Chapter 4: Immunity and Privileges of Diplomats and Their Family and Staff

"Words are one thing, actions another. Good words are a mask for concealment of bad deeds. Sincere diplomacy is no more possible than dry water or wooden iron."

L. C. Green

4.1 Introduction

Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Whenever in history there has been a group of independent states co-existing, special customs have developed on how the ambassadors and other special representatives of other states were to be treated. Diplomats, who are sent and received in other countries, represent the state from which they come. Each state can have its own ideas, policies and programmes in the international field which may not suit the convenience of the receiving state, but she will have to listen to the view point of the sending state. It is because each state believes in the philosophy of sovereign equality. It is believed that no state can force the other state to follow particular ideology or adopt a particular course of action at an international level. Any such attempt is considered as interference in the internal affairs of a state and is opposed to the very principle of sovereign equality. This can only be possible when diplomatic agent enjoy certain immunity and privileges.

Granting privileges and immunities to diplomatic envoys is a long-standing norm of international law. The formal sending of envoys as representatives of States may be traced back to the practice of ancient Greece. The ambassadors exchanged between the members of the Amphictyonic League were regarded as inviolable. Similar practices can also be found in the States of ancient India or in the Roman Empire. These practices, established on a customary basis, were codified in the 1961 Vienna Convention on Diplomatic Relations. Countries which have recognized the Convention believe that such practices contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. The purpose of diplomatic privileges, immunities and exemptions, as described in the Convention is not to benefit individuals themselves but to ensure the

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efficient performance of the functions of diplomatic missions that represent States. The justification for treating diplomats in this special way is that such measures are necessary for diplomatic functions to be executed effectively. This is not always understood by a state’s public opinion, which can lead to adverse comment on the matter.

4.2 Meaning

Immunity is the unique asset of diplomatic immunity, can be employed and virtually shared in ways which benefit individuals and groups pursuing democratic development goals and reform.²

Host countries can’t withdraw immunity, but several have expelled diplomats for alleged interference in internal affairs. The excuse is often that they had supported specific political or partisan outcomes rather than democracy development in general. Intimidation is a frequent recourse of authoritarian regimes, including against the families of diplomats. The doctrine of immunity represents a departure from the conventional practice of holding people responsible for their wrongful actions. It is considered to be the exception to the general rule of territorial jurisdiction. There is little distinction between immunity and a privilege and in many cases these have been used interchangeably. Various authors like Verdross, Morton, Stefko and Makowski have tried to distinguish between the meanings.

Although each writer defined the concepts in his own words, they essentially have a common thread. “Privileges” can be defined as a benefit or right to do something that others have no right to do, while “immunities” can be defined as the exemption from local jurisdiction. Bartos mentions that there is a need to maintain a distinction between the two on the ground that immunities have a legal basis, while only some privileges are based on law and others are a matter of courtesy.³ The field of diplomatic immunities is one of the most accepted and uncontroversial of international law topics, as it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this.

² Krishnamurthy GVG, *Dynamics of Diplomacy* (1st Ed), Nation Publishing House New Delhi, 1968
As the International Court of justice noted in the *US Diplomatic and Consular Staff in Tehran* case:

> “the rules of diplomatic law, in short, constitute a self-contained regime, which on the one hand, lays down the receiving state’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse.”

Immunity means an exemption. And diplomatic immunities means the exemption of normally granted to the diplomats, a privilege is a right or an advantage or favor belonging to a person or a class. As such diplomatic privileges mean the special favors or advantages conferred on diplomats by a treaty, convention or a courtesy. The immunity and privileges jointly confer status on diplomats. Diplomatic immunity is a form of legal immunity and a policy held between governments, which ensures that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws. It was agreed as international law in the Vienna Convention on Diplomatic Relations 1961 (for short Convention 1961), though the concept and custom have a much longer history. Many principles of diplomatic immunity are now considered to be customary law. Diplomatic immunity as an institution developed to allow for the maintenance of government relations, including during periods of difficulties and even armed conflict. Originally, these privileges and immunities were granted on a bilateral, *ad hoc* basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault.

Over time, a body of customary international law developed to provide a broad range of privileges and immunities for diplomats, eventually including some degree of similar protection for members of their staffs and families. The Convention 1961 reflects the customary international law with respect to diplomats and is now adhered to almost universally by the nations of the world.

The Supreme Court of United States in *U.S v Coplon and Gubithchev*, has observed that “mere possession of a diplomatic passport or visa, without actual membership of a diplomatic mission accredited to the territorial or any other state, is

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insufficient to confer immunity”. The House of Lords in *Engelke v Musmann*\(^6\) was of the view that “the statements of the Foreign Office as to the diplomatic status of a particular person are accepted as conclusive by in the same way as with foreign states and foreign sovereign. The immunity of diplomatic envoy extends not merely to their own persons, but to their suits, and members of their family forming part of their household, provided that they are not nationals of the receiving state. Usually the practice in most of the countries is to deposit periodically with the Foreign Office or similar government department a list of personnel for whom exemption from territorial jurisdiction is claimed.

In other words diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities. Today, immunity protects the channels of diplomatic communication by exempting diplomats from local jurisdiction so that they can perform their duties with freedom, independence, and security. Diplomatic immunity is not meant to benefit individuals personally; it is meant to ensure that foreign officials can do their jobs. Under the concept of reciprocity, diplomats assigned to any country in the world benefit equally from diplomatic immunity.

Diplomatic immunity and privileges are the rights enjoyed by diplomats to perform their function independently without any intervention by the receiving state, without which they could not discharge their functions, and which exceeds those possessed by the other bodies or individuals. Immunities and privileges are essential incidents to high and multifarious functions which the diplomats are called to perform representing his state interest in receiving state. The distinctive mark of immunities and privileges is its ‘ancillary character’ a necessary means to fulfillment of functions. Immunities and privileges are enjoyed by the diplomatic missionary because these missionary cannot perform there functions without unimpeded use of the services of his members; and by each state for the protection of its members and the vindication of its own authority and dignity.

The rules of diplomatic immunity sometimes have raised indignation in ordinary people, but are almost always observed by states, because states have a common interest in preserving the rules. A state may be under pressure from its

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internal public opinion to limit the immunity of foreign diplomats, but it usually resists the pressure, because otherwise it would create a precedent which would be used against its own diplomats in foreign countries. All states are both ‘sending states’ and ‘receiving states’, and consequently the rules on diplomatic immunity work much more smoothly than the rules on expropriation, for instance, which are sometimes regarded as favoring the rich states at the expense of the poor states. The rules of diplomatic immunity are ‘essential for the maintenance of relations between states and are accepted throughout the world by nations of all creeds, cultures and political complexions’. Major breaches of these rules, such as Iran’s behavior towards the United States diplomats who were held as hostages in 1979–81, while extremely rare, receive disproportionate publicity because of that rarity.

4.3 Rationality

The immunities and privileges which are granted to diplomatic agents are not, as in the case of sovereign Heads of State, based primarily on the principle par in Parem Non Habet Imperium, but on such agents need for them for the purpose of fulfilling their duties to be independent of the jurisdiction control and the like, of receiving states. The preamble of Convention 1961 enshrines that privileges and immunities granted to diplomatic agent are primarily based on the need to ensure the efficient performance of the function of diplomatic mission.

Fenwick viewed that “the basis upon which this personal immunity rests was generally found in the principle that ambassador personified the state or sovereign he represented. From this principle follows not only the custom of according special protection to the ambassador but also a comprehensive exemption from the local jurisdiction.”

The diplomatic agents have been granted certain privileges and immunities from an early date. The ancient Greeks considered an attack upon the person of an ambassador as an offence of ‘great nature’. An injury to envoys in ancient Rome was, regarded as a deliberate infraction of the ‘jus gentium’. The same has been recognised in the great epic like Ramayana and Mahabharata in Indian ancient history.

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7 Mukhi H.R, Diplomacy Theory and Practice, (2nd Ed), SBD Publishers Distributors, Delhi, 2008 p. 221
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The principles of sacredness of the body of diplomatic representative it is observed that “the person of public minister is sacred and inviolable. Whoever offers any violence to him not only affronts, the sovereign he represents, but also hurts the common safety and well being of nations, he is guilty of crime against the whole world.”

Hugo Grotius, in 1625 has said that diplomats are regarded as “possessing a peculiarly sacred character in consequence of which they have accorded special privileges and immunities.”

During the 16th and 17th centuries, the privileges and immunities were firmly established by numerous precedents. There were, indeed, a few exceptions, and even as late as the early 19th century ambassadors in developing countries could be threatened with imprisonment. But the rules were very generally observed in all civilized society. The thinking underlying these proportions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free diplomats from national control to enable them to discharge their responsibilities impartially on behalf of their nation.

4.4 Philosophy of Immunity and Disability

Immunity is an exemption from the force of law specifically from the exercise of power. It is a subset of the rights that one have and another person not exercise power to change the existing rights. Its opposite is disability. A diplomat has diplomatic immunity not be charged and tried in the court of a foreign country in which diplomat enjoys diplomatic status. Thus, the ambassador of country C in Australia who causes an accident by reckless driving in Sydney may successfully invoke his diplomatic when charged for the offence in an Australian court. A donor who donates a part of this income to a charity may claim an exemption (immunity) from income tax on that part of the salary. The right to remain silent is an immunity enjoyed by an accused person that prevents the police or the prosecution from forcing the accused to give evidence against him. Hohfeld regarded immunity in a more expansive way. According to him every disability of a person under the law creates immunity. These concepts are duty, claim, liberty, no-claim, power, liability,

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disability, and immunity. Hohfeld explained how these concepts logically related to one another through what he called “correlation” and “opposition.” These concepts and the analytical framework arising from them are best explained using hypothetical.

**Immunities** → **Disabilities**: The holder of immunity is not exposed to the exercise of a power within the domain covered by the immunity. In that domain, everyone vis-a-vis whom the immunity obtains is disabled from changing the immunity holder’s entitlements.

i. Most of the entitlements conferred by so-called bills of rights are immunities.

ii. Immunities must accompany other entitlements to prevent them from being meaninglessly hollow.

iii. The relationship between the power/liability axis and the immunity/disability axis is precisely similar to the relationship between the liberty/no-right axis and the right/duty axis. Just as a liability is the absence of immunity and a disability is the absence of a power, so a no-right is [obviously] the absence of a right, and a duty is the absence of a liberty.

iv. Note that rights are logically parallel to immunities and that liberties are logically parallel to powers, whereas rights are genetically or etiologically parallel to powers, and liberties are genetically or etiologically parallel to immunities.

Hohfeld’s system is based on definitions of the fundamental elements which are themselves based on three concepts: claim, control, and freedom. Specifically, a right is one person’s affirmative claim against another person to have that other person do something or not do something, and a privilege is one person’s freedom from the right of another person. As a result, to the extent that a privilege negates a right, the person that would otherwise have the right has a no-right and the person who has the privilege does not have a duty. However, to the extent that a privilege does not negate a right, the person that has the privilege still has a duty. Likewise, a power is one person’s affirmative control over creating or ending or maintaining a legal relation as against another person, and immunity is one person’s freedom from

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the power of another person. As a result, to the extent that immunity negates a power, the person that would otherwise have the power has a disability and the person that has the immunity does not have a liability. However, to the extent that immunity does not negate a power, the person that has the immunity still has a liability.\textsuperscript{11}

Immunities and Disabilities as already brought out, immunity is the correlative of disability (“no-power”), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one’s affirmative claim against another, and a privilege is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative “control” over a given legal relation as against another; whereas immunity is one’s freedom from the legal power or “control” of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (\textit{i.e.}, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X’s property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X’s interest, that is a very different matter: correlative to such sheriff’s power would be the liability of X, the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity.\textsuperscript{12}

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general


\textsuperscript{12} W. Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, \textit{Yale Law Journal}, (1913), p.28–59.
suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions, rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities, seem to be what may be called “the lowest common denominators of the law.” Ten fractions may, superficially, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators 5–15, 6–15, etc., comparison becomes easy, and fundamental similarity may be discovered. The same thing is of course true as regards the lowest generic conceptions to which any and all “legal quantities” may be reduced.

**Immunity- Disability Relation**

Immunity denotes freedom from the power of another, which disability denotes the absence of power. In *Hurst v. Picture Theatres Ltd* (1915) 1 KB 1 it was held that where a liberty to be on premises is coupled with and ‘interest’, this confers immunity along with the liberty, which cannot therefore the revoked. The relationship between power, liability, immunity and disability may be explained as follows:

1. If X has a power, Y has a liability. They are therefore ‘jural correlatives’. A liability in Y means the absence of immunity in him. Therefore, immunity and liability are ‘jural opposites’ (more strictly, ‘jural negations’, as previously explained).

2. Conversely, the presence of immunity in Y implies the absence of a liability in him. The absence of a liability in Y implies the absence of a power in X. Therefore, an immunity in Y implies the absence of a power in X, i.e. power and immunity are ‘jural contradictories’,

3. The absence of power could have been styled ‘no-power’, in the same way as no claim, but Hohfeld preferred to give it the term disability. Power and disability thus become ‘jural opposites’ (‘negations’). It follows from this that immunity in Y implies the presence of a disability in X, i.e. they are ‘jural correlatives’.\(^{13}\)

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Distinction between Claim and Immunity

Immunity is not necessarily protected by a duty in another person not to attempt an invasion of it. If X is immune from taxation, the revenue authorities have no power to place him under a duty to pay. A demand for payment is ineffectual, but X has no remedy against them for having made the demand. If immunity is the same as claim, there should be correlative duty not to make a demand. In Kavanagh v. Hiscock (1974) QB 600, it was held that the relevant section of the Industrial Relations act 1971 (since repealed) conferred on picket’s immunity from prosecution or civil suit, but no liberty to stop vehicles on the highway and no claim not to be prevented from trying to stop vehicles. Secondly, there may be immunity in X, which is protected by a duty in Y, but the claim correlative to that duty is not in X. Thus, diplomatic envoys are immune from the power of action or other legal process. As pointed out earlier, even if there are claims correlative to duties in criminal law, they are not in the persons for whose benefit the duties exist. Finally, immunity in X may be protected by a duty in Y and the claim correlative to the duty may also be in X, as in the case of the malicious presentation of a petition in bankruptcy Chapman v. Pickersgill (1762) 2 Wils 145. In 1936 the corporation conveyed to the company a plot of land for 99 years for use as an airfield, and the corporation undertook to maintain it for use by the company. In 1970 the corporation purported to revoke the company’s interest in the land. It was held that although the corporation was not entitled to override the company’s interest in the land, the latter’s only remedy lay in damages and not in an injunction.

The effect of the 1936 conveyance would appear to have been to grant, inter alia, a liberty to the company; and if the corporation was unable to determine that interest, then that liberty seems to have been coupled with immunity against revocation. The court refused an injunction on the ground that to issue one would amount to compelling the corporation to fulfill its obligation to maintain the airfield, i.e. be equivalent to an order for specific performance. It is here that the confusion lies. The ‘right’ of the company, which the court held could not override, was its liberty plus immunity; but the ‘right’ correlative to the duty to maintain the airfield was its contractual claim. Breach of this duty is remediable by damages, but the question whether an injunction could be issued to support the immunity ought not to have been related to compelling performance of the contractual duty.
Distinction between Liberty and Immunity

The position of a diplomatic envoy illustrates this. Such a person is treated as being capable of committing a breach of duty and is under a duty to pay damages, although immune from the power of action or other legal process to compel him to do so. In other words, he has no liberty to do the act, nor a liberty not to pay damages for it, but he has immunity from process all the same. It was held in *Dickinson v. Del Solar* (1930) I KB 376 that the fact that an envoy was thus under a sanction less duty to pay damages was sufficient to involve his insurance company in responsibility. If, on the other hand, he voluntarily pays the damages, he cannot recover them, since there is the duty to pay.

4.5 Theoretical Approach

The providing of immunity and privileges to diplomats is as old as the birth of civilization, there has been lot of debate over of immunity and privileges that are granted to diplomat in this modern era. The present international law on diplomatic relations has been concluded, basing the customary practices of international law on diplomat’s relations which existed in the past. The reasons for grating special status to diplomats are:

- It is traditional;
- It helps diplomats to carry out their functions satisfactorily, free from legal, physical or moral pressures. (Functional Theory)
- It is based on the principles that diplomats are personal representatives of their heads of state and also, in effect if not in form, of governments and hence of the people of their own countries.¹⁴ (Representative Theory)

Since the 16th century there have been three major theories of diplomatic immunity. Each theory plays a prominent role during different periods in history. These theories are: (a) extraterritoriality (b) personal representation, (c) functional necessity.

¹⁴ Palmer and Perkins, International Relations (3rd Ed), Scientific Book Agency, Calcutta, p.90
4.5.1 Extraterritoriality

Diplomatic immunity is based on the doctrine of an objective and fictitious extraterritoriality. The diplomatic agent "is not supposed even to live within the territory of the sovereign to whom he is accredited; and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes supposed still to be in his own country."\(^{15}\)

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

Further, ambassadors were seen in two ways, (a) as a personification of those who sent them, and (b) they were held to be outside the limits of the receiving State.\(^{16}\) This is based upon the fiction that an ambassador, residing in the accredited State, should be treated for purpose of jurisdiction as he was not present. Extraterritoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of State X are on territory which is foreign from the point of view of the State in question. The fiction that the diplomatists dwelling was part of the territory of his own country and that he carried with him its law. Diplomatists could not be governed by the same laws as the people among whom they dwelt and by long custom, ante-dating perhaps all other rules of international laws.

\(^{15}\) John H. Latane, 'International Law and Diplomacy', (The American Political Science Review, Vol. 1, No. 1), Nov., 1906, p.11
\(^{16}\) Supra 3, pp. 40-43
Authors like Emmerich de Vattel (1758) and James Lorimer (1883) emphasized that an ambassador’s house and person are not domiciled in the receiving State, but in the sending State. An example where this theory played a role is in 1987 concerning the security level of embassies in Moscow: the US Secretary of State said at a press conference that the Soviets “invaded” the sovereign territory of the US embassy. Another example is with reference to political asylum in embassies: Cardinal Mindzenty was given asylum in the American embassy in Budapest. No authority may force entry into an embassy or compel an embassy to remove a person given asylum. What can be gathered from this is that asylum in an embassy was and is realized through the concept of extraterritoriality. The decline of this theory can be seen, according to McClanahan, as a result of academic groups abandoning the theory in order to draft codifications for international law.17 Other reasons stem from the vagueness of the term “extraterritoriality” leading to incoherent and politically motivated interpretations. For instance, the term is persistently used to describe not only the mission, but all types of immunities and privileges enjoyed by the personnel, which seems contrary to the original understanding of the term. The courts also found extraterritoriality conceptually difficult when finding that the actions of a diplomat were committed on the receiving State’s soil rather than domestic soil.

This artificial justification of legal rules based on customary international law was replaced by the direct reference to this source of law, and it was held on those grounds that "diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction."18 Formally, the notion of extraterritoriality was frequently invoked to explain an envoy’s position. Extraterritoriality is however, a fiction only, for diplomatic envoy’s are in reality with the territories of the receiving state. Further in Afghan Embassy Case,19 the Supreme Court of Germany declined to accept the plea of the accused, who had murdered the Afghan minister of the premises of the Afghan Legation, that German courts had no jurisdiction on the ground that the act was committed outside German Territory. The theory of extraterritoriality does not hold well under the present international law. The secretary serving with the

19 AD, 7 (1933-34), [http://www.supreme/court/germany/embassycase](http://www.supreme/court/germany/embassycase) (accessed on 30th may 2009 )
British embassy in Washington was injured by a letter bomb; her claim for compensation is the UK was disallowed because her injury was not sustained in the UK since an embassy abroad is not British Territory. Modern Public International Law rejects the theory of extraterritoriality and courts have been against the theory of extraterritoriality of diplomat’s missionaries in strict sense.

