period of 1974 to Mid - 1984, there were 546 occasions on which persons avoided arrest or prosecution for alleged serious offences (i.e. offences carrying a potential sentence of six months imprisonments or greater) because of diplomatic immunity.<sup>2</sup> However, it was in the mid 1970's that more worrying problems developed. It became clear that certain diplomatic missions were holding firearms, contrary to the provisions of local laws. Further, it seemed that these firearms were often being imported through the diplomatic bag. Article 27 (4) of the convention provides that the bag may contain only diplomatic documents or articles intended for official use. In recent years in various western countries there have also been terrorist incidents in which it was believed that the weapons used were provided from diplomatic



sources. It was widely thought that certain foreign governments were promoting state terrorism against dissident exiles, through the involvement of their embassies in the country concerned.<sup>3</sup> Every other day one hears of the so called revolutionary groups taking over their country's embassies and actually committing atrocities therein, and getting away with it, by virtue of article 22, which makes the premises of the mission inviolable. The officers of the receiving state are not to enter such premises unless with the consent of the sending state. In this chapter, my intention is to look at a few cases of the abuse of diplomatic privileges and immunities in our modern times and also to bring out some of the blatant lacun<sup>a</sup>es of international law. The abuses range from the violation of the premises of an embassy, the searching of diplomatic bags, Intelligence gathering activities in the receiving state.

#### THE VIOLATION OF THE PREMISES OF AN EMBASSY.<sup>4</sup>

In February, 1980, normal diplomatic communication with Libya Embassy in London was complicated by the fact that (as in other Western Capitals) the so-called revolutionary committees had taken over the embassy and re-named the embassy. "The Libyan People's Bureau" and refused to designate a person in charge of the mission.<sup>5</sup> On April 17th 1984, an orderly demonstration was held by Libyan opponents of Colonel Gaddafi's government on the pavement in St. James Square, London opposite the People's bureau. Both the foreign office in London and British Ambassador in Tripoli had been warned that if the demonstration were allowed to go ahead, Libya "would not be responsible for its consequences." Shots were fired from the windows of the Bureau, killing <sup>a</sup>woman police constable (WPC) Yvonne Fletcher, who was on duty in the square. The events immediately following were these;<sup>6</sup> the Libyan authorities in Tripoli were immediately asked to instruct those inside the Bureau to leave the building and to allow it to be searched for

weapons and explosives. This request was however, refused; and as a result of such a refusal, the British Embassy in Tripoli was the scene of hostile demonstrations and certain British citizens were unjustifiably arrested and detained. Her Majesty's government in a bid to terminating relations laid down some conditions:<sup>7</sup> firstly, that occupants of the bureau and all other Libyan diplomatic staff in the country should have safe custody out of the country. Secondly, that British diplomats were to leave Libya in safety. Thirdly, that the British government should be satisfied that all weapons and explosives were removed from the bureau and that it could no longer be used for terrorist acts. Incredible as it may sound, the Libyan government turned down these proposals.

A chain of events escalated from this already fermented situation. On April 20th, a bomb exploded in the luggage hall of Heathrow airport injuring twenty five people. There was widespread press speculation that it was connected to the incidents of St. James Square. The British government however reserved their position. On April 22nd the Libyans were notified that diplomatic relations would terminate at 6 p.m. that day and that all diplomatic staff and other persons in the Bureau were to leave by Mid-night 29th-30th April. The Home secretary announced various measures tightening the exercise of his discretionary powers in respect of Libyans already in the country or wishing to enter.<sup>8</sup> Consequently the Bureau was evacuated on 27th April 1984, those leaving were questioned and electronically searched. Diplomatic bags that left the bureau were not searched or scanned. The bureau was sealed and on 30th April 1984, was entered by the British authorities in the presence of a representative of the Saudi Arabian embassy and searched. Weapons and relevant forensic evidence were found.<sup>9</sup>

This one case is a clear illustration on how diplomatic agents have used their privileged status to break the laws of the receiving state.

The law enforcing officers of the receiving state cannot enter the mission premises unless with the permission of the diplomats in the embassy. The gun that killed WPC Fletcher was definitely brought in by way of the diplomatic bag and also left in the same way. Thus one can see that international law is not very effective in such instances. It is a toothless bull-dog laying down rules and regulations to govern diplomatic practice, but failing to carve out penalties to be meted out to states which violate such laws. The April 1984 incident dealt not only with the inviolability of the embassy, but also with the protection of the diplomatic bag from being opened or detained.<sup>11</sup> The way the British handled this unfortunate affair was quite admirable, given the fact that Libya's accession to the Vienna Convention had been qualified by a reservation that provided that were it to entertain:

"Strong doubts that the contents of a diplomatic pouch include items which may not be sent by diplomatic pouch in accordance with paragraphs 4 article 27 of the said convention, the socialist people's Libyan Arab Jamahiriya reserves its right to request the opening of such pouch in the presence of an official representative of the diplomatic mission concerned. If such a request is denied by the authorities of the sending state, the diplomatic bag shall be returned to its place of origin."<sup>12</sup>

The U.K.'s refusal to search the diplomats bags of the Libyans expelled from the bureau was generally assumed by the press and the television reports at the time to be part and parcel of the obligations laid upon the U.K. by the Vienna Convention. The United Kingdom government however conceded one point, that it's decision not to search the bags of the Libyan diplomats was actually a political decision, and claimed that its hands were tied by the requirements of international law.

The most recent case that shocked the World with regards to the violation of the mission premises was the case of The U.S. Diplomatic and Consular staff in Iran.<sup>13</sup> On November 4th 1979, a mob of about 300 young Iranians

stormed the U.S. embassy compound, Tehran, and overpowered the U.S. Marine guards, trapping therein some 60 Americans. Urged by their revolutionary leader Ayatollah Ruhollah Khomeini who denounced the American embassy as "centre of spying and plotting." The world watched in stunned disbelief when on Wednesday Nov. 7th 1979, the Iranian militants stated:

"any military or non-military attempts by the U.S. or its agents in Iran to free the American spies held as hostages in their embassy will cause their immediate execution."<sup>14</sup>

