Chapter 8: Conclusions and Suggestions

8.1 Concluding Remarks

A conscious attempt has been made in this work to trace the development of diplomacy from antiquity and to make in-depth study of diplomatic immunity and privileges and its abuses. It has been traced that diplomacy is as old as mankind, and that the ancient man was involved in diplomatic activities, since they also negotiated to either initiate or end wars with their neighbors. These people even at that time had simple rules to guide them. Diplomacy at this stage was *ad hoc* in nature, while contemporary diplomatic and consular relationship is largely permanent in practice. It is therefore, submitted that conclusions are drawn carefully on the basis of the discussion made in each chapter.

The First Chapter of the thesis outlined the background of diplomatic immunity and privileges, definition diplomacy; the Vienna Convention requires the parties to extend privileges and immunities to family members forming part of the household but does not define family members. Further theories granting of absolute immunity to diplomat and his family and staff have been analysed meticulously, the research also developed and has accessed the validity and value of the principal theoretical and practical foundations of diplomatic privilege and immunity. Thus, the theories of “personal representation”, “extraterritoriality” and “functional necessity” as commonly accepted bases, as well as the principle of reciprocity. The invocation of diplomatic immunity by foreign governments to avoid the criminal liability of diplomatic personnel is a problem confronting every nation that maintains diplomatic or consular personnel. Unfortunately, waiver of immunity remains a rare occurrence in cases of serious crime. Consequently, a great deal of criticism has been leveled at the system of immunity and a number of proposals have been put forth to hold diplomats accountable for crimes committed. At the same time, there has been a revolution in the practice of diplomacy itself. Whereas in past centuries the ambassador was the only official link between sovereign states, members of government may now easily communicate. Face-to-face meetings between heads of state, once a rare occurrence due to the weeks of travel such visits often entailed, are now commonplace as well. The diplomat’s monopoly on official communication between governments, as this research has shown, they are broken into increasingly
smaller pieces over the past several decades as long-distance travel and communication have become fast and reliable. In spite of these changes, diplomatic immunity has remained a high, broad barrier to the pursuit of recompense by citizens injured by those same diplomats. Further, this research has examined the logic of continuing to uphold immunity at its traditional high level in an era in which diplomats have become significantly less important in the overall scheme of international relations.

Despite the advent of the telephone, airplanes, and fax machines, diplomatic immunity continues to play an important role in international relations. The maintenance of embassies throughout the world provides a permanent and concrete presence reminding every nation of its international obligations and interests. However, as the relationships of nations have developed and evolved over the last several thousand years. In addition to the embassy property being considered the land of the sending state, diplomats, once truly considered the mouthpiece of the sovereign, were extended absolute immunity accorded to the sovereign ruler himself. However, as these justifications for diplomatic immunity fell into question, it was nevertheless asserted that immunity was still necessary to allow the unfettered function of diplomacy. Moreover, the pragmatic concern of exposing diplomats to the jurisdiction of potentially hostile countries provides an even stronger rationale for the continuance of diplomatic immunity. Nevertheless, over the past twenty year’s headlines of diplomats committing terrorism and other violent crimes has spawned an outcry of dissatisfaction with the doctrine.

The Second Chapter makes in-depth study on the concept of diplomatic immunity and traces its roots back to ancient times, and it is a practice that should remain intact. However, it is not a practice to be abused, and appropriate precautions can and should be taken to ensure that diplomats abide by the laws and regulations of the host state. While it unfortunately often takes a tragic event to bring about policy changes in the realm of diplomatic immunity, a balance must be achieved that not only protects diplomats from harassment but also those citizens that accord visiting diplomats the hospitality of their nation.

Further, the chapter has analysed the codification of customary practice of diplomatic immunity; however, the Vienna Convention in 1961 finally managed to
gain over 150 signatories to agree to 55 Articles on Diplomatic Relations. This Convention ensured only that the functional necessity theory is prominent and that immunity would be granted in order to protect the functions of the diplomat and ensure he could perform them free from interference. Furthermore, it limited absolute immunity, especially with regard to civil matters and classified diplomats according to their official functions. These changes helped decrease immunity for civil jurisdiction, but left it absolute for criminal jurisdiction.

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

It has been said that several solutions to the problem including unilateral legislation, multilateral amendment to the Vienna Convention, compensation funds, mandatory insurance requirements and more stringent enforcement of pre-existing sanctions. Unfortunately, these solutions have largely proved either inappropriate or inadequate for dealing with the sensitive subject of diplomatic abuse.

**The Third Chapter** analysis the traditional point of view, the functions of an envoy or diplomatic agent can be said to consist of representing his home state by acting as the mouthpiece of his government and as the official channel of communication between the government of the sending and receiving states. His functions would also include reporting on the conditions and developments in the
state where he is appointed to reside as well as protecting the interests of his home state and its nationals in the receiving state.

Perhaps the more important function of an envoy in the matter of protection of the interests of his nationals which is likely to arise often, is to afford protection to their lives and properties in individual cases or collectively, and to afford them such assistance as they say need. To a person who is resident abroad the diplomatic agent of his country is his friend in need. And it is to the envoy that he has turned when he suffers harm or his interests are adversely affected either by reason of some action of the Government or governmental agencies or in the hands of a private person. Thus in the case of a riot or civil commotion the diplomatic agent will be well within his rights to ask the government of the receiving state to take adequate measures to protect the lives and proprieties of his citizens and to protest to the government if it fails to do so. For instance during the Liberia crisis early 1990, as a result of high tension, the American Ambassador there organized for the airlifting of the American nationals from Liberia. Also during the Kano crisis of early October 1991, the American diplomatic agent monitored the events there and directed their citizens. However, in ancient times, it was fashionable for treaties to lay down duties and to specify liabilities and the procedure to be followed in cases of breach. In modern law, legal institutions like the International Court of Justice and other tribunals have developed rules of responsibility. In discussing international responsibility there is always a strong tendency on the part of some lawyers to reduce it to the normal rules of human responsibility in terms of either contractual or delectable. This comparison in true sense is too literal therefore, not apt. International responsibility is based on breaches of treaties and other responsibilities imposed by international law.