In Radwan v Radwan, Mr. Justice Cumming-Bruce observed that there was consensus that there was no valid foundation for the alleged rule that diplomatic premises were to be regarded as outside the territory of the receiving state. Fawcett has observed that “The premises of a mission are inviolable and the local authorities may enter them only with the consent of the head of the mission. But this does not make the premises foreign territory or take them out of the reach of local law for many purposes. It was significant that neither Article 31 of Convention 1961 stated that the premises of a mission were part of the sending state and if that had been the view of contracting parties, it would no doubt have been formulated.”

4.5.2 Representative Theory:

This theory is based on the idea that the diplomatic mission personified the sending state. The theory has deepest and earliest origin. The theory gained widespread recognition during the Renaissance period when diplomacy was dynastically oriented. These representatives received special treatment. When the receiving State honoured them their ruler was pleased and unnecessary conflict was avoided. The representative was treated as though the sovereign of that country was conducting the negotiations, making alliances or refusing requests. The great theorists of the 16th and 17th century like Grotius, Van Bynkershoek, Wicquefort and Vattel supported and encouraged the use of this theory. Montesquieu describes representation as “the voice of the prince who sends them, and this voice ought to be free, no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged.”

20 Dick Richardson, Decision and Diplomacy, (1st (Ed), Routledge, New York), 1995, p. 22
The Supreme Court of America in *Agostini v De Antuerno*, held that diplomats are representatives of his master. The Diplomatic privileges and immunities are based upon the representative’s character of the diplomat. It equates the immunities of the agents with those of the sending State itself. The Chief Justice of the Supreme Court of Canada stated that “immunity is established on the principle that a minister is considered to be in place of the sovereign he represents, and on that basis it is impliedly granted by the nation to which he is accredited. It is impossible to conceive that the prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power.”22 A foreign sovereign committing the interest of his nation with a foreign power to care of on a person whom he has selected for that purpose cannot be presumed to have intended to subject his minister in any degree to that power, and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain.

Marshall C.J in *United States of America in Exchange v MacFaddon*23 observed that “A sovereign committing the interests of his own nation with a foreign power to care of a person whom he has selected for the purpose cannot intent subject his minister in any degree to that power; and therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, the privileges which are essential for the dignity of his sovereign, and to the duties he is bound to perform”. Whatever the theoretical basis for the grant of diplomatic immunities may be, it is nonetheless clear that they are essential for the performance of diplomatic obligation. The necessary pre-request of such relation is that the minister must be able to carry on his duties, whether they consists in looking after the country or of his co-nations resident in their foreign country, unfettered by any local interference.

If applied in modern times this theory would be less appropriate, in that it was based mainly on monarchies and not on sovereign States. This is an interesting concept, since a president of a sovereign State could be seen as having the same

functions and stature as a monarch. Ross discredits this theory on three grounds. First, the foreign envoys cannot have the same degree of immunity as the ruler or sovereign.\textsuperscript{24} Second, the decline of the monarchs and the progression of majority vote make it unclear who the diplomat represents. Last, the immunity does not extend from the consequences of the representatives’ private actions. Wright further criticizes the theory by placing the diplomat above the law of the receiving sovereign, which is opposite to the principle that all sovereigns are equal.\textsuperscript{25} Yet despite its declining popularity, the theory is still used, albeit infrequently. For example, in 1946, a federal court in New York granted diplomat immunity from service of process under this theory. This theory of representation is inadequate as it explains only those exemption concerning official acts which diplomatic agents enjoy in common with other State officials, but leaves unexplained those immunities which they posses with reference to acts performed in a private capacity.

4.5.3 Functional Theory

The Functional theory is more dynamic and adaptable than the other two theories and has gained acceptance since the 16\textsuperscript{th} Century to modern practice. The rationale behind a need for a diplomat’s privilege and immunities is that it is necessary for him to perform his diplomatic function. Diplomats need to be able to move freely and not be obstructed by the receiving State. They must be able to observe and report with confidence in the receiving State without the fear of being reprimanded. Grotius’ dictum \textit{omnis coactio abesse a legato debet} (“all force away from embassy that owes”) stresses that an ambassador must be free from all coercion in order to fulfill his duties.\textsuperscript{26} Although Grotius, Van Bynkershoek and Wicquefort regarded it as necessary to protect the function of the mission, they felt that it was not the primary juridical basis of the law. It was Vattel who placed the greatest emphasis on the theory in order for ambassadors to accomplish the object of their appointment safely, freely, faithfully and successfully by receiving the necessary immunities. In the 18\textsuperscript{th} Century, the Lord Chancellor in \textit{Barbulli}'s case declared that diplomatic privileges stem from the necessity that nations need to interact with one another.

\textsuperscript{24} M S Ross, ‘Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities’, \textit{American University Journal of International Law & Policy}, 1989, pp. 177-178.
\textsuperscript{26} Supra Note 16, p. 357.
Similarly, in *Parkinson v Potter* the court observed that an extension of exemption from jurisdiction of the courts was essential to the duties that the ambassador has to perform.

*Preuss* very pertinently observes: “As the foundation of the diplomatic immunities, the theory *ne impediatur legatio* or the interest of function is now predominant, having supplanted the function of extraterritoriality as the theoretical basis of diplomatic privileges and immunities. It shares the field with the representation theory, without being excluded by it.” The Modern tendency is, however, to allow immunities and privileges to an envoy on the basis of “functional necessity”, that is to say, the immunities are to be granted to the diplomats because they could not exercise their functions perfectly unless they enjoyed such privileges. It is obvious that were they liable to ordinary legal and political interference from the state or other individuals, and thus more or less be dependent on the goodwill of the government of the state to which they are accredited, they might be influenced by considerations of safety and comfort in a degree which would materially hamper them in the exercise of their functions.

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

It is this of “functional necessity” which, it is said, casts an obligation on states to grant a certain minimum of immunities and that minimum comprises such immunities and privileges as will permit the diplomatic envoy to carry out his functions without hindrance or avoidable difficulty. Nothing less will ensure compliance with maxim *ne impediature legato*. It is the basis of “functional

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27 *Parkinson v Potter* [1885] 16 QBD 152, [http://www.uk/qbd/parkinson/potter](http://www.uk/qbd/parkinson/potter) (accessed on 30th June 2009)

necessity” the International Law Commission proceeded in preparation of the draft of Article of Vienna Convention on Diplomatic Relations.  

The International Court of Justice in *U.S.A v Iran* observed that “the institution of diplomacy, with its privileges and immunities has withstood the test of centuries and 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, further while no state is under any obligation to maintain diplomatic or consular relations with another, yet cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Convention of 1961 and 1963…. “One of the pillars of modern international law is the diplomatic immunities of the ambassadors”. The primary advantage of this functional necessity is that it is adaptable and has safeguarded against excessive demands for privileges and immunities. In other words, it restricts immunity to the functions of the diplomat rather than giving him absolute immunity. A disadvantage is that it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function. Generally, diplomats should not commit criminal acts or act in a manner unbefitting of their status.

A diplomat’s behaviour in a foreign country is best described by the Arabic proverb: “*Ya ghareeb, khalleek adeeb*” which translates to “O stranger, be thou courteous”. What is of greatest importance is that diplomats should act in good faith for the protection of the receiving State’s security? Functional necessity is recognised in the Convention 1961 and was deemed practical under the UN Convention. Current juridical understanding of diplomatic immunity demonstrates that diplomats cannot be prosecuted for criminal or civil acts outside their diplomatic functions (Article 31 of Convention 1961). Yet it seems that in practice they have absolute immunity against criminal prosecution, whether their acts are during or outside their functions. Another criticism of this theory is that it is vague, since it does not establish what a “necessary” function of a diplomat is. What is reflected in the theory is that diplomats cannot function properly without immunity. The extent of this immunity may be

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31 Supra Note 16, pp.32-33.
understood to mean that diplomats may break the law of the receiving State in order to fulfill their functions.

Whatever may be the theoretical basis for granting of diplomatic immunities, which form an exception to the rule that all the persons and things within a sovereign state are subject to its jurisdiction, it is and has been an acknowledged rule of law that states are under obligation to allow the diplomatic agent to enjoy full and unrestricted independency in the performance of his allotted duties, which necessarily implies immunity from jurisdiction in respect of his person, his acts, and the premises of the diplomatic mission.

4.6 Diplomatic Missions

Diplomatic immunity has been described as a "necessary evil." The main rationale for providing diplomatic immunity is that the individual must be allowed to perform his functions freely and independently without fearing political persecution by the receiving state. Another argument put forth is that diplomatic immunity is necessary for the efficient functioning of the diplomatic process. A further benefit of diplomatic immunity is that it is reciprocal. Reciprocity permits governments to extend diplomatic privileges and immunities because these governments expect the same will be done for their personnel.

4.6.1 Inviolability of Mission

The principle of Inviolability of diplomatic agent arose out of the concept that the diplomatic agent representing his sovereign and that any insult to him constituted an affront to the prince who had sent him. In the course of time, however, it came to be recognized on the basis that it was essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials and even private person. Inviolability is the foundation of diplomatic privileges and immunities. Inviolability of the person is one of the first principles of diplomatic law that has remained prominent. The inviolability of premises was confirmed soon after the establishment of permanent missions. It is reinforced by the immunities from jurisdiction of the receiving State given by virtue of diplomatic law. It has been said that inviolability

demands, as a prerequisite, immunity from jurisdiction. The inviolability of mission premises was generally established in customary law by the 18th century. It is now considered one of the most important immunities.

One of the first examples illustrating the inviolability of a mission from judicial process and executive action is the Sun Yat-Sen incident of 1896. Sun Yat-Sen was a Chinese national and a political refugee who was detained as a prisoner in the Chinese Legation in London. Once his friends became aware of this, they applied to court for the issue of a writ of *habeas corpus*.33 The court refused to issue the writ, doubting the decorum of the action, and considered the matter to be for diplomatic proceedings. From this the British government formally requested the Chinese Minister to release him, which was done the following day.34 In *Palachie case* it was held that ambassadors should be kept free from all injuries and wrongs, and by the law of all countries and of all nations, they ought to be safe and sure in every place, in so much that it is not lawful to hurt the ambassador of our enemy; and herewith agreed the civil law. “The duty to care for and protect a foreign minister is higher than the general duty on a state to protect all persons on its territory whether natives or foreigners”. The person of an ambassador has even been held sacred and inviolable, by the law of nations.35

Before the Convention 1961, it was remarked that ambassadors were deemed to be outside the territory of the receiving State, with the use of the extraterritoriality theory. Today, Article 22 declares that the premises of the mission are inviolable and that agents of the receiving State, including police, process servers, building safety and health inspectors, and fire brigades, may not enter such premises without the consent of the head of the mission. Even when the British authorities wished to construct a new underground railway line running underneath the premises of several embassies, the express consent of each embassy was sought. During the formulation of Article 22, there was a concern about the position of the mission if an emergency endangering human life or public safety occurred on the mission premises. The original draft of paragraph 1 gave authorities and agents of the receiving State power of entry in an extreme emergency once the permission was obtained by the receiving

35 Supra Note 28, p. 271
State’s foreign ministry. The difficulty arose in finding examples of past State practice supporting this position. Thus the ILC concluded that such an addition was inappropriate and unnecessary.

At the Conference there was some debate over the issue of allowing entry in case of a fire, epidemic or other extreme emergency. This was objected to on the basis that the receiving State might abuse this power and enter into the mission in what it considered an “extreme emergency”. The Conference clearly decided that the inviolability of the mission should be unqualified. In other words; any crimes committed on the mission’s premises are regarded in law as taking place in the territory of the receiving State, but no right of entry is given to the receiving State, even where it suspects or has proof that the inviolability of the mission is being abused.

However, Denza remarks that entry without consent as a last resort may be justified in international law by the need to protect human life. If this is the case, then why not allow entry in times of emergencies? An incident that sparked international outrage concerning the abuse of diplomatic missions was the Libyan shooting in St James’s Square. A group of Libyan protestors opposed to Libyan leader Qaddafi had assembled before the People’s Bureau in London to protest the leader’s treatment of students in Libya. The group was peaceful, when without warning machine gunfire came from the People’s Bureau into the crowd. The gunfire killed a policewoman, Constable Yvonne Fletcher, and injured ten people in the crowd. The police immediately surrounded the embassy to prevent anyone entering or exiting the building. The Home Secretary demanded that Libya should allow the police to enter the building to seek suspects and gather evidence. However, the Embassy refused entry. In response to the British action, the Libyan government retaliated by ordering the police to besiege the British embassy in Tripoli. With both countries holding each other’s embassies and their official’s hostage, a stalemate occurred. Britain looked for legally acceptable alternatives to resolve the dispute. The British officials decided that in order to capture the gunmen, they had to close the People’s Bureau and evaluate each official’s immunity under the Convention 1961.

36 Supra Note 25, p.179.
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Those not accorded immunity were held back for questioning and possible prosecution. Surprisingly enough, no prosecutions occurred. Despite constant denied requests to enter the embassy, the Libyan government offered to send an investigatory team to London whose work would be followed by prosecutions of any suspects in Libyan courts. Britain declined this offer. Britain guaranteed all occupants safe passage out of Britain and promised not to inspect their bags. The British delegation in Libya were released and returned to Britain. After the occupants of the People’s Bureau had left, the police searched the embassy and discovered weapons and spent cartridges of a submachine gun. The person responsible for the death of Constable Fletcher was never punished. The question that arises from the above situation is why the police were not able to enter the embassy. The Convention 1961 confers such immunities and privileges to *bona fide* diplomats and embassies and not to terrorists camouflaged as diplomats. Furthermore, there have been debates that the embassy was in fact not qualified as a *bona fide* embassy since the change of government was not accepted by the UK. If this was the case then the Libyan People’s Bureau was not inviolable according to Article 41 (3) of Convention 1961. Another argument that would justify entry into the embassy is self-defence. Had the firing continued, counter-firing would have been possible.

Self-defence was not used as a justifiable reason for entry, but the search done while Libyans exited the Bureau was justified.\(^37\) There have been several theories and suggestions that if the Bureau was a *bona fide* mission, then its status as such were lost by breach of the obligations under Article 41(1) to respect the laws of the receiving State. The purpose of the Convention 1961 is to promote international relations, and not to cause the interruption of negotiations or communication or even worse, promote abuse of diplomatic immunity. There are several examples where States have entered into a mission despite its inviolability. The Pakistan government told the ambassador of Iraq that it had evidence that arms were being imported into the country through diplomatic cover and stored in the Embassy of Iraq. The Pakistan government requested permission to search the premises, but this was denied by the Iraqi ambassador. However, the government authorized the police to enter and search the premises in the Iraqi ambassador’s presence. Large quantities of arms were

discovered stored in crates. Although the Iraqi government protested, the Pakistan government declared the ambassador *persona non grata* and recalled their own ambassador.

On the other hand, entry into the embassy without justification cannot and should not be tolerated. There is a danger of entering the mission premises without consent of the ambassador. An example occurred in 1985 when the South African police entered the mission of the Netherlands and rearrested a Dutch anthropologist, Klaas de Jonge, on the grounds of assisting the ANC and escaping from detention. The Dutch protested and a threat to recall the South African ambassador led to the prisoner’s release and apologies for the violation. This incident re-enforced Article 22 and ensured that the mission was protected from intrusion of the receiving State. In addition, Article 22 places a special duty on the receiving State to take appropriate steps to protect the premises from attack, intrusion and damage or impairment of dignity.

The impairment of the dignity of the mission was considered in the Australian case *Minister for Foreign Affairs and Trade and Others v Magno and Another.* Magno and other representatives of the East Timorese community placed 124 white wooden crosses on the grass next to the footpath outside the Indonesian embassy as a symbolic protest against the killing of a number of East Timorese people by the Indonesian military. The Australian Diplomatic Privileges and Immunities Act of 1967 authorized the removal of the crosses as an appropriate step to prevent the impairment of dignity of the mission. Further the court held in *R v Roques* that the impairment of dignity of the mission required abusive or insulting behaviour rather than just political demonstrations.

Appropriate steps imply that the extent of the protection provided must be proportionate to the risk or threat imminent to the premises. Accordingly, if the receiving State knows of an impending hostile demonstration or attack, then it is obliged to provide protection proportionate to the threat. In the much cited case of *United States Diplomatic and Consular Staff in Tehran* the ICJ upheld the principle

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39 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1192-3) 112 ALR 529, [http://www.cases/ALR/magno](http://www.cases/ALR/magno) (accessed on 12 June 2009)
of the inviolability of the premises of a diplomatic mission and the duty upon the receiving State to protect the premises, documents and archives as well as the obligation to protect the personnel of the mission. Before looking at the facts and infringements of this case, there were concerns over the ICJ’s jurisdiction in the hearing of the case. Article 36(1) of the Statute of the International Court of Justice states that the court may hear all cases that are referred to it and all matters provided for in the Charter of the UN or in treaties and conventions. The US’s claim to the court’s jurisdiction was based on the Convention 1961 and its Optional Protocol and the Consular Convention and its Optional Protocol.

Article 1 of both the Optional Protocols states: “Disputes arising out of the interpretation of the Convention shall lie within the compulsory Jurisdiction of the International Court of Justice and may accordingly be brought before the Court”. The facts of the case were that in November 1979 a strong militant group of Iranians stormed into the US Embassy of Tehran, seized buildings, entered the Chancery, destroyed documents and archives, gained control of the main vault, and also held 52 diplomatic, consular and other persons hostage.41 On the facts the ICJ held that it was satisfied that the Iranian Government had failed to take appropriate steps within the meaning of Article 22 and 29 towards ensuring the safety of the embassy and the consulates at Tabriz and Shiraz. Other infringed Articles included Article 25, imposing a duty on the receiving State to provide facilities for a mission to perform its functions, Article 26, allowing freedom of movement and travel for diplomats, and Article 27, imposing a duty to permit and protect free communication for official purposes. Furthermore, it was wrongful to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship. The infringements also constituted a violation of the Charter of the UN and of the Universal Declaration of Human Rights. Iran did not comply with the Court’s judgment immediately. The matter was settled through negotiations between the two parties in the Algiers accord.

The mission must not be misused. Article 41 imposes a duty regarding the use of mission premises. They cannot be used in any manner that is incompatible with the functions of a mission in a diplomatic meaning. Members of a mission may not use the premises to plot the removal of the government or the political system of the

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receiving State. What is of concern is that the blanket mandate of immunity covers the most serious crime against a government i.e. espionage. This threat to national security is entwined within the diplomatic structure, resulting in embassies sometimes being involved in the business of spying.

A career diplomat cannot be a professional “spy” or information collector because the nature of a diplomat is to be visible to the public eye, while “spies” should be unknown to the public. Edmondson states that the motive for committing espionage is irrelevant. The most important element is that information is collected, whether injurious to the receiving State or not. A crime is committed, even if the receiving State is an ally. Diplomatic personnel remain immune from prosecution in order to perform their functions, yet in instances it indirectly encourages this illegal act and results in his protective status becoming contradictory.

