AN EXAMINATION OF THE PRINCIPLE OF DIPLOMATIC IMMUNITIES IN RELATION TO INTERNATIONAL CRIMES

BY

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DECLARATION

I **SSEBUNNYA MARVIN** declare that this Research Report presented to the School of Law of Kampala International University is my original work and has never been submitted to any institution of higher learning for any award.

Signature: ..... Date 4/05/2018.....

APPROVAL

This Research Report has been done under my supervision as a University Supervisor and submitted to the School Law with my approval.

Signature..... Date. 26/05/2018

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(SUPERVISOR)

DEDICATION

This dissertation is dedicated to my Late Father Tom Kalule, my dearest mum Nakyanzi Damarie and Aunt Kyokunda Jane who supported me all days and also to my father Mr. Senfuka Lawrence for their contribution and efforts that they have put in for me to reach this level of education and accomplishing my degree.

Thank you very much.

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I love you all and may God bless you.

LIST OF STATUTES

Convention on the Privileges and Immunities of the UN (1946),

Diplomatic Privileges Act of 1964.

General Convention on the Privileges and Immunities of the Organization of African Unity (1965).

The Vienna Convention on Diplomatic Relations 1961.

The Vienna Convention on Consular Relation (1963)

The International Court of Justice (ICJ)

UN Convention on Special Missions 1969.

ACRONYMS

ILR	-	International Legal Relations
USA	-	United states of America
US	-	United States
BC	-	Before Christ
AD	-	After Death (ano-domino)
VCDR	-	Vienna Convention on Diplomatic Relations
ICJ	-	International Court of Justice
PNG	-	Papua New Guinea
EU	-	European Union
ILO	-	International Labour Organization

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ABSTRACT

This research examined the principle of diplomatic immunities in relation to international crimes. It was based on analysis of the principle of Diplomatic immunities in International Law, relationship of diplomatic immunities to international crimes and establishment of the challenges to the principle of diplomatic immunities under international law. The geographical scope of this study was global because diplomatic exchange is a worldwide practice. The methodology used was and covered a times scope of in between 1990-2016. The methodology used was Library research based where the researcher relied on secondary data from the selected libraries of Kampala International University, Makerere University, and library of foreign relations and Diplomatic Missions in Kampala to enrich the findings of the study. Hence the techniques used in this research included selective readings which were used as referencing materials and systematic note taking. The study was divided into five chapters where chapter one covered all the historical background of diplomatic immunities and literature reviewed by other authors in relation to diplomatic immunities. Chapter two analyzed the principle of diplomatic immunities in international law in general that is discussing the issue in general with expression of specific case laws. Chapter three discussed the relationship between the two variables which composed the research and these were diplomatic immunities and international crimes to see whether one of them leads to existence of the other. Chapter four provided for the challenges to the principle of diplomatic immunities under international law and how it becomes a challenge to diplomats and the society. Hence in regard to the challenges, chapter five provided for the conclusions and recommendations for improvement of diplomatic immunities.

CHAPTER ONE
INTRODUCTION

1.0 Introduction

The rules concerning diplomatic relations have been an important aspect of international law[1]. This was highlighted in the US Diplomatic and Consular Staff in Tehran case[2] in which the ICJ confirmed the fundamental nature of the law on diplomatic immunity as "the maintenance of which is vital for the security and well being of the complex international community of the present day".

1.1 Background of Diplomatic Immunity

Denza notes that the Vienna Convention on Diplomatic Relations can be considered as of the "most successful" instruments within the United Nations regime in terms of its broad implementation by States. She asserts that "its success is due not only to the basic rules of diplomatic law and to the effectiveness of reciprocity as a sanction against noncompliance."[3] Hillier points out that, until the end of the 1950s, the source of diplomatic law was Customary International Law. In 1957, the international law commission undertook to produce a draft Convention on Diplomatic Relations. This draft formed the basis of the Vienna Convention on Diplomatic Relations in 1961, which was signed on 18th April 1961 and entered into force on 24th April 1964. The Convention was widely regarded as codifying existing rules of customary law and many states are party to it.[4]

However, diplomatic immunity is not for personal inviolability, but is for the efficient performance of the functions of diplomatic missions as representative States and thus those provided with this immunity are not expected to abuse it but promote international relations. It is therefore upon this background and setting that the researcher carried out this study and found out the extent to which diplomatic immunity has been abused in order to establish possible areas that call for revision in the laws governing diplomatic immunity and privileges. This dissertation examines the rules governing diplomatic relations, personal inviolability and the origin of diplomacy. It expounds on the diplomacy right from the primitive societies to

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[1] *Malcolm Shaw International Law 4th Edition, Cambridge University Press 1997.*
[2] *The Iran case, ICJ Reports (1980) ILR, P. 55.*
[3] *Eileen Denza, Vienna Convention on Diplomatic Relations, United Nations, Audiovisual Library of International Law, United Nations, 2009.*
[4] *Tim Hillier, Sourcebook on Public International Law, Senior Lecturer in Law. De Mont Fort University Leicester, 1998 at 316.*

modern diplomacy in regard to the history of diplomatic immunities and privileges. This chapter sets out the focus of the thesis and the methodology employed.

1.1.1 The Concept of Diplomacy

The word diplomacy is used in various contexts in accordance to its application. However, for the purpose of this study the following definitions will be adopted; According to Webster's Third New International Dictionary, diplomacy is defined as "the art and practice of conducting negotiations between nations for the attainment of mutually satisfactory terms or, adroitness or artfulness in securing advantages without arousing hostility; address or tact in conduct of affairs".

The Oxford English Dictionary defines diplomacy as "the management of international relations by negotiations, the method by which these relations are adjusted and managed by Ambassadors and Envoys, the business or art of the diplomatist and lastly the address in the conduct of international intercourse and negotiations."

1.1.2 Origin of the word Diplomacy

Derian[5] points out that; the word diplomacy is derived from a Greek word 'diplous' or 'diploma' which literally means twofold. In ancient Greece, a diploma was a certificate certifying completion of a course of study, typically folded in two. In the days of the Roman Empire, the word diploma was used to describe official travel documents, such as passports and passes for imperial roads that were stamped on the double metal plates. Later the meaning was extended to cover other official documents such as treaties with foreign countries. According to Nicholas, it was only in 1796, when the word diplomacy was first introduced into English by Edmund Burke[6].

1.2 Statement of the Problem

The concept of immunity is very old. Ancient Greek and Rome government, for example accorded special status to envoys and the basic concept has evolved and endured to date. These immunities were accorded to these envoys in the belief that they would contribute to the development of friendly foreign relations. However, in this changing world, the

[5] *Derian DJ.,Diplomacy, Blackwefl Oxford,UK (t999) at p.30.*
[6] *Nicolson. H.,The Evolution of Diplomatic Method, Constable & Co Ltd 1954 at p.30.*

immunities accorded to diplomats and consuls raise a great threat to the security of a nation and the world as a whole. Diplomats may in one way or another aid in serious crime such as the growing threat of terrorism and other international crimes such as drug/narcotic trafficking.

1.3 Objectives of the study;

Terrorism, money laundering and other international crimes pose a unique threat to peace and security of the world. This being the case, the objectives of this study were as follows;

I. To examine the principle of Diplomatic immunities in International Law
II. To examine the relationship of diplomatic immunities to international crimes.
III. To establish the challenges to the principle of diplomatic immunities under international law.

1.4 Research questions

I. What is the principle of Diplomatic immunities in International Law?
II. What is the relationship of diplomatic immunities to international crimes?
III. What are the challenges to the principle of diplomatic immunities under international law?

1.5 Scope of the Study

1.5.1 Geographical scope

The geographical scope of this study wass global. This is due to the fact that diplomatic exchange is a worldwide practice. However, this research was limited to diplomatic immunities and privileges. The researcher undertook research in the diplomatic institutions especially High Commissions/ Embassies located in Uganda. However-the research incorporated examples and case law from different countries.

1.5.2 Time scope

The time scope covered in this study was from 1990-2016 due to the fact that diplomatic immunities and international crimes are always prevailing meaning that the issue is constant.

1.5.3 Subject Scope

For purposes of this study, focus was put on analysis of principle of diplomatic immunities under international law. Finally, international laws and conventions such as the Vienna Convention were consulted.

1.6 Significance of the study

This study contributes significantly to identifying the weaknesses of the law governing diplomatic immunity and privileges.

By examining criminal activities which diplomats have engaged in this study makes a strong case for the revisiting of diplomatic immunity. This is a contribution to the efforts towards controlling serious crime as well as governing the conduct of the diplomats. Thus the study contributes to the debate for possible amendment of the law of diplomatic immunity. The objective and impact of this is to make a contribution give the courts a mandate to make diplomats accountable for their misconduct.