In international law, any breach of a legal obligation gives rise to international responsibility. Objective test is applied to determine responsibility. Less emphasis is placed on the elements of dolus and culpa (those are the elements of intention and the neglect). A convention or a rule of customary intentional law may create the obligations breached. Where the acts of one state cause injury to another state; the injured state is entitled to redress. State responsibility is therefore, concerned with circumstances and principles, which will ensure redress to the injured state. The nature of the redress will depend on the nature of the wrong. Sometimes, the redress is sought through diplomatic channels. Instances where the integrity of the state is at
stake, a mere apology and an undertaking not to repeat the act being complained of may suffice. Where the act has led to a material loss or damage, the question of reparation may arise, in this kind of situation, recourse may therefore, be had to international arbitral tribunals. The wrong that has brought about the loss may be of various types. It may have arisen from a treaty obligation or injuries to the citizen of another state. Where there is a breach or omission of a rule of international law; the claim of right under municipal law is not available to the state that is alleged to be in breach. Therefore, where an act has been characterized as an international wrong it cannot be affected by the characterization of the same act as lawful under municipal law.

Responsibility of a state for a breach of contract entered into by the state and aliens or foreign corporations may not necessarily be international in character. An international responsibility may arise if apart from the breach of the contract, the state concerned did some other acts, which amount to a denial of justice against the alien. However, if under the contract, either expressly or impliedly, the state concerned and contracted with the state of the alien that it would observe certain of arrangements with its citizens, the breach of such terms will amount to state responsibility.

The career diplomatic corps has lost its monopoly on official communication between states; it still fills many important roles. It is true that to significant degree instantaneous communications devices, security of state head, national security assistants and secretaries of state have restricted ambassador’s duties, but not quite to the level of mere ritual, public relations and in keeping for itinerant statesmen as at least one source has described the situation. Diplomats’ roles in negotiating, in representing their government and as cultural liaisons are still extremely important to the conduct of international relations.

**Chapter Four** of thesis as emphasized the concept of diplomatic immunity, deeply rooted in the law of nations, is a useful tool in international relations when used responsibly, but the neither the States nor any other civilized nation should tolerate its abuse to shield illegal and sometimes violent activity. Although statistically small, one must wonder why we tolerate at all the problem of diplomatic crime shielded by claims of diplomatic immunity.
Abuse of the privilege has gone largely unpunished and undeterred for centuries. Today, the potential for wide-scale destruction and death from terrorist activities conducted under cover of diplomatic immunity threatens not just the United States but all countries and must be stopped. Deterrence of reciprocal harassment of diplomats can be accomplished through the use of remedies already available such as declaring a mission staff *persona non grata*. Reform of the system is long overdue and the states should take steps to reform by proposing an amendment to the Vienna Convention to make abuse of the privilege more difficult, to bring to justice diplomat offenders, and to provide victims of diplomatic crime with redress in the courts. If unsuccessful in proposing amendment to the Vienna Convention, the states should act unilaterally to abrogate the terms of the Vienna Convention by amending their municipal laws to accomplish substantially the same goals. These steps may seem antagonistic to harmonious international relations, but they do violence neither to the purpose of the Vienna Convention nor to the functional necessity underlying the Vienna Convention. The Vienna Convention's purpose is not to provide a shield for scofflaw diplomats and terrorists but rather to ensure that diplomats may efficiently perform their duties and to bolster friendly relations between nations. It is time to review the privileges and immunities provided by the Vienna Convention in light of today’s circumstances.

It is claimed that treaties have implemented the functional necessity doctrine through expansive provisions that resemble the doctrine of absolute diplomatic immunity. They contend that international organizations and their personnel have little need for jurisdictional immunities. To the contrary, they argue that international immunities encourage international organizations to behave irresponsibly. Building on these premises, they urge us to draw on state-immunity principles and to expand the authority of municipal courts to make immunity determinations based on principles of restricted sovereign immunity or the functional necessity doctrine. Implicit in such proposals lays the assumption that the expansion of municipal court jurisdiction would not produce substantial institutional costs and would generate significant benefits in the form of increased accountability.

Although solutions to abuses of diplomatic immunity and their effectiveness are controversial, one matter is clear: the government sees the weaknesses of the current law, and has the ability, if not always the will, to improve the situation.
Unfortunately for the landlord, in this instance, he/she is left without a remedy. The landlord can only hope that the government will pursue his/her interests and will persuade the offender to withdraw. Our government's policy is consistent with the purposes of diplomatic immunity and the practices of other nations. Therefore, although it is now understandable why courts are reluctant to act against foreign diplomats, the government should use all means in its power to assure the United States citizen's rights and fully compensate him or her. Anything short of that would only create more bad feelings towards our ‘guests’ from abroad, and inhibit any sort of transactions among states citizens and foreign diplomats. Since the government has once before shown a hint of improvement in demanding due compensation from delinquent diplomats, we can only hope that it will continue down this path, and that it was not a mere exception to its usually disinterested demeanor.

International immunities have experienced a significant diminution over the course of the twentieth century. The provisions of immunities agreements do not resemble the doctrine of absolute state immunity. Rather, they permit the maintenance of international immunities only on the basis of functional necessity, but give international officials the primary authority to apply the functional necessity doctrine. Drawing on a recent decision by the ICJ, national prejudices still threaten the work of international organizations. These prejudices justify the continued existence of international immunities and the maintenance of decision-making authority at the international level. In fact, an expansion of municipal court authority would impair the capacity of international organizations to perform their obligations with respect to peace, security, and human rights. Fourth, and finally, international organizations initiated the movement towards accountability. As a result, they have created alternatives to municipal court litigation that promote a high degree of responsibility. Under these circumstances, it seems unlikely that an expansion of municipal court jurisdiction would enhance the accountability of international organizations.