Many intelligence agencies have used their immunities to assist their work. When an operative is arrested it is routine to invoke immunity, and the only recourse for the receiving State is declaring the operative persona non grata and directing his immediate removal from the country. Between March and the end of October in 1986, there was a series of expulsions of US and Soviet diplomats on charges of spying and intelligence activities.\textsuperscript{42} There has been no consistency over the years in dealing with the discovery of espionage, but the expulsion or recall of the accused diplomat has been considered normal practice.

Whether a right or recognition to diplomatic asylum for either political reasons or other offences exists within general international law is doubtful. There is no express mention of it in the Convention 1961. Although in principle refugees sought should be returned to the authorities of the receiving State in the absence of a treaty or bilateral agreement to the contrary, this does not always happen in practice. The reason for the omission in the Convention 1961 is simple; it was deliberately excluded because most governments shared the view that the Convention 1961 was not the place to formulate rules on the controversial and sensitive question of granting asylum. Diplomatic asylum has been considered a matter of humanitarian practice rather than a legal right. In other words, humanitarian, political or other motives may lead to the granting of asylum. It is therefore, only in war and violent revolutions and

\textsuperscript{42} Supra Note 16, pp.162-163
governments that this practice has been extended. Although this is the general sentiment among countries, it still prohibits receiving State police officials from entering the embassy and forcibly removing the asylum seeker.

The incident of a Dutch fugitive, Klaas de Jonge mentioned above, confirms this. A removal of this nature constitutes a violation of the sanctity of the embassy premises. Similarly, when Liberian soldiers entered the French Embassy in Monrovia in 1980 and arrested the son of the former Liberian President who had been granted asylum. France protested against the unacceptable violation of the status of the mission. Among Latin American countries, the right of diplomatic asylum has been used and is accepted. The reason for this practice is that international agreements were concluded by those countries allowing for this right. Furthermore, there is a Convention on Diplomatic Asylum that was drafted in 1954 in Venezuela. The procedure under this Convention allows asylum seekers to remain in the mission long enough to be guaranteed safe passage from the country. In the event there is an overflow of asylum seekers additional premises can be created and they too will be inviolable.

Embassy cars, furnishings and other property, including embassy bank accounts in the mission, are also protected from search, requisition, attachment or execution. In some cities, due to serious congestion of motor vehicles and limited parking spaces, an embassy car may be towed away if the driver cannot be found. There was a lengthy debate around 1984 in the UK as to whether the attachment of bank accounts of a diplomatic mission was permitted. The court in Alcom Ltd. v Republic of Colombia accepted that the bank accounts were primarily used for the running of the embassy and not for commercial purposes, resulting in immunity from attachment.

4.6.2 Inviolability of Diplomatic Property

It is well principle of international law that the person of envoys is regarded inviolable. The diplomat under this enjoys inviolability with regard to property (Article 20 of Convention 1961). Inviolability attaches from the movement the diplomatic agent sets his foot in the country to which he is accredited if previous

43 Supra Note 32, p. 353.
notices of his mission has been notified to the Government of the receiving state and accepted by the state. In any case the immunity attaches as soon as he has made his character known by the production either of his passport or his credentials. It extends over the period occupied by him on arrival, his sojourn and his departure within a reasonable time after the expiration of mission. This is not affected by the breaking out of war between his country and that to which he accredited (Article 44 of Convention 1961).

Further the Convention grants that ‘the premises of the mission (building, and the land, ancillary thereto used for the purpose of mission) shall be inviolable. The agent of the receiving state may not enter them except with the consent of Head of Mission (Article 22 (1) of Convention 1961). So only in Westminster City Council v Government of Islamic Council of Iran45 held that the premises that have ceased to be used outside Art 22 and may be made safe by local authority acting under statutory power. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution. In case of the United States Diplomatic and Consular Staff in Tehran46 the International Court of Justice upheld the principle of inviolability of the premises of the diplomatic mission under Convention 1961 and the same question of inviolability of a legation’s premises arose in England in 1984 when shots were fired from the Libyan people’s Bureau in London at demonstrations outside the Bureau, killing a women police officer. The British Government abstained from authorizing any entry of the premises, but insisted on the recall of the Bureau’s staff, thus complying strictly with the principles laid down by the International Court of Justice.

Difficulties can arise when there is a suspicion of misconduct on the premises or entry might be desired for some bona fide purpose such as to fight fire. In this context it is important to note Article 41 (3) which states that “the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention.” In case where an entry has been

sought this provision has been raised as justification. It is said that a diplomatic mission is ‘foreign soil’. This may be correct culturally, but not legally. The land on which the mission premise’s stand remains part of the territory of the receiving state, and buying and releasing the land has to be done under local law.

The clear examples for breach of rule of inviolability are in Iran case where the International Court of Justice took the opportunity to stress importance of this principle and the duties it imposed on the receiving state in particular the special duty arising under Article 22 (2). The court observed that ‘the receiving state should take all appropriate steps to protect the premises of the mission and the correlative duty of the receiving state to protect the premises, and the documents and achieves of the mission’. The court clearly stressed the obligatory nature of the duty placed on the receiving state under Article 22, 24, 25, 26 and 29 to ensure proper functioning of diplomatic premises.

The issue relating to car bomb attack on Indian embassy in Kabul on July 7, 2008, killing 41 people and injuring more than 150 persons raised issue of the responsibility of the receiving state towards the diplomat protection in the receiving state.47 There are still two difficult related issues that require mention. They concern, respectively, the relationship of general treaty principles on the one hand, and of the concept of self-defense on the other, to the notions of inviolability under the Convention 1961. 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 obligations vis-à-vis the violating state, the drafting history of the Convention 1961 seems to make the operation of this principle inappropriate. This conclusion is buttressed by the fact that Convention 1961 provides for its own remedies in case it is violated the severing of diplomatic relations is available as a response to what one could term "a fundamental breach."

Article 24 provides for the archives and the documents of the mission to be inviolable at all times and wherever they may be. This means that no archives may be seized, detained or be produced as evidence in any legal proceedings in that state. The term “archives” is not defined in the Convention 1961, but it is clear that it was intended to cover a wide definition, including any form of storage of information or

47 THE WEEK, July 20, 2008, pp.26-27
records in words, pictures and in our modern society in the forms of tapes, sounds, recordings, film and digital data.

The Harvard Research in 1930\textsuperscript{48} accorded limited protection to archives and required that their confidential character be protected, provided that notification of their location has been given to the receiving State. The ILC extended the protection of archives in three ways. The first was by using the expression “\textit{inviolable}”. This expression provides for two implications: the receiving State abstains from any interference by its authorities, and that a duty of protection of the archives is necessary. The second is by adding the words “\textit{at any time}” to clarify that inviolability continues without interruption, even when ties are broken; and lastly, by adding the words “\textit{wherever they may be}” confirms that archives do not have to remain in the mission to be inviolable. The rationale behind this is to enable the mission to carry out two important functions of negotiating with the government of the receiving State and reporting to the sending State on the conditions and developments within the receiving State.

Is there a principle of self-defense that continues to exist side by side with the Convention 1961, allowing the authorities of the receiving state to take certain action against an embassy, notwithstanding Article 22 of the Convention? In a very interesting statement, the Legal Adviser to the Foreign and Commonwealth Office took the view that "self-defense applies not only to action taken directly against a state but also to action directed against members of that state."\textsuperscript{49} Sir John Freeland thought that where the classic requirements were met, forcible entry of embassy premises might be justified in self-defense. This writer remains skeptical as to the applicability at all of the international law concept of self-defense to violent acts by the representatives of one state within the territory of another, directed against the latter's citizens.

The same inviolability applies also to the private residence of diplomatic agent and also to property of diplomatic administrative staff of the mission and their families who are not the nationals of the receiving state.\textsuperscript{50} As to a diplomatic agents

\textsuperscript{49} Supra Note 21, p.177.
\textsuperscript{50} Article 30 (1) and 37 (1)
property it may be noted that while it is inviolable, the furnishings and other property on the premises of the mission and the means of transport of the mission are stated to immune from search, requisition, attachments or execution.

Particular problems have arisen in relation to embassy bank accounts, especially where the account covers not just the operating costs of the embassy but also other transaction of the sending state or its agencies, perhaps for commercial purpose. In *Alcom Ltd v Republic of Colombia*\(^{51}\) has held that “it would seem that embassy account operated solely for commercial purposes would not be immune from normal legal procedures applicable to it, whereas an embassy account solely for diplomatic purposes would be immune from such process. Accounts used for both kinds of purposes are in an uncertain position, which may have to be settled in the light of the particular circumstance.

Surrender of criminals taking shelter within the mission premises

Article 31 (2) of Convention 1961 states “no police officer or any other official of the state can enter a diplomat’s residence without his permission”, this has been amply made clear in Article 16 of the Pan-American Convention at Havana 1928 which reads “no judicial or administrative functionary or official of the state to which the diplomatic accredited, may enter the domicile of the later, or of the mission without his consent”. The Convention provides exception for free communication in case of action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions where the local authority has jurisdiction.

It is generally agreed that the immunity affords no jurisdiction for an envoy to give shelter to a criminal within the premises. An envoy is expected to act with due regard to the law and order in the receiving state. Article 17 of Pan-American Convention of 1928 provides that if a crime is committed within the embassy or legation by a person from without the offender should be handed over to the local. In Convention 1961 Article 41 (3) also provides that the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the convention or by other rules of general international law. In a case

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decided by the Supreme Court of French Republic in 1865 it was held that the French Court had jurisdiction to investigate into the case where a Russian subject assaulted an attaché inside the Russian embassy in Paris. The receiving state may also protest if a private person is detained within a foreign embassy, as such an act will amount to an abuse of the right of the envoy to inviolability in respect of his premises. In the case of Sun-Yat-Sen, a political refugee of China, who was detained within the Chinese Legation in London, the Foreign Officer intervened with the result that he was released although the courts felt some difficulty in issuing a Writ of habeas corpus and ordering Sen’s release having regard to the immunity of the diplomatic premises.

4.6.3 Freedom of Communication and the Inviolability of Official Correspondence (Article 27 (1) of Convention 1961)

It is essential to the proper functioning of a diplomatic mission that it is able to communicate freely for all official purposes, both with its home government and with other missions of its own state in other countries. Further Article 24 of Convention 1961 extends the concept of inviolability to all communication and documents of the diplomat agent not matter where ever they are in the receiving country.

Protection of the freedom and secrecy of official communications of missions with their own government is possibly the most important of all privileges and immunities given in international law. A mission is entitled to communicate for official purposes and to have access to every facility for this in the receiving State. Telecommunication is considered as any mode of communication over a long distance and can be in written form and delivered by couriers, telephone services, fax, electronic mail, wireless transmitters and the like. There is no clear, established rule in customary law concerning the inviolability of correspondence to or from a mission sent through the public postal system. Letters to the mission would become archives or documents on delivery, but not before then. The inviolability of official correspondence is twofold: it makes it unlawful for the correspondence to be opened by the receiving State, and it prevents the correspondence from being used as evidence in a court proceeding.

52 Supra Note 17, p. 64.
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The House of Lords in *Shearson Lehman Bros and Inc v Maclaine Watson*\(^{53}\) has held that ‘inviolability of diplomatic communication’ was held to protect achieves not only from the authorities of the receiving state but also from use in legal proceedings by private parties, but not to protect document already been communicated to a third party by a person acting with appropriate authority. The receiving state must therefore, permit and protect such free communication. A mission may use appropriate means for such communication, including diplomatic couriers and messages in code or cipher, through wireless transmitter may be used only with consent of the receiving state. The radio interception of message to and from diplomatic mission, which does not hinder the transmission of the message themselves is not contrary to international law.

Formerly, the freedom of communication was limited in principle to the diplomatic mission’s exchange with the government of the sending state and with the consulates under its authority within the receiving state. At present with the increase in air communication, the practice appears to have changed. Communications with embassies and consulates in other countries need no longer necessarily pass through the Ministry of Foreign Affairs of the home state of the envoy, and use is often made of certain intermediate posts from which dispatches are carried to the various capitals to which they are addressed.\(^{54}\)

### 4.6.4 Diplomatic Bag and Diplomatic Couriers

All official correspondence of mission is inviolable. The concept of inviolability of communication extends to bags of the diplomatic agents (Article 27 (3) of convention 1961). It is certainly accepted international practice, and probably international law, that in exceptional cases where the receiving state had grounds for suspecting abuse it had right to challenge in respect of the diplomatic bag. It could, that is, ask for permission to inspect the content. The sending state could either allow the bag to be opened and inspected or have the bag return to its place of origin. The ‘diplomatic bag’ is defined as meaning: “the package containing official correspondence, and documents or articles intended to exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communication referred to in Article 1 which bear visible external marks of their

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\(^{54}\) *Article 25 of Draft Articles adopted by The International Law Commission at its Tenth Session*
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character as a diplomatic bag”.

Article 27 (3) requires that the bag be allowed through without inspection. Reservation to the Convention insists upon a power of inspection have been made, but have met with protest by some other parties. United Kingdom Foreign Affairs committee report says that “Article 27 does not prohibit electronic scanning of the diplomatic bag or sniffing by dogs”. The exemption of the diplomatic bag from examination through electronic or other technical devices, which does not appear in Art 27 (3) of the Convention is controversial and has been objected to by many states.

There is no doubt that in recent years these provisions have given rise to public debate. A balance has to be sought between of communication and the equally important need to guard against abuse. Allegations have circulated about the diplomatic bags being used to smuggle drugs, weapons, art treasures and sometimes individuals. Even then the receiving state and transit states must permit the entry, transit and departure of the diplomatic bag, and grant exemption from custom duties, taxes and related charges, other than charges for storage, cartage and similar services rendered. The diplomatic bag is given more absolute protection under the Convention 1961 than was given under customary law. Previously, the receiving State had a right to challenge a bag that was suspected to contain unauthorized items. If this occurred, the sending State could either return the bag unopened, or opens it in the presence of the authorities of the receiving State.

France allowed the Ministry of Foreign Affairs to compel the opening of the bag in the presence of the representative of the mission where there was serious reason to suspect abuse. The US required the consent of both the Ministry of Foreign Affairs of the receiving State and the mission to open the bag. The United Arab Republic allowed the receiving State to require the sending State to withdraw the bag. The Conference tried several times to limit the absolute protection of the diplomatic bag. Today Article 27 determines that no diplomatic bag may be opened or detained.

The Convention 1961 does not provide a requirement as to what a diplomatic bag is. Normal practice is that the bag resembles a sack; however, the bag may vary in

55 Berridge G. and Alan James, A Dictionary of Diplomacy, (2nd Ed), Palgrave Macmillan, Great Britain), 2003 p. 71
57 Supra Note 38, p.117
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size from an aircraft full of crates to a small pouch, as long as there is clear, visible, external marking indicating that it is part of the foreign embassy, or it bears an official seal ensuring its protection. The Soviet Union attempted to stretch the definition of a diplomatic bag. In July 1984, the Soviet government sent a nine-ton Mercedes tractor-trailer into Switzerland, sealed against custom inspection. When entering Germany, the German government claimed that this was extreme and that the “diplomatic bag” was motorized and capable of its own movement. This was not what the Convention 1961 intended and it was not considered a diplomatic bag and thus not inviolable. The crates found within the lorry were accepted as diplomatic bags and thus not opened. A solution could be to limit the size of bags to certain standard sizes. For instance, one could be a size to hold documents and another size to accommodate office equipment. To limit it further, it could be mandatory to limit it to one item per bag.

A diplomatic bag usually falls into one of two categories; accompanied or unaccompanied, depending on the importance of its contents. The main function of a courier is to supervise the bag that he accompanies and to ensure that the rules of international law are adhered to. The ILC distinguished between three types of couriers, namely, permanent diplomatic couriers, ad hoc couriers and captains of commercial aircrafts entrusted with a diplomatic bag.

A diplomatic bag may be carried by a diplomatic courier who is entitled to the protection of the visiting State, enjoys personal inviolability and is not liable for arrest or detention. A diplomatic courier is a full-time employee of a Ministry of Foreign Affairs and on every journey he must be provided with a document indicating his status and the number of packages constituting the diplomatic bag. The sending State or mission may also designate ad hoc diplomatic couriers. They are used primarily by smaller States lacking resources to employ professional couriers, but larger States use them for urgent deliveries of documents where a normal courier service would be too slow. An example of an ad hoc courier is a businessman on his way to the receiving State, escorting the bag while he is there. Ad hoc couriers are protected by the receiving State and enjoy personal inviolability. They are not subject to any arrest or detention until they have delivered the diplomatic bag to the mission concerned. A common arrangement, especially for small posts or developing countries, is to

58 Supra Note 17, p. 144.
“deputise” the captain of an aircraft. Though he is not considered a courier, and thus has no immunity, the diplomatic bag retains its inviolability. The mission receiving the bag sends one of its members to take possession of the bag directly and freely from the captain. The limited immunities for *ad hoc* couriers and captains are to enable those persons to complete their functions.

There have been concerns regarding the use of the diplomatic bag. Denza claims that there is a continuing need to balance the need for confidentiality of diplomatic bags with the need for safeguards against abuse.\(^5^9\) There are several instances where the bag has been used to smuggle drugs, explosives, weapons, art, diamonds, money, radioactive materials and even people. Despite this, the diplomatic bag may not be opened or detained. There have been requests for permission to open the bag in the presence of an official of the mission. If this request is denied, the only recourse available to the receiving State is to deny entry of the bag into the country.

Article 27, paragraph 3, does not confer inviolability on the diplomatic bag, but only that it cannot be opened or detained. There is no indication that representatives at the Conference considered the possibility of tests on the bag without opening it to reveal or confirm whether the bag contained illegal items. With the introduction of scanning of baggage by airlines in the 1970s, some governments took the view that scanning did not equal opening bags.

However, the general practice among States has been not to scan bags unless deemed necessary. Britain took the view that electronic scanning is not unlawful under the Convention. However, some countries believe it to be “constructive opening”. Despite this, the British government did not scan and expressed its doubts on technical grounds about the advantage gained by doing so. For example, when scanning the diplomatic bag and weapons are shown, the result would lead to opening the bag, which is prohibited by the Convention. Another form of testing a bag is through the use of dogs specifically trained for such purposes.

This is particularly useful in the smuggling of narcotics, explosives and possibly humans. The most cited incident of the abuse of diplomatic bags occurred in July 1984, when Umaru Dikko, a former minister of the deposed Shangeri Government of Nigeria, wanted by the new Nigerian government on charges of

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Embezzlement of government funds was abducted. He was kidnapped outside his home in London and after being heavily drugged was placed in a crate. Two large crates arrived at Stansted airport to be loaded on to a Nigerian Airways aircraft. The crates were handled by a member of the Nigerian Government service, who held a diplomatic passport but was not a member of the mission in Britain and did not have any diplomatic status in the country. He made no protest when he was asked to be open the crates. One of the crates contained the unconscious Dikko and another man who had in his possession drugs and syringes. The other crate contained two other men. Both were conscious. A total of 27 people, including the three persons other than Dikko who were found in the crates, were arrested. The main reason for the crates being opened without objection was that there were no clear visible markings indicating it was a diplomatic bag. The Foreign Secretary made it clear that even if the crates had borne markings, the concern of protecting life was more important than immunity. In that situation, the use of scanning or dogs would have assisted in the discovery.