The study is also expected to provide a base for further research which will help to narrow the existing gaps on the subject.

1.7 Methodology

To complete this research, the following methods were used to collect data in order justify the existence or disprove of the stated problem;

1.7.1 Library research

Data collection was mainly through library upon which the researcher relied on secondary data from the selected libraries of Kampala International University, Makerere University, library of foreign relations and Diplomatic Missions in Kampala to enrich the findings of the study. The information from these libraries was analyzed. These included thesis, dissertations, government policies, journals, newspaper, text books and various International law articles, which gave the researcher a foundation on the data collected.

The techniques which were used in this research included selective readings which were used as referencing materials and systematic note taking. Comparative studies by other researcher were also used.

1.8 Literature Review

Much has been written about diplomatic immunity in the context of international law. The researcher analyzed relevant literature on the potential for abuse of diplomatic immunity and how it has been abused and to identified existing gaps that may act as stimulus while revising and amending the existing laws. In respect to diplomacy in primitive societies, ideas relating to diplomacy have arisen in many primitive societies, seemingly without external intervention. A study of the diplomacy seen in societies in Australia, Asia, Africa and America showed familiarity with the idea when messengers and envoys maintained intertribal relations, and some had beliefs that messengers had a protecting taboo that could not be violated, whereas others received envoys and their messengers depending on a given arrangement. This is because messengers were often selected not from among the expendable members of the society but from the leading men and women of the tribe.[7]

According to diplomacy in ancient history, Fahad, points out that, due to lack of consistent written record, very little is known about diplomacy in ancient history and that, although, few in number, there are references to diplomatic concepts across many societies such as the Egyptians, the Assyrians, the Babylonians, the Hebrews, the Chinese and the Hindus. Fahad further emphasizes that, documents dating back to ancient Egypt have been discovered which describe the exchange of envoys between the Egyptian Pharaohs and neighbouring monarchs. In addition to these descriptions, a treaty dating to 1278 BC between the pharaoh Ramses II and Hturs II, the king of Hittites has been found.

Contrary to Fahad's view, Zaid, illustrates that, according to a cuneiform library founded by Sargons II in 700 BC, there is plenty of records on envoys between Assyria, Babylon and Elm during the reign of Assurbanipal and did not encourage contact relations with outsiders. However records have been found that describe protocol and the rules to be used in such dealings when they occurred. The Hindus also recognized the importance of diplomacy as is shown by the following quote from the laws of man; "peace and its opposite (that is war) depend on the ambassadors since it is they who create undue alliances.[8]

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[7] *Malhaes. JC.D., The Pure Concept of Diplomacy, Greewood Press 1988 at p.15.*

[8] *Zaid M, Diplomaic Inimunity: To Have or iVot to Have, That is the Question, -ILSA Journal of International Practitioners. 1998, vol.4 No, 2.*

Another important article on the work of diplomatic immunity is suggested by Rene Vark. His article "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes" (2003) addresses such issues as personal inviolability and diplomatic immunity in case of serious crimes as well as examines possible remedies against abuses of diplomatic status. Thus, this internship policy paper seeks to look into the extent to which these privileges can be invoked, and the obligation of the diplomat who has transgressed the laws of the receiving State and any action that should be taken by the diplomat's country.

The most abundant source of information is from the Old Testament particularly, The Book of Judges which points out the history of the Hebrews. It describes the dispatching of messengers by Jephat to negotiate with the Ammonites and The Book Samuel describes the sending of messengers from the house of Saul to the house of David to bring peace to the two houses.[9] The Greeks; among the earliest diplomats were the heralds of the Homeric period[10]. The heralds were among other things, official agents of negotiation and were chosen for such qualifications as a good memory and a loud voice. As relations between the Greek city- states became more sophisticated, so did the qualifications for diplomatic representatives. By the 6th Century BC, only the best orators were chosen to be Ambassadors.[11]

Derian further notices that, by the 5th BC, the Greeks had implemented a system of continuous diplomatic relations and that a good deal of what is known about diplomacy in Ancient Greece comes from histories recorded by Thucydides which include an account of diplomatic conference that took place in Sparta in 432 BC. This conference included such "modern" concepts as making speeches, debates, proposing motions and carrying out votes. Also' interesting is the fact that the idea of diplomatic immunity had already taken root, allowing representatives from city/states with antagonistic relationships to take part in these conferences.

Demosthenes, another important historical figure, acted as an Ambassador for Greece for a time.[12] According to the Romans and Italians, Simon Szykman[13] clearly points out that, the Greek system of diplomacy acted as a foundation for that of the Roman Republic which grew

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[9] *Malhas, JCD., The pure concept of Diplomacy, Greenwood Press 1988 at P. 15.*
[10] *(8th century BC).*
[11] *Supra note 6.*
[12] *Supra note 6 at P.30.*
[13] *Simon Szyman, Journal of Diplomacy; An History perspective, Carnegie Mellon University Spring, 1995.*

in many centuries and became the Roman Empire in 27 BC. The contributions of the Romans to diplomacy were not to its practice but to its theory. The Romans stressed the importance of adhering to agreements and treaties. Rather than producing skilled negotiators, the Roman diplomat was more an administrator than a negotiator.

Frey L and Frey M further emphasize that, whether due to a lack of skilled negotiators the Roman Empire eventually started to decline and gave way to the Byzantine Empire in the 6th Century AD. The Byzantine emperors recognized the importance of diplomatic skill and revived the art. Under Emperor Justinian's rule, the Byzantine Emperor grew partly through the use diplomatic strategies: Firstly, weakening the barbarians by inciting rivalry between them, secondly, securing the' friendship of frontier tribes with money and flattery, and thirdly, conversion of heathens to Christianity.[14]

They further assert that, as the Byzantine Empire, too, eventually declined, the playing of one despot against another became a common diplomatic strategy. In this period, the skills desirable in diplomats changed from simple orators to trained observers who could also provide report about internal politics in the courts of despots as well as in foreign countries. On the other hand in feudal Europe, there was little in the way of an established system of dialogue between countries. During the thirteenth and fourteenth centuries, the diplomatist-statement began to appear as a consequence of both common interest and rivalries between city/states.

However, according to Cambon the Venetians were reputed to be among the best in this capacity. Their archives include diplomatic documents spanning from the 9th to the 18th Century and include written instructions given to their Ambassadors, replies brought back from foreign countries and reports written upon completion of mission.[15]

In regard to French diplomacy, it did not become a realized profession until the 15th Century when the Italian state began to appoint permanent Ambassadors. Among the best known Ambassador were Dante, Petrarch, Boccaccio and Machiavelli. Although Diplomacy started with the Italians, it was the. French who began to create the very early framework for modem diplomacy.[16]

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[14] *Linda S Frey L and Marshal L. Frey, History of Diplomatic Immunity, Ohio University Press, 1999, at p. 797.*
[15] *Carnbon J., History of Diplomacy, Macmillan Press, 1954 at p.24.*
[16] *(McClanahan. 1989).*

CHAPTER TWO

THE PRINCIPLE OF DIPLOMATIC IMMUNITIES IN INTERNATIONAL LAW

2.1 Overview

In 1965 in the case of *Empson v. Smith* the judge pronounced; "it is elementary law that diplomatic immunity is not immunity from legal liability but immunity from suit".[17] This means that diplomatic agents are not above the law; they are under an obligation "to respect the laws and regulations of the receiving State" (VCDR, Article 41, 1) and if they violate the law they are still liable, however they cannot be sued in the receiving State unless they submit to the jurisdiction. Thus, while personal inviolability is a physical privilege, diplomatic immunity is a procedural obstacle.

According to Malcolm[18], the British parliament first guaranteed Diplomatic Immunity to foreign Ambassadors in 1709 with legislations prohibiting prosecution, arrest and imprisonment of Ambassadors and their servants. By then, in Western Europe, the prosecution, arrest and imprisonment of Ambassadors was confined and closely tied to the prerogative of nobility. In the Second World War, Diplomatic immunity was upheld and Embassies evacuated through neutral countries.[19] Malcolm further notes that, during the 17th, 18th and 19th centuries embassies were not permanent establishments but were actual visits by high ranking representatives of the sovereign or the sovereign in person.

However, the new Diplomatic Immunities and Privileges Act came into force on 28 February 2002 and repealed the Diplomatic Immunities and Privileges Act, Act o. 74 of 1989. The purpose of which was to introduce the new Act No. 37 of 2001 and to explain the reasons for adoption of a new Act and what the new Act involves.