Governments are often confronting a tension between a desire to demonstrate compliance with emerging international legal norms and an interest in shaping those norms by taking and advocating particular positions. Foreign state immunity cases heighten this tension, because a court and not a foreign ministry official must make the decision. If the judicial decision maker follows flawed legislation, the consequent decisions will hamper the government's efforts to advance its vision of the
international law of foreign state immunity, and will give rise to conflicts with international law.

The terroristic abuse of diplomatic status can be controlled neither by moving demonstrations away from embassies nor by trying to amend the Vienna Convention. What is needed in close coordination between the various parts of government, and international security cooperation; Governments must keep themselves more fully informed than they have sometimes appeared to be in the past, and should not, for the sake of promoting trade or other reasons, seek to accommodate those who are reluctant to conform to the requirements of the Vienna Convention. Above all, those remedies available for abuse in the Convention especially the power to limit the size of the mission, to declare a diplomat *persona non grata* should be used with firmness and vigor, and not just reserved for matters related to espionage.

Political necessity and state sovereignty appear to be entrenched factors in the battle between more traditional principles of absolute immunity and new norms of international law. No clear and consistent practice regarding head of state immunity has been established. States may sometimes elect to preserve stability in the international arena by invoking the historical grant of immunity to former heads of state. If stability is not an overriding concern, states may choose to pursue more legalist goals by embracing the precept of individual accountability for crimes against international law. It is within national courts that this tension between immunity and individual accountability will be most acute. Nation states and national courts deciding between applying the broad grant of traditional immunity and piercing that veil will most likely be influenced by extralegal findings of immunity, as evidenced in the Hirohito decision, and truncated legal reasoning, as evidenced in Pinochet.

Nonetheless, future world leaders must be made aware that a boundary exists between international jurisdictional immunities extended to afford such protection and the criminal impunity Pinochet and others have exhibited. Although this boundary is not yet a clear one, the fact that an elderly soldier, long retired from the front lines of political battle, has been haled before one nation's courts to answer for his transgressions suggests that the international community is now willing to define precisely where such a boundary lies. As the International Criminal Court becomes a reality and human rights are more broadly recognized, victims of tyranny will no longer be without recourse.
Fifth Chapter which has analyzed the diplomatic asylum finds its origin, basis, and excuse in a passion coeval with human nature, the desire for vengeance. From the holy city of refuge of King David's time to the Hidalgo case in Ecuador, the underlying principle has been the same, not a matter of legal right, but the conflict on the one side of a frenzied thirst for revenge, and on the other of the cooler, higher counsel of humanity and self-control. Nations have attempted to call in certain doctrines of recognized international law in justification, or to engraft, by means of a fiction or by figures of speech, excrescences upon the body of international jurisprudence; but it will be found that the so-called right is the product of circumstances, and that the recurrence of conditions resembling those wherein it had its birth is today the cause of its revival; in other words, that the "right of asylum" is no right at all, but merely a privilege granted or claimed where its use finds sanction in the necessities of a mutable condition of society.

The ICJ in Asylum Case, for the first of its kind to go before such a tribunal, has contributed more than it has to the clarification of an erratic practice. It is certainly desirable, both for the progressive development of international law and the continuing assertion of law and order in international politics, that grants of diplomatic asylum be discouraged and that such grant as are made be stringently regulated. A perusal of the Judgments of the International Court of Justice in the Haya de la Torre Case suggests that a thoroughgoing review of the usages and treaties dealing with diplomatic asylum would be in order. As the Latin-American states have taken the initiative in seeking to regularize the practice through law, it is to be hoped that this review may actually be carried out at the tenth International Conference of American States.

In those countries in which the government is stable and enduring and the local law dominant, the privilege is seldom called in question, but has fallen into innocuous desuetude, simply because there has been no necessity for its exercise, until today it is doubtful if in one of the greater nations of the world its existence would be either claimed or conceded. However, in those states comprehended under the term Spanish-American countries, the conditions favoring its use have so frequently occurred that it has continually been the subject of diplomatic correspondence; there has seemed something inherent in the Spanish character demanding the interposition of a restraining hand at certain recurrent crises in the
political lives of those countries. Thus it is that almost every instance of the attempted exercise of the privilege by an American minister has occurred in one of the so-called republics of Central and South America.

This seems to be about as far as it is possible to curtail the “right”, or perhaps, until the civilization of the South American countries is farther advanced, about as far as is expedient. Within these narrow limits, if they are strictly adhered to, humanity and wisdom seem to have joined hands, and with a consistent course predicated upon the above gleaned principles, the so-called right of asylum should not in the future be the cause of any serious difficulty.

Thus once a crime is qualified as political and a demand for a safe-conduct is made, that safe-conduct must be conceded and, if the State granting asylum requires it, the safe-conduct must be in writing. These recent provisions, inter alia, place considerable power in the hands of diplomatic representatives, and they should, therefore, now more than ever before, exercise their responsibilities with regard to the right of asylum with forethought and prudence.

Chapter Six has analysed on the concept state practices of USA, UK, India and South Africa. Abuses of diplomatic immunity challenge both state legislative and judicial branches of the municipal government. Through cooperation and an active search for solutions, the United States can hold diplomats responsible for their actions without threatening the safety of United States diplomats abroad or undermining the appropriate role of the judiciary in reforming the rules governing this area of the law. By establishing insurance and other compensatory mechanisms, in addition to criminal liability in more serious cases, both the legislature and the courts may arrive at a solution that simultaneously benefits the victims of such abuse and preserves the goals of diplomatic immunity. If they involve only a financial threat without dire consequences for the personal liberty of the diplomat, the dangers of reciprocity may be a reasonable price to pay for making diplomats more accountable for their criminal and tortious acts.