Iran's major quarrel with the U.S. was the latter's acceptance of the ousted Shah of Iran to go for treatment there. Iran wanted the Shah to be handed over to them for a trial. The treatment of the U.S. embassy staff members by the Iranians was one of the vilest forms of the violation of mission premises. The persons of the diplomatic agents were also the subject of humiliation, they were blindfolded and paraded before hostile mobs. The Iranian militants also begun publishing confidential U.S. diplomatic papers as evidence of an alleged U.S. plot to give asylum to the Shah,<sup>15</sup> thereby violating the rule that the archives and documents of the mission are inviolable and also the rule that the receiving state is to give full facilities for the performance of functions of the mission,<sup>17</sup> the Iranian government also failed to protect communications for official purposes<sup>18</sup>. Underlying all these was the accusation that the U.S. embassy was the very nerve-centre for intelligence gathering activities. When the U.S. denied that they would surrender the Shah, Khomeini said:

"The U.S. government by keeping the Shah has declared its open opposition to Iran. The U.S. Embassy in Iran is our enemies centre of espionage against our sacred Islamic movement."<sup>19</sup>

The seizure of the American embassy and the holding of hostages for 444 days had far-reaching consequences. There was a world-wide denunciation of Ayatolla's ignorance and lack of respect for international laws governing

diplomatic relations and immunity. His mis-use of Islam to attain political gains was condemned even by Iran's Revolutionary Council. On November 19th 1979, the spiritual leader of students holding the American embassy vowed to put on trial hostages accused of spying. On November 23rd 1979, rioting mobs attacked the U.S. embassy in Islamabad; The U.S. cultural centre in Harare and Rawalpindi and burned a British Library in Rawalpindi. In apologising to the U.S. for the embassy raid, President of Pakistan Zia-ul-haq said that muslims have a sacred duty to protect foreign embassies.

President Carter in retaliation, put bans on oil from Iran.<sup>20</sup> Almost immediately he was seen to be freezing Iranian assets, Carter acted to "block" all official Iranian assets in the U.S. after the Iranian government announced that it would withdraw some twelve billion dollars in deposits from American banks and switch them to friendly countries. This brought in another and totally different dimension / the cold war between Iran and the U.S. With the United Nations security council and the O.P.E.C. emerging as the next battlefields. The U.S. on 16th November, 1979 blocked an attempt by Iran to arraign it before the security council of the U.N. This was seen as a moral defeat for America by the Iranians, who consequently stepped up their threats and claimed that if the U.S. forced the ousted Shah to go to any country but Iran, harsh actions would be taken against hostages inside the besieged mission. Carter charged the Iranian leaders with encouraging terrorism.

"The U.S.A. will not yield to international terrorism or to blackmail;" he said.<sup>21</sup>

This hostage crisis provided compelling evidence of a leadership prepared to take extraordinary international risks in pursuit of its domestic agenda.

Khomeini demonstrated a cool and calculated ability to manipulate events for its own benefit and to function purposefully in the midst of political and economic tumult. The leadership in Iran also displayed an appreciation for damage limitation, as when it quietly squelched calls for a hostage trial and expelled a hostage who was seriously ill in order to avoid probable U.S. retaliation. The leadership in Tehran showed itself to be exquisitely sensitive to its own internal priorities, immensely stubborn and tenacious in the face of nearly universal reproach. Flexible and calculating in minimising tactical damage to its own interests and thoroughly pragmatic, even non-ideological - when it determined that the game was no longer worth the candle. The seizure of the U.S. embassy in Tehran, showed Iran's irrationality in pursuit of idiosyncratic religion revolutionary goals, as well as being a formidable adversary.<sup>22</sup>

The government of Iran in tolerating, encouraging and failing to prevent and punish the conduct described in the preceding statement of facts, violated its international legal obligations to the U.S. as provided by articles 2 (3) of the U.N. charter which stipulates that:

"All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered:"

and also Article 2 (4) which is to the effect that all members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state. The government of Iran also violated a cardinal principle of the U.N. Charter i.e. the *peaceful* \* settlement of disputes article 33.

The international court of Justice found that Iran by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable

rules of general international law, has incurred responsibility towards the United States. The court also held that to wrongfully deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations; as well as with the fundamental principles enumerated in the universal Declaration of Human Rights. The court made a point of stressing that obligations laid on states by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between states in the inter-dependent world of today.

"There is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose."<sup>23</sup>

It was on this basis, that the court unanimously held that the government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4th November 1979 and what follows from these events, and to that end:

(a) Must immediately terminate the unlawful detention of the U.S. charge d'affaires and other diplomatic and consular staff and other U.S. nationals now held hostage in Iran and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention<sup>24</sup>)

(b) Must ensure that all said persons have the necessary means of leaving Iranian territory, including means of transport;<sup>25</sup>

(c) Must immediately place in the hands of the protecting power the premises, property, archives and documents of the U.S. Embassy in Tehran and of its Consulates in Iran;<sup>26</sup> The fourth decision was also unanimous,

the court stated that no member of the U.S. Diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness.<sup>27</sup>

It is ironical to note that it took the U.S. government over five months to break off diplomatic relations with the government of Iran, this they did on 7th April 1980. This goes to show just how highly the institution of diplomacy is regarded, and the court working on this stated that diplomacy has proved to be:

"an instrument essential for effective co-operation in the international community, and for enabling states, irrespective of their differing constitutional and social systems to achieve mutual understanding and to resolve their differences by peaceful means."<sup>28</sup>

THE USE OF DIPLOMATIC IMMUNITY AS A COVER FOR PEACETIME INTELLIGENCE GATHERING ACTIVITIES IN INTERNATIONAL LAW ESPIONAGE

The connection between diplomacy and peacetime intelligence gathering activities is a long one. The establishment of embassies on a permanent basis have been a lasting feature of European diplomacy. Amongst the many functions carried out by Embassies, that of intelligence gathering is by far one of the most important. With its nerve centres in the embassy, intelligence gathering networks have sprung up, embassy personnel being the organisers; such persons have always been sheltered from the judicial process of the receiving state by diplomatic immunity. International custom has for centuries accepted the inviolability of diplomats, their entourages and household - the purpose behind this inviolability has been to permit the diplomat to fulfil his important duties without hindrance by the local authorities. They can however be prosecuted for acts done outside their official duties.<sup>29</sup> In the U.S. it has been held that acts of intelligence gathering in violation of municipal espionage law are not official duties and therefore functional or qualified immunity cannot protect a person accused of having committed those activities <sup>30</sup> as was in the case of U.S. V



Egorov<sup>31</sup> and also U.S. V Coplon<sup>32</sup>. Diplomatic mission members have organized intelligence gathering networks in the receiving states, without fear of local process; thereby exploiting the immunities enjoyed by them as laid down by the Vienna Convention. The privileges and immunities enjoyed by the mission itself, encourage the clandestine intelligence gathering activities of the diplomatic staff. The Vienna Convention makes the premises of the embassy inviolable. The mission being guaranteed the freedom of communication by using cipher or code or courier with the sending state. Couriers are given special protection whereas official communication of the embassy is inviolable and the diplomatic bag must not be opened.