2.2 Concept of diplomatic immunity

According to Higgins[20], diplomatic law governs the conduct of relations between representative organs of a state operating within the territory of another state, and the receiving state. Its purpose is to facilitate international diplomacy, balance the pursuit of the

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[17] *E. Denza 1998, p. 256.*
[18] *Malcolm D. Evans International Law, 2nd Edition, Oxford University Press 2003.*
[19] *Ibid.*
[20] *Rosalyn Higgin, American Journal of international Law Editorial Comment 64: The Abuse of Diplomatic Privileges and I mm unities, Thomson/West © July 2006.*

foreign policy interests of the sending state with respect for the territorial sovereignty of the receiving state. However, diplomatic immunity is an exception to the general rule of territorial jurisdiction. It allows diplomats to be able to carry out their functions within the framework of necessary security and confidentiality but it still contributes to the balancing of interests between the sending and receiving state, because immunity does not entitle diplomats to flout local laws.

This is stipulated in Article 31 (1) of the Vienna Convention which binds the diplomat to the laws of the receiving state, and immunity does not exempt him from the jurisdiction of the sending State. This implies that despite the protection of security and confidentiality provided to the diplomatic agents, they are bound by the local laws and thus not expected to work beyond the jurisdictions of the country in which they are operating and the researcher for this matter will explore the extent to which the diplomats have violated diplomatic immunity.

Rene Verk[21], points out that diplomatic immunity is elementary law that it is not immunity from legal liability, but immunity from suit as held in ***Empson v Smith***[22] Court made it clear that on termination of diplomatic status for whatever reason, any subsisting action that had to be stayed on the ground of the defendant's immunity could be revived. This car, be done even though he/she was entitled to immunity when the events concerned took place or when process originally begun. Diplomatic immunity is also defined as, a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and to a large extent, their personal activities.[23]

The immunity of a diplomatic representative from the criminal jurisdiction of the receiving state was, in earlier literature regarded as indistinguishable from his personal inviolability. At the time when the principle of personal inviolability was first clearly established, it was unusual for criminal proceedings to take place without prior arrest and detention of the accused but as time passed and the arrest and detention of the accused was not essential for criminal proceeding, diplomatic immunity from criminal jurisdiction emerged as a separate principle of diplomatic law.

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[21] *Rene Verk, Personal inviolability and Diplomatic immunity in Regard to Serious Crime, Juridica International, 2003.*
[22] *Queen's Bench Division I QB. 426 (1996).*
[23] *Clay Hays' Presentation, What is Diplomatic Immunity?, Conference held at the Las Vegas, March 2000.*

However, the need for diplomatic immunities is not so self-evident. Although a majority of authors believe in such a need and do not admit any exceptions, there are also those who oppose these immunities or permit certain exceptions but when speaking of the legal basis of diplomatic immunity, three theories are usually mentioned.[24] Firstly, the oldest and also the most outmoded is the "theory of extraterritoriality", which was a legal fiction based on the notion that the territory of the receiving state used by the diplomatic mission or diplomat should be considered as a part of the territory of the sending state instead. Secondly, the latter theory was replaced by the "theory of representative character" which was also partly used in the Vienna Convention.[25]This theory is based on the idea that the diplomatic mission, and thus also diplomats, personify the sending state and therefore they should be granted the same immunities and independence as those granted to the sending state.

Further, there is now the "theory of functional necessity", which provides a conceptual basis for the Vienna Convention though there is no direct reference to such basis. According to this theory, the justification for granting immunities to diplomatic agents is based on the need to enable normal functioning of diplomatic missions and diplomats. The legal basis of immunities in the Vienna Conventions can be found in the preamble which explains that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States".

Driven by the functional necessity, this theory confers a certain minimum immunity on the diplomatic agent to perform his functions without hindrance. This obviously makes a link between granting immunities and performing the diplomatic functions and can also provide a certain level of control where such a link is missing. Consequently, diplomatic immunity protects diplomats from the receiving state, which may, for various reasons, want to hinder the diplomatic agent in carrying out his functions effectively, for example, by commencing unfounded penal proceeding.

The judge said in the classic case of *Empson v. Smith* that "it is elementary law that diplomatic immunity is not immunity from legal liability but immunity from suit".[26] This means that diplomatic agents are not above the law; on the contrary, they are under an

[24] *I.L.C. Yearbook, 1958, vol. II, pp. 94–95.*
[25] *Article 3 points out clearly that the diplomatic agent represents the sending state and the preamble also acknowledges the link between the immunities of diplomats and their function as representing the sending state.*
[26] *Empson v. Smith, Queen's Bench Division. 1 Q.B. 426 (1996).*

obligation "to respect the laws and regulations of the receiving State[27] and if they breach the law they are still liable, but they cannot be sued in the receiving state unless they submit to the jurisdiction.[28] While personal inviolability is a physical privilege, diplomatic immunity is a procedural obstacle.

Diplomatic immunity from criminal jurisdiction is unqualified and absolute[29] while in the case of civil and administrative jurisdiction there are certain exceptions.[30] Article 31, paragraph 1 confirms that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. This unlimited immunity concerns all possible minor offences as well as grave crimes, starting with breaches of traffic regulations and finishing with conspiracy against the national security of the receiving state or crimes against humanity. It also seems to be so that enjoyment of immunity by a diplomatic agent is not connected with the functions *expressisverbis* enumerated in Article 3.

The legal consequence of diplomatic immunity from criminal jurisdiction is procedural in character and does not affect any underlying substantive liability. Therefore, whenever immunity is established and accepted by the court, the latter must discontinue all proceedings against the defendant concerned. The court has to determine the issue of immunity on the facts at the date when this issue comes before it and not on the facts at the time when an event gave rise to the claim of immunity or at the time when proceedings were begun. This means that if a diplomatic agent becomes, in the eyes of the court, entitled to immunity he may raise it as a bar to both proceedings relating to prior events (that occurred before he became a diplomat and entitled to immunity) and proceedings already instituted against him. The diplomatic agent is also immune from any measure of execution and he can raise his immunity from execution to bar any form of enforcement of a conviction or judgement against him.[31]

Though all proceedings against the diplomat must be suspended during the period of entitlement to diplomatic immunity, it does not mean that these proceedings are "null and void" because of immunity. In the case of *Empson v. Smith* the court made it clear that on

[27] *Article 41, paragraph 1 (see also Note 5).*
[28] *Dickinson v. Del Solar, King's Bench Division, – 1 K.B. 376 (1930).*
[29] *Arrest Warrant of 11 April 2000. Available at: http://www.icj- 20020214.PDF (30.7.2003).*
[30] *Article 31, paragraph 1.*
[31] *Article 31, paragraph 3, though there are still exceptions in case of execution of certain judgments in civil matters from which diplomats do not enjoy immunity.*

termination of diplomatic status for whatever reason, any subsisting action that had to be stayed on the ground of the defendant's immunity could be revived. This can be done even though he was entitled to immunity when the events concerned took place or when process was originally begun. At the same time, the trial of a diplomatic agent after dismissal from his post and loss of his immunity does not violate the prohibition of retroactive application of criminal laws. The reasoning is that the effect of the loss of immunity is to remove the procedural impediment and enable judicial authorities to prosecute a former diplomat for acts which at the date of their alleged commission constituted crimes according to local law.[32]

The Convention does not spell out the legal consequences of diplomatic immunity from jurisdiction but it is generally accepted that it is procedural in character and does not concern any basic substantive liability. The court must determine the issue of immunity on the facts at the date when this issue comes before it and not on the facts at the time when proceedings were begun. It follows that if the defendant becomes entitled to immunity he might raise it as a bar to proceedings connecting with previous events or to proceedings already instituted against him. The diplomat if still entitled to immunity could of course raise it as a bar to any form of enforcement of a conviction or judgment against him.[33]

Diplomatic immunity, in international law, the immunities enjoyed by foreign states or international organizations and their official representatives from the jurisdiction of the country in which they are present. The inviolability of diplomatic envoys has been recognized by most civilizations and states throughout history, to ensure exchanges of information and to maintain contact, most societies even preliterate ones granted messengers safe-conduct. Traditional mechanisms of protecting diplomats included religious-based codes of hospitality and the frequent use of priests as emissaries. Just as religion buttressed this inviolability, custom sanctified it and reciprocity fortified it, and over time these sanctions became codified in national laws and international treaties.[34]

Protections afforded to foreign envoys varied greatly in the ancient world. Greek heralds, who were recognized as inviolable by the city-states, procured safe passage for envoys prior to negotiations. Typically, the inviolability of envoys was not respected by third parties. As

[32] *Gustavo J. L. and Another before the Supreme Court of Spain. – International Law Reports, 1991, vol. 86, p. 517.*
[33] *R. Vark 2003.*
[34] *Linda Frey Marsha L. Frey, international law.*

empires in China, India and the Mediterranean grew more powerful, diplomatic protections decreased. The law of diplomatic immunity was significantly developed by the Romans, who grounded the protection of envoys in religious and natural law, a system of norms thought to apply to all human beings and to derive from nature rather than from society. In Roman law the unassailability of ambassadors was guaranteed even after the outbreak of war. [35]

During the middle Ages in Europe, envoys and their entourages continued to enjoy the right of safe passage. A diplomat was not responsible for crimes committed before his mission, but he was answerable for any crimes committed during it. During the Renaissance permanent rather than ad hoc embassies developed and the number of embassy personnel as well as the immunities accorded to them, expanded, when the Reformation divided Europe ideologically, states increasingly turned to the legal fiction of extraterritoriality which treated diplomats, their residences, and their goods as though they were located outside the host country to justify diplomatic exemption from both criminal and civil law.