A more coherent U.S. view of restrictive diplomatic immunity is essential for the United States to play a leadership role in the further development of the international law of foreign state immunity, including the negotiation of agreements, such as the diplomatic conference on foreign state immunity called for by the International Law Commission.
A more predictable statute also would benefit both private entities dealing with foreign states and the foreign states themselves, because both could plan transactions with more confidence about whether the transaction would be subject to U.S. jurisdiction. Increased consistency between U.S. judicial decisions and the positions on foreign state immunity that the Executive Branch advances on the international level would also facilitate U.S. foreign relations, because the State Department would need to defend troubling decisions to foreign states less frequently and would not feel compelled to participate in litigation against foreign states as often as it has in recent years.

The United Kingdom and the United States have considered changes in foreign policy and have re-examined privileges and immunities given to foreign diplomats in their countries. Despite these changes and policies, diplomats continue to abuse their rights. These abuses could have dire consequences both for the diplomats and the sending State. The failure of the Vienna Convention and/or other international agreements to provide any suitable sanction fosters an environment for such abuses to continue.

Nation too must see to it that a delicate balance is struck and maintained, in their practice, between the need to exercise official functions without impediment or obstruction and the need to reciprocate equality of treatment, with the necessity and desirability of preserving the Rule of Law within a given national society. Without respect for the integrity of the Rule of Law, the application of jurisdictional immunities under contemporary international law will cease to have its raison d’être. It is accordingly ever so vital to maintain this equilibrium at any cost, so as to prevent and deter possible abuses, misuses and misapplications of jurisdictional immunities of any kind.

Various Acts of made by the governments of United Kingdom, United States, Republic of South Africa and India to try and curb diplomatic abuses. Each state have found that although they have restricted immunity from previous practices it still places the diplomats’ needs above its own citizens. Thus several suggestions have been put forward and argued whether they are successful in restricting immunity comprehensively. Such suggestions are amending the Vienna Convention on Diplomatic Relations; using the functional necessity theory to further limit immunity;
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forming bilateral treaties between States as a possible means to restrict or limit; and lastly establishing a Permanent International Diplomatic Criminal Court.

It should be suggested that states to adopt a “restrictive” interpretation of article 39(2) by citation to sources that flatly contradict. It is claimed that this alleged error in interpreting the Vienna Convention is part of a pattern of disregard for international obligations that threatens to undermine the integrity of the principle of pacta sunt servanda. Such grand accusations undoubtedly spark reader interest. But, when they are based solely upon an entirely erroneous interpretation of a single treaty, it is the integrity of legal scholarship that suffers, not the integrity of the principle of pacta sunt servanda.

Chapter Seven has made an analysis of impact of abuse of diplomatic immunity on human rights; the chapter has analysed the World War II which offered a powerful lesson in the danger inherent in an international legal order based upon the notions of absolute sovereignty. This lesson provided the impetus for the creation of organizations such as the U.N. and led to a diminution of the concept of sovereignty to protect human rights. There is a growing consensus that the international community is no longer prepared to stand aside and tolerate a government committing violations of fundamental human rights.

The adoption of the Rome Statute is evidence of the world commitment to the advancement of human rights. The world, however, does not have to make a choice between national sovereignty and human rights. Concerns over violations of sovereignty by diplomats are minimal as compared to the incidents of genocide, crimes against humanity, and war crimes. Because there is little evidence of diplomatic abuses, and because one would expect diplomatic abuses to occur more frequently than those committed by personnel of an international organization seeking to promote human rights, the granting of immunities to the ICC Prosecutor will not be a severe diminution to the notion sovereignty.

Now that the commitment to advance human rights is evident, it would be unthinkable to undermine the potential of the Court's personnel with ineffective tools. One of the final steps towards an effective ICC is the adoption of the Draft Agreement. The U.N. delegates at the Procom should note the trend toward the protection of human rights in the international community and negotiate the
agreement with a view towards increasing the privileges, immunities, facilities, and exemptions of the Court and its personnel.

The first generation of rational choice criticism is right, on balance, to be skeptical of claims that customary international law is widespread, or that a particular rule binds a particular state in a matter of keen interest to it. But given persistent recognition of custom as a legal institution, one might be equally skeptical of claims that custom cannot exist, and slow to assume that its principles require legal rules and individual state interests to be antinomies. Reconsidering the application of rational choice theory, it would appear, suggests that customary international law may be a valuable vehicle for simultaneously advancing individual and aggregate state interests, even putting aside the possibility of more altruistic or normative ambitions. Maximizing cooperation’s potential requires both improving the cooperation between international legal doctrine and rational choice analysis and generating criteria that better allow the states themselves to decide.

Defining ‘real actions’ as those where the court’s sole and primary objective is to settle disputes over present title or interest in property gives the exception meaning and at the same time excludes those actions where the transfer of property is merely a consequence of the court's resolution of some other issue.

Immunities law still shields perpetrators of human rights abuses from lawsuits in municipal courts to an unacceptable extent. The law remains uncertain and, as the Pinochet case demonstrates, a similar situation prevails in Britain and presumably in other countries as well. Thus, the need remains to provide a human rights exception in law governing diplomacy to allow the law to catch up with the monumental progress of international human rights law. The attempts thus far have not succeeded in taking this next step forward, but the opportunity and the demand are both present for doing so.