Only such persons designated as diplomats by the sending state and received in that capacity by the receiving state are protected by the law. On the basis of this reasoning, courts of law have rejected the plea of diplomatic immunity by soviet citizens who were working in the U.S. as employees of international organisations. These employees were charged and convicted of espionage, contrary to U.S. law, for having attempted to steal vital information from the country. These cases show a general consensus that these persons did not enjoy diplomatic immunity from the judicial process in U.S., courts since they were not the diplomatic agents of the U.S.S.R. to the U.S.A. The courts conceded that as employees of international organisations, they could have invoked functional or qualified immunity. Functional immunity being unable to bar a prosecution for espionage, as that activity is not part of the functions of an international organisation, would have been of no avail to the individuals concerned. This is not to say however, that employees of international organisations do not have any immunities. If there are treaties granting such immunity or if there are municipal laws providing to that effect, such employees of international organisations may have full immunity e.g. the Secretary General of the U.N. and his immediate assistants enjoy full diplomatic immunity.<sup>33</sup>

The total effect of the law relating to diplomatic immunities on persons involved in intelligence gathering activities is that if a properly qualified diplomat is involved in that activity he cannot be subject to local criminal jurisdiction even if his activities amount to a crime in municipal law. The protection offered to peacetime intelligence gathering agents, by diplomatic immunity from criminal jurisdiction is total. This is so, if the person concerned fully qualifies as a diplomat. This protection is, however, limited to only a very small number of those involved in the intelligence gathering business. The majority of those persons are citizens of the target state, who remain exposed to criminal prosecution and penalty.

Espionage, as yet is not a big problem for african and third world countries. It is there, but on a limited scale. The press carries reports almost everyday of the U.S. having expelled some Russian national for allegedly selling vital information. Thus, espionage is a major thorn-in-the-flesh for the eastern block countries as well as Western European states. Recently, Kenya closed down the Libyan Embassy in Nairobi, because of what it termed Libyas "gross insult to Kenya." April 1987, saw the expulsion of five Libyan diplomats stationed here including the charge d'affaires, on the allegation that three university of Nairobi students had been paid to spy for them. Kenya took this drastic step "because of gross interference in the internal affairs of Kenya by the Libyan diplomat." Kenya saw Libya as violating the diplomatic conventions and the O.A.U charter on the non-interference in the internal affairs of other states. On December 18, convinced that the Libyan embassy in Kenya was not performing duties to enhance relations between the two countries, the latter closed down the former embassy. The Libyans were seen to be in contravention of article 3(d) of The Vienna Convention which stipulates that the function of a diplomatic mission consists inter alia 3(d) in ascertaining by all lawful means, conditions and developments in the

receiving state and reporting thereon to the government of the sending state. It is this proviso that has been misunderstood. The limits of its legitimate exercise is also not all self-evident thereby the belief commonly held that diplomats are but official spies. Article 3(d) of the Vienna Convention stipulates that this ascertainment should be by "lawful means" there is no guidance as to what is lawful, and could be interpreted to mean "within the law of the receiving state."

The only recourse left to the receiving state with regards to an envoy who acts in serious and flagrant disregard of his obligation may be to declare such a person, an outcast i.e. a persona-non-grata. Likewise, diplomats found taking part in intelligence gathering activities, organising or financing subversive acts, as harbouring foreign agents or allowing them to carry on their activities from the premises of the diplomatic mission, or of wrongfully giving shelter to fugitives from justice, should be declared persona-non-grata.

#### THE ABUSE OF THE DIPLOMATIC BAG<sup>34</sup>

The diplomatic bag is accorded under the Vienna Convention a more absolute protection than was given under the previous customary law. Previously, it was on the whole accepted that the receiving state had a right to challenge a bag which it believed to contain unauthorised articles. If this occurred the sending state could elect either to return the bag unopened or to open it in the presence of the authorities of the receiving state. This practice of challenge to a suspect bag is still permitted in the case of consular bag under the Vienna convention on Consular Relations.<sup>36</sup> But it is no longer permitted in the case of a diplomatic bag. The bag may contain only diplomatic documents or articles intended for official use, but the authorities of the receiving state may not demand that it be returned or opened even if they suspect that it is being used to smuggle arms or other illegal exports or imports. States were fully conscious of the dangers of

abuse, but they were even more aware that any right of search could be abused by officials claiming to have grounds to suspect any bag which they wished to investigate. The receiving state or the airline authorities may subject a bag to detector device designed to show the presence of explosives, metal or drugs, since this does not involve opening or detaining it, and if this test disclosed grounds for suspicion the airlines could decline to carry it. In one incident the customs authorities in Rome realised that a large diplomatic bag destined for Cairo was emitting moans. They seized and opened it and found that it contained a drugged Israeli who had been kidnapped. Some members of the Egyptian Embassy were declared persona-non-grata as a result of this discovery.<sup>37</sup>

In July 1984, a similar thing occurred. Umaro Dikko a former minister of the deposed Shagari government in Nigeria, was abducted. The bizarre events of that abduction showed that Dikko was heavily drugged and placed in a crate - two large crates classified as diplomatic bags arrived at Stansted airport at about four O'Clock in the afternoon, to be loaded on a Nigerian Airways aircraft. The crates were attended by a member of the Nigerian Government service who held a diplomatic passport but was not a member of the mission to the U.K. and had no diplomatic status in England. He made no protest when the crates were required to be opened. Members of the staff of the high commission who were at Stansted were invited to inspect the crates. One crate contained Mr. Dikko, who was unconscious and another man who was conscious and in possession of drugs and syringes. The other crate contained two men, both conscious. A total of twenty-seven people, including the three other than Mr. Dikko were arrested. Charges were preferred against three persons, none of whom claimed diplomatic immunity at the time.

The Umaro Dikko affair deals with the searching of diplomatic bags - when they can be opened or detained or to be sent back to the place of origin.