The doctrine of quasi extra territorium (Latin: "as if outside the territory") was developed by the Dutch jurist Hugo Grotius (1583–1645) to sanction such privileges and during the 17th and 18th centuries other theorists turned to natural law to define, justify or limit the increasing number of immunities. These theorists used natural law, with its appeal to universal moral injunctions, to argue that the representative nature of a diplomat and the importance of his functions especially that of promoting peace justified his inviolability; the same moral law underscored his obligations to the larger community.

Because immunities varied greatly between jurisdictions, and because some jurisdictions offered few if any immunities, to protect their envoys countries increasingly resorted to laws such as the Act of Anne (1709) in England which exempted ambassadors from civil suit and arrest or treaties such the 17th century agreement between England and the Ottoman Empire that forbade searches of the British embassy, exempted the servants of embassies from taxes and allowed the ambassador wine for his own use.

Although the French Revolution (1789) challenged the basic foundations of the ancient régime, it reinforced one of its hallmarks, diplomatic inviolability. By the late 19thcentury, the

[35] *E. Denza 1998.*

expansion of European empires had spread European norms and customs, such as diplomatic immunity and the legal equality of states throughout the world because of the increasing number of privileges and immunities enjoyed by envoys, some theorists sought to undermine the concept of extraterritoriality by highlighting its attendant abuses such as the granting of asylum in embassies to notorious criminals and smugglers.

The Vienna Convention on Diplomatic Relations (1961) restricted the privileges granted to diplomats, their families, and staff. Avoiding controversial issues such as diplomatic asylum and focusing on permanent envoys rather than on ad hoc representatives or other internationally protected persons, the convention accorded immunity from criminal prosecution and from some civil jurisdiction to diplomats and their families and lesser levels of protection to staff members, who generally were given immunity only for acts committed in the course of their official duties. Since the 19th century, diplomatic privileges and immunities have gradually been extended to the representatives and personnel of international organizations.

2.3 Sources of Diplomatic Law

The law on diplomatic relations will be drawn from legislations provided by International Law which makes it a subset of international laws and hence its sources of laws are those recognized as sources of International Law.

2.3.1 The International Law on Diplomatic Relations

2.3.1.1 The Vienna Convention on Diplomatic Relations

Until the end of the 1950s, the source of diplomatic law was Customary International Law. In 1957, the International Law Commission undertook to produce draft Convention on diplomatic relations. The draft formed the basis for the Vienna Convention on Diplomatic Relations 1961[36] which was signed on 18 April 1961 and entered into force on 24 April 1964 and by January 1992 there were 158 contracting states. The Vienna Convention was widely regarded as codifying existing rules of customary law. It was in fact one of the most successful codification by the International Court of Justice.[37]

[36] *Referred to this chapter as the Vienna Convention on Diplomatic Relations 1961s.*
[37] *Malcom D. Evans, International Law, r Edition, Oxford University press(2003).*

The main reason for the Convention's success was a comprehensive formulation of almost every aspect of diplomatic law to the satisfaction of most states and the presence of reciprocity; each state is a sending and a receiving state. Following the normal rules for International Treaties, only parties are bound by the specific obligations of the Convention. It is unclear just how much the Convention was originally a codification of existing law, as opposed to a progressive development. However, as the court indicated in ***US. v. Iran***[38], a great part of the Convention now reflects Customary International Law and it is clear that virtually all the disputes over Diplomatic Law Can be resolved by reference to this treaty or the obligations contained therein. It emphasizes the functional necessity of diplomatic privileges and immunities for efficient-conduct of international relations and points out the character of the diplomatic mission as representing the sending state. If one state does not wish to enter into the Convention, it is not legally compelled to do so.

The Vienna Convention emphasizes functional necessity of diplomatic mission.[39] These functions include representing the sending state in the receiving state; protecting the interests of the sending state; negotiating with the receiving state; reporting on conditions and developments within the receiving state and generally promoting and developing friendly relations between sending and receiving state.

The Convention deals with procedural questions in relation to establishment of diplomatic relations and in particular the appointment and accreditation of diplomatic agents[40]. The consent of the receiving state is required in form of a prior agreement for the appointment of the head of the mission[41]. Such consent is important if the performance of the mission is to be good its head (to be personally acceptable to both of them.

Article 7 is to the effect that other diplomatic agents (except defense attaches) -do not need to obtain prior consent of the receiving state. However, the sending state must provide a notification to the receiving state on the arrival and final departure (or termination of the functions) of all member of the mission. This aspect of getting consent from the receiving state can be well understood by looking at the court decision in ***R V Governor Pentovilla***

[38] *1980 ILR ICJ P.55.*
[39] *Article 3.*
[40] *Article 4 to 19.*
[41] *Supra note 1.*

Prison, ex parte Teja[42] where Lord Parker noted that it was fundamentally important for the diplomatic agents to be accepted by the receiving country before claiming diplomatic immunity.

The view was carefully interpreted by the court of appeal in **RV Secretary of state for the Home Department, ex parte Bagga.**[43] In the light of the facts of the forgoing case Parker LJ held that if a person already in a country is employed as a secretary, for example at an embassy, only notification is required before that person becomes entitled to immunities.[44]

Further as per the Vienna Convention, the receiving state is at any time including before their arrival in the receiving state, entitled to inform the sending state that the head of the mission or any other members of the mission is persona non - grata, or unacceptable, without giving reasons.[45] In such cases, the state must recall the person or terminate his functions. The receiving state may after a reasonable time treat the person as no longer enjoying diplomatic immunities and privileges if the sending state fails to respond. **Articles 22 to 28** concern the privileges and facilities which the sending state must grant to the mission itself and on the other hand Articles **29-39** deal with immunities enjoyed by the members of the mission.

The Vienna Convention moreover grants jurisdictional immunities to diplomats which include other matters such as the inviolability of the private residence of a diplomatic agent, immunity from taxes and customs; and exemption from national service requirements in the receiving state. It is however important to emphasize that these rights and privileges are not granted for personal benefits of the individuals concerned but to ensure the efficient performance of the functions of the diplomatic mission. In addition, the Vienna Convention is to the effect that members of the diplomatic missions owe certain duties towards the state. These are;

The duty to respect the law and regulations of the receiving state[46]and the duty not to interfere with internal affairs of the receiving state.[47]

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[42] *(1971), 52 ILR 368.*
[43] *(1990) 88 ILR 404.*
[44] *Supra note 7 at page 7.*
[45] *Article 7, Vienna Convention.*
[46] *Article. 5.*

Further, the premises of the mission must not be used in any manner incompatible with the functions of the mission.[48] Other duties include the aspect that a diplomatic agent must not carry out any professional or commercial activity for personal profit in the receiving state.[49] The Vienna Convention recognizes various categories of staff members of diplomatic missions who enjoy immunity from jurisdictions to a different extent.

There are the diplomatic agents (that is, the head of the mission and other members of the diplomatic staff) and their families provided they are not nationals of the receiving state enjoy immunities rationed personae by virtue of their office.[50] They are granted personal inviolability including freedom from arrest and detention,[51] absolute immunity from criminal jurisdiction[52] and immunity from civil and administrative jurisdiction.[53] The Vienna Convention also recognizes administrative and technical staff and their families, who are not nationals or permanent residents of the receiving state and they enjoy similar personal inviolability from criminal jurisdiction given to diplomatic agents.

However **Article 37(2)** emphasizes the fact that they only enjoy immunity from civil jurisdictions in relation to acts performed in the course of their duties. Moreover it recognizes service staffs who are not nationals or permanent residents of the receiving state. This group enjoys immunity *ratione material*, in respect of acts performed in the course of their duties. **Article 38(1)** discusses the immunity of diplomatic agents representing the sending state but who are in fact permanent residents or nationals of the receiving state, who also enjoy immunity *ratione materiea* in respect of their official acts.