Since the first attempt to codify the law of diplomatic relations in 1895, there has been one rule of residual diplomatic immunity: immunity subsists after termination of diplomatic status for official acts only. Because diplomatic immunity is a procedural bar and not a substantive release from liability, a diplomat is amenable to the jurisdiction of the courts of the receiving state once his or her tour of duty is over. Only the diplomat's official acts remain immune indefinitely. This longstanding
customary rule was incorporated into article 39(2) of the Vienna Convention in 1961 and has been consistently applied in state practice.

In this new environment, the traditional law of diplomacy must also evolve through new interpretation of existing rules. If some of those rules are deficient or insufficient to regulate diplomacy, new rules ought to be created. In this light, this thesis has identified several provisions under the existing law of diplomatic or consular immunity and privilege that are applicable to the diplomatic environment. They are the rules on the inviolability of premises, inviolability of documents and archives, freedom of official correspondence, privilege of tax exemption, and immunity from judicial jurisdiction. New interpretations of these rules have also been suggested.

8.2 Research Findings

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

From the above discussion following findings are arrived:

1) Rules of diplomatic immunity have remained unaltered since the time they were established. However, in time, the various and often inconsistent practices required consolidation. This occurred at the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

2) There is a growing consensus that the international community is no longer prepared to stand aside and tolerate a government committing violations of

¹ L S Frey and M L Frey, The History of Diplomatic Immunity, (Ohio State University Press: Columbus), 1999, p.120.
fundamental human rights. The adoption of the Rome Statute is evidence of the world commitment to the advancement of human rights. The world, however, does not have to make a choice between national sovereignty and human rights. Concerns over violations of sovereignty by diplomats are minimal as compared to the incidents of genocide, crimes against humanity, and war crimes. Because there is little evidence of diplomatic abuses, and because one would expect diplomatic abuses to occur more frequently than those committed by personnel of an international organization seeking to promote human rights, the granting of immunities to the ICC Prosecutor will not be a severe diminution to the notion sovereignty.

3) The invocation of diplomatic immunity by foreign governments to avoid the criminal liability of diplomatic and consular personnel is a problem confronting every nation that maintains diplomatic or consular personnel. Unfortunately, waiver of immunity remains a rare occurrence in cases of serious crime. Consequently, a great deal of criticism has been leveled at the system of immunity and a number of proposals have been put forth to hold diplomats accountable for crimes committed.

4) Vienna Conventions establish a set of minimum standards for the treatment of diplomatic and consular personnel, and states are free to enter other agreements which extend immunity beyond the limits prescribed in the conventions. Strict interpretation of the Vienna Convention has potential as a limited effort to offer some recourse to victims of diplomatic crime. The greatest rationale for appropriate criminal jurisdiction over diplomats is the fact that no satisfactory theoretical justification for absolute immunity exists today.

5) Consular properties enjoy similar immunities, but it should be noted that they are not immune from expropriation for purposes of national defence or public utility as long as the expropriation does not impede the performance of consular functions, and adequate compensation is promptly paid.

6) The Vienna Convention declares inviolable the person of the diplomat. The diplomat enjoys immunity from the law enforcement activities of the receiving State's agents. Moreover, the receiving State has a duty to protect the diplomat from attack. Also, diplomats enjoy immunity from the civil and criminal
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jurisdiction of the receiving State's courts. Further, the receiving State's authorities may not compel the diplomat to give evidence as a witness and must, with certain exceptions, provide exemption from execution.

7) Diplomats' and diplomatic missions' freedom of movement within the receiving State is guaranteed. Host governments rarely restrict movement of diplomats unless such restriction is directly reciprocal to restrictions placed upon its own diplomats in the other receiving State. In any event, diplomats ignoring such restriction enjoy immunity from any punishment and the receiving State must ignore the violation or declare the diplomat persona non grata, or unwelcome person.

8) Only the sending State may waive the immunities and privileges accorded to members of its diplomatic mission and it may only do so expressly. Given the immunities and privileges enjoyed by the diplomat, receiving States have limited options for dealing with abuse.

9) The fundamental principles of diplomatic immunity have been in place for more than 2,000 years. Ambassadors in ancient Greece and Rome were not subject to local jurisdiction, and their persons and correspondence were inviolable. The signing of the Vienna Convention in 1961 codified these ancient, widely accepted rules.

10) For State immunities, it is the sovereign equality of States that justifies the granting of jurisdictional immunities. For diplomatic and consular immunities, in addition to the principle of non-impediment or non-obstruction of the mission, diplomatic and consular, there is inevitably the element of reciprocity, which is a derivative of the equality of sovereign States that has come into play with regard to the immunities enjoyed by international organizations.

11) The Vienna Convention on Diplomatic Relations 1961 is reputed to be undoubtedly the most important document on the subject of diplomatic relations that exists, being a landmark of the highest significance in the codification of international law.

12) Diplomatic asylum has no universal acceptance, but the members of Havana Convention on Asylum have recognized as part of their regional treaty. The Vienna Convention on Diplomatic Relations 1961 has indirectly recognized the
granting of asylum under inviolability of premises of diplomat.

13) Most of the Third World Countries have felt the heat of abuse of diplomatic immunity against their municipal law and have posed great challenge to receiving states to bring balance between international obligation and national interest.

14) The Article 31(4) of Convention 1961 provides that the immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state. This connotes that the criminal immunity among others that the diplomatic agent enjoys in the receiving state does not extend to the sending state Article 31 (1). The convention can therefore, place a special duty on the sending state to punish their diplomatic agents where a grave crime has been committed.

15) The blatant abuses and violations of diplomatic privileges and immunities coupled with the alarming wave of terrorism and illicit trafficking in drugs, point to the necessity to revise the convention with a view to its appropriate location within the matrix of diplomatic praxis and contemporary realities.