Some theories have been advanced that the provisions of article 27(3) of the Vienna Convention are not mandatory. The first theory is that the inviolability of the bag is to protect diplomatic materials, but not materials that do not fall in that category - and indeed constitute an abuse of the diplomatic bag. Secondly, that the abuse by members of a mission of the functions protected under the convention entails forfeiture of the protection of the convention. There is no way of ascertaining that a bag contains illicit materials save by examination, and that possibility gives too much opportunity to a receiving state to interfere with the proper flow of diplomatic materials. Even those states that suffered most in recent years from the abusive use of the diplomatic bag, that has undoubtedly occurred, show little enthusiasm for a departure from the prohibition of search in article 27 (3). The most evident case is that of the expelled Libyan diplomat from the United Kingdom. The latter abstained from opening or searching the diplomatic bags that left the Bureau, knowing full well that the very gun that killed WPC Fletcher must have come in the same way - viz - the diplomatic bag and was leaving in the very same way.

The diplomatic bag has also been abused by diplomats when they transport drugs like heroin in them. Since they are exempt from custom inspection at Airports, diplomatic agents have been the best known courier for narcotic drug-trafficking; Diplomatic bags are also employed at times for such clandestine purposes as guns and arms running, smuggling, currency trafficking and as already shown even for the transportation of human beings.<sup>38</sup> There is indeed a consideration by certain states whether a departure needs to be made from the customary rule of absolute inviolability of the diplomatic bag? This matter, however, is to be reviewed with utmost caution since the principle of the freedom of communication is an essential element of diplomatic relations and any exceptions maybe justified only in cases of abuse and under adequate safeguards.

The 29th session of the international law commission 1977 (ILC) dealt with the status of the Diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier. This topic had assumed importance in recent years because of technological development in the means of communications, as also the growing abuse of the privileges and immunities of the courier and the diplomatic bag appeared to make existing international agreements inadequate. One option is that in a new instrument states should be given the option to reserve the right to apply the safeguard found in Article 35(3) of the convention on consular Relations, which provides that if the receiving state has serious reason to believe the bag contains non-permitted articles, it may request that the bag be opened in its presence. If this request is refused, the bag shall be returned to its place of origin.<sup>40</sup> Electronic scanning and any remote examination by equipment or dogs would not be unlawful under article 27, though technically it would not be advantageous i.e. scanning can identify the existence of a problem, but its precise nature would often require the opening of the bags; it is not correct that states acting lawfully have nothing to fear from scanning, such practice might reveal sensitive information about e.g. types of ciphers in use by the sending state. Thus, the unwillingness of many states to have these provisions amended, so as it is, the abuses will continue piling up.

#### KIDNAPPING OF DIPLOMATS.<sup>41</sup>

The kidnappings of individual diplomats usually have at their very core calculated and coldblooded purposes. Such kidnappings are always very carefully planned and the security authorities could hardly be expected to protect every single senior diplomat, whether at home or during his or her comings and goings. The object was nearly always the same i.e. to extract a particular concession from a government, under the threat that, if the concession were not granted, a human life would be lost and the government refusing the concession would be to blame, both generally and in the eyes of the country which the victim represented.

The first case of attempted kidnapping which startled world opinion occurred in Guatemala city on 28th August, 1968 - The American Ambassador Mr. John C. Mein was returning normally to his office from lunch at the embassy residence when his official car was blocked in a down-town street, seeing a number / young men in fatigue uniform bearing down on the car, /of Mr Mein jumped out and ran and was shot dead. The next day an organisation calling itself "Fuerzas Armadas Rebeldes" announced that he had been killed "while resisting political kidnapping." On March 21, 1969, the Federal German Ambassador, Count Karl Von Sprati, was kidnapped and held captive by the same organisation, who demanded as the price for his release, //of seventeen political prisoners. There was some delay in the negotiation and consequently on 5 April, the body of Count Von Sprati was found with a bullet-hole in the temple. In May 1971, the Israeli Consul-General in Istanbul was kidnapped and murdered by Turkish terrorist; in March 1973, the Saudi-Arabian Embassy in Khartoum was occupied by the 'black September group' during which the American Ambassador, his counsellor the Belgium Charge D'affaires, were murdered. Statistics show that over 25 kidnappings or attempted kidnappings occurred between 1968-1973.<sup>43</sup>

The basic purpose of kidnapping and holding as hostages people of diplomatic status could only be to cause the sending state to exercise pressure on the receiving state, which is responsible for his protection to "purchase" his release. The purchase price can be very precise, for instance the release of the receiving state of certain people held in prison - people probably of no direct interest to the 'victim' at all. Or for political reasons, as in the kidnapping of the British Ambassador to Uruguay, where the motive appears to have been a determined desire by the Tupamaros organisation, a young revolutionary group to establish themselves as the second power in the state.

Diplomatic kidnapping, although an event concerning international diplomacy, is not amenable to diplomatic methods, as between for instance, the

government employing the kidnapped diplomat and the agents of the kidnapping. The victim government will use the diplomatic channel to urge a government in whose territory a diplomatic kidnapping takes place to intensify its search for kidnapers and the kidnapped and to ensure better protection in the future. But any negotiation has to be between the territorial government and the kidnapers. If the diplomats' sending state embarked on its own direct negotiations with the kidnapers, this could be resented by the territorial government as an intervention in an affair which was its responsibility.

The use of diplomatic kidnappings was frequently successful, notably in Brazil where for instance, the release of the Swiss Ambassador, Mr. Giovanni Enrico Bucher kidnapped in December, 1970 was eventually purchased after a month and a half of negotiations, by the release of no less than 70 "political prisoners." Underlying the government decisions in these cases was the fundamental political and ethical question whether the paramount consideration was to preserve the life of a human being or to discourage recurrent kidnapping by refusing to accede to the kidnapers' demands. A life would inevitably be risked by a refusal to pay the price demanded.

The legal position with regards to such offences is clear. Diplomatic agents and premises of course enjoy inviolability under customary international law, which is reflected in the Vienna Convention on Diplomatic Relations of 1961. The receiving state is under a special duty to take all appropriate steps to prevent any attack on the person, freedom and dignity of diplomats and to protect diplomatic premises. International co-operation is clearly essential both in the prevention of crimes against diplomats and in the punishment of offenders. To this end, it was felt increasingly desirable to conclude an international convention concerning legal measures aimed at the prevention and punishment of crimes against diplomats. The organisation of American States adopted a convention on the subject in 1971, and later that year the United Nations General Assembly asked the ILC to prepare a set of



draft articles. The convention on the prevention and punishment of crimes against Internationally Protected Persons, including Diplomatic Agents came into force in 2nd February, 1977 and it provided inter alia that persons alleged to have committed certain attacks against diplomatic agents and others should either be extradited or have their case submitted to the authorities of the state where the alleged offender is present, for the purpose of prosecution. It contains, in addition, provisions concerning co-operation, the transmission of information and the treatment to be accorded to alleged offenders.