Lastly, the Vienna Convention recognizes all members of the diplomatic mission who whilst in office enjoy a subsisting immunity ratione materiea in respect of their official acts even after they have left office.[54] Worth noting is the fact that immunities and privileges under the Vienna Convention operate only in respect of the jurisdiction of the receiving state. However, the provisions of **Article 40** can be distinguished in that the third states must accord

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[47] *Article 41. (1).*
[48] *Article 41 (3).*
[49] *Article 42.*
[50] *Article 37(1).*
[51] *Australian case of je Andrade v, de Andrade (1984) 18 ILR 29.*
[52] *Article 31.*
[53] *United States Diplomatic and Consular Staff in Tehran, judgment, ICS Report (1980) P 3 Para 62-63 and 77.*
[54] *The German Constitutional Court Case ofthe Former Syrian Ambassador to the GDR (1997).*

diplomatic agents and their family members inviolability and such immunities as may be required to ensure their transit or return whilst en route to and from post.[55]

2.3.1.2 The Vienna Convention on Consular Relation (1963)

Consuls represent the state in many administrative ways including through issuing visas and promoting the commercial interests of their state. They are based not only in the capitals of the receiving but also in provincial cities. They are accordingly not permitted the same degree of immunities and privileges as diplomatic agents. Their role is to represent the sending state and to promote and/or protect its interests in the receiving state but with emphasis on technical and administrative matters rather than political matters in which diplomatic staff specialize. In many aspects consulars deal with private interests of the sending state.

Consular relations can include[56]; protecting the interests of the receiving states and its nationals[57], assisting nationals of the sending state in need of help in the receiving state, obtaining appropriate legal assistance for nationals of the sending state before tribunals and other authorities of the receiving state. Moreover, they are supposed to assist vessels and aircrafts of the sending state, issue passports and or visas and other notable functions and promote cultural exchange.

The Vienna Convention in **Articles 2-24** deals with the establishment of consular relations; the need of consular functions;[58] facilitate privileges and immunities relating to consular offices and other members of the consular post;[59] the regime relating to honorary consuls[60] and general provisions.[61] The difference in the functioning of consuls as compared to diplomats is in the extent of immunities and privileges that are generally granted to consuls. In relation to immunity from jurisdiction, consular offices enjoy only immunity *ratione materiea* that is to say in respect of acts performed in the exercise of their consular functions.

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[55] *The Netherlands Case, Public Prosecutor .v. IBC (1984), 94 ILR 339.*
[56] *Article 5, Vienna Congress.*
[57] *LaG rand (Germany v. USA) Merits, Judgment, ICJ Reports 2001, P 466 at Para 74.*
[58] *Articles 25-26.*
[59] *Articles 40-57.*
[60] *Articles 58-68.*
[61] *Articles 69-73.*

2.3.1.3 Judicial Decisions

The term judicial decision is a 'subsidiary' means for determination of law on Diplomatic Immunities and Privileges[62] whereby a court is bound to follow its previous or superior decision in Municipal Law has no application in International Law. The ICJ itself will closely examine its previous decisions and will carefully distinguish those cases, which it feels should not be applicable to the problem being studied.[63]Judicial decisions in this case are a source of law, when upon construction of a constituent instrument, state parties to the present

Statute declare recognition as compulsory without any special agreement[64] and also when subjected to **Article 59** court functions in accordance with judicial decisions and teachings become subsidiary means for the determination of rules of law.[65]

In addition, to the International court of justice the phrase judicial decision encompasses international arbitration awards and the rulings of national Courts.[66] The case **T v Belgium** can for instance be referred to when the question of the procedure to be used in declaring diplomats persona non grata arises and in determining whether the decision by a receiving state to declare a diplomat persona non grata can be reviewed. The parties in the case relied on the decision by the UK House of Lords in the **Pinocheti case**[67] when immunity was set off by the Appeal Court in Santiago and confirmed by Supreme Court in 2005 and the French court de cassation in the Gadaffi case.[68] The facts of the case were as follows; a Congolese national and a financial attache applied for the suspension of a decision which the Belgian state, acting pursuant to **Article 9(1) of the Vienna Convention on Diplomatic Relation 1961** had declared him persona non grata. It consequently asked him to leave Belgian territory within eight days. The reason for this decision was that the applicant had systematically failed to pay domestic rent over a number of years despite repeated legal proceedings and warnings, and also failed to comply with a court judgment ordering him to vacate the premises in question by a certain date.

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[62] *Statue of the International Court of Justice Article 38.*
[63] *Supra note 2 at pg 7.*
[64] *Article 36 (2) ICJ Statute.*
[65] *Article 38 (d) ICJ Statute .*
[66] *Supra note 1 at pg 104.*
[67] *R v Bow street Metropolitan Stipendians ex parte Pinocbet Ugarte (Amnesty International Intervening) (NO3) (2000)AC 151 (1999) 2 ALL ER 97.*
[68] *Sos attentat and castelnau d' Esnault v Gadaffi, head of state of Libya, France, Court of Caation, Criminal Chamber, 13 March 2000 NO 1414.*

The application was held inadmissible because a request for recall of a diplomat, provided for by the Vienna Convention could be made at any time and without the receiving state having to explain its decision. It was a discretional power of the receiving state and was a remedy of states and not individuals because of its nature; the decision by the receiving state to inform the sending state that a member of its diplomatic staff was persona non grata was not subject to review. Secondly, whenever a diplomatic staff was declared persona non grata it was the sending state to recall the person affected or terminate his functions for the mission.

The case of **Ministry of Defense of the government of the Uganda Kingdom v Ndengwa Marchs**[69] can also address the issue of immunity from legal processes. The respondent filed a suit jointly and severally against the appellant and another person who was a member of the British army, for damages of negligence arising out of a motor accident. The appellant entered appearance under protest and filed an application seeking for an order to strike out the proceeding against him on the ground that the government of the United Kingdom of Britain and Northern Ireland as a foreign sovereign state had not consented to his being sued in the Kenyan court and was entitled to diplomatic immunity.

It was deponed in 1983 for the appellant that it being a ministry, it was not a legal entity separate from the government. After the application was dismissed, the appellant appealed to the Court of Appeal. The appeal was allowed after considering that it was a matter of international law that courts in Kenya would not entertain an action against certain privileged people and institution unless the privileges were waived.

Further, the appellant had neither waived its immunity nor consented to submit to the jurisdiction of the Kenyan courts. There was evidence that the appellant, the Ministry of Defense Claims Commission (United Kingdom), was a section or department of the Ministry of Defense of the UK which in turn was a department of the government of the United Kingdom and as such was not a legal entity separate from the government therefore had diplomatic immunity

[69] *(1983) 18 March.*

2.4 Analyzing the Diplomatic Immunities and Privileges

2.4.1 Draft article on the diplomatic courier and diplomatic bag

Article 27 requires the receiving state to allow and protect freedom of communication for the mission and states that the official correspondence of the mission shall be inviolable and the use of codes is expressly authorized. A wireless transmitter may be used with the consent of the receiving state.[70]There was a division of opinion at the Vienna conference between the developed and developing stages over this issue. The right to install and use a wireless transmitter did not require consent according to some States.[71]

All correspondence relating to the mission and its functions is inviolable and, importantly, the "Diplomatic bag" must not be opened or detained.[72] So Further the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents and interests or articles intended for official communication.

It is clear moreover, that the "bag" may vary in size from an aircraft full of woven crate to a small pouch but, as long as it bears visible external marking, it is immune from normal entry procedures. The diplomatic bag has been the subject of immense abuse, following which the International Law Commission under **Article 28** of the Draft Article on the Diplomatic Courier and Diplomatic Bag was finally adopted in 1989 in an attempt to eradicate the abuse of the diplomatic bag.

In regard to the Diplomatic Courier (a person accompanying a diplomat) the draft articles of the diplomatic bag provide for regime of the diplomatic privileges immunities and inviolability that entitles protection of the diplomat. He is to enjoy personal inviolability and is not liable to any form of arrest or detention.[73] His temporal accommodation is inviolable,[74]and he will benefit from immunity from criminal and civil jurisdiction of the receiving or transit state in respect of all functions performed in the exercise of his functions.[75] In general, his privileges and immunities last from the moment he enters the territory of the receiving or transit state until he leaves such state.

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[70] *http://en.wikipedia.org/wiki/diplomatic-law (accessed on 10 June 2010).*
[71] *Supra note 1 at pg 7.*
[72] *Section 27(3).*
[73] *Draft article 10.*
[74] *Draft article 17.*
[75] *Draft article 18.*

2.4.2 Inviolability of the Mission

The premises of the mission (the embassy) are inviolable and agents of the receiving state are not to enter them without the consent of the head of the mission.[76] Premises include any building and ancillary land, irrespective of ownership, which are used for the purposes of the mission including the residence of the head of the mission.[77] This appears to be an absolute rule. In the Sun Yat City incident[78], the court refused to issue a writ of habeas corpus with regard to a Chinese refuge held against his will in the Chinese legation in London.[79] The issue was resolved by diplomatic means.