### 8.3 Testing of Hypothesis

Based on the findings of research, the hypothesis of the current research stands established because the problem of abuse of diplomatic immunity is clearly a complex and multifaceted one. The range of crimes committed runs the gamut from the relatively trivial (traffic violations), to the extremely serious (rape, murder, and even slavery) in the receiving state. The diplomatic immunity has been abused to a large extent the instance of United Kingdom in 1984 and the recent instance of USA diplomats in Pakistan has proved the same to be true.

It has been witnessed that the diplomat's role has shrunk significantly during the twentieth century, but his immunity and privileges granted to diplomats are unchanged from time immemorial. Abuses of immunity that were tolerated in past centuries due to the diplomat's important functions and duties need no longer be endured. International law should reflect this fact. The historically granted immunity and privileges to the diplomats has been recognized under the international instrument (Vienna Convention on Diplomatic Relation 1961), which has been codified under international law providing concrete evidence for the same. The states are against the
tolerance of abuse of immunity and privileges granted to diplomat and their family, the national laws are in the favor of reducing the diplomatic immunity and privileges in so far as reducing the immunity the best example is that of South Africa.

The current research work points that the Diplomatic inviolability of premises has been misused to grant diplomatic asylum to the persons who have committed crimes in the receiving state, even though there is no universal accepted law for the same. The international regime has been silent on the concept of diplomatic asylum even though asylum is right of every sovereign state, but diplomatic asylum as been indirectly recognized under Article 22 of Vienna Convention 1961. Even though many countries are against granting of asylum to criminals in the receiving state diplomatic premises, the states have tolerated because of inevitability diplomatic relations.

However, taking advantage of the facilitated negotiations and enhanced transparency generated by diplomat, developing countries would be able to perform more powerful diplomatic activities and engage with developed countries on a more level playing field than previously. The developing nations are economically burdened because of large size of diplomatic legation and absolute immunity and privileges granted to diplomats against their local laws. The hypothesis so far as it relates to transparency is a myth, the developing countries are suffering a lot of financial burden to maintain the diplomatic relations because of the diplomatic immunity granted to civil prosecution, diplomatic bag and as well as exemption from taxes and duties. It has been proved that this immunity has been used to smuggle goods from and to the receiving states which have created economical burden on the receiving state. The local law of the state has been proved fatal to curb these abuses.

Human rights philosophies and municipal law governing diplomatic immunities and privileges there has been gross violation of these immunities and privileges granted to them. The states are finding difficult to bring balance between its human rights protection and granting of diplomatic immunity. This research points out that the states and international community have given importance to human rights under the principle *jus cogens* but the same principle has been applied and diplomatic relations which has raised the issue of balancing these two pre-emptive rights of the nations.
However, there is still lacuna in the existing laws governing diplomatic immunity and privileges under international law and municipal law.

8.4 Recommendations and Suggestions

The establishment of resident embassies is the genesis of modern diplomacy and crystallizes three theories that influenced the rationale for diplomatic immunity. These theories are extraterritoriality, personal representation and functional necessity. Extraterritoriality worked around the concept that the embassy was not part of the receiving State but was the property of the sending State. Any crimes committed against or by the members of that embassy could not be lawfully prosecuted in the receiving State. This theory soon developed and included not only the embassy, but the residence of the ambassador, and was then extended to his staff and family. The personal representation theory was a favorite theory in the early development of diplomatic immunity. The basis of this theory was that diplomats received immunity as if they were the foreign sovereign. This was out of respect and avoided any form of conflict. The last and most important theory is based on the idea that immunity is necessary and recognized for the efficient functioning of the diplomat. This theory is incorporated in the Vienna Convention as the dominant theory. However, due to the position and status of the diplomat, the personal representation theory is also reflected, although not so obviously. Diplomats have been given a unique international legal status so that they can represent their country without fear of intimidation, interference and reprisal.

8.4.1 Amendments to the Vienna Convention on Diplomatic Relations

The aim of possibly amending the Convention 1961 is to reduce the scope of diplomatic immunity for criminal conduct, which poses a problem in receiving States. The areas of amendment can be divided into three categories, namely the criminal acts of diplomats, the abuse of the diplomatic bag, and the use of the mission. With regard to the criminal acts of diplomats, the amendment is intended to limit the criminal immunity of diplomats. To achieve this there is a need of international agreement on a list of criminal acts that all nations would exempt from the rules of diplomatic immunity, called a universal crime list. This list could include any violent behavior against another person, such as murder, assault, battery and one of the most problematic offences, driving while under the influence of intoxicating substances.
Even offences against property, like forcible entry into a premises, vandalism and conversion of property by using of physical violence, could be included in the list.

The diplomatic bag has been a controversial topic for many decades. The amendment should firstly limit the diplomatic bag to a standard size, which should be large enough to allow diplomats to carry their confidential and official documents without interference from the receiving State. Before bringing bigger bags containing embassy equipment or similar items, special arrangements with the receiving State should be made.

If the receiving State has strong suspicions concerning the contents of the bag, they should be able to request that the bag be searched in the presence of an official representative of the sending State. If there is a diplomat who abuses the use of the diplomatic bag, the receiving State should have jurisdiction to prosecute the diplomat to the full extent of the law.

Original drafters of the Convention 1961 felt that the inviolability of the mission had to be absolute to prevent abuses by the receiving State. However, the increasing use of embassy premises for terrorist acts and different forms of espionage has led to suggestions of amending Article 22. It has to be suggested that there is a need to reevaluate the receiving State’s domestic procedure and amend the Vienna Convention to restrict immunity for espionage.

However, in order for the receiving State to enter the mission premises, it must show reasonable cause as to the questionable conduct within the embassy. The Convention 1961 contains no provision for its amendment; however, Article 39 of the Vienna Convention on the Law of Treaties creates as a general rule that treaties may be amended by agreement by the parties. If it is to be valid and effective, all signatory nations to the Convention 1961 must unite and agree to the amendments. It may be extremely difficult to amend the Convention 1961 from a logistic perspective, but in the event that the interests of the various States are aligned it should not prove impossible, even in circumstances of the super-powers’ general reluctance to agree on any amendments to the Convention 1961.