The European convention on the suppression of terrorism signed on 27, January, 1977 by member states of the Council of Europe, imposes an obligation on contracting states not to regard specified offences (including hijacking, kidnapping and certain crimes of violence) as political offences for the purpose of extradition ; and while a state may refuse extradition in cases which it considers to be political, it must, if it does so, take into consideration when evaluating the character of the offence any particularly serious aspects of the offence and submit the case to the competent authorities for the purpose of prosecution.

#### CONCLUSION

The growing abuse of the privileges and immunities has assumed a great importance in recent years, and appeared to make existing international agreements inadequate. Even though the issues involved were covered by existing law, there is still room for some degree of elaboration of amplification. The basic question in view of the already existing conventions on the subject, was the need to formulate a short and simple protocol supplementing these conventions or that the draft should take the form of a binding instrument in the form of an international convention. It was suggested that the importance of the topic required the making of a legal instrument to overcome and fill the legal loopholes which still existed,

despite the four Vienna Conventions.

When looking at the inviolability of the premises of an embassy, its vital to note that the inviolability of the premises is not lost by the perpetration from them of unlawful acts.<sup>43</sup> Both the ILC in its preparatory work and the conference at which the Vienna Convention was drafted, deliberately rejected the idea of specified exceptions in the face of manifest abuse.<sup>44</sup> The position to them was this simple: inviolability had to be absolute if the door was not to be opened to possible abuse by the receiving state. This however gives rise to two difficult but related issues: i.e. The relationship of general treaty principles on the one hand, and the concept of self-defence on the other, to the notions of inviolability under the convention. Although a fundamental breach of treaty (which the use of embassy premises for terrorism surely is) would normally allow another state party to the treaty to be relieved of its obligation vis-a-vis the violating state, the drafting history of the Vienna convention seems to make the operation of this principle inappropriate. The convention has its own remedies in case its violated - severing of diplomatic relations is available in the wake of a fundamental breach.

It is not true to say that when a diplomat violates his duty he loses immunity such a reading is inconsistent with the immunities given, which operates precisely in respect of such alleged violations, and which, in the case of diplomatic agents, apply even to unofficial acts. The personal immunity enjoyed by the diplomat in respect of criminal offences perpetrated by him, is absolute.<sup>45</sup>

Looking at the British experience of the Abuse of Diplomatic privileges and immunities, it is clear terrorist abuse of diplomatic status can never be controlled by moving demonstrations away from embassies, nor by trying to amend the Vienna Convention:

"It is doubtful whether, from the U.K.'s point of view, amendment is even desirable. In respect of all these matters were constantly reminded of the importance of reciprocity - namely, that the privileges and immunities operate to provide a very real protection

for our diplomats and their families overseas, and that action should not be taken which would expose them to personal danger or make the carrying out their diplomatic tasks more difficult or even impossible. The U.K. maintains a substantial number of diplomatic posts overseas and there is little doubt, that, in many of these posts, the protections afforded by the convention are necessary for the effective and safe performance of their functions."<sup>46</sup>

What is needed is a close co-ordination between the various parts of governments and international security co-operation. Governments must keep themselves more fully informed than they have sometimes appeared to be in the past and should not for the sake of promoting trade and other reasons, seek to accommodate those who are reluctant to conform to the requirements of the Vienna Convention.

Above all, those remedies available for abuse in the convention - especially power to limit size of mission, to declare a diplomat persona-non-grata should be used with firmness and vigor, and not just reserved for the matters related to espionage. Legal means are at hand, but they need to be matched by political will.

CHAPTER FOURRECOMMENDATIONS FOR THE FUTURE REFORM OF THE LAW OF DIPLOMATIC IMMUNITY

In everyday life one of the basic principles is to maintain peaceful relations between individuals and to avoid offence. This role is even more necessary in international relations, as the consideration and respect due to independent states and their representatives come into play. It is by acting correctly and especially by expressing oneself in a polite manner that one gains attention and respect.<sup>1</sup> Diplomacy is the most important means of effectuating foreign policy, although it is not the only means. It is through diplomacy as an activity (including the content, modes and matters of the activity of general and special state agencies of foreign relations) of heads of states, of governments of departments of foreign affairs, of special delegations and missions, and of diplomatic representations appertaining to the effectuation by peaceful means of the purposes and tasks of the foreign policy of a state.

This chapter is an exposition of the diplomatic immunity, ceremonial and protocol, and what role they have played in upholding the civilities between states and their officials.<sup>2</sup> It is only after giving an appraisal of such issues, that one gets to the level of giving recommendations. Even at the risk of repetition, the fundamentals of the diplomatic immunities has to be brought out. The immunities granted to diplomats are to permit them to fulfil their important mission without hindrance by the local authorities.<sup>3</sup> The head of a diplomatic mission ought to be in a position to act freely in the interests of the state of which he is the representative.<sup>4</sup> In as much as he possesses no coercive force, custom has accorded him, since time immemorial, certain privileges and immunities intended to guarantee his personal independence, the independence of his property, and the necessary recognition of his dignity and that of the country he represents.<sup>5</sup>

The privileges and immunities, recognized by the law of nations and by reciprocal practice, were codified and completed by the Vienna Convention

of 18th April, 1961, which gives legal force and a contractual character to the respective obligations of states and of diplomats who exercise their function. Articles, 29-39 of the Vienna Convention of 1961 enumerate the principles and immunities granted to members of diplomatic missions. Such immunities are granted to empower diplomats to carry out their duties efficiently without local authorities being able to prejudice their actions. On their side, diplomats have certain obligations towards the state that receives them, article 41 enumerates these.

#### DIPLOMATIC CEREMONIAL AND PROTOCOL

There is no society without ceremonial. It is everywhere observable that some sort of order and discipline are required when a community comes into being. Social life imposes respect for certain rules without which communal life would not be possible, and for lack of which anarchy and chaos would certainly result. The leaders of each community evolved a hierarchy maintain order and also to stabilize the structure of society. In this way each state built up a comprehensive set of practices which secure for those in official, political, and administrative positions the prerogatives, privileges and immunities which they require for the full and productive exercise of their functions.