In 1979, The US embassy in Tehran Iraq was taken over by several hundred demonstrators. Archive and documents were seized and fifty diplomatic and consular staffs were held hostages. In 1980, the international court declared that under the 1961 convention on consular relation, "Iran was placed under the most categorical obligations, as receiving state, to take all appropriate steps to ensure the protection of the United States embassy and consulates, their staff"[80] The court stressed the seriousness of Iran's behavior and the conflict between its conduct and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, the international rules of which diplomatic and consular law is comprised and rules of fundamental character of which the court must here again strongly affirm.[81]

In regard to a break in diplomatic relations 'the receiving state must respect and protect the premises of the mission.'[82] There is a distinction between inviolability under **Article 22** and respect and protection under Article 45(a). The United Kingdom's view, for example is that **Article 45(a)** does not mean that the premises continue to be inviolable.[83]

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[76] *Article 22.*
[77] *Article I.*
[78] *1896.*
[79] *A.DMcNair, International Law Opinions, Oxford, 1956, vol. I,p.85.*
[80] *The Iran case, ICJ REPORTS 1980.PP.3,30-1 ;6,ILR,P.556.*
[81] *Daniel D. Ntanda Nsereko, The International Criminal Court: Jurisdictional and Related Issues, Springer Netherlands, Volume 10, No I/March, 1999.*
[82] *Article 45(a).*
[83] *Foreign Affair Committee, report, p. x.*

2.4.3 Diplomatic Immunity Property

The property and the means of transport of the mission are Immune from search, requisition, attachment or execution.[84] By **Article 23**, a general exception from taxation in respect of the mission premises is posited. In the light of customary and treaty law, property used by the sending state for the performance of its diplomatic function in any event enjoys diplomatic immunity even if it does not fall within the material or spatial ambit of the **Article 22.**

In further explaining this aspect the House of Lords in **Alcam Ltd v. Republic of Columbia**[85] held that under the State Immunity Act, 1978, a current account at a commercial bank in the name of a diplomatic mission would be immune unless the plaintiff could show that it had been earmarked by the foreign state solely for the settlement of liabilities incurred in the commercial transaction. An account used to meet the day - to - day running expenses of a diplomatic mission would therefore be immune.

This approach was also based upon the obligation contained in **Article 25 of the Vienna Convention on diplomatic Relations** which provides that the receiving state 'shall accord full facilities for the performance of the functions of the mission.' The House of Lords noted that the negative formulation of this principle meant that neither the executive nor the legal branch of the government in the receiving state must act in such a manner as to obstruct the mission in carrying out its functions.[86]

However, the exemption from immunity in **Article 6** relating to the proceedings involving immovable property in the UK did not extend to the proceedings concerning "a mission." In ***Intro Properties (UK) Ltd V Sauvel,***[87] the court of appeal held that the private residence of a diplomatic agent even when used for Embassy social function from time to time did not constitute use for the diplomatic mission. Therefore, in any event the proceedings did not concern the French government's title to possession of the premises but were merely for damages for breach of a covenant in a lease. Accordingly, there was no immunity under **Article 30 (1).**

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[84] *Article 22.*
[85] *(1984) 2 ALL ER 6; 74 ILR, P.180.*
[86] *The State Immunities Act Section 16.*
[87] *(1983) 2 ALL ER 495;64 ILR 9384.*

Worth noting is the fact that the archives and documents of the mission are inviolable at any time and wherever they may be. The scope of the **Article 24** was discussed by the House of Lords ***in Shear Son Leman V McClain Watson***[88], which concerned the intervention by the international Tin council on the ground that certain documents it was proposing to add as evidence were inadmissible. This argument was made in context of Article 7 of the international Tin council (immunities and privileges) order 1972 which stipulates that the ITC should have inviolability of official archives as is accorded in respect of official archive of a diplomatic mission.

Lord Bridge interpreted the phrase 'archive and documents of the mission', in Article 24 as referring to 'the archives and documents belonging or held by the mission'. Such protection was not confined to the executive or the judicial actions by the host state, but would cover, for example, the situation where documents were put into circulation by virtue of theft or other improper means.

2.4.4 Diplomatic Immunities Personnel

The person of a diplomat is inviolable and he may not be detained or arrested. The receiving state is under a duty to protect him and prevent any attack on his person, freedom or dignity.[89] **Article 30(1)** provides for the inviolability of the private residence of a diplomatic agent, while **Article 30(2)** provides that his papers, correspondence and property are inviolable.

Section 4 of Diplomatic Privileges Act of 1964 stipulates that, whether a person is or is not entitled to any privileges or immunity under the Act which draws most of its instruments from the Vienna Convention, a certificate is issued under the authority of the secretary of state, in which the fact relating to the question becomes its conclusive evidence.[90] A diplomat is immune from the criminal, civil and administrative jurisdiction of the receiving state. The only remedy the host state has in the face of an offence committed by a diplomat is to declare him persona non-grata under **Article 9.**

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[88] *(N02)(1988)1 WLR ;77 ILR,P 145.*
[89] *Article 29.*
[90] *Article 31.*

However, this immunity is subject to three exceptions:

- Where the action relates to private immovable property situated within the host state (unless held for mission purposes),
- In litigation relating to succession matters in which the diplomat is involved as a private person (for example as an heir on execution) and
- With respect to an unofficial professional or commercial activity engaged in by the state. For example, a diplomat will enjoy immunity in the majority of civil actions. He will however, not have immunity in respect of civil actions arising out of a private consulting business or other unofficial commercial activity.

Generally, all members of a diplomatic family enjoy the same immunities so long as they are not nationals of the receiving state.[91] Moreover administrative and technical staff and their families enjoy immunities similar to the diplomats, save that immunity from civil jurisdiction extends only to acts done in the course of the official function. These immunities are lost however, if they are nationals of, or permanently reside in the receiving state.[92]

2.4.5 Continuing Necessity

The doctrine of diplomatic immunity enables diplomats to exercise their duties without, being impeded by the authorities of the receiving state. This prevents relations between countries from being governed by force alone. The Vienna Convention relied on the functional necessity[93] of Diplomatic immunities and privileges. There is a link between performance of diplomatic function and immunities. The Vienna Convention grants them when the link exists and denies them when no such link exists. Diplomats are granted immunities with privileges to protect them from coercion by the receiving state or by individuals within the receiving state. Otherwise, diplomat, subject to the economies political pressure, would be forced to rely on the receiving states goodwill. Such reliance would hamper the diplomat's independence and ability to represent the sending state effective.

Diplomatic immunities and privileges are important in ensuring that the processes of diplomacy are conducted appropriately and when it is not respected there should be an uproar and expression of outrage. They are valuable and an integral feature of relationship between foreign nations. To protect diplomats from criminal and civil prosecution in foreign land,

[91] *Article 37.*
[92] *Article 37.*
[93] *Vienna Convention's preamble states in part that purpose of privileges and immunities granted in the Vienna convention is to". Ensure the efficient performance of the functions of the diplomatic missions".*

with differing cultural and legal norms as well as fluctuating political climates, there is a need to bargain to offer that same protection to diplomats in the sending state country.

Moreover, not all countries provide the level of due process to which the diplomats are accustomed to and because diplomats are particularly vulnerable to exploitation for political purposes, immunity for diplomats abroad is essential. Diplomatic immunity and privileges are also important to contribute to the development of friendly relations among nations.[94]

Day-to-day practice indicates that both states and diplomatic agents still have problems interpreting the relevant provision, of the Vienna Convention on diplomatic immunity. Unfortunately, the diplomats are the ones more likely to misinterpret the extent of their privileges and thus make use or to be more precise and correct-abuse their inviolability and immunity[95]. Such abuses may still be tolerable by the receiving state in the name of securing effective performance of diplomatic functions, if these abuses involve merely minor offences or crimes such as evading parking tickets and traffic fines, drug abuse, use of violence and other crimes as previously discussed.