### 8.4.2 Recommendation for the State Law

The UK identified five areas of the Convention 1961 where a stricter policy should apply. Firstly, diplomats and staff should be classified into the appropriate
categories and there is a need to be clarified about that falls into the definition of ‘family’, in order to determine what immunity they are entitled to. This is essential in order for the receiving State to know whether they can prosecute an offender or adhere to the Convention 1961. Secondly, two proposals were considered in order to limit the size of the mission. The first, which was not viable, was to impose ceilings on the size of all missions. The second option, which is more practical, is to limit missions according to their relations to the sending State. The expansion of diplomatic networks meant an increase in staff, thus leading to more people with immunity, which in turn means more possibilities of abuse of immunity. Within this technological age, the size of a mission can be questioned. Governments have a right to limit the size of a mission as in accordance with Article 11. The use of communication is designed to augment information flows between governments and not to displace it. The flow of information discharges responsibilities more quickly, more securely and more cheaply. The telephone is personal and affords immediate response. While there is a disadvantage in that there is an absence of human contact, this can be easily overcome through the use of the Internet and video conferencing.

So with these forms of telecommunications, why not limit the size of a mission to the most important diplomats and staff? This, in turn, lowers the number of persons with immunity, including their families. Thirdly, diplomatic bags, which are one of the major areas of abuse, can be scanned or searched by specially trained dogs in order to identify illegal items that are being smuggled. Bags that are not permitted to be opened in the presence of a representative will be sent back to the sending State. Adding the extra measures further provides a form of deterrence against smuggling of items into the receiving State that eventually could lead to a breakdown in State interaction. Finally, immunity from jurisdiction was resolved by stating that the Vienna Convention should be strictly applied and the remedies be implemented more.

8.4.3 Use of the Functional Necessity Theory

It is believed that privileges and immunities are founded primarily on a functional foundation; however, the privileges and immunities are inextricably linked to the representative character of the State, i.e. the use of the personal representative theory. In other words, the extent of the privileges and immunities granted to diplomatic agents who are representatives of the receiving States must be limited to
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those same privileges and immunities which are granted to the sending State, unless they can be justified with the use of the functional necessity theory.

Although it may be argued that all theories are intertwined into diplomatic immunity, functional necessity is the dominant theory. The preamble of the Convention 1961 shows intent for the use of the functional necessity theory as a basis. The use of this theory allows for the undisturbed, efficient functioning of diplomats. Their purpose is to promote international discourse, which is essential for peace; a noble goal. The need to ensure the freedom and independence of the diplomatic agent was and still is a priority for those who formulated the Convention 1961. Thus the fundamental justification for granting exemptions from local law is to limit interference with the diplomatic mission and to ensure its independence. The argument that family members also perform official functions is weak and the reason behind the granting of privileges and immunities is to secure the independence and freedom of the diplomatic agent.

It has been stated that legal actions against the diplomat would cause disruptions in the diplomatic process. His status and stance as an international spokesperson for his country would be affected when prosecuted for a crime. The diplomat’s attention would be diverted from his political duties, to trying to defend himself and his family. Lines of communication between the countries would be affected and the entire process of international dealings would be at risk. Diplomatic immunity aims to avoid such problems and further decrease any reprisal, by promoting an orderly and responsible manner of conducting international affairs. This concept gives rise to the belief that in order to function efficiently the diplomat must engage in criminal offences that harm or violate the citizens of the receiving State. It hardly makes any sense that the Convention 1961 allows for the bringing of civil suits in certain circumstances and not the prosecution of criminal acts. Which could cause a bigger international problem between States? It can be argued that bringing a civil suit does not harm a diplomat or affect the process of his functions, because the plaintiff has no personal influence on the diplomatic process, while prosecution could affect diplomatic relations between States, whether it was intended or not. This point of view cannot be accepted in its entirety. It can be argued that in both civil suits and criminal prosecutions, the plaintiff and complainant are not harassing the diplomat but seeking justice for the harm suffered.
A diplomatic agent should be free to perform the duties of his State. This has two aspects, the degree of immunity given and the immunity necessary for the performance of his diplomatic function. It permits the diplomat to perform bona fide functions in complete freedom and independence. However, would this theory still be valid if he committed crimes? And lastly, limiting diplomats’ immunity to official functions has the effect of repudiating diplomatic immunity.

What is a receiving State to do when a diplomat engages in activities that go beyond his functions? The only recourse under the Convention 1961 is to request the recall of the diplomat, to declare him person non grata, to request waiver of immunity, and as a last resort to end relations between the receiving and sending States. It can be argued that these methods in themselves can affect the diplomatic process, especially ending the diplomatic process between States. So why not limit privileges and immunities of offenders so they can be dealt with and thus preserve the diplomatic process? This argument is obvious, in that these privileges and immunities are to benefit the diplomatic process and not the individual, and committing crimes and violent acts does not promote friendly relations between States. It has further been mentioned that the immunity granted is for the protection of diplomatic agents and the premises.

Regardless of the differences between the reasons for immunity, it has been accepted that the functional theory is important in order to avoid war and injury. It can be said that it is a necessary instrument in order to accomplish their objectives and perform their duties safely, freely, faithfully and successfully. This necessity has led States to be willing to accept limitations of jurisdiction upon their own territory, which has been done for many decades: this is the reason diplomatic immunity has been sanctified by usage.