The ceremonial which governs international events is of the greatest importance based on tradition and national temperament, it creates in each state the right setting and material conditions, so that the relations between the government of each sovereign state and all ranks of officials, foreign and national, may develop fully in a peaceful and harmonious environment and atmosphere. Protocol on the other hand, codifies and puts into practice the rules of ceremonial and supervises their application. It aims at making diplomatic intercourse easier, being merely a regulating function, no excessive importance should be attached to it. However to have a peaceful and stable world, the roles of comity as well as the ceremonial and protocol surrounding the diplomatic office must be strongly upheld, it is

only in so doing that the states of the world will realize their ambitions in the pursuit of their political, economic, social and cultural endeavours.

In these days of political agitation it too often happens that countries allow political parties to organise "spontaneous" street manifestations against the embassy or consulate of a country with whose policies they may not agree. In so doing, the authorities assume greater responsibilities than the press, which is allowed to excite crowds that may, and often do break out of control. It is a cardinal rule of the Vienna Convention that governments should not allow inconsiderate attacks against foreign states or permit their representatives to be molested. Such incidents are rampant in our world of today, and provides usually alot of humiliation for the states concerned. Governments are very high strung on matters touching on pride, since this entails having to apologise and to make amends for the insults. Most governments being dictated to principles of courtesy and rules of comity, make good the wrong done. Others like Libya and Iran are more adamant and have to be chastised by the international court. These attacks against foreign states and their representatives is a direct violation of the provisions of the Vienna Convention of 1961.<sup>7</sup>

In the wake of such frequent and blatant violations of the convention, are there any means if any, that is at the disposal of the international community, to address such agravations? Many theories have been advanced by different scholars: Sir Ian Sinclair<sup>8</sup> asserted that inviolability of premises is not lost by the perpetration from them of unlawful acts. That is to say, that simply because some grave dereliction of duty has ensued from the diplomat's activity in the mission premises, the premises are thus rendered open and susceptible to the receiving state's civil and criminal jurisdiction. Or alternatively that the law-enforcing officers of receiving state can enter and ransack them at will. The Vienna Convention is clear on this fact. Inviolability had to be absolute if the door was not to be opened to possible abuse by the receiving state.<sup>9</sup>

The Libyan-British fracas of April 17, 1984 is a leading authority here: International law of diplomatic immunity prevented the bureau from being entered and those responsible from being arrested. Some of the recommendations forwarded by Ministry of Foreign Affairs were as follows:

- i. That diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations;
- ii. It was suggested that some way should be found of searching diplomatic bags that were suspected containing either drugs or weapons.

I do agree with the latter point wholeheartedly. One way would be to provide in a new instrument that states should have the option to reserve the right to apply the safeguard found in Article 35(3) of the Vienna Convention on consular Relations, which provides that if the receiving state has serious reason to believe the bag contains non-permitted articles, it may request that the bag be opened in its presence. If the request is refused, the bag shall be returned to its place of origin. Electronic scanning, remote examination by equipment or dogs would not be unlawful under article 27.

The point that when a diplomat violates his duty he loses his immunity is inconsistent with the reading of the Vienna Convention.<sup>11</sup> Rather, it should be qualified, to read that, immunity from jurisdiction of accredited diplomats, should be limited, in respect of the technical and administrative staff and their families. These are people who should only enjoy 'functional' as opposed to absolute immunity. It is actually such junior employees who who flagrantly flout the local laws behind the facade of diplomatic immunity.

The sending states should not wait for the receiving state to declare its diplomatic envoys persona-non-grata,<sup>12</sup> but must go ahead and remove

personal immunity of the envoy after participation in acts of state terrorism. The sending state must recall such disgraceful characters without waiting for the international community to prompt it.

In view of the diplomatic premises being used for acts of state terrorism, the host country may close down that particular mission; without even seeking permission from the sending state. Kenya recently closed down the Libyan embassy in Nairobi because she felt that the embassy was not performing duties to enhance relations between the two countries.<sup>13</sup> The accrediting state may also withdraw the inviolable status of diplomatic premises if she feels that it is being used for the perpetration of unlawful acts. This invariably leads to the premises being closed down and the envoys being summoned back to the home country.

Even with the rupture of diplomatic relations between two states, it is imperative that all such persons who had been <sup>enjoying</sup> enjoying diplomatic immunity be given a fairly reasonable time to finalise their affairs in that particular country and must be given safe conduct out as well.<sup>14</sup> Not like the incidence between Kenya and Uganda in January 1988, where the latter detained the former's envoy in a house for a whole night; or like the Libya-Britain debacle where many Britons were subject to arbitrary arrest and harassment.

Above all, after all the suggestions have been given what really remains is this, should we not have a proper interpretation of the Vienna Convention? There are certain sections of thinkers in society who feel that a proper interpretation of the convention would support the view that immunity and inviolability fell away when diplomats and missions abused their positions, but that if the convention made these desirable outcomes impossible, then the convention should be amended or denounced. However, it became clear



that diplomatic law is not only about the balancing of legitimate interests between the sending state and the receiving state; another factor often at play is the presence abroad, in the territory of the sending state of an expatriate community of the receiving state. For instance, 8,000 Britons were resident in Libya in April 1984. Thus, the extent to which countries will avail themselves of the opportunities for lawful response to abuse of diplomatic immunities will depend in large measure upon whether that expatriate community is perceived to be at risk. That is something that the balanced text of the Vienna Convention cannot provide against and by the same token any amendment of that text or withdrawal from its obligation had to be absolute if the door was not to be opened to possible abuse by the receiving state.<sup>15</sup> Two difficult, but related issues arise here concerning: first, the relationship of general treaty principles on the one hand, and on the other, the concept of self-defence to the notions of inviolability under the convention. Although a fundamental breach of treaty (which the use of embassy premises for terrorism surely is) could normally allow another state party to the treaty to be relieved of its obligations vis-avis the violating state the drafting history of the Vienna convention seems to make the operating of this principle inappropriate. The question that follows is this, Is there a principle of self-defence that continues to exist side by side with the convention, allowing the authorities of the receiving state to take certain action against an embassy, notwithstanding Article 22 of the convention? The notion of self-defence must meet certain classic requirements for it to become operative i.e. must have "a necessity of self defence, instant, overwhelming, leaving no choice of means and movement for deliberation." If these are met, forcible entry of embassy premises might be justified in self-defence. In international law, the concept of self-defence to violent acts by the representatives of one state within the territory of another, directed against the latter's citizens, has met with a lot of skeptic criticism as to its applicability as well as with a lot of opposition from states. This concept is defined as follows:

"Self-defence applies not only to action taken directly against a state, but also action directed against members of that state."<sup>16</sup>

This is a clear contravention of the Vienna Convention, which stipulates that diplomatic immunity must be absolute to have any meaning. Custom, traditional usage and rules of comity adhere to this and provide that so absolute are these immunities that they must never be used as measures for reprisals.<sup>17</sup> Diplomatic law, privileges and immunities attaching thereto, greatly enhance the development of the international law of co-operation,<sup>18</sup> this text would not be complete without a word on the influence of international law on Foreign policy and Diplomacy.