2.5 Theories and principles of diplomatic immunity

Diplomatic law is one of the oldest branches of international law. Over time, necessity enforced most states to provide envoys fundamental protections; otherwise no international political system could exist. If governments are to seek to power each other's policies and actions through successful communication, they should suppose that their diplomatic agents abroad will not be found under such conditions that would prevent them from engaging without restraint in bargaining and persuasion. Envoys and messengers were usually regarded as sacred and enjoyed particular privileges and immunities when traveling in a foreign country. In this regard it would be appropriate to cite Julius Caesar, who wrote more than 2000 years ago; "The inviolability of ambassadors is sacred and acknowledged as such by all civilized peoples".[96] It is still the general rule of international law that "diplomats and embassies are to be treated as if they were on their native soil".[97]

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[94] *Ibid Note 51.*
[95] *Supra note.*
[96] *J. Shaw 2002.*
[97] *K. J. Holsti 1972, 139.*

The oldest records detailing real diplomatic practice emerged in the Greek city-states over 2.000 years ago. The principle of diplomatic immunity sustained to expand and develop throughout the Roman and Byzantine Empires, the Middle Ages and the Renaissance and Classical periods[98]. The Greek states, mainly in the classis age (750-350 B. C.) were all too fond of making war on each other and of forming temporary alliances to help themselves against their enemies and ambassadors sent by the States to promote these alliances and to make peace were accorded immunity and were regarded as under the protection of Zeus. On the other hand, it is noteworthy to cite the Assyrian envoy of Sennacherib, who met King Hezekiah's negotiators just outside the walls of Jerusalem about the year 700 B. C., "Kings, queens, generals and other dignitaries are portrayed as sending messengers to adversaries in the region, usually with such unwelcome tidings that they would need every ounce of immunity that they could get"[99]. Consequently, much of diplomatic practice required codification and was documented in international treaties, which allowed States to rely on these agreements for the defense of their envoys. These efforts to codify diplomatic law culminated, as it was mentioned above, at the 1961 Vienna Conference.[100]

The creation of these laws is summarized by three theories - personal representation; extraterritoriality and functional necessity. The personal representation theory is based on the idea that the diplomat is a representative of a sovereign State, and as the representative he is entitled to the same privileges as the sovereign. Under this theory the diplomat is viewed as the representation of the head of the sending State[101]. The theory of extraterritoriality suggests that the property of a diplomat and the diplomat himself should be treated as if they were on the territory of the sending State. As the diplomat is considered to be living in the sending State, he remains immune from the criminal and civil jurisdiction of the receiving State. [102]

Under the theory of functional necessity, which is regarded as the most dominant and accepted one for the justification of diplomatic immunity, privileges and immunities are essential to allow diplomatic and consular officials to execute their duties successfully.

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[98] *V. L. Maginnis 2003.*
[99] *G. V. McClanaham 1989.*
[100] *J. Barker 1996.*
[101] *V. L. Maginnis 2003.*
[102] *J. Wood, J. Serres 1970.*

[103]This justification is cited in the preambles to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, according to which, "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States" (Vienna Convention on Diplomatic Relations, Preamble).

In the United Kingdom the House of Commons Foreign Affairs Committee has put the case this way "Diplomatic immunity is thus part of diplomatic law and is an exception to the general international law rule of territorial jurisdiction. Its purpose is to allow diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. It also acknowledges the representative character of a diplomatic mission. This does not grant diplomats freedom to flout local law. They are still required to obey it, but will in many cases be immune from local jurisdiction to enforce such laws.

A mission is not "extra-territorial" in the sense that it is territory belonging to the sending state but it is given the protection of inviolability within the receiving state. Both inviolability of premises and the diplomatic bag, and the privileges and immunities of diplomats, are all directed towards facilitating the performance of the diplomatic function".[104] The early history of the law relating to diplomatic privileges and immunities is a subject of a valuable research. The status of foreign envoys was formerly a topic of great practical importance, as is shown by the amount of literature and the number of international incidents to which it gave rise.

In the period since World War II, a number of international conventions have been concluded, two of which are the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. These Conventions continue to be used as a point reference in the development of related areas of international law. The Vienna Convention on Diplomatic Relations contains fifty-three articles that govern the behavior of diplomats, thirteen of which address the issue of immunity. The most relevant article relating to immunity is Article 31

> "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" (Article 31). Pursuant to Article 31, the diplomat loses civil immunity in

[103] *A. Cassese 2005.*
[104] *UK House of Commons 1984, p.8.*

situations like when there is a dispute over "private immovable property" in the receiving State; if the diplomat is acting as an administrator, executor or inheritor in his capability as a private person or if the diplomat undertakes a commercial or professional activity which is not part of his official functions.

The preamble of the Vienna Convention states the view of the participating states on the theoretical basis of diplomatic privileges and immunities. It also states that the purpose of the Convention is "the development of friendly relations among nations, irrespective of their differing constitutional and social systems" (Vienna Convention on Diplomatic Relations, Preamble). The second edition of a book Diplomatic Law by Eileen Denza (1998) which is a commentary on the Vienna Convention on Diplomatic Relations is an essential source of reference and learning for diplomatic immunity. This enlarged and fully updated edition places each provision of the 1961 VCDR in its historical context, provides prolonged exposure of the diplomatic practice, as well as it thoroughly examines problems in the field, not least the abuse of diplomatic immunity.

The International Court of Justice (ICJ) shared the latter view and strongly emphasized that diplomats are entitled to diplomatic immunity from any form of criminal jurisdiction under general international law. Though this may be in case of crimes which do not concern the general interest of the whole international community, one may still reassess the applicability of absolute immunity from criminal jurisdiction in cases of crimes against humanity, war crimes or other crimes of such gravity, that is, international crimes. In this regard it should be stated a provision of the 1975 Convention on Representation of States in International Organizations[105], which reads as follows:

"In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall recall him, terminate his functions with the mission, the delegation, the observer delegation, or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State".[106]

[105] *Done at Vienna on 14 March 1975. Not yet in force.*
[106] *Article 77, 2.*

Indeed, the theory of functional necessity renders questionable the legitimacy of diplomatic immunity in such cases. It is difficult to argue that crimes against humanity and war crimes are consistent with the functions of a diplomat. Thus, an argument should be made that when diplomats act for example like war criminals, they must lose the benefits of those immunities they are generally entitled to.[107]

Although diplomatic immunity from criminal jurisdiction is unqualified and absolute, the sending State retains its full jurisdiction over its diplomatic agents and it would be under international pressure to prosecute diplomats who have committed serious crimes affecting the interests of all States.[108] In this regard it is appropriate to mention that a diplomatic agent shall be justifiable in the courts of the sending State. The competent tribunal shall be that of the seat of the Government of the sending State, unless some other is designated under the law of that State".[109]

In fact, not all acts performed by a diplomatic agent remain forever immune from the jurisdiction of the receiving State. After the function of a diplomatic agent comes to an end, he loses his diplomatic immunity and he may be sued for all his actions except for those performed in the exercise of his official functions. The diplomat concerned has reasonable time to leave the receiving State before he loses his immunity, but whenever he chooses to return to that country he may find himself faced with criminal procedure. Thus, one way of excluding diplomatic immunity in case of serious crimes is "to establish hierarchy between norms granting such immunity and norms protecting certain fundamental values such as human life and then show that the latter norms have priority over the former norms".[110]

[107] *R. Vark 2003.*
[108] *Nahlik 1990.*
[109] *ILC Yearbook (1957 &1958).*
[110] *Ibid.*

CHAPTER THREE

RELATIONSHIP OF DIPLOMATIC IMMUNITIES TO INTERNATIONAL CRIMES

3.1 Overview

The development of substantive norms of international human rights and international criminal law has not been matched by the development of mechanisms and procedures for their enforcement. The primary methods of judicial enforcement envisaged by international law are the domestic courts of the state where the human rights violation or international crime occurred and the courts of the state responsible for that violation and to this end, international law imposes obligations on states to prosecute those who have committed international crimes within their territory.

3.2 Relationship of diplomatic immunities to international crimes

3.2.1 Immunity of State Officials

International law confers on certain state officials immunities that attach to the office or status of the official. These immunities which are conferred only as long as the official remains in office are usually described as 'personal immunity' or 'immunity ***ratione personae***'. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states.[111] In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations,[112] and other officials on special mission in foreign states.[113]

The predominant justification for such immunities is that they ensure the smooth conduct of international relations and as such they are accorded to those state officials who represent the state at the international level. International relations and international cooperation between states require an effective process of communication between states.[114] It is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states.[115] As the International Court of Justice (ICJ) has pointed out, there is 'no more fundamental prerequisite for the conduct of relations between States than the inviolability of

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[111] *Watts, supra note 1.*
[112] *Arts 29 and 31 Vienna Convention on Diplomatic Relations 1961 (VCDR).*
[113] *Arts 21, 39, and 31 UN Convention on Special Missions 1969, 1400 UNTS 231.*
[114] *Wickremasinghe, supra note 1, at 406.*
[115] *Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity', 52 Duke LJ (2002) 651, at 656.*

diplomatic envoys and embassies'.[116] In short, these immunities are necessary for the maintenance of a system of peaceful cooperation and co-existence among states.9 Increased global cooperation means that this immunity is especially important.