8.4.4 Bilateral Treaties

Treaties fulfill a broad range of functions in international law and cover a variety of subject matters. Under Article 2 (1)(a) of Vienna Convention on Law of Treaty, 1969 a treaty can be defined as “an international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. They range from bilateral treaties whereby two States secure reciprocal
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rights and obligations to multilateral treaties, which act as legislation in the international system. Bilateral treaties can help with the expanding of the Convention 1961. The Law of Treaties Convention is a multilateral treaty of a blend of codification and progressive development that guides States on the law of treaties. It is interesting to note that although a State is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts that would defeat the object and purpose of such a treaty until it has made it clear that its intention is not to be bound by the treaty.

Article 2 of the Convention allows for agreements whereby two or more States can seek to establish a relationship amongst them governed by international law, and as long as it is agreed upon, there will be a legal relationship. A treaty is the main instrument the international community possesses for the purpose of developing international cooperation, as contracts, leases and settlements govern national law. The object of treaties is to impose binding obligations on the States who are parties to them.

By using this approach and executing agreements between themselves, those who fear diplomatic persecution can continue using the Articles in the Convention 1961, but more importantly, functional necessity will blossom into a rule of customary international law, whereby all States will be bound to respect agreements and functional immunity. It must be noted that any bilateral agreements entered into by States will supersede the Articles stated in the Convention 1961. Furthermore, the treaty remains the best, most versatile means to regulate the conduct of States. Therefore, a receiving and a sending State can enter into a bilateral treaty stating terms as to when automatic waiver can take place or whether a diplomat, staff and their families can be prosecuted.

8.4.5 Proposal for a Permanent International Diplomatic Criminal Court

The proposal for a Permanent International Diplomatic Criminal Court foresaw a court with compulsory jurisdiction over alleged criminal acts committed by individual diplomats. It would provide an acceptable means of adjudicating offences arising under the scope of diplomatic immunity. It would be formed through an amendment to the Convention 1961 allowing its creation. The court would have the power to impose fines and imprison diplomats. With the adoption of the Court,
through a staff of attorneys attached to the Court to play both prosecutor and accused, the likelihood of the receiving State obstructing discovery is diminished. The Court’s members would consist of legal experts from States party to the amendment and will be selected in a manner that avoids geographical or cultural bias. Furthermore, members would not sit on any case involving suspects with whom the members share citizenship, and likewise with members of the offended State. A staff of investigators attached to the Court would conduct discovery of evidence, thereby reducing any conflict between the sending and receiving States.

In addition, the Court would be responsible for the administration of its own penal facilities. This means that the Court will have the discretion to impose monetary fines as sentences. Each State would be obliged to create and replenish individual accounts. Judgments would then be executed against the defendant’s State account and transferred into the victim’s State account. The Court would also possess the power to imprison diplomats. Threat of imprisonment generally deters criminal acts. The Court would administer and own its own system of penal facilities, which would be accorded international organisation status similar to that of UN agencies. The initial arrest of a diplomat would be made by the police force in the receiving State under the watchful eye of an impartial third State. This would further ensure that the receiving State does not abuse its privilege to enter the embassy while being inviolable. Custody of the accused diplomat would be given to officials of the Court’s penal system as soon as possible.

Rules of discovery, procedure and evidence would be formed before the start of the Court operation using common regulations between the various States’ civil and penal codes. The Anglo-American concept of “beyond a reasonable doubt” would be adopted as the standard onus of proof, to ensure a fair inquisitorial procedure. The advantages of such a Court are twofold. Firstly, the Court would operate free from potential bias of local proceedings and secondly, the use of a court outside of a bilateral agreement excludes the possible termination of diplomatic relations between the two nations in extreme cases.

From the above prospective the research work has focused on many key, stabilizing factors and principles of international law. The pre-emptor norms of general international law are also focused. The principle of good faith, reciprocity
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and good order are examined in this thesis. And in a similar vein state responsibility and individual accountability in international are also arrived at the appropriate places to shape this thesis keenly and meticulously. A part from above main suggestions following requirements are to be considered as integral part of the thesis.

- Diplomatic immunity should be reformed to fully incorporate the theory of functional necessity and to provide additional safeguards to potential plaintiffs under this theory. These safeguards include the mechanisms of settlement and waiver implemented under the UN Convention described in Part III.B.

- There ought to be reciprocal arrangement to hold much promise as a deterrent of government mistreatment of diplomats and as an alternative to immunity. It has the advantage of being self-enforcing: states think carefully before acting against foreign diplomats because their own citizens are equally vulnerable in other countries. It is far from a perfect solution; however, as states do not all share the same ability to take countermeasures.

- State should create a claims fund or funds to compensate victims of diplomatic crime, to enforce the Vienna Conventions quite strictly, and to give the emerging International Criminal Court jurisdiction over crimes by diplomats.

- As it has been witnessed that limiting immunity to only those acts required for a diplomat to fulfill his official functions. It will show that the functional necessity theory of immunity has been successful in its application to the privileges and immunities of officials working in international organizations, such as the United Nations. It will argue that functional immunity should be applied to diplomats rather than absolute immunity.

- The Vienna Convention is an exception for real actions relating to private immovable property must be defined in a way that does not threaten to eviscerate diplomatic immunity by including all actions.

- The sending state and receiving state would have to develop a procedure whereby the representatives of each have input into the decision of whether to waive functional immunity, and therefore As long as foreign sovereigns interact, the need for diplomatic immunities will continue to exist. Diplomatic immunity has ensured an essential minimum level of freedom and independence for sending states' representatives and has enabled diplomats to
safely work in potentially hostile foreign environments.

The above discussion clearly points the amendments of the Vienna Conventions on Diplomatic Relations which is distant future in order to cater for, among other aspects, the concern for human rights and related issues. Meanwhile, domestic law, policy and decisions of national courts will continue to have a major role in the curtailment of future abuse.

It can be summarizes observable trends and changes in the nature of diplomatic privileges and immunities, emphasizing not only liberalizing and restricting developments, but also the growth of certain mistreatment practices that have afflicted certain segments of diplomacy in recent decades.