As a result of the increasing disquiet over the use of diplomatic bags, the General Assembly of the UN directed the ILC to consider the status of the bag and couriers. This led to the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Couriers. Article 1 of the Convention 1961 looks at the scope of present articles and to whom they apply and Article 28 deals with the protection of the diplomatic bag. It states that the bag shall not be opened or detained, as in the Vienna Convention. Furthermore, the bag shall be exempt from examination directly or through electronic or other technical devices. However, if the authorities of the receiving State believe that the bag contains something other than the items listed in Article 25, they may request the bag to be examined or scanned. If such examination does not satisfy the authorities, the bag may be opened in the presence of an authorized representative of the sending State (Article 28). If this request is denied, the bag may be returned to its place of origin. This provision was introduced to show the balance between the interests of the sending State in ensuring the safety and confidentiality of the contents of the bag, and

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the security interests of the receiving State.\textsuperscript{61} It would appear that this provision is however ineffective and inadequate. Examination and scanning is permitted in circumstances where the bag contains items not listed in Article 25. This makes sense for small bags and pouches. It does not seem that the ILC dealt with larger “bags”, and the Convention 1961 does not limit the size of the bag.

International Law Commission had examined the issue and in 1989 it produced a final text on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and recommended that the Assembly convene a conference to study the matter. However, informal consultations revealed wide divergences of view on some of the draft articles, particularly the one relating to the inviolability of the diplomatic bag. In consequence, progress towards a treaty on the issue remains held up. But at the level of practice the situation is in almost all respects managed satisfactorily. The special provision of draft Article 28 (2) allowing for the opening of the bag in the presence of a representative of the sending state, or if that is refused, its return to its place of origin only applies to consular bag.

Although the ILC and Conference debated the issue of diplomatic bags, it seems that States gave inadequate weight to the need for protection against abuse. With the increase of abuse it is prudent to apply the Vienna Convention protections to diplomatic bags, or are there salient political and legal reasons which mitigate in favor of restrictions? The simplest limitation to implement would be by means of the size of diplomatic bags, and in so doing prevent the smuggling of people, artworks and even heavy machinery.

4.6.5 Exemption from taxes, local charges and Customs

Immunity from Taxes

The VCDR and the VCCR are the primary resources for evaluating the proper treatment and responsibilities of diplomats and consular officials in host states. Two articles of the VCDR directly address diplomatic immunity from taxation. This section explains both the immunities and the exceptions to immunities provided by these two provisions. Additionally, it examines the history of the VCDR’s adoption to provide background for the inclusion of these articles.

A. Articles 34 and 23: No Immunity for “Specific Services Rendered”

Articles 34 and 23 of the VCDR directly address taxation of diplomatic officials. Article 34 relates to the general taxation of diplomatic agents, while Article 23 covers taxes stemming from mission premises. Because Articles 34 and 23 contain almost identical language, the history and interpretation methods used for one can be used for interpreting the language of the other. Article 34 provides:

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

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) 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;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Similar to the language in Article 34, Article 23 also provides an exception to tax immunity for “specific services rendered.” Article 23 states:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.62

In general, diplomatic exemption from taxation is a broad immunity. While there are specific exceptions, when faced with conflicting interpretations, courts should favor exemption. The terms used in the articles are not defined, and because nations raise revenue differently, what one nation defines as a charge for services rendered could be deemed a tax in another nation. The line between what is considered a charge or fee for specific services and what is simply a tax is blurry. Even when labeled a tax under a nation’s revenue laws, a charge can still be for specific services rendered for purposes of the VCDR. Charges for specific services rendered include bridge and road tolls and charges imposed by local governments to provide services such as water, road maintenance and improvement, and street lighting. Charges that would not fall within the exception for specific services rendered include contributions for national security efforts, “public education, social security benefits or the general expenses of central government.”

Diplomats are generally immune from paying “non-beneficial” local taxes or rates. Non-beneficial rates are those from which the mission does “not . . . derive a direct benefit.”63 The distinction between beneficial and non-beneficial rates is an important one that courts across the country and regimes around the world use when analyzing whether charges constitute a fee or a tax. Unfortunately, there is no bright-line test for what constitutes a benefit and what does not. Some courts require a benefit to actually be conferred, while others only require the possibility of a benefit. The meaning of benefit also varies among nations and international organizations. The only constant is that the definition of a benefit depends upon the jurisdiction in which the court or governing body resides.

History and Rationale Surrounding Immunity to Taxation in the Vienna Convention on Diplomatic Relations:

In general, diplomatic immunities stem from the conviction that in order to accomplish the goals of the represented foreign states, diplomats must have absolute

62Art. 23 (1)

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independence from the host state. Originally, host states did not tax diplomats for reasons of courtesy. The courtesy became a generally accepted practice, and it became customary to provide a general immunity from taxation. Because the custom only provided for a general immunity, many nations entered into bilateral agreements to define the specifics of the immunity from taxation. In several cases, national governments passed legislation to afford immunity from taxation expressly conditioned on reciprocity. The practice of requiring reciprocity illustrates that before the Convention 1961, international legal texts only discussed diplomatic immunities as generally recognized principles of international law and did not specify or define the immunities on a broad international level.

There are two schools of thought on whether diplomatic premises are exempt from local assessments. The first subscribes to the view that no diplomatic immunity exists from local assessments. Specifically, scholars say that no immunity exists from charges imposed for the “upkeep of roads, bridges, and canals, although exemption is sometimes granted as a matter of courtesy.” The revenue raised by rates is used for the benefit of residents of the place, and being residents of the place diplomats derive the same benefit as any other citizen. Thus, diplomats should pay just like every other resident.

The second school of thought maintains that diplomatic premises themselves are entitled to immunity. However, the driving force behind such arguments is that enforcement is not possible, which is a problem separate and distinct from the liability issue. Even scholars who argue in support of immunity recognize that certain rates would not be exempted. Such rates include those charged for services “from which an envoy himself derives benefit, such as sewerage, lighting, water, night watch, and the like.” There are several reasons for providing tax immunities to diplomats. First, there is a general principle that “one sovereign does not tax another.” Another reason is to ensure that the diplomat can “carry out his duties independently of the receiving State.” In order to do this, it is beneficial for the diplomat to enjoy exemption from taxes associated with his official work and residence in the host state. Lastly, diplomats should only be “subject . . . to the tax regime[s] of [their] sending State[s], rather than to a succession of varying tax regimes in the States where they serve.”

64 A B Lyons, ‘Personal Immunities of Diplomatic Agents’, British Yearbook of International Law, 1954, p. 299
Both the revenue-raising authorities and the sending states benefit from the administrative convenience of limiting taxation authority to that of the sending states’ regimes. While diplomats and host governments may bicker about the intricate exceptions, Articles 34 and 23 of the VCDR provide diplomats general immunity from taxation.

Immunity from Customs duties:

Article 36(1) requires the receiving state to permit the import, free from all customs duties, taxes and related charges, other than service charges, of ‘articles for the official use of the mission’ and ‘articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment’, this latter privilege continuing throughout his posting. It is for the head of mission and the sending state to determine, in good faith, what is covered by these formulas; these days they include even construction materials needed for the premises of the mission. Customary international law is generally regarded as imposing on receiving states no obligation to grant exemption there from the goods which are intended for diplomatic agent’s private use. In practice, and by courtesy the laws of many states grant such a within varying limit. However, the receiving state is not under an obligation to allow the entry of goods the import of which is subject to a general prohibition (Article 41 of Convention 1961). In Keller v Attorney-General it was held that the goods imported by the diplomat in abuse of his diplomatic privileges may be treated as smuggled. Similarly, since the Convention contains no privileges regarding exports, any prohibition on exporting certain articles, such as antiquities, applies equally to the mission and its staff.

Immunity from Local charges

These are a form of payment known as rates to the authorities of a local administrative area as the means of paying for those local public services which are not wholly paid for from central government funds. Such charges are with the scope of term ‘municipal dues and taxes’. Consequently a diplomatic agent can be required to pay such charges imposed for local objects from which he himself derives benefits, such as sewerages, street lights, water, refuse removal and the like.

In *Parkinson v Potter*\(^6^6\) the English court was of the view that “distinct from requiring payments of rates in the question of enforcing such payment if it is refused. In England, the payment of local rates could not be enforced by suit or distress against the member of a legation. The Canadian Supreme Court in the matter of a reference as to the powers of corporation of the city of Ottawa has held that no rates could be levied on buildings owned and occupied by foreign legations. A minority the judge held that rates could be imposed but that their payment could not be enforced.\(^6^7\)

These important import privileges are qualified by the right given to the receiving state to control the exercise of the privileges by means of its laws and regulations in order to prevent abuse. They can prescribe procedural formalities, restrictions on quantities, the period within which duty-free entry of goods will be allowed on first installation (for those staff entitled to that privilege), and regulations on subsequent disposal of goods imported duty-free.

**4.6.6 Immunity from police rules**

Closely linked with their exemption from criminal jurisdiction is the exemption they are also accorded from the police of the receiving state. Orders and regulations of police cannot be enforced against them. On the other hand this exemption of police cannot does not carry in any privilege for diplomatic agent to do what he likes as regards matters which are regulated by the police. He is expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course he cannot be punished if he acts otherwise, but the receiving stating government may request his recall. Since 1961, there have been examples of police entering diplomatic missions without permission in pursuance of their normal duties, in particular pursuing suspected criminals. But, even if the police were unaware of the status of the premises, the intrusion would amount to a breach of its inviolability. There is, however, a possibility that in very exceptional circumstances police may enter the premises without consent if its occupants, whether diplomats or terrorists,

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clearly pose a real and immediate danger to human life outside the premises. In all other cases, the receiving state has the remedies of *persona non grata* or severing diplomatic relations.

### 4.6.7 Immunity from local and military obligation (Art 35)

Article 35 exempts a diplomatic agent from all personal services, from any kind of public service (such as sitting on a jury), and military obligations, including those connected with requisitioning, contributions and billeting of soldiers.

### 4.6.8 Immunity from social security provisions (Art 33)

Since a diplomatic agent will continue to be subject to the social security legislation of the sending state, he is exempt from local social security obligations (Article 33(1)). A private servant who is in his sole employ is also exempt if he is not a national of or ‘permanently resident’ in the receiving state and is covered for social security by the sending state or a third state (paragraph 2). But, if that exemption does not apply, the diplomatic agent must carry out the employer’s obligations under local social security legislation (paragraph 3). Although the Convention does not provide specifically that a mission must comply with local social security legislation in respect of those of its staff who are not exempt (mostly locally engaged), sending states increasingly take the view that they should as good employers ensure that local social security contributions for non-exempt staff are paid by the mission. Even when a member of a mission is exempt, he can take part in the local social security scheme if this is permitted by local law (paragraph 4). Nothing in Article 33 affects the provisions of social security agreements past or future (paragraph 5).

### 4.6.9 Right to worship

A diplomatic agent has freedom of worship no matter whether that believes in that method of worship or not. The receiving state is not concerned with the method of worship of the diplomat. Further the envoy has privilege so called right to chapel. This is the privilege of having a private chapel for the practice his religion, which must be granted to an envoy by the law of the receiving state.\(^{68}\) This privilege in former times was of great value, when freedom of religious worship was unknown in most of the states, it has at present a limited value only. But it has not disappeared,

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\(^{68}\) Supra Note 64, pp.371-72
and might become again of practical importance in case of states should give way to religious intolerance. It must, however, be emphasized that the right of chapel need only comprise the privilege of religious worship in a private chapel inside of official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the official of a chaplain, who must be allowed to perform religious ceremonies within the chapel, such as baptism and the like. It further includes permission to all compatriots of the envoy, even if do not belong to his retinue, to take part in the service. But the receiving state may not allow its own subjects to take part therein.

4.6.10 Right to Travel

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory (Article 26 of Convention 1961). This provision has been frequently the subject of restrictive interpretation, to which state affected adopt to respond with a similarly restrictive interpretation. The United States imposed restrictions on travel of Russian diplomats in USA. The other instance of breach of obligations owed by Iran, and breached by its treatment of US embassy personnel, was that relating to freedom of movement.

4.6.11 Commencement and Termination of Mission Immunities

The Vienna Convention has clear provisions regarding commencement and termination of privileges and immunities with regard to diplomats, but it does not inform on the mission or its property. In the Harvard Draft Convention inviolability is contingent on a notification to the receiving State that the premises are occupied by diplomatic agents. Several members of the ILC addressed the problem when drafting the Convention, but each provided a different answer. Ago says that it was practice to notify the receiving State that premises were acquired to be used as a mission and that inviolability begins on such notice. Fitzmaurice suggests that inviolability of premises begins from the time they are put at the disposal of the mission. Bartos says that it was customary to claim inviolability when they reached the stage of interior
immunity and decoration.\textsuperscript{69} McClanahan considers the inviolability of abandoned premises and concludes that as a result of the Vienna Convention’s failure to deal with the subject, State practice will take precedence.\textsuperscript{70}

It is noted that ownership of the mission rests with the sending State and although the intention is to use it for diplomatic purposes, it does not make it inviolable. However, when the receiving State has notified the sending State of the acquisition of the premises to be used as an embassy and the necessary paperwork is completed, then the premises will be regarded as inviolable. Where the mission has vacated its buildings, inviolability is continued for a reasonable period. On the other hand, where diplomatic relations has been severed or the mission has been recalled, the premises lose their diplomatic character and inviolability, as in the Fletcher incident.

\textbf{4.7 Diplomatic Agents’ Privileges and Immunities}

\textbf{4.7.1 Personal inviolability}

Peoples have recognized the special status of foreign representatives already since ancient times and therefore some of the fundamental principles concerning such representatives, for example, personal inviolability, are as old as the first civilizations. Since then, diplomatic law has continuously developed and also changed, but the vital principles have survived that evolution. Diplomats are exempt from the administrative, civil and criminal jurisdiction of all authorities of the receiving state. This immunity is by far most important the freedom of person of a minister for the proper functioning of his duties for which he is accredited. It must however be remembered that the immunity is the immunity of the state which he represents and not his personal immunity, and the state can waive immunity and consent to his prosecution before local courts.

Diplomats are accorded the highest degree of privileges and immunities. Five privileges established in the Vienna Convention are exemption from taxation, custom duties and baggage inspection, exemption from social security obligation, from personal and public services, and exemption from giving evidence.\textsuperscript{71} Except for the

\textsuperscript{69} Supra Note 59, p. 146
\textsuperscript{70} Supra Note 17, p.51.
\textsuperscript{71} Article 28, 36, 33, 35 and 31 paragraph 2 Convention 1961.
exemption from baggage inspection, the other privileges fall under the realm of private law and will not be considered. Prior to the Vienna Convention, diplomats received the greatest degree of immunity. They could not be arrested unless they were actually engaged in plotting against the State they were accredited to, and even in such extreme circumstances an application for their recall was implemented. In 1717 the Swedish ambassador to England was a prime suspect in a conspiracy to overthrow George I. The British government obtained evidence by intercepting some letters. The ambassador was expelled from Britain.

The Convention 1961, adopted the functional necessity theory to justify the diplomat’s privileges and immunities. These privileges and immunities are given to diplomats on the basis of reciprocity. Any government which fails to provide these to a diplomat within its territory knows that it could suffer not only collective protests from the diplomatic corps in its own capital, but also retaliation against its own representatives in a foreign State. Under Article 29, diplomats are accorded full immunity and, like the inviolability of a mission, this has two aspects. Firstly, there is immunity from action by law enforcement of the receiving State, and secondly there is the special duty of protection by the receiving State to take appropriate steps against attack. Ogdon adds a third aspect, stating that the State has a duty to punish individuals who have committed offences against diplomats, which most foreign States make provision for in domestic laws.\(^2\)

In the past 25 years diplomats have been in more physical danger than ever before. These attacks have shown the dark side of their “special, official, privileged status”. McClanahan succinctly points out that it is ironic that people involved in diplomatic work are often criticised in the media for being ineffective and only attending cocktail parties, formal functions and ceremonies. Yet, unfortunately, diplomats, their homes and family are targets of violent groups and oppositions. A spate of kidnappings of senior diplomats occurred in the late 1960s and early 1970s. The object of a kidnapping is always to extract a particular demand from a government. The threat of the execution of a diplomat and the failure to fulfill the demand leads to the refusing government being held responsible for his death.\(^3\) As a

\(^3\) Supra Note 38, p.199
consequence of the high incidence of political acts of violence directed against diplomats and other officials, the General Assembly of the UN adopted a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1979 (in short Convention 1979). Article 2 of Convention 1979 foreseen offences are primarily murder, kidnapping, attacks upon the person, violent attacks upon official and private premises, and any threats or attempts to commit any of the above offences. Nations ratifying the Prevention and Punishment Convention make these crimes punishable with appropriate penalties, which take into account the gravity of the offence and either extradite offenders or apply the domestic law. The draft text was prepared with the outmost urgency through a Working Group without the appointment of a Special Rapporteur.

Where there is a threat to the safety of a diplomat, such as a mob attack or kidnapping, the receiving State should provide special protection, like an armed guard or bodyguards. In Guatemala City on 28 August 1968 an American ambassador, John Gordon Mein, was returning to his office after lunch when his official car was blocked in a down-town street. Seeing a number of men in uniform climb out of the vehicle coming towards him, Mein jumped out of his car and began running. The men shot the ambassador and he died instantly. This incident shocked the world. Another incident involving the same members of the organisation that tried to kidnap Mein was when the Federal German ambassador was forced from his car and held captive. The kidnappers demanded the release of 17 political prisoners in exchange for the return of the German ambassador. While negotiations were in progress between the Guatemalan and German governments, the demand was raised to 25 prisoners and $700,000, which the Germans offered to pay. The Guatemalan government refused to set convicted prisoners free and the body of the ambassador was found with a bullet in his head.74

Where a government is aware of a possible kidnapping, or diplomats situated in countries such as in South America or in the Middle East, where diplomats are vulnerable to terrorist attacks, extra measures should be taken in the tightening of their security and the protection of these diplomats. Although the Convention 1961 does place a duty on the receiving State to protect diplomats, the receiving State

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

4.7.2 Immunity from Jurisdiction

Jurisdictional immunity entails that persons with immunity cannot be brought before the courts for any illegal acts or offences committed while in the receiving State during the period of their functions. The distinction is well summarised in Dickinson v Del Solar\(^\text{75}\) where it was emphasised that diplomatic immunity does not signify immunity from legal liability, but rather imports exemption from local court jurisdiction. This extends to all jurisdictions whether civil, administrative or criminal. Thus, a diplomatic agent who commits an illegal act in the receiving State cannot be prosecuted in the local courts as the courts would be “incompetent to pass upon the merits of action brought against such a person”.

4.7.2.1 Immunity from criminal Jurisdiction

The rationale behind criminal jurisdiction is to prosecute and punish those who commit illegal acts or offences. Immunity from criminal jurisdiction of a diplomatic agent, provided in Article 31, means that the diplomat cannot be brought before the criminal courts of the receiving State for illegal acts or offences committed in that State during his stay, which is contrary to the very ethos of the rule of law and justice. The scope of offences which may be considered is very broad. The largest category of offences involving diplomats has been, inter alia, drunk and negligent driving, parking offences and drugs possession, although incidents have also been reported of rape, assault and robbery.