Contemporary international law is the law of peaceful coexistence and of the free development of peoples. The character of the influence of contemporary international law on the international relations, foreign policy, and diplomacy of states for the purpose of ensuring the peaceful coexistence and freedom of peoples is also determined by this.<sup>19</sup> International law also aims to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect / human rights and for fundamental /fo freedoms for all without distinction as to race, sex, language or religion. It is in this light that the following recommendations are made.<sup>20</sup>

1. All the states of the world should join together in advocating for peace in our world of today that is torn by strife. We should have an international community that is transnational, and that traverses all cultures, race, sex and even religion. At the very root of this should be the respect for all human beings, diplomatic agents notwithstanding.
2. The principle of self-determination of all peoples should be upheld. The sovereign integrity of states must never be sacrificed at the alter of international cooperation, the principle of 'jus cogens' must be accorded the sanctity it deserves.

3. Diplomacy and diplomatic law must be safeguarded. Nations that violate the provisions of the convention should be penalised severely, and all the nations of the world should come together in a concerted effort to eradicate deliberate contravention of the diplomatic laws and practices.
4. Diplomats should know the legal limits of their activities in the host country. They must at all times act consistently with the written law and also keeping in mind their duties.
5. The developed world should see the plight of developing world and come to their aid. This however, must not involve subservience of any kind - i.e. economic aid must never be taken to mean economic slavery, or political dependence. The development must be separate, that is to say that a state must be left alone to organise its internal affairs, without any undue interference from other states. Thus the development of states must be mutually interdependent, and at the same time a state must be allowed to retain its independence.
6. Diplomatic agents must act with decorum expected of their profession; and must not unnecessarily interfere with the host country's internal affairs.
7. There should be a feeling of collective responsibility among states, such that failure to protect diplomatic agents and missions by one state, should be borne by all the states acting collectively as a body, which would be badly hurt by such omissions. Compensation must be paid fully to the injured state, and the international community must tender such necessary apologies.
8. There must be a close co-ordination between the various parts of governments and international security co-operation. Governments must keep themselves more fully informed than they have sometimes appeared to be in the past, and should not for the sake of promoting trade and other reasons, seek to accommodate those who are reluctant to conform to the requirements of the Vienna Convention.
9. The instigation and arousing of the public against the diplomatic agents

and citizens of a country with whose policies the receiving state does not agree with, should be stopped. The protesting party should instead seek other legal means. International legal forums do exist e.g. the U.N. security council, for handling such issues. States must not resort to violence or even armed attack of that particular country's embassies in its territory i.e. recently Honduran students went on a rampage burning down embassy and cars belonging to the U.S. embassy staff, to protest President Reagan's policy regarding Central Americans.

10. The supremacy of international law over the municipal law must be borne in mind at all times. A state which fails to discharge its obligations under international law cannot be heard to plead its own international affairs or its municipal law to waive its international obligations. So it is incumbent upon the receiving states to give adequate protection to diplomats, and in cases of terrorist attacks on diplomatic agents, the states ought to reach some kind of settlement with the terrorist without necessarily endangering their lives.

The aim of this text was to look into the law of diplomatic immunity. What it is and what its objectives are? How it came about and its development over the years upto the present day. The issue that kept recurring was the role of diplomatic relations in enhancing international cooperation and to what extent it had succeeded in so doing. Because of this it was inherent, therefore to tackle issues which at the very onset would have appeared irrelevant, but which on closer examination turned out to be components of diplomacy and the law of diplomatic immunity. It is my earnest hope that this has been achieved, albeit, the many errors and omissions which are likely to have been committed.

In chapter one, diplomacy was defined and its historical development was also given. Diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other, or carry out political and even legal transactions, in each case through their authorized agents. Diplomacy normally involves the exchange of permanent diplomatic missions, and similar permanent, or at least regular representation is necessary for states to give substance to their membership of the United Nations and other major inter governmental organisations. Commercial treaties, which brings the new markets within reach of the country's sources of production, markets which will provide the machinery and raw materials indispensable to national progress, are signed under the aegis of diplomatic law. It is also due to an alert and well-structured diplomatic system that enables a government to keep in touch with the development of other nations and learn from the progress they have made. Diplomatic action also enhances the technical assistance of a friendly nation as well as making international aid available.

However, the development of diplomacy was not rapid. The rules followed by states as regards diplomatic relations as well as the recognized

privileges and immunities of diplomats, were built up empirically in the course of centuries and have been strengthened by reciprocal practice. The history of permanent and temporary diplomatic missions dates back only as far back as the 17th century. The rights, duties and privileges of diplomatic envoys, however, continued to develop according to custom in the early 18th century, through to the 19th century and only ripened into a common understanding on the subject during the congress of Vienna, 1815. Even as early as the 5th Century B.C., The Greek city states had special missions between themselves. Ambassadors were looked upon as being sacrosanct, and by that very fact ipso facto, enjoyed special protection and privileges.

Both the industrial development as well as the break up of the Holy Roman Empire, greatly facilitated the development of diplomacy. After this, no state could live in isolation. It became an inherent necessity to states to advocate for the promotion of peace, since it was only in a stable community where economic prosperity, cultural and political relations could be achieved. That is why in 1815, the Europeans acting in concert came together to settle once and for all the threat posed to them by the Napoleonic Wars. In short therefore, chapter one summarized what diplomacy really is and some of its exigencies. The object of diplomacy is to make use of peaceful and practical methods of conciliation, to tighten the bonds of friendship with allied governments, to develop friendly relations with neutral countries, and to commend the respect of hostile governments.

This has been achieved in the modern world. As opposed to the beginning when diplomatic relations were conducted on a bilateral basis, today multilaterality has become one of the characteristics of modern diplomacy. This is mainly due to the improvements in the means of transport and communications which in turn demands more and more multilateral solutions, for today there are a few problems which only affect the relations between two single countries.