The most important consequence of the personal inviolability of the envoy is his right to exemption from jurisdiction of the receiving state in respect of criminal proceedings. The immunity of a diplomatic agent in this regard is absolute, and he

\(^{75}\) Dickinson v Del Solar (1930) 1 KB 376, [http://www.uk/kb/reports/1930](http://www.uk/kb/reports/1930) (accessed on 12th may 2009)
cannot under any circumstances be tried or punished by local criminal courts of the country to which he is accredited. Article 19 of the Havana Convention on Diplomatic officers 1928 states “Diplomatic officers are exempted from all civil or criminal jurisdiction of the state to which they are accredited”. The same principles have been embodied in Article 31 of Convention 1961. The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention under the criminal laws of the receiving state (Article 29 of Convention 1961).

Oppenheim in summarizing the position of states:

“As regard the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of international law agree nowadays that the receiving stat have no right in any circumstances whatsoever to prosecute and punish diplomatic envoys”. 76

According to Fauchille “diplomatic agents irrespective of rank, enjoyed complete exemption from civil and criminal jurisdiction of the state to which they are accredited”. According to Sir Cecil Hurst “on the whole it may be stated with confidence that the view that the diplomatic agents and the members of his suit are exempted from the criminal jurisdiction of the state to which they are stationed is not only sound in itself, but is in accordance with the practice of all civilized states”.77

Complete exemption of a diplomatic agent from local criminal jurisdiction appears to be fully justified by the requirement of his function. Otherwise the inviolability of his person could hardly be guaranteed. The authorities on international law appear to be unanimous on this question. The same view has been taken by learned societies like the American Institute of International Law.

This immunity is by far the most important. The freedom of person of the ministry is necessary for the proper performance of his duty for which he is accredited. It is settled principle of law that a diplomatic agent can under no circumstance be prosecuted in the receiving state for any criminal offence which may be committed. It is clear that this absolute immunity attaches also to acts committed in his private capacity, because it is difficult to see as to how a crime can be committed by a diplomatic agent in the exercise of his official functions. In case concerning United States Diplomatic and Consular Staff in Tehran, 78 the ICJ felt that it is

76 Supra Note 8, p 79
77 Supra Note 32, p. 107
advisable to warn that submitting the staff in question to any form of criminal trial or investigation would constitute a grave breach of receiving state obligation under Article 31 (1) of Vienna Convention on Diplomatic Relations 1961.

Immunity from jurisdiction should not be confused with the immunity from liability, for once the exception from jurisdiction is effectively waived, and liability may arise. The immunity, if any, is form suit, not from liability. Lord Hewart CJ in case of Dickinson v Del Solar\(^79\) has pointed out that:

‘Diplomatic agents are not, in virtue of their privileges as such immune from legal liability for any wrongful act. The accurate statement is that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction’

A person entitled to immunity in the receiving state might still be subject to the jurisdiction of his home state. In 1915 when Gottfried Ruh, a registrar of the Swiss legation in Berlin, embezzled moneys entrusted to the legation, the Swiss Government asked the German Government to arrest and extradite him to Switzerland; he was tried at Berne in June 1916, and sentenced to penal servitude.\(^80\) In Greek State v X\(^81\) it was held that a diplomat may be prosecuted and for a misdemeanor. In 1904 Mr. Gurney, Secretary to the British Embassy at Washington, was fined by the police magistrate of Lee, in Massachusetts, for reckless driving but the judgment was afterwards annulled and the fine remitted. The refusal of diplomats and embassies to pay parking fines is viewed increasingly seriously in many states, and has lead to server action against persistent offenders. Although diplomatic agents may not be prosecuted for traffic offences such as illegal parking, and the clamping of diplomatic vehicles is contrary to the Convention 1961. The issue to them of a notification of the commission of traffic or parking offences is not itself a violation of their immunities and it may expected that they should pay fines imposed for parking offences; some states, such as UK and USA, make this the practice for their diplomats abroad.

\(^79\) (1930) 1 KB 376 at 380, \url{http://www.uk/kb/reports/1930} (accessed on 12th may 2009)
\(^80\) Supra Note 7, p. 1096
\(^81\) (1953), ILR, 20, p. 378, \url{http://www.ilr/reports/1953/309.pdf} (accessed on 12th may 2009)
The supreme court of USA in *X v Department of Justice and Police of the Canton of Geneva*\(^\text{82}\) have held that withdrawal of driving license after signal traffic violation has been held to be violation of diplomatic immunity, although withdrawal on grounds of an inability to drive safely as shown by repeated traffic violation would be permissible. The status of the granting the diplomats of parking privileges on the public highway as a matter of courtesy only. The incident of the Ambassador of Papua New Guinea has been a widely discussed event with regard to diplomats’ drunk and negligent driving. Ambassador Kiatro Abisinito was driving his car whilst intoxicated and crashed into the rear of a parked car in which two people were sitting. The ambassador was travelling at such a speed that his car hit two empty cars on the opposite side of the street, jumped a sidewalk, hit another car waiting at an intersection and bounced back across the street where it smashed into a small brick wall. The police charged the ambassador with failing to pay attention to driving, which could lead to fines of up to $100 000. The police and the State Department agreed that owing to his status, he could not be prosecuted. What makes this incident important is that the Office of Foreign Missions revoked the ambassador’s driving permit the next day. The State Department also asked the US State Attorney to prepare a criminal case against the ambassador in the event that one of the people hit by Abisinito was to die. While the ambassador could not be prosecuted at the time, a criminal charge against him would bar his later re-entry into the US. This served as a warning to diplomats to obey the law.

Another incident that sparked debate was in 1976, where a cultural attaché to the Panamanian Embassy ran a red light in Washington DC and collided with the car of American physicians Brown and Rosenbaum. The accident rendered Brown a quadriplegic, while Rosenbaum escaped unharmed. Diplomatic immunity prevented any charges or suit being laid against the Panamanian. Brown’s medical bills were extensive and she quickly exhausted her insurance coverage. Despite pleas to the Panamanian embassy for support, the offending ambassador refused to offer any help to Brown.\(^\text{83}\) Brown’s life would never be the same. It would have been justifiable for the attaché to be held legally responsible for her medical bills and charged with negligent driving.


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In the above instances the diplomats were immune from jurisdiction and the victims could not prosecute, or were not able to claim for compensation. Governments should consider whether diplomatic relations should be prioritized over the protection of its citizens which gave the government its power. Article 31 lays down no procedure as to when or how immunity should be pleaded or established. These issues are usually left to the law of each State. When a court determines the issue of immunity, it must do so on the facts at the date when the issue comes before it and not on the facts at the time when the conduct or events gave rise to a charge or when proceedings were begun. There was a suggestion by the Venezuelan delegation at the Vienna Convention to place an obligation on the sending State to prosecute a diplomat accused of an offence that is punishable in both States. This suggestion seems appropriate and reasonable, but it was criticized as being too extreme.  

Even though the same act may be recognized as an offence under both jurisdictions, the potential exists that the consequences and the sanction for such an act may be vastly different. Immunity should be granted on the functions of the diplomat, his *ratione materiae*, and not his *ratione personae*. The distinction is that the former deals with permanent substantive immunity from local law, while the latter deals with exemption from judicial process in the receiving State, meaning that *ratione personae* expires at the end of an assignment while *ratione materiae* continues.

Although this seems the ideal interpretation of ‘immunities’ in this context it did not stop a high-ranking Afghan diplomat who was on his way to buy an air-conditioner at an appliance store from driving into a woman over a dispute over a parking space. He was not prosecuted. The question to be asked is how does not punishing him for hurting someone over a parking space protect his ability to fulfill his functions? Diplomats have been caught saying “*The safety of citizens isn’t as important as the meeting I’m going to*”, or “*If I choose to leave my car in the middle…it would be none of your damned business*”. Is it too extreme to prosecute a diplomat who does not respect local laws, the citizens of the receiving State and even their own employees? 

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A further issue that arises is whether a diplomat may claim immunity in a third state for alleged criminal offences. During the 16th and 17th Centuries it was custom for diplomats who wished to cross foreign territory to get to their post to seek assurance of safe conduct from the ruler of the foreign country. During the 19th and early 20th centuries, controls on travel became general and restrictive measures were implemented, i.e. diplomats had to obtain a prior visa if necessary. Article 40 adopts a strictly functional approach to the question of privileges and immunities to be given to diplomats passing through a third state. The third state is obliged to accord the diplomat inviolability to ensure transit or return only if the government of the diplomat is recognised by the third state. This is also extended to his family members who are accompanying him or travelling separately to join him. Civil proceedings may be brought against them, provided that it does not involve arrest.

This is illustrated in *R v Governor of Pentonville Prison, ex parte Teja.* Teja was arrested on leaving Heathrow Airport bound for Geneva following a warrant, charging him with a number of offences, issued by the Republic of India. The court accepted that he was on a mission from the Costa Rica government and held a diplomatic passport. The Ambassador of Costa Rica wrote to the Secretary of State for Foreign and Commonwealth Affairs requesting Teja to be released under Article 40. The court rejected the argument that he was proceeding to Geneva to take up his post there, as there was no embassy for Costa Rica in Switzerland, thus he had no immunity and was subsequently prosecuted.

But if acts and behaves otherwise, disturbs the internal order of the receiving state, the latter will certainly request his recall or dismiss him at once. Thus it will often be the policy of the receiving states to request a waiver of immunity in such cases and if no waiver is forthcoming, normally to require the alleged offender to leave the country. This policy is followed in all most all the states. Even in the case of conspiracy the receiving state has only right to expel and not to prosecute or punish the diplomatic agent. Since the Second World War, the expulsion of diplomatic agents on the grounds amounting to engaging in activities subversive of the receiving state has become almost a commonplace of international relations. Espionage will

86 Supra Note 38, p.151-152.
88 Instance of Libyan embassy in U.K in 1984
almost always constitute a beach of the receiving states criminal law. The diplomat’s immunity from jurisdiction will thus prevent him being on trial for such an offence. To avoid diplomatic agent escaping, because of his immunity from criminal prosecution in receiving state, the ILC has proposed that he will be liable to prosecution before an International Criminal Court.

4.7.2.2 Immunity from civil and administrative jurisdiction

It is generally recognized that a diplomatic agent cannot be sued in any local Civil Court of the country to which the agent is accredited. Some writers place restrictions on this immunity, as in their view the agent can be sued after his mission has expired for acts done during his mission. In England and Holland immunity from the jurisdiction of Civil Courts was recognized as far back as the 17th Century and in England exemption was expressly granted by Statute in Queen Anne’s reign. In Holland, France and Prussia special enactments were made to safeguard their rights.89

Article 31 (1) of Convention 1961 enumerates that diplomatic agents are immune from civil and administrative jurisdiction of the receiving state. No civil action of any kind as regard debts or their car, furniture etc can be seized for debts. They cannot be prevented from leaving country for not having paid their debts, nor can their passport be refused to them in this account. This exemption is confined of his functions as a diplomat and not for property or services outside his official duties. Lord Chief Justice Hewart in Dickinson v Del90 solar has explained the immunity of civil and administrative jurisdiction “Diplomatic agents are not by virtue of their privileges as such immune from legal liability for any wrongful acts. The accurate statement is that are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior of the agent.”

A diplomatic agent’s immunity from suit applies to both his private acts and to those performed in the course of his official functions. The ILC considered the jurisdictions mentioned to comprise any special courts in the categories concerned.

89 Supra Note 22, p. 37
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like commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial functions. The National Courts have extended the immunity to acts committed before the diplomat entered into his official position. In *Nazre Aga*\(^1\) case the French Court of Cassation has laid down that the diplomatic which is founded by the necessity for mutual independence of States extends to every effective member of the legations. It can only be set aside by a clear and regular acceptance by these persons of the jurisdiction of the Courts before which they are proceeded against. It is irrelevant whether the defendant contracted his obligations before or after he began his official duties. It is sufficient that he possesses his official character at the time when proceedings against him are initiated. Further in *Ghosh v D'Rozario*\(^2\) where the Court of Appeal held that immunity precluded the continuance of pre-existing proceedings. But sub-clauses of Article 31 (1) (a), (b) and (c) of Convention 1961 provides for certain exemptions, namely:

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

There does not seem to be any English decision which is authoritative for this proposition, although the matter is now governed by statute of the respective nations. However, the principle which has been strengthened by the laws and customs of most civilized States plainly implies the fact that diplomatic agents are to be considered outside the jurisdiction of the country in which they are officially recognized with regard also to their private affairs. The holding of the premises, for the purpose of private residence of a diplomatic agent, not to be treated as held for the purpose of the mission.

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

In *Re Nijdam*\(^3\) the English Court has held that the extent to which this exemption finds a place in customary law may be questioned. The Court while rejecting the claim of immunity in respect of a request to supply the revenue authority with

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\(^1\) 48 Clunet – 1921 p.922  
\(^2\) (1963) 1 QB 106; 33 ILR, p. 361  
information about an estate, of which the diplomat was one of the beneficiaries the Court, observed that the diplomat has to produce the document before the revenue authority in relation to private property.

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

Further the Vienna Convention on diplomatic relations 1961 under Article 41 requires that a diplomatic agent shall not, in the receiving State, practice for personal profit any such activities.

4.7.3 Inviolability of Diplomat’s Residence and Property

Previously there was no distinction between the residence of the ambassador and the premises of the mission. However, as a result of the growing numbers of diplomatic and official staff, it is often necessary to separate this premises. Many States enacted legislation conferring inviolability on the residence of the diplomat and later express provision was made for inviolability in the Havana Convention. The nature of the property was made clear by the ILC, which stated that it denoted a residence distinct from the mission, which could include a hotel room, an apartment or house, whether owned or leased. A second residence, such as a holiday home or a hotel room away from the capital would also have inviolability, but if the diplomat began living in it, it might lead to the loss of inviolability of the principal residence. The papers and correspondence of a diplomat under customary law were not accorded inviolability.

However, the Convention 1961 goes beyond customary practice and confers inviolability on all papers and correspondence that may be private in character. The inviolability of a diplomat’s property does not mean that he is exempt from the law and regulations of the receiving State. The diplomat’s property included movable and immovable property, ranging from houses and furniture to motor vehicles and lawnmowers.

A scenario like this arose in Agbor v Metropolitan Police Commissioner 94 where a Nigerian diplomat moved out of his flat for “redecoration”. When the diplomat moved out, a Biafran family moved in. The Nigerian High

94 Agbor v Metropolitan Police Commissioner [1969] 2 All ER 707
Commissioner claimed that the residence still maintained its inviolability and requested police assistance to evict the family. However, the court found that the diplomat had moved out permanently and it had thus lost its inviolability. Article 36 provides that the personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds of suspicion that it contains articles that are not for official use of the mission or for personal use of the diplomat or his family. Possessing a diplomatic passport means that personal luggage is seldom subjected to inspection. However, possessing a diplomatic passport does not necessarily mean immunity from criminal jurisdiction. For instance, in *US v Noriega and Others* General Noriega was charged with narcotic offences. The court held that a diplomatic passport might secure certain courtesies in international travel, but was without significance in law. Most drug traffickers who are caught receive severe penalties, but for diplomats the worst that can happen is a loss of face and possible expulsion from the country’s diplomatic service. Therefore, most diplomats seem ready to take the risk because of the potential rewards.

In the event that there are grounds of suspicion, the bags may be inspected in the presence of the diplomatic agent or his or her authorized representative. Some airports routinely allow the luggage to be sniffed by dogs to check for drugs. If the dogs sense drugs, the diplomat is normally requested to open the suspicious bag. If the diplomat does not allow his baggage to be inspected or tested by agents of the aircraft carrier, the carrier is under no obligation to carry him. Interestingly, in September 1986, the Italian Foreign Ministry announced that as an anti-terrorism measure, all diplomats’ baggage and pouches in Italy would be scanned by metal detectors and possibly by X-ray machines. However, Britain and the US have resisted this practice, except on specific occasions.

4.7.4 Commencement and Termination of Privileges and Immunities

The importance of knowing when privileges and immunities commence and terminate ensures proper protection for those who are immune from criminal jurisdiction. Article 39 lays down that personal privileges and immunities begin when the person entitled enters the receiving State on his way to take up his post. If the diplomat is in the territory when he is appointed, the said privileges and immunities

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begin when his appointment is notified to the Ministry of Foreign Affairs. Privileges and immunities attached to diplomatic status continue during the entire period for which the status is recognized by the receiving State. This provision ended a long debate concerning the uncertainty of State practices as to whether the critical date for the beginning of immunities was the date of notification of appointment, the date of the formal presentation of his credentials, or the date of his arrival in the territory.

Under Article 39(2) there is continuing immunity with regard to official acts. It follows the formulation that immunity would not continue for a person leaving the receiving State for any act which was performed outside the exercise of his function as a member of the mission even though he was immune at that time. What is considered an official act? The definition for official acts is not self-evident, according to Brownlie. The concept presumably extends to matters which are essentially “in the course of official duties”. It is possible that a distinction must be made between official acts which are open to the local law and those which cannot be prosecuted. The former category would deal with dangerous driving in an official car, i.e. having an accident while on official business, while an example of the latter would be a contractual promise made in negotiations for a concession with a legal person in private law. However, attention has been drawn to this provision since the restrictive theory was implemented. This theory was brought about by the US Department of State in a circular to all Missions in 1984. This circular stated that diplomats suspected of crimes would be expelled from the US and their immunities would cease at that point. Further, there is a right to prosecute such persons if they returned to the US unless the acts occurred in the exercise of their official function. A recalled official cannot expect immunity if he returns to the receiving State in an unofficial capacity and whether he remains in the diplomatic service in his own country is immaterial.

Article 39(2) further allows ambassadors a reasonable period to wind up their affairs and leave the country. Previously, customary practice in the UK and US was that diplomats retained their immunity from local jurisdiction during the period necessary for them to wind up their affairs and to depart to their own State. Even in cases of expulsion, the diplomat’s person remains inviolable. This is clearly indicated
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and established in Musurus Bey v Gadban.\textsuperscript{96} It is impossible to set precise limits upon time necessary for a person to complete his preparations of departure. There are very few provisions in national legislation formulating a precise time frame, and those that do, vary. For example, when the US and Turkey broke diplomatic relations in 1917, the Turkish chargé d’affaires in Washington requested to remain in the United States temporarily because of his health, and the US made no objection. There have been cases where a diplomat may be granted an unusually short period in which to leave the country, for instance Libyan diplomats had to leave Britain in 1984 within seven days, and in 1991 an Iraqi diplomat was given 48 hours to leave Germany. So it appears that the receiving State can determine the length of the period of grace. A difficulty arises with regard to the commencement and duration of immunity of diplomats where their governments have undergone a change that is not in accordance with the sending State laws or Constitution. Koffler suggests that as long as the receiving State continues to recognize the status quo, the mission and the diplomats will continue to have immunity.

4.8 Members of Family and Staff Privileges and Immunities

4.8.1 Members of Family

The members of the diplomatic agent’s family forming part of his household enjoy a range of privileges and immunities. Privileges and rights include personal inviolability, inviolability of residence, and immunity against criminal and civil jurisdiction, exemption from social security provisions, exemption from taxation, exemption from personal services and exemption from customs duties and inspection.