However, it was in the period following the Second World War, that high level multilateral meetings really showed how extremely useful they could be in solving world problems. Exchange of information on the multilateral plane are carried out in every field, but more especially in matters concerning health conditions in different countries. Data from all over the world are collected and analysed by the WHO. Thus diplomacy embraces all facts of everyday life, be they legal, political, economic or even cultural aspects of any given society.

In chapter two, the Vienna Convention of 18th April, 1961 was looked at in detail. The privileges and immunities granted to members of the diplomatic missions are enumerated therein. The 1961 convention gives legal force and also the contractual character of the respective obligations of states and of diplomats who exercise their functions. The main theme of this chapter was to bring out the fundamentals of the privileges and immunities granted to the diplomatic agents. Such immunities are granted to empower diplomats to carry out their duties efficiently without local authorities being able to prejudice their actions. On their side the diplomats have certain obligations towards the states that receives them. The Vienna Convention of 1961 is agreed to be largely confirmatory of existing customary law and was ratified by a great majority of states including the U.S. and Iran, as well as the U.K. and Libya. It is likely that this document will in future govern relations between all states even though they may not all be signatories to it. However, the privileges and immunities granted to the diplomatic agents, have been the subject of violations by both the diplomats themselves as well as the accredited countries. This is introduced at the end of chapter two and is followed up in chapter three.

The technological development in the means of communication as also the growing abuse of the privileges and immunities granted to diplomats, appeared to make existing international agreements inadequate - i.e. the four Vienna Conventions. Chapter three was a case-study of the recent violations as well as the continuing abuse of the privileges and immunities. Diplomatic missions are holding firearms which have been brought into the host country through the diplomatic bag. Apart from this contraband goods, ie. drugs, have been smuggled into the receiving states by way of the diplomatic bag or pouch. The most stunning incident was that of the abduction of a human being and transportation thereof in the diplomatic bag. Another gross abuse of the diplomatic privileges and immunities, is the violation of the mission premises by the diplomats on the one hand, by perpetrating terrorist activities therein, and on the other, by attacks against the embassy premises by members of the hosting country. Time and time again it happens that receiving states allow political parties to organise demonstrations against the embassy or consulate of a country with whose policies they may not agree. The other rampant abuse of the immunities enjoyed by the diplomatic agents is by the latter themselves. They have exploited these immunities and have organised intelligence gathering networks in the receiving states, without fear of local process. The world over, diplomatic agents have been meddling in the internal affairs of the receiving states, this is going beyond the powers conferred on them. The question is, should there be a change in the law of diplomatic immunity? Most states have opposed this, the chief proponent being Britain who stated that inviolability of premises as well as the other immunities had to be absolute if the door was not to be opened to possible abuse by the receiving state. They concluded by stating that the amendment of the Vienna Convention was not only virtually impossible to achieve, but also of doubtful desirability. Most states seem to take this view. For instance, even those states that suffered most in recent years from the



abusive use of the diplomatic bag that has undoubtedly occurred, show little enthusiasm for a departure from the prohibition of search in Article 27 (3) of the Vienna Convention.

In the wake of such rigorous and blatant violation of the Vienna Convention, what recourse does the international society have to redress such wrongs? This comes with the recommendations under chapter four: because the existing international agreements have been rendered inadequate, it has been felt that there is room for some degree of elaboration or implications of these roles already embodied in the relevant international conventions in the light of modern state practice, could serve to alleviate the uncertainty which still persisted and which often gave rise to practical problems. A number of suggestions have been put forward, namely: the limiting of immunity from jurisdiction of accredited diplomats technical and administrative staff and their families; the removing of personal immunity after participating in acts of state terrorism; obligatory opening of the diplomatic bag upon request following reasonable suspicion of the inviolability of diplomatic premises if they have been used for acts of state terrorism e.t.c. However, as already said, states are hesitant about compromising the provisions of the Vienna Convention, their main contention being that to do so would be to open a Pandora box, that is to say that the receiving states would have an excuse to harass the diplomatic agents in its territory. Any changes in the law of diplomatic immunity may produce unexpected effects in the newer law, and the newer law may affect the old.

All in all, recent variations in the applications of the law of diplomatic immunity, plus pressures working both from within and without the law, suggest that the most important problem before the ILC may be that of change in the law. In view of this possibility, emphasis may well be

given to progressive development as well as codification, for there is a need to project principles that will serve to maintain some measure of uniformity in future developments. The alternative by default will likely be continuing variation in state practice leading to diversity and conflict in one of the most ancient branches of the law of nations. The Vienna Convention on Diplomatic Relation is undoubtedly the most important document on the subject that exists, besides being a landmark of the highest significance in the codification of international law. It can be criticised, and diplomacy may develop in other directions in the future, but there can be no doubt that the approved text is highly satisfactory and lays down standards that are relevant to present day conditions.

This text was also concerned with the developing body of "new international law" pertaining to the immunities of international organisations becoming geared to the old by treaty provisions which adopt in some particulars the law of diplomatic immunity as a standard. Employees of international organisations may have full immunity, if there are treaties granting such immunity, or if there are municipal laws providing to that effect. The secretary-General of the U.N. and his immediate assistants enjoy full diplomatic immunity.

In a nutshell, the legal position with regards to the immunities enjoyed by the diplomatic agents is that the latter as well as the diplomatic premises enjoy inviolability under Customary International Law, this is reflected by the Vienna Convention. The receiving state is under a special duty to take all appropriate steps to prevent any attack on the person, freedom and dignity of diplomats and to protect diplomatic premises. International co-operation is essential both in the prevention of crimes against diplomats and in the punishment of offenders. This is what led to the conclusion of the convention on the prevention and punish-

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ment of crimes against internationally protected persons, including diplomatic agents and others should either be extradited or have their case submitted to the authorities of the state where the alleged offender is present for the purpose of prosecution. This convention came into force in February, 1977.

Thus in conclusion, I wish to humbly submit that even though the Vienna Convention is fairly confirmatory of the existing customary law, there is, however, still room for amplifications. The society we live in today is one that is quite dynamic, to keep up with the societal developments, our hitherto existing laws must indeed undergo some changes. Law is still a developing phenomenon, without any exceptions. If ever there was a time that was ripe for a serious work providing practical guidance to diplomatic and consular officers, it is now.

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