Previously, there were some instances where family members committing crimes were released and in others they were arrested, prosecuted and found guilty. A well-known early cited case involved Dom Pataleone de Sá e Meneses. This case indicates how members of a family invoked immunity to avoid prosecution. Sá travelled to England with his brother, Dom João Rodriguez Sá e Meneses, the Portuguese ambassador. While his brother negotiated, Sá did nothing. In November 1653, Sá became enraged when he was insulted by a Colonel Gerard and attacked and wounded the Colonel. A bystander, Anthuser, intervened and stopped the fight. Sá

retreated but came back that evening with 20 armed attendants and went to find Anthuser. Mistaking a Colonel Mayo for Anthuser, they attacked him and inflicted several wounds. The commotion attracted a Greenway and when he came out to see what the commotion was about, a servant shot him in the head, killing him. When the guards came, the Portuguese party fled to the embassy.97

The ambassador initially refused to surrender the men, but gave in when the guards threatened to use force. The ambassador complained to the English government about the violation of his residence and thought that the men would be released. However, this did not occur. The issue facing the courts was whether Sá and his attendants could be prosecuted in English courts for murder. Justice Atkyns contended that Sá had forfeited his privileges by his actions. Even attendants are allowed extraordinary immunities, but when they break the law of nations they are liable. At his trial, Sá contended that he was immune from prosecution, first because he was the brother of the ambassador and secondly, that he was authorized to act as an ambassador in his brother’s absence, as shown by letters provided by the King of Portugal. He relied exclusively on the second reason, but it was found that he had no official function and only accompanied his brother out of curiosity. The court rejected Sá’s arguments and the court found him and four of his attendants guilty of murder and they were sentenced to be hanged.98 Although diplomatic immunity did not protect Sá, the Convention 1961 would now cloak him with immunity.

With the establishment of permanent missions it became accepted that the family would accompany the diplomat. The ILC debated very little over extending full privileges and immunities to the family of a diplomat. The question which puzzled most States was who was regarded as family. The majority of States did not define exactly which members of the family were entitled to immunities, but preferred some flexibility to settle disputes between the individual mission and the national government. Families are regarded as an extension of the person of the diplomat. The protection of the family has therefore been regarded as necessary to ensure the diplomat’s independence and ability to carry on his functions, as held in The

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Magdalena Steam Navigation Co. v Martin. 99 Although the reasons for the family of a diplomat accompanying him into the receiving State can be understood, they should not be entitled to full immunity in criminal jurisdiction. For instance, during the years 1980 to 1981, Manuel Ayree, 19 year-old son of the third attaché to the Ghanaian delegation committed rape, sodomy, assault and other crimes in New York City. After Holmes (one of his victims) and her boyfriend identified Ayree while walking in the street months after her rape, the investigating officer, Pete Christiansen, arrested Ayree. Jane Doe (another victim) further identified him in a line-up and the police began the paperwork for prosecution. After being identified as the son of the Ghanaian diplomat he was released and all charges dropped, owing to his diplomatic immunity. The State Department’s only remedy was to declare him persona non grata and expel him from the US. Family members who do not respect local laws and commit unlawful acts knowing that they can be protected against prosecution should not be entitled to such privileges and immunities and is it not necessary.

4.8.2 Mission Staff

Before the Convention 1961, the question of the privileges and immunities towards staff was inconsistent among States. For example, the UK, US, Germany, Austria and Japan extended all the privileges and immunities of diplomatic immunities to all staff, including domestic and private servants, while other States, like Switzerland, France, Argentina, Chile, Greece and Italy, restricted immunities of minor diplomatic staff. In some areas, before privileges and immunities were awarded to personnel, three conditions had to be fulfilled. Firstly, that the personnel’s proposed functions are concerned with the relations between nation and nation; secondly, that the proposed functions must not interfere with the internal affairs of the country accredited to; and finally, the venue, which implies that a diplomat must be part of the mission in order to receive his immunities.

Since the mission staff constitute the larger portion of the total number of persons connected with a diplomatic mission, and they are most likely to commit offences in the receiving State. There was a need to create a uniform rule. Even the drafting and discussion of the ILC and Conference felt that this was one of the most

99 Supra Note 83, p. 22.
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controversial issues to be dealt with. The ILC was originally in favor of the extension of full diplomatic immunities and privileges to administrative and technical staff and their families. The rationale was that it is occasionally difficult to distinguish between diplomatic agents and technical and administrative staff and their functions. However, as a result of the growing numbers of missions and their staff there was a need to limit the number of persons entitled to diplomatic privileges and immunities. It was suggested that private servants only receive immunity with regard to official acts. In the end, Article 37 was the result entitling administrative and technical staff and private servants to limited privileges and immunities. Once it was decided to grant limited immunity, there was also a need to distinguish between the different types of staff immunity. There are no precise rules in the Convention 1961 about the tasks performed by the administrative and technical staff. Members of the administrative and technical staff and members of their families, unless they are nationals or permanent resident of the receiving State, enjoy the same privileges and immunities as diplomatic agents, except that they enjoy civil and administrative immunity for official acts only. Therefore, they cannot be prosecuted in any circumstances, unless their immunity has been waived by the sending State.

Service-staff differ from private servants. Service-staff receive immunity for their official acts. Privileges include exemption from tax on their emoluments and exemption from social security provisions. These limited privileges and immunities may be supplemented by the receiving State through bilateral agreements. In Ministère Public and Republic of Mali v Keita the Appeal Court in Brussels had to determine whether the murder of the ambassador of Mali by a chauffeur, who was a member of the service staff, was an act performed in the course of his duties. It was agreed that the crime was committed during his hours of service and on the premises of the embassy, but the court found that the act occurred as a result of a personal dispute between the ambassador and the chauffeur, who was not immune from criminal jurisdiction. From this it seems that immunity can only be claimed on the basis of a bona fide service. Therefore, immunity will not be recognised for a cook of an ambassador who has no kitchen, or for a Christian chaplain employed by a Muslim ambassador.

100 Supra 3, p. 81
101 Supra Note 38, pp.146-147
Private servants have the fewest privileges and immunities accorded to them. They are exempt from tax on emoluments and, provided that they are register for social security in purposes in their Sending State they will be exempt there from in the receiving State. However, the Convention 1961 provides that jurisdiction over private servants must be exercised in a way that does not interfere unduly with the functions of the mission. For example, the ambassador’s cook cannot be arrested for criminal charges on the day the ambassador is hosting an important dinner party. In *United States v Ruiz*[^2] the defendant was charged with larceny. The court held that a servant would have been entitled to immunity had his employer, the Peruvian ambassador, asserted it on behalf of the servant. The ambassador did no such thing and the defendant was subsequently convicted. The position of staff who is nationals or permanent residents was a further concern for the ILC. It was argued that a national of the receiving State entitled to full diplomatic immunity could commit murder and not be subjected to criminal jurisdiction either in the receiving State or the sending State. It should be emphasised that diplomats and members of staff who are nationals or permanent residents of the receiving State are entitled to immunity from jurisdiction only for official functions performed and the receiving State grants and extends only privileges and immunities which it considers appropriate.

There have been a number of complaints in recent years about abuses of diplomatic privileges and immunities which form the basic structure of the Convention 1961 remains in place. The duties are set out in Article 41 of the Vienna Convention which reads:

- Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.
- All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
- The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

It is clear that privileges and immunity accorded to the diplomats is linked by Article 41 (3) to the legitimate functions of the mission. It is equally clear that the diplomat is obligated to respect the laws of receiving state. The wording of the Article indicates that the duty of diplomats to obey internal laws is without prejudice to their privileges and immunities. Thus, on the conventional interpretation abuse by a diplomat does not entail the loss of privilege. The reason for this is to protect the diplomat from any attempt by an unscrupulous receiving state to fabricate evidence and promote a case with the object of securing some form of advantage. The interpretation is of limited relevance because if cogent evidence exists of abuse by a diplomat most states will not hesitate to declare the individual persona non grata under Article 9.

The primary abuses of diplomatic immunity can be divided roughly into three categories: the commission of violent crimes by diplomats or their family; the illegal use of the diplomatic bag; and the promotion of state terrorism by foreign governments through the involvement of their embassies in the receiving State. Many nations have been affected by diplomats abusing their immunity, but the US is seeing the larger share, since the embassies are situated in Washington DC and the UN officials reside in New York City. Barker suggests that abuse occurs where the diplomat is subject to substantive law, but when he breaks it; the receiving State has no jurisdiction over him. The fact that the receiving State is not entitled to enforce its jurisdiction against a person because of his immunity is due to the existence of two distinct but related concepts: inviolability and immunity from jurisdiction.

There is little doubt that individual abuse by certain diplomats have resulted in demand for restrictions and modification of the Convention 1961. Such a project is unlikely in the immediate future because of the need to secure such a wide range of agreement. However, in the cases of grossest abuse the receiving state can expel particular individuals or choose to break off diplomatic relations completely.

4.9 Diplomatic Immunity, State Immunity and Consular Immunity

Sovereign immunity and diplomatic immunity are the two principles exceptions to the exercise of territorial jurisdiction. Sovereign immunity refers to immunity

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refers to immunities enjoyed by foreign heads of state. Diplomatic immunity refers to immunities enjoyed by their official representatives.

The basis of state immunity

The traditional view of immunity was set out by Chief Justice Marshall of the United States Supreme Court in *Exchange v McFadden*[^104^], in this case concerned a ship, the Exchange, whose ownership was claimed by the French government and by a number of US nationals. The US Attorney General argued that the court should refuse jurisdiction on the ground of sovereign immunity. Chief Justice Marshall stated: “The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns or their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him”.

State immunity developed from the personal immunity of sovereign heads of state. At an international level all sovereigns were considered equal and independent. It would be inconsistent with this principle if one sovereign could exercise authority over another sovereign. The immunity of sovereigns is expressed in the maxim *par in parem non habet imperium*. In medieval times ruler and state were regarded as synonymous, and sovereignty was regarded as a personalized concept. By the time of *Exchange v McFadden* it was clear that sovereign had a representative character and that actions taken on behalf of the sovereign, or in the name of the sovereign, were capable of attracting the same immunities.

State immunity can also be linked to the prohibition in international law on one state interfering in the internal affairs of another. In *Buck v AG*[^105^] (1965), the Court of Appeal was called upon to discuss the validity of certain provisions of the

[^104^]: Supra Note 41, p.72
Constitution of Sierra Leone and refused on the basis that it lacked jurisdiction. In the course of his judgment, Diplock LJ stated:

“The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state ... As a member of the family of nations, the Government of the United Kingdom observes the rules of comity, videlicet the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or its property, except in accordance with the rules of public international law. One of the commonest applications of this rule ... is the well known doctrine of sovereign immunity ... the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. The question arises as to whether immunity arises ratione personae or ratione materiae”.

This quotation would seem to support the view that immunity applies only ratione materiae, but other writers are not so sure:

... does [immunity] apply ratione personae or ratione materiae? The answer is probably both. Immunity applies ratione personae to identify the categories of persons, whether individuals, corporate bodies or unincorporated entities, by whom it may prima facie be claimable; and ratione materiae to identify whether substantively it may properly be claimed... 106

It seems better to suggest a twofold test: first, is the entity concerned entitled to immunity and then, if the answer is yes, is the act itself one which carries immunity.

The Distinction between State Immunity and Diplomatic Immunity

Although State immunity and diplomatic immunity share the same terminology and share some practical consequences, they constitute even if interrelated two different regimes. As explained above, State immunity refers to the entities that can claim an exemption to the exercise of the Forum State’s jurisdictional and administrative powers, whereas diplomatic immunity extends to the diplomatic staff and mission of the sending State. The purpose of State immunity is to protect the sovereignty of the State by exempting acts performed by a foreign State in its sovereign authority from the exercise of jurisdiction of the Forum State: par in parem non habet imperium. The purpose of diplomatic immunity is to allow the State to exercise its diplomatic functions without any constraint: ne impediatur legatio. As

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will be shown below, diplomatic relations lead to the existence of immunities that go beyond those that apply to State immunity.

Apart from diplomatic immunities, there are also immunities that apply to a State’s other agents, such as heads of State, heads of government, ministers of foreign affairs, consular staff, and armed forces abroad. Consequently, these immunities must also be distinguished from State immunity. Heads of State, heads of government and ministers of foreign affairs enjoy absolute immunity *ratione personae* while exercising their functions.\(^{107}\) Consular staff benefit from immunity for acts performed in the exercise of their function only. Armed forces abroad are subject to specific immunities stemming from the relevant agreements or resolutions upon which their presence is established. Article 31 of the European Convention on State Immunity 1972 expressly preserves this kind of immunity. With regard to the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Chairman of the *ad hoc* Committee that elaborated it explained: “One of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not. In any case, reference should be made to the Commission’s commentary on article 12, stating that ‘neither did the article affect the question of diplomatic immunities, as provided in article 3, nor did it apply to situations involving armed conflicts’. It had to be borne in mind that the preamble stated that “the rules of customary international law continued to govern matters not regulated by the provisions of the Convention”."\(^{108}\)

The sources of the rules applicable to State immunity and to diplomatic immunity are different. Leaving aside the relevant customary rules, the former is governed in conventional law when applicable by the ECSI and, when it enters into force, the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the latter by the Vienna Convention on Diplomatic Relations. Both kinds of immunities have in common the fact of being an attribute of the State. This is the reason why the diplomatic immunity of an agent can be waived by the State, in a similar way as State immunity. Diplomatic and State immunities differ as to their scope. The latter is essentially governed by the distinction between *acta iure gestionis*


and \textit{acta iure imperii}, only the latter enjoying immunity. The former is determined on a \textit{ratione personae} basis, irrespective of the nature of the act concerned.

\textit{Distinction between the Scopes of Both Types of Immunities in International Instruments}

International instruments dealing with State immunity have preserved other eventual types of immunities, by determining that the scope of these instruments is limited to State immunity and are without prejudice of the existence or governing principles of other immunities. Thus, the United Nations Convention on Jurisdictional Immunities of States and Their Property in its Article 3 states that:

1. \textit{The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of: a. Its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and b. Persons connected with them.}

2. \textit{The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State \textit{ratione personae}.}

The UN Convention follows the draft articles prepared by the International Law Commission in 1991, the Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement adopted by the \textit{Institut de Droit international} in the same year and the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994.

Similarly, but less comprehensive in its description than the UN Convention, the European Convention on State Immunity provides in Article 32 that “Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them”. Paragraph 1 of article 3 of the UN Convention has in mind immunities regulated by treaties such as the Convention 1961, the Vienna Convention on Consular Relations of 1963, the Convention on Special Missions of 1969, The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975, the Convention on the Privileges and Immunities of the United Nations of 1946 and similar instruments related to specialized agencies and other international organizations. The scope of diplomatic
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Immunity covers both agents and property. Both of these are analysed in the sections that follow.

Immunity for Acts Involving Diplomatic Agents

Diplomatic agents are entitled to immunity *ratione personae*. According to article 31 of the Vienna Convention on Diplomatic Relations:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
   a. A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
   b. An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
   c. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Immunity of a diplomat agent for a given act does not necessary amount to State immunity. As a consequence of the distinction between both types of immunity, it can be that a given act accomplished by a diplomatic agent would allow proceedings against his or her State, while the agent him or herself could not be personally sued for his/her own act. This result would be achieved by applying State immunity rules in the first case and diplomatic immunity rules in the second one.
In a decision of 10 June 1997, the Bundesverfassungsgericht – leaving aside its decision with regard to the merits of this particular case rightly summed up the distinction between State immunity and diplomatic immunity, when dealing with a complaint of a former Ambassador against an arrest warrant issued for an act he had committed in his official function. According to German Federal Constitutional Court, State immunity and diplomatic immunity represent two distinct concepts of international law, following their own rules, so that one can draw no conclusions from the limits of one notion as to the existence of similar limits on the other notion. This is because of the personal element involved in diplomatic immunity, which protects not only the sending State but also the diplomat personally. Even if a State does not enjoy immunity for non-sovereign acts, this does not mean that a diplomat involved in such acts is subject to the jurisdiction of the receiving State.

The distinction between acta iure imperii and acta iure gestionis which characterizes the concept of State immunity is unknown to the law of diplomatic relations. Thus, diplomatic immunity for official acts is not a mere reflection of the immunity of the sending State but has its independent basis in the special status of the diplomat. Similarly, and prior to the judgment of the Bundesverfassungsgericht, the Spanish Supreme Court had distinguished between diplomatic immunity and State immunity by overturning the decision of a lower tribunal having granted immunity for a conflict arising from an employment contract between a State and a Spanish citizen, on the basis of Article 31 of the Convention 1961. Further the Spanish Supreme Court, the reasoning adopted by the lower tribunal was tantamount to applying by analogy the immunities recognized by the Convention 1961 to diplomatic agents to the State. Rather, it is the distinction between acta iure imperii and acta iure gestionis that determines the extent of the State immunity. Diplomatic agents enjoy immunity even when they act in a private capacity to the extent determined by Article 31 of the Convention 1961.

The Portuguese Supreme Court of Justice has also confused both kinds of immunities when deciding a case brought against French diplomats for a contract of employment concluded with a domestic servant having Portuguese citizenship. According to its decision of 30 January 1991, “the State’s immunity from jurisdiction...”

109 Supra Note 30, p. 22
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contained in the Convention 1961 aims at ensuring the reciprocal independence of States and prevents States from being placed in the position of defendants in the courts of another State. This rule is applicable also to the diplomatic agents of a State, but only when the acts are practiced on behalf of the State and for the purposes of the mission and not in case of acts in their private capacity. Hiring a domestic servant for the private residence of a diplomat is an act outside of the diplomatic functions of the agent and therefore not included in the immunity from jurisdiction. A fortiori, diplomatic agents enjoy immunity when they are sued for acts accomplished in the exercise of their function or as representatives of their State. Thus, in an application against an Ambassador and an Embassy on the issue of the payment of a rent that the plaintiff claimed the Embassy owed her, the District Court of Reykjavik in its decision of 30 June 1995 applied Article 31 (1) of the Convention 1961 in order to dismiss the case.

Immunity Regarding Property of Diplomatic Missions

In this particular field, immunity refers to the right of the State to have its property utilized in exercise of its diplomatic functions to be considered as immune and consequently not subjected to measures of constraint. As will be shown below, both diplomatic and State immunities can apply simultaneously in this particular case, leading to the same result. Diplomatic representations do not have a distinct legal personality from that of the State. Hence, any action related to the property of diplomatic missions cannot but be an action against the State. This is affirmed by the judgment of the Icelandic Supreme Court on 15 September 1995, in which proceedings against the Embassy of the United States of America were considered as addressed against the United States of America itself.110

In general, international instruments dealing with State immunity were obliged to include a provision according to which no measures of constraint should be directed against property affected for the use of diplomatic missions. Thus, Article 21 of the UN Convention on Jurisdictional Immunities of States and Their Property refers to specific categories of property and provides as follows:

“property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): a. Property, including any bank account, which is used or intended for use in the performance of the

functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences”.

For its part, Article 22, paragraph 3 of the Convention 1961 provides that “the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”. The provisions embodied in instruments related to State immunity suggest that in all cases this property must be considered as affected to acts accomplished *iure imperii*, insofar as they are used or intended for use in the performance of the functions of diplomatic missions. Applicable rules, either conventional or customary, in the field of diplomatic relations, signal that such property is immune, by virtue of its vital role in the accomplishment of the diplomatic functions.

However, a distinction must be made between immunity of jurisdiction and immunity from execution in cases related to leases of immovable property for diplomatic and consular missions. Measures of constraint are excluded with regard to those premises, but jurisdictional immunity does not apply with regard to actions related to contract relations concerning these goods, insofar as the regular activity of the diplomatic mission is not affected by these proceedings. In a case submitted to the Turkish Court of Cassation, the plaintiff requested against the United States of America the payment of sums due for the use of the telephone and for what he considered to be a misuse of his estate, rented for the activities of a consulate. The defendant invoked the immunity granted by international law in general and the Vienna Convention on Consular Relations 1963 in particular. Since the lease is a contract of private nature, the Turkish Court dismissed the applicability of immunity from jurisdiction. However, in another case, the Great Chamber of the same tribunal more controversially applied the rules related to immunity from jurisdiction to a case in which measures of constraint against the premises of an Embassy were at stake, excluding immunity for acts accomplished *iure gestionis*.

Given the existence of both types of immunities with regard to the impossibility of execution of property affected to the diplomatic mission, some national tribunals have faced difficulties in determining the applicable rule to cases.

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concerning such property. In a decision of the District Court of Rotterdam of 14 May 1998, the tribunal seemed to refer to State immunity when affirming, on one hand, that “the starting point in this dispute is that pursuant to international law a foreign State is entitled to immunity from execution when execution measures are employed against the State concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service”. On the other hand, the same decision seems to refer to diplomatic immunity when explaining that, even if the decision would jeopardise the administration of Dutch justice, “a higher importance should in principle be attached to the rules of international law than to the rules of Dutch law (in particular Dutch procedural law), with the result that the interests of the uninterrupted functioning of a diplomatic mission should in this case prevail over the interests of executing (by expeditious means) a judgment given in the Netherlands”.  

In some cases, the rules applied by tribunals are those pertaining to one or both fields of immunity. In a British House of Lords’ decision of 12 April 1984, only rules related to State immunity were invoked when holding that “under customary international law the bank account of a diplomatic mission used for defraying the expenses of running the mission, enjoys immunity from execution in the receiving State and that The State Immunity Act should be construed so far as possible to accord with the requirements of customary international law”. The House of Lords expressly referred to section 13 (4) of the State Immunity Act to recognise the immunity from execution of the bank account in question. It must be remembered that the 1961 Vienna Convention on Diplomatic Relations is given effect in English Law by the Diplomatic Relations Act 1964. In spite of this, no reference to diplomatic immunity rules was made in this decision.

In other cases, however, domestic tribunals have decided in a way opposite to that prescribed by international law, both in the field of State immunity and in the field of diplomatic immunity. In a decision of a Turkish Court of First Instance of 18 December 2002, for example, interim measures against bank accounts of the Embassy

113 Supra Note 33, p. 345.
and the consulate of the Defendant State were adopted. The waiver of immunity by a State can raise the problem of the extent of this waiver. Diplomatic immunity must be waived in an explicit way. In a judgment of the Court of Appeal of Paris of 10 August 2000 it was decided that the renunciation of immunity from the execution of an arbitral award embodied in a contract cannot be constructed as implying a waiver of diplomatic immunity of execution, on the grounds of Convention 1961. Case law dealing with employment contracts for activities related to diplomatic missions has been contradictory. In the field of State immunity, some of these contracts are excluded from the benefit of immunity. The situation is not regulated by the Convention 1961. The Swiss Federal Tribunal, denying immunity to Egypt with regard to a contract of employment concluded with an Egyptian citizen in Switzerland for low-ranking activities accomplished at the Egyptian Mission in Geneva, applied the State immunity rule concerning *iure gestionis* acts, although using a rather confusing terminology borrowed from the law of both diplomatic and State immunities.

By contrast, other tribunals have recognized immunity for working activities related to the organization and operative structure of a consular office, as being the direct expression of the foreign State and expressing also a typical public activity of that State. This was the case of the Italian Supreme Court of Cassation’s judgment in *Giaffreda v. France*\(^{114}\) of 18 November 1992, in which the employee was even Italian. In a similar case, the Court of Appeal (*Tribunal da Relação*) of Porto applied the immunity of a foreign State in a case involving a Portuguese subject. The tribunal clearly applied consular immunity, when stating that “immunity encompasses not only acts *ius imperii*, but also cases where States act as a private law person”, and, since “a Consulate constitutes a representation of a foreign State and its acts are, whether of *ius imperii* or *ius gestionis*, acts of the State and thus Portuguese courts lack jurisdiction to judge them.”

Even if, from the theoretical viewpoint, the distinction between State immunity and diplomatic immunity can be easily determined, from the practical point of view, tribunals sometimes find it difficult to distinguish between them. This is particularly so when they have to solve a concrete case in which diplomatic agents or

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missions, or diplomatic immovable assets or other goods are involved. As a matter of fact, embassies, consulates or other State missions do not enjoy a separate legal personality to that of the State. This has been constantly underlined in the case law of different States where lawsuits had been brought against Ambassadors, consuls, or embassies, consulates or other missions. Consequently, the real defendant in those cases was considered as being the relevant State.

It emerges from the above analysis that State immunity and diplomatic immunities distinguish themselves by their nature. As seen, the former is subject to the distinction between *iure imperii* and *iure gestionis* acts, only the first type being covered by immunity. Diplomatic immunities, on the other hand, apply to persons in their capacity as diplomats or to property used in the exercise of diplomatic functions, no matter the nature of the act under scrutiny. Having different scopes, there is no possibility of contradiction between them. In this light, the comment on Article 32 of the ECSI made in the Explanatory Report, that “in the event of conflict between the present Convention and the instruments mentioned above [VCDR 1961 and VCCR 1963], the provisions of the latter shall prevail” can be considered as unnecessary.

Taking into account the identity of consequences arising from State immunity and diplomatic immunity with regard to property related to diplomatic missions, State practice shows that in some cases immunity has been granted on the basis of diplomatic or consular immunity, in others on the basis of State immunity, and in others on the basis of both types of immunity. There are also cases in which immunity has been recognized without any explicit invocation of a particular kind of immunity.

**Consular Immunity**

The primary function of consulates, vice consulates, and consular posts is to represent and deal with nationals of the sending state. They enjoy certain immunities, but not as extensive as those enjoyed by diplomatic agents. The law relating to consular relations is contained in the Vienna Convention on Consular Relations 1963 which entered into force in 1967 (in short Convention 1963). As in the case of diplomatic relations, consular relations can only exist by agreement between the two states and by virtue of Article 23 of the Convention it is possible for the receiving state to declare a consular official *persona non grata*. The Convention provides for the inviolability of the consular premises and the consular archives and documents.
Consular staffs are entitled to freedom of movement, subject to the requirements of national security, and to freedom of communication. Consular officials do not, however, enjoy complete immunity from the local criminal jurisdiction. Although they are not liable to arrest or detention, save in the case of a grave crime, they can be subjected to criminal proceedings. Their immunity from civil and administrative jurisdiction only extends to acts performed in the exercise of consular functions. Members of the consular staff’s family do not enjoy significant immunities.

Difference between diplomatic immunity and consular immunity

In the pre-Convention era, the principle that consular officers were immune only for their official acts--acts performed in the exercise of consular functions was so widely followed in bilateral conventions and so widely accepted by both courts and commentators that it was recognized as a rule of customary international law. The Convention 1963 a product of the efforts of the International Law Commission ("ILC") and the Vienna Conference on Consular Relations, codified international law on consular immunities by providing:

Article 43 of Convention 1963 “Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions”.

In codifying the "consular functions" principle, the Convention 1963 maintained the basic difference between consular and diplomatic immunities: “consular personnel enjoy immunity from legal process only in respect of official acts, whereas diplomatic agents have full personal inviolability and immunity from legal process.”

The more limited scope of consular immunity is reflected in the structure of the Convention 1963 and illustrated by comparison with the Convention 1961. While both Conventions provide that “it is the duty of all persons enjoying . . . privileges and immunities to respect the laws and regulations of the receiving State,” and “not to interfere in the internal affairs of that State,” laws and regulations cannot be judicially enforced against diplomatic agents because they enjoy complete criminal immunity, and complete civil and administrative immunity except insofar as they engage in a limited number of activities. In contrast, the duty of consular officers to respect receiving-state laws is judicially enforceable in all cases, except where Article 43 grants immunity for acts performed in the exercise of consular functions. Because
consular immunity attaches only to official acts, an important issue for the drafters of the Convention 1963 was how, and indeed whether, to codify consular functions.\footnote{R B Lillich, ‘A Case Study in Consular and Diplomatic Immunity’, \textit{Syracuse Law Review}, (1960-1961), p. 305.} Eventually, the drafters recognized that if immunity depended upon whether an act was performed in the exercise of consular functions, it was vital that courts be able to determine the functions to which immunity would apply. Article 5, a non exhaustive list of the most important consular functions, emerged after lengthy debate among both members of the ILC and conferees to the Vienna Conference as a compromise between a general definition and a specific enumeration. Problems of interpretation generally arise as to what acts “performed in the exercise” of the functions are listed.

\textbf{Standards of Interpretation}

While the immunity rule of the Convention 1963 mandates a distinction between consular and diplomatic immunities, it does not, without more, unambiguously delimit the scope of consular immunity. Conflicting interpretations, by both courts and commentators, create uncertainty for both consular officers and the receiving-state nationals who deal with them.

1. Broad Interpretations: The Convention 1963 must be invoked to establish immunity: the list of consular functions in Article 5 and the immunity rule of Article 43. One court has read Article 5(m), the catch-all definition of consular functions, to operate as a broad license to engage in activities under the protection of immunity. In \textit{Heaney v. Spain},\footnote{Ibid, p. 305} the Second Circuit held that contracting with United States citizens to disseminate adverse publicity about a foreign government was compatible with the exercise of consular functions, finding "nothing which would suggest that these alleged activities would not be embrace the catch-all definition." Therefore, the consular officer was immune from suit for breach of contract. Another court expanded the scope of immunity by implicitly interpreting the phrase “in the exercise of consular functions” in article 43 to mean during such exercise, focusing scrutiny solely on the temporal connection between the act and the function. If a function is recognized under Article 5, immunity attaches to any act committed during that function's exercise. In \textit{Commonwealth v. Jerez},\footnote{Ibid p.306} the Supreme Judicial Court of
Massachusetts appeared to follow this analysis in holding that a consular officer was immune from suit for assault and battery committed on a police officer as he proceeded to a cultural gathering.

Furthermore, Jerez read narrowly language in the Convention 1963 that might have distinguished the conduct in question from consular functions recognized by article 5. The court found that the duty to respect the laws of the receiving state under Article 55 "cannot be construed to mean that the doing of a single illegal act takes the activity outside the scope of the consular functions except where specifically so provided in Article 5." Therefore, the court reasoned that the consular officer's alleged "single illegal act" of assaulting a policeman did not take his activity outside the scope of consular functions.

2. Narrow Interpretations: One California appellate court held that "the manner in which . . . an authorized function was carried out determined whether it was in fact rendered within the scope of consular duties." Literally applied, this standard bases the legitimacy of a consular function on the means chosen to perform it. Where the means are suspect, the ultimate activity is rendered outside the scope of consular functions and immunity is lost. A restrictive interpretation also has been reached by focusing on the international law principle of noninterference expressed in article 55 of the Vienna Convention. In *Gerritsen v. de la Madrid Hurtado*, the Ninth Circuit held that the action of a consular officer who forcibly silenced a demonstrator outside his consulate constituted an "interference with the United States' internal affairs" and thus was not "within the limits permitted by international law." Therefore, his action could not properly be protected by the Convention as a consular function. Under such an approach, presumably any consular activity that adversely affects the interests of the receiving state or its nationals is suspect as interference in the receiving state's internal affairs.

3. Alternatives: Commentators have attempted bright-line answers to consular immunity questions, such as distinguishing official from nonofficial acts on the ground that the former are "performed under the authority and on behalf of a State by one of its organs . . . so that the act can be imputed to it and deemed an 'act of State.'" One writer has suggested expanding the length and detail of the list of consular functions.
functions in the Convention 1963 so that the immunity attaching to the exercise of these functions would be more clearly defined. Another has proposed that courts apply a “substantial departure” test, whereby a substantial departure from an act a consular officer is required to perform indicates that he is acting outside his official duties and therefore not entitled to immunity. Finally, both courts and commentators have suggested a political solution to the problem, which would remove responsibility for immunity determinations from the courts and place it with the State Department.\footnote{Green, ‘European Convention on Consular Functions: A Contribution by the Council of Europe to the Development of International Law’, Revue Belge de Droit International, 1972, pp. 176-187}

The terms "official acts" and "acts performed in the exercise of consular functions" have been used interchangeably by courts and commentators, ILC report to the General Assembly, 16 U.N. GAOR Supp. (No. 9) at 29, Article 43, comment 2, U.N. Doc. A/4843 (1961), However, the latter term is more precise because not all official acts, for example those specific to diplomatic functions, can be performed by consular officers.

Prior interpretations of the Convention 1961 have left the scope of consular immunity uncertain. However, the text, preparatory work, and structure of the Vienna Convention show that consular immunity derives from its functional necessity and is delimited in scope by balancing competing sending-and receiving-state interests. A functional approach to immunity questions can resolve most interpretive problems and provide a framework for answering those questions it cannot definitively resolve.

4.10 Deterrent Measures for Abuse of Diplomatic Immunity

International law does not offer unrestrained license to individuals with immunity. An element of granting immunity is the obligation to obey local laws (Article 41 of Convention 1961). Hill considers and explains Sir Cecil Hurst’s outline of procedure to be followed in diplomatic channels. The first step is to address the person charged with the injury by highlighting that the diplomat’s behavior would reflect perilously on his diplomatic career and on the public opinion of the citizens of the receiving and sending State. If the head of the mission agrees to the charge, the necessary arrangements of settlement or waiver will be organised. In the event that the head of mission does not take any action, the receiving State may appeal to the
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sending State. Ways in which abuse of privileges and immunities can be controlled are: the declaration of persona non grata, waiver of immunity, handing the offender over for prosecution in the jurisdiction of the sending State, reciprocity, breaking off diplomatic ties and settlement of disputes.

4.10.1 Persona Non Grata

The diplomatic officer must be acceptable to the receiving State if he is to have any official status at all. Article 9 of the Convention 1961 allows for the receiving State not to accept individuals before appointment and also to expel diplomats after their appointment as a result of their wrongful acts. The fundamental rationale of this Article allows for the receiving State to expel a diplomat who has behaved unacceptably. This Article essentially means that declaring a diplomat, staff or his family persona non grata forces the sending State to take one of two actions: either recalling the diplomat to his home country or terminating his functions with the sending State’s mission. Should the sending State refuse to remove the individual from his duties then the receiving State may refuse to recognise the person as a member of the mission, resulting in him being liable to prosecution.120 The time frame in which he has to leave will depend on the circumstances of the incident. It is not possible to come to a conclusion as to what is a reasonable period. Interestingly, 48 hours has been the shortest time span justified as a “reasonable period”. One of the most common reasons for declaring a person persona non grata is for espionage. In 1971, the British government repeatedly warned the Soviet Union to reduce the number of KGB agents in diplomatic and trade establishments. As a result, 105 Soviet officials were declared persona non grata. Another reason for declaring a diplomat persona non grata is involvement in a conspiracy against the receiving State.

This has, today, largely fallen into disuse. In 1976, the Libyan ambassador to Egypt was expelled after being found distributing anti-President Sadat leaflets. Diplomats have also been required to leave following the discovery of the use of violence or implication in a threat. For instance, three Syrian diplomats were expelled by the West German Government in 1986 following the discovery that they had supplied explosives used in terrorist attacks in Berlin and in 1994; Iranian diplomats were expelled from Argentina after an investigation found evidence linking them to a

bombing of the Argentine-Jewish Aid Association which had killed close to a hundred people. Article 41 has made it clear that diplomats should not interfere in the internal affairs of the receiving State. So in 1988, the government of Singapore asked for the recall of a US diplomat on grounds of interfering in Singapore’s domestic affairs, by persuading lawyers opposed to the government to stand for the forthcoming elections.\(^\text{121}\)

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

4.10.2 Waiver of Immunity

History knows of very cases when sending states have argued to waive the immunity of their diplomatic agents. The sending state more likely prefers to recall the diplomat or dismiss him from its service in such cases. The request for waiver of immunity usually means that the criminal offence in question is of such degree that if the sending state does not waive the immunity, the receiving state is no longer prepared to accept the diplomat in issue as a diplomatic agent. States, however, have waived the immunity of their diplomatic agents and one of such instances concerns a Georgian diplomat. The second-highest ranking diplomat for the Republic of Georgia in the United States, Gueorgui Makharadze, was involved in a tragic automobile accident that resulted in the death of a sixteen-year-old girl, a Brazilian national, on 3 January 1997 in Washington D.C. He was alleged to have been deriving at a speed of eighty miles per hour and hour and under the influence of alcohol, but due to his diplomatic status he was not given a breathalyzer or blood test. This incident was followed by public uproar, particularly when Georgia prepared to recall the diplomat.

\(^{121}\) Supra Note 59, pp. 65-67.
Finally, due to intense public pressure, the Georgian president agreed, as a moral
gesture, to voluntarily waive Makhardze’s immunity. The diplomat consequently pled
guilty and currently serves his sentence in the United States. The waiver of
immunity, empowered by Article 32, is the “act by which the sending State renounces
that immunity with regard to the person concerned”. Once waiver occurs, the local
courts in the receiving State will have jurisdiction to prosecute and punish the
offender. The Preamble of the Convention 1961 states that the purpose of a
diplomatic agent’s immunity is not to benefit the individual, but to ensure that his
performance to represent his State is unhindered.

There was a debate in both the ILC and the Conference as to who was entitled
to waive immunity and whether there should be a distinction between civil and
criminal jurisdiction. A further aspect of the problem was whether the head of the
mission was entitled to waive immunity of any member of his staff or if it always
required a formal decision by the sending State. The view that the head of mission
could waive immunity was rejected by the majority of the ILC. Furthermore, waiver
by the sending State is a serious decision, for it places the diplomatic agent, as far as
legal responsibility is concerned, in a situation where he is equal to that of a citizen in
the receiving State. Diplock LJ in Empson v Smith interprets diplomatic actions as
voidable rather than void. It has been stated by international authors and a court
decision by Kerr LJ in Fayed v Al-Tajir that jurisdictional immunity is not personal
to the diplomatic agent but belongs to the sovereign of the sending State; hence that
waiver can only be given by the sending State and not by a diplomatic agent.

In terms of paragraph 2 Article 32 of the Convention 1961, waiver must
always be express and irrevocable. In recent years there has been an increase of
rigorous requests for waiver. In the UK it is standard practice to press for waiver in
cases of drunken driving. In other countries it has also become common to persuade
the local press to take up victims’ grievances to pressure governments into granting
waiver. Negotiation for waiver seldom occurs because the sending State has no
obligation to waive immunity. However, there are instances where waiver has
occurred, such as in 1997 when a second-ranking diplomat from the Republic of

122 M.S. Zaid, ‘Diplomatic Immunity: to Have or not to Have, that is the Question’, ILSA Journal of
123 Supra Note 41, p.56
124 Supra Note 21, p. 348.
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Georgia to the US was held responsible for the death of a sixteen-year-old American girl in a car accident. The diplomat was driving at 80 miles an hour in a 25 mile zone. A blood test was taken and it was established that the diplomat’s blood alcohol was twice the legal limit. Immunity was invoked, but President Clinton withheld $30 million in aid to Georgia. As a result the President of Georgia waived the immunity of the diplomat and he was duly prosecuted.125

When a diplomat is found smuggling drugs and claims immunity, the receiving State in most instances will request waiver of immunity from the sending State. For example, in 1985, London police arrested a man in possession of two kilograms of heroin that he obtained from a house in London. The police went to the house and searched the premises and found more heroin. The occupant claimed immunity as a third secretary of the Zambian mission. When confirmation was made of the man’s identity, they stopped their search and withdrew. The Zambian mission protested and the Foreign Office issued an apology. The police had strong suspicions that the drugs had arrived through a diplomatic pouch, so the Foreign Office approached the mission and demanded the waiver of immunity of the third secretary. The head of the mission, displeased, consulted with President Kaunda, who swiftly waived immunity and the third secretary was arrested and prosecuted. In a letter Kaunda conveyed that diplomatic immunity was never intended to prevent investigation of serious crimes. There have even been instances where the sending State would grant a conditional waiver. For example, in 1989, Van den Borre, a 25-year-old soldier assigned as a clerk in the Belgian Embassy in Washington DC, admitted to the murders of Egan, a gay airline reservations clerk, and Simons, a gay cab driver. The Belgian government waived his immunity only on condition that he did not receive the death penalty as a possible sentence.126

Despite the fact that the above examples show that some States do waive immunity of diplomats, family or staff, waiver is seldom granted. The decision to waive immunity is not based on a legal decision but rather on a political basis; for instance, retaliatory measures taken against their own diplomats or even fabricated charges being brought against their personnel in the receiving State. Waiver is a good remedy if States are willing to grant it. A possible solution is for States to enter into

125 Supra Note 110, p. 130.
126 Supra Note 103, p.100.
agreements for automatic waiver in serious criminal offences. This would serve as a better deterrent than merely having the option to waive immunity.

4.10.3 Jurisdiction of the Sending State

According to Article 31 (4) another deterrent is for a diplomat to face the jurisdiction of his own national courts for crimes committed in the receiving State. Courts have the competency to try a national for an offence committed abroad if the offence is punishable under the laws of his own country and the country where the offence was committed. The purpose behind this is to ensure that diplomats who were recalled or expelled cannot avoid legal action being taken against them in their own countries, since they have no immunity at home. It further allows victims to pursue the diplomat in the sending State, especially with regard to civil suits. A major drawback is that while there is a threat to respect the laws of the receiving State for fear of being prosecuted at home, the sending State is not obliged to prosecute its diplomatic personnel. Silva asserts that if the sending State does not waive immunity to allow the receiving State to prosecute, it then has a moral duty to bring the person before its courts. Despite this, it does not often happen and diplomats frequently go unpunished.\textsuperscript{127} Another drawback, apart from jurisdiction, is that an act constituting an offence in the receiving State might not be an offence in the sending State. Nonetheless, not being able to bring suit against diplomats in the receiving State does not mean that the diplomat is relieved of liability.

Denza explains that it is difficult to use this remedy in criminal cases. The diplomat cannot be extradited so he is able to be physically present to stand trial in the sending State. Furthermore, witnesses in the receiving State could not be compelled to travel in order to testify.\textsuperscript{128} In most instances, where a government is ready to allow criminal proceedings to take place it would be logistically simpler and more cost-effective to waive immunity. This remedy is usually used in civil cases. In 1982, the adopted son, Francisco Azeredo da Silveira Jr, of the Brazilian ambassador went to a club and dance venue known as ‘The Godfather’ in the US. He got into an argument over a packet of cigarettes. After Silveira was told to leave he pulled out handguns and started yelling that he was part of the Mafia and threatened to kill the bouncer,

\textsuperscript{128} Supra Note 59, p.166
Skeen. Skeen then pursued Silviera as he fled from the club. Silviera fired five times and Skeen was hit three times. Skeen tried to claim medical costs, but failed. Even if this remedy is used in criminal cases, it is not effective, as shown in 1999 when a Russian diplomat used diplomatic immunity to avoid being prosecuted for drunken driving and colliding with two women. The Russian ambassador assured the Canadian Government that the diplomat would be prosecuted in Russia and serves a sentence of five years in prison. Yet Russian law professors believed that he would only receive a suspended sentence. Unfortunately, no information could be obtained to compare the predicted or actual outcome. With regard to traffic violations, the Israeli government in 1979 recommended that Israeli diplomats in foreign States pay their parking violation fines or else face being penalised in Israel.129

4.10.4 Reciprocity

Reciprocity stands as the keystone in the construction of diplomatic privilege. It is the largest contributor to the binding force of international law. Through reciprocity there is a more profitable cooperation and friendly relations usually occur. Furthermore, it forms a constant and effective sanction for the adherence to the Convention 1961. Every State is both the receiving and sending State. The basic concept arising out of reciprocity is that in the event that there is failure to accord privileges and immunities to diplomatic missions or its members it would likely to be met by a countermeasure of the other State.

Reciprocity has been stated by Southwick to be the “truest sanction” provided by diplomatic law. This was shown in Salim v Frazier130 where the court stated that reciprocity guarantees the respect and independence of representatives. States usually adhere to the law of immunities primarily because of the fear of retaliation. All diplomatic privileges and immunities are extended to representatives of the sending State are on the understanding that such privileges and immunities will be reciprocally accorded to the representatives of the receiving State.

In 1957, Australia submitted comments on the Draft Articles of the Convention by the ILC and objected to the general requirement that the receiving

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State should treat all members of diplomatic missions equally. It remarked that reciprocity was essential in order to deal with countries that imposed restrictions on missions in their territory.\textsuperscript{131} Through reciprocity, a State can attempt to punish diplomats in the sending State. As a result of this, reciprocity has merged into a social process, the process of globalization and the development of technology making interaction between States inevitable. The disadvantage of reciprocity is that a series of aggressive or subtle reciprocity actions can eventually result in the official degeneration of relations between nations. It is in a State’s interest to respect diplomatic immunity in order to ensure the safety and respect of its diplomats.

However, even this concept can be abused, as was shown in May 1987. Chaplin, the second-ranking diplomat in Iran, was beaten and arrested by Iranian Revolutionary guards on unspecified charges. This incident was followed by the arrest of Gassemi, an Iranian consulate in Manchester, for charges of shoplifting, reckless driving and assaulting an officer. When used negatively, as it was in this instance, reciprocity has the effect of tit-for-tat.

\textbf{4.10.5 Breaking Diplomatic Ties}

Previously the rupture of diplomatic relations between countries was considered a serious measure. In most cases, this rupture would lead to war. In 1793, Great Britain broke off diplomatic ties with France as a result of the execution of Louis XVI and ordered the French ambassador to leave the country. A few days later, France declared war.\textsuperscript{132} In some instances it is a measure used as the only remaining option to stop serious abuses. Qaddafi’s regime in Libya came into power after a military coup in 1969. He renamed the embassies People’s Bureaus and has continually abused and exploited diplomatic immunities, hiding terrorist weapons in their missions and communicating plots of terrorist murders against opponents of the regime through diplomatic bags and coded messages. The US went as far as closing down the Libyan People’s Bureau in the hope of curbing these abuses. Even in the Libyan shooting in London where Constable Fletcher was killed, Britain broke diplomatic ties as a last resort, because no other remedy had worked.

\footnotesize{\textsuperscript{131} Leyser, ‘Diplomatic and Consular Immunities and Privileges’, \textit{American Journal of International law}, 1965, p.448  
\textsuperscript{132} T J Lawrence, \textit{The Principles of International Law}, (6\textsuperscript{th} Ed), D.C. Heath & Co. Boston), 1910, pp. 301-302.}
Using this remedy might ensure that diplomats from that specific country never commit a crime in the receiving State again, but once again, the perpetrator goes unpunished. Yet it is interesting to note that although countries have severed diplomatic ties, it does not mean that the two countries do not negotiate or converse at all. A group of diplomats of the State will work under the flag of another State. This is known as an “interests” section and is regulated by Article 45 and 46 of the Vienna Convention. For instance, when the 1991 Gulf War broke out, Iraq and UK had severed ties; however, an interests section of Iraq was attached to the Embassy of Jordan in the UK. The Embassy of Jordan is known as the protecting power who allows Iraq to conduct diplomatic relations in their embassy. Interests sections can also be established as a step towards reconciliation between disengaged States. An example was in 1955 when the Soviet Union and the South African government severed relations. However, as a result of their common and strong interests in the economic sphere of gold and diamond marketing, and the domestic changes in South Africa by the 1980s, interests sections were opened under the protection of the Austrian embassies in Moscow and Pretoria.

4.10.6 Settlement of Disputes

The Vienna Convention provides the Optional Protocol to the Convention 1961, Concerning the Compulsory Settlement of Disputes. The Optional Protocol provides for settlement of disputes arising out of the interpretation of the Convention 1961. Any disputes arising between States concerning diplomatic functions are to be heard in the ICJ. The disputes heard are over the interpretation or application of the Convention 1961 that cannot be resolved by arbitration or by judicial settlement. An example of when the Optional Protocol was used was in the Tehran hostage case. What distinguished this event from other disputes was the failure of Iran to use any remedies provided for in the Convention 1961. The disadvantage is that it does not provide a settlement alternative for individuals who are injured as a result of diplomatic misconduct. Furthermore, not many States make use of this Optional Protocol, which makes this form of remedy ineffective.

4.11 Possible Remedies against Abuses of Diplomatic Status

Most remedies discussed previously are still theoretical and most likely require amendment to the Convention 1961 in order to become effective and applicable. This development is, however, unlikely, as states are not anxious to change the Convention 1961 and put at risk a stable and more or less satisfactory and operable system. But now we will examine certain remedies that customary international law, the Convention 1961 and other international instruments provide and receiving states can make use of to deal with cases where a person enjoying diplomatic immunity has seriously breached local or international law.

4.11.1 Self – Defence

Scholars who tend to challenge the absolute nature of diplomatic immunity from criminal jurisdiction often argued that the receiving state may invoke self-defence as the basis for trial and punishment of offending diplomats. This was a popular view among writers in the 15th to 17th centuries, when conspiracy became quite a common crime committed by ambassadors. The main argument was that diplomatic immunity cannot be more important than the security of the receiving state, but nevertheless the sovereigns did not follow this line of argument and used other means to deal with the diplomats in question.

However, one has to make a distinction between self-defence as a basis for trial and punishment and as an immediate and proportionate reaction to crime which can endanger the lives of other people. The latter concept is definitely more acceptable and reasonable and it is likely to be correct to argue that the offending diplomat could even be killed in self-defence. Therefore the receiving state may, without breaching its obligations under the principle of personal inviolability, detain a diplomatic agent if he commits a crime, which is a flagrant breach of law, in order to ensure both the security of the diplomat himself and public. This kind of detention should not be interpreted as punishment or subjecting the diplomat to the criminal jurisdiction of the receiving state. Consequently, self-defence could be used as an immediate measure of prevention in the case of threat of irreparable damage to person or property regardless of whether the threat is directed against the state, its agents or its nationals.
Support for the principle of self-defence as a remedy against the crimes committed diplomats can also be found in the commentary of all ILC on the article on personal inviolability. It states that being inviolable, the diplomatic agent is exempted from certain measures that would to direct coercion, but this, however, does not exclude self defence. The ILC considered self-defence as a measure of immediate reaction and not as a ground for trial and punishment (the latter has actually never left the realm of the doctrine). The ICJ, referring to the principles of personal inviolability and diplomatic immunity from jurisdiction, also said that naturally it does not mean that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving state in order to prevent the committing of the particular crime.134

It is very rare, but states have still availed themselves to the principle of self-defence. One of such incidents happened in Paris on 31 July 1978 following a hostage-taking operation by a Palestinian inside the Embassy of Iraq. The ambassador, who acted as a mediator, managed to reach an argument with the Palestinian and the latter finally left the mission premises escorted by two French policemen. But at the moment when the Palestinian was going to get into the police car waiting for him at the gate of the embassy, the diplomats started to fire at them from the mission premises, killing two (including a policeman) and injuring others. The police returned fire immediately in self-defence and consequently killed one of the Iraqis. They also arrested three others for participation in the shooting and they were soon expelled from France. The response of the police was surely justified and proportional and constituted an immediate measure to eliminate danger of injuries to person. When commencing on this case, the government of France refrained from any official reference to the principle of self-defence. This is understandable, because there are no clear rules when and under what circumstances this principles may be applied as a response to serious crimes committed by diplomats, and any use of self-defence entails the risk of arbitrary application. Self-defence should be used with due regard to the requirement prescribed in this respect in the classic Caroline case, namely a necessity of self-defence, instant, overwhelming, leaving no choice of means, no moment for deliberation and proportionality.135

134 United State Diplomatic and Consular Staff in Teheran, Para. 86.
135 Supra Note 29, pp. 894-896.
4.11.2 International Criminal Procedure

The principles of personal inviolability and of diplomatic immunity only restrict the jurisdiction of the receiving state and possible transit states, thus not having an *erga omnes* effect. Therefore, offending diplomatic agents can be prosecuted in certain circumstances as discussed above. But in addition to those there is one more possibility, namely where such diplomats are subject to criminal proceeding before certain international criminal courts.\(^{136}\)

History has witnessed the creation of several international criminal tribunals. The first and probably the most notorious one was the International Military Tribunal of Nuremberg, which was created by the victors of the Second World War to try the war criminals of Nazi Germany. Since then, international tribunals have rejected any claim to official position as a defence. For example, Article 7 of the Charter of the International Military Tribunal of Nuremberg reads: “the position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or migrating punishment”. It is clear that any claim to official status is not directed against the jurisdiction of the relevant tribunal, but against potential liability in respect of alleged crimes.

The same issue is also addressed in the Rome Statute, but in addition to question of liability, the statute considers also the question of jurisdiction. Firstly, the Rome Statute applies equally to all persons without any distinction based on official capacity, and the latter in no case exempts a person from criminal responsibility. But secondly, Article 27, paragraph 2 of the Rome Statute clarifies that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the International Criminal Court from exercising its jurisdiction over such a person”. Therefore, a person cannot hide behind his diplomatic immunity in order to escape criminal proceeding before the ICC as long as the crime occurred on the territory of a state party to the Rome Statute or the person accused of the crime is a national of a state party to the Rome Statute. The latter possibility means that if the sending state of the criminal diplomat is party to the Rome Statute and sending state has failed to initiate criminal proceeding or conduct such proceeding independently or impartially, the ICC can initiate its own criminal

proceedings. However, the initiation of criminal proceeding is hindered by one factor – if the diplomat concerned is still in the receiving state and sending state has refused to waive its immunity. Article 98, paragraph 1 of the Rome Statute states that the ICC may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international law with respect to the diplomatic immunity of a person, unless the ICC can first obtain the co-operation of the respective third state for the waiver of the immunity. In other words, the Rome Statute does not permit the receiving or transit state to violate personal inviolability or diplomatic immunity in order to permit the receiving or transit state for the waiver of immunity. In other words, the Rome Statute does not permit the receiving or transit state to violate personal inviolability or diplomatic immunity in order to extradite the criminal diplomat to the ICC. Therefore, such immunity can still be an obstacle to criminal proceedings, but at least retired or former diplomats can no longer hide behind continuing immunity in respect of official acts. Nevertheless, the ICC is an important step ahead in securing the prosecution of the people who otherwise would escape legal proceeding due to their privileged status.

Such exceptions to diplomatic immunity in different international instruments do not, however, enable us to conclude that any those exceptions exist in customary international law in regard to national courts.

4.12 Conclusion

Every State with representatives abroad needs protection for its diplomats, the embassy, documents and bags. Any act committed by a diplomat that is unlawful has no effect on the functioning of the mission and thus the offender should be punished accordingly. Furthermore, police and legal officials are then trapped between the international obligations of their respective countries on not prosecuting protected offenders for their crimes and their oath to their country and citizens to uphold the law. There is no justification for refraining from prosecution a diplomat who rapes, smuggles, kills or commits any other serious crime. Further, there is an even less convincing rationale for families and staff of diplomats to be treated with the same immunity.

As the breach of trust by diplomats becomes more obvious, the use of diplomatic privileges and immunities, although essential to the efficient operation of relations of States, has increasingly become endangered. The Convention 1961
simply places the diplomats beyond the laws of the receiving State and in most cases creates an environment of impunity. As a result, some diplomats, their families and staff will continue to use their status to abuse their immunity in order to gain considerable profits or just carry out violent, immoral or illegal behaviour. Berridge states that the inviolability of diplomatic agents is somewhat less sacrosanct than the inviolability of the mission because the constraints on a diplomat endanger the performance less than the constraints of the mission premises. If this is the case, then absolute immunity from prosecution is not necessary.

Again, we are living witnesses to new waves of crime, at least in intensity and proportion, which are capable of threatening international peace and security. Murder, assassinations with political underpinnings, terrorism, international trafficking in narcotics, etc are commonplace. Interestingly, in recognition of the reality, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973, punishes inter alia the international commission of murder kidnapping or other attack upon the person or liberty of internationally protected persons.

All the above abuses indicate that although the Vienna Convention 1961 is a good codification of customary practice something is missing the absence of deterrence against criminal acts. The number of diplomats who abuse their position is relatively low. For instance, in 2002 British diplomats abroad escaped criminal prosecution on 21 occasions, by as they were effectively cloaked by immunity. The threat of prosecution could help deter any unlawful behaviour by diplomats, staff and their families. Since declaring offenders persona non grata and other forms of deterrent measures do not seem to be effective, immunity should be restricted by alternative means.

There are powerful reasons for diplomatic immunity, but these reasons should be balanced against the need to prevent crime and the need to protect the rights of the victims. Even Hollywood films portray diplomats committing offences and hiding behind the diplomatic immunity, as in Lethal Weapon 2 starring Mel Gibson and Danny Glover. In this film South African diplomats smuggle drugs and money and commit murder. Is this a fair reflection? In some instances, it can be answered in the affirmative. If this is the case, what have governments done to change this perception?
International law and even municipal laws of some states have adequately handled the question of abuse of privileges and immunities internationally protected persons. The question of handling abuses of privileges and immunities by internationally protected persons remains a very delicate one. States, especially the host states have to be careful how they deal with offending diplomats because of the importance of reciprocity. These immunities are given on the understanding that they will be reciprocally accorded, and their infringement by a state will lead to protest by the diplomatic body resident there in, and would prejudicially affect its own representation abroad. International organization does not necessarily have this fear, but since their officials carry out their functions in state, a careful handling situation is also required to create greater efficiency by the official. International law provides the immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

The above provision identifies the great role the sending state can play in checking abuses since the immunity of the diplomat does not exempt him from the jurisdiction of the sending state. However, in cases where the sending state is a party to the abuse as was in the Libyan case, it cannot be relied upon to check the abuse. Sending states who are not party to the abuse can also instill discipline in the offending diplomat.

It is true that diplomats are exempt from the criminal, civil and administrative jurisdiction of the receiving state. However, this exemption may be waived by the sending state. Moreover, the immunity of a diplomat from the jurisdiction of the receiving state does not exempt him/her from the jurisdiction of the sending State. It is also within the discretion of the receiving State to declare any member of the diplomatic staff of a mission persona non grata. This may be done at any time and there is no obligation to explain such a decision. In these situations, the sending State, as a rule, would recall the person or terminate his/her function with the mission. Thus, the Convention 1961 provides for specific measures that can be taken by both the sending and receiving States in cases of misuse or abuse of diplomatic privileges and immunities. On the whole, diplomatic privileges and immunities have served as efficient tools facilitating relations between States.