3.2.2 Immunity from Criminal Process for International Crimes

It is clear that senior officials who are accorded immunity *ratione personae* will be hindered in the exercise of their international functions if they are arrested and detained whilst in a foreign state. For this reason, this type of immunity, where applicable, is commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by states. The absolute nature of the immunity *ratione personae* means that it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts.[117] Also, the rationale for the immunity means that it applies whether or not the act in question was done at a time when the official was in office or before entry to office.[118]

What is important is not the nature of the alleged activity or when it was carried out but rather whether the legal process invoked by the foreign state seeks to subject the official to a constraining act of authority at the time when the official was entitled to the immunity. Thus, attempts to arrest or prosecute these officials would be a violation of the immunity whilst invitations by a foreign state for the official to testify or provide information voluntarily would not.[119] However, since this type of immunity is conferred, at least in part, in order to permit free exercise by the official of his or her international functions, the immunity exists for only as long as the person is in office.

In the *Arrest Warrant* case, the ICJ held that Foreign Ministers are entitled to immunity *ratione personae,* and further held that the absolute nature of the immunity from criminal process accorded to a serving Foreign Minister *ratione personae* subsists even when it is alleged that he has committed an international crime and applies even when the Foreign

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[116] *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran) [1980] ICJ Rep 3, at para. 91.*

[117] *Arrest Warrant case, supra note 9, at para. 54; Fox, supra note 1, at 694. See also the treaty provisions cited supra at note 5.*

[118] *Arrest Warrant case, supra note 9, at paras 54–55.*

[119] *Ibid., at paras 55, 70–71; Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), ICJ judgment of 4 June 2008, at para. 170.*

Minister is abroad on a private visit.[120] The Court stated that it has been unable to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The principle that immunity *ratione personae* extends even to cases involving allegations of international crimes must be taken as applying to all those serving state officials and diplomats possessing this type of immunity.[121] Indeed the principle is uncontroversial and has been widely applied by national courts in relevant cases as well as being upheld in state practice.[122] The only case which may be construed as denying immunity to a Head of State is *United States v. Noriega*. However, immunity was not accorded in this case on the ground that the US government had never recognized General Noriega (the *de facto* ruler of Panama) as the Head of State.

3.2.3 Officials Entitled to Immunity Ratione Personae

Where officials represent their states at international organizations they will usually be accorded immunity by treaty.[123] Likewise under Articles 29 and 31 of the UN Convention on Special Missions 1969 the person of any official abroad on a special mission on behalf of his or her state is inviolable, with the result that he or she may not be arrested or detained. Furthermore, Article 31 of that Convention provides that 'the representatives of the sending State in special mission and the members of its diplomatic staff are immune from the criminal jurisdiction of the receiving State'.[124]

These are treaty based conferrals of immunity *ratione personae* which extend the category beyond the Head of State, Head of Government and Foreign Minister. However, the policy underlying the immunity is, in all cases, consistent with that enunciated by the ICJ. These treaty-based conferments of immunity are intended to facilitate the conduct of international

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[120] *Arrest Warrant case, supra note 9, at para. 55.*
[121] *Ibid., at para. 58.*
[122] *Murphy,' in 'Contemporary Practice of the United States Relating to International Law', 97 AJIL (2003) 962, at 974–977; Plaintiffs A, B, C, D, E, F, supra note 16.*
[123] *Art. IV, para. 11, Convention on the Privileges and Immunities of the UN (1946), supra note 4; Art. V, General Convention on the Privileges and Immunities of the Organization of African Unity (1965).*
[124] *Arts 29 and 31 UN Convention on Special Missions 1969, supra note 5.*

relations. Although the Convention on Special Missions is in force, only a small number of states have become party to it (38 at the time of writing).

Although the International Law Commission was of the view that the immunity of special missions was established as a matter of international law, a US Federal District Court doubted that these provisions represented customary international law.[125] However, the US Executive Branch has taken a different view and has asserted that foreign officials only temporarily in the United States on 'special diplomatic mission' are entitled to immunity from the jurisdiction (criminal and civil) of US courts.[126]

What is of particular interest is that such assertions of immunity have covered people who are not the Head of State, Head of Government or Foreign Minister. For example, the US government suggested immunity in a case brought against the Chinese Minister of Commerce and International Trade.[127] Governments and courts in other countries are also willing to accept the customary law status of the rule granting immunity to members of Special Missions. In the *Mutual Assistance in Criminal Matters* case, Djibouti relied on the Special Missions Convention in its written pleadings although neither it nor France was a party to that Convention.[128]

The UK government and UK courts have also recognized the immunity of special missions on the basis of customary international law. In *Re Bo Xilai*,[129] a magistrates' court in England was willing to grant immunity to the same Chinese Minister of Commerce on the ground that this was required by customary international law since he was part of a special mission. Likewise, Germany declined to arrest the Chief of Protocol to the President of Rwanda (Rose Kabuye) when she was on an official visit to the country in April 2008, acknowledging that she was immune, although she was subject to a French-issued arrest warrant on terrorism charges.[130]

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[125] *USA v. Sissoko, 121 ILR 599 (SD Fla, 1997).*
[126] *US Executive Branch in Li Weixum v. Bo Xilai, DCC Civ. No. 04-0649 (RJL).*
[127] *Li Weixum v. Bo Xilai, supra note 29.*
[128] *Djibouti v. France, supra note 12, Memorial of the Republic of Djibouti, Mar. 2007, at paras 131–140.*
[129] *128 ILR (2005) 713. See also proceedings in England regarding Israeli Minister Ehud Barak, supra note 16.*
[130] *Akande, 'Prosecution of Senior Rwandan Government Official in France: More on Immunity' (2008).*

The customary international law basis of special missions immunity was accepted by the Criminal Chamber of the German Federal Supreme Court in the *Tabatabai Case,* where it stated:

> irrespective of the (UN Special Missions Convention), there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an ad hoc envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law.[131]

It is important to point out that it has been accepted that this type of special mission immunity applies even in cases concerning international crimes for example, immunity was recognized in *Re Bo Xilai*, even though the case dealt with allegations of torture. Likewise, the Belgian Government in the *Arrest Warrant* case accepted in its pleadings to the ICJ that the arrest warrant in question would not be enforceable, on immunity grounds, in cases where a representative of a foreign state was in Belgium on the basis of an official invitation.[132]

Questions remain as to the precise contours of the special mission immunity. In particular, it needs to be determined what constitutes a special mission. According to Article 1 of the Convention on Special Missions a special mission is 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'. This suggests that the receiving state must not only be aware that the foreign official is on its territory, it must also consent to that presence and to the performance of the specified task. It is this consent which gives rise to the immunity.[133]

Although this special mission immunity is broadly applicable it does not apply to state officials abroad on a private visit. This is what distinguishes it from the type of immunity *ratione personae* discussed by the ICJ in the *Arrest Warrant* case. In that case, the Court held that the Foreign Minister (and also the Head of State and Head of Government) would be

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[131] *Decision of 27 Feb. 1984, Case No. 4 StR 396/83, 80 ILR (1989) 388 (Germany: Federal Supreme Ct).*
[132] *Warrant case, supra note 9, Counter-Memorial of the Kingdom of Belgium, 28 Sept. 2001, at paras 1.11–1.12, 3.2.32.*
[133] *The Schooner Exchange v. McFaddon, 11 US 116 (1812) (US Sup. Ct.).*

immune even if abroad on a private visit.[134] It is not controversial that a foreign Head of State is entitled to absolute immunity *ratione personae* from criminal jurisdiction of foreign courts even whilst abroad on a private visit. However, prior to the ICJ's decision it was not certain that this same immunity applied to Foreign Ministers or Heads of Government abroad on a private visit.[135]

In the *Arrest Warrant* case, the ICJ justified the conferment of this broad immunity to a serving Foreign Minister on the ground that it was necessary for the conduct of international relations. However, this argument is not convincing. It is difficult to see why a Foreign Minister should require immunity from jurisdiction when on a private visit. Such visits are not necessary for the international relations of the state.[136] To the extent that the Foreign Minister (or other official) is immune whilst abroad on *official* visits then the conduct of international relations ought not to be greatly impeded as the Minister is free to travel to conduct such relations. Justification for immunity of senior officials when abroad on a private visit must be sought elsewhere.

There are two further justifications for immunity *ratione personae*, beyond the 'functional' rationale discussed above which may be of use symbolic sovereignty and the principle of 'non-intervention'. It is worth pointing out here that none of these rationales can be taken as the sole justification for the rule of immunity *ratione personae.* They must be read together to give a convincing account of why the rule of immunity still exists.

It has been argued that the rule according Heads of State immunity 'reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler'.[137] A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he *symbolizes*: the sovereign state. The person and position of the Head of State reflects the sovereign quality of the state[138] and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents.

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[134] *Arrest Warrant case, supra note 9, at para. 55.*
[135] *Watts, supra note 1, at 102–109.*
[136] *R. van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (2008).*
[137] *Ibid., at 180. See also Fox, supra note 1, at 673.*
[138] *Watts, supra note 1, at 53, 102–103.*

The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State. The principle is the 'corollary of the principle of sovereign equality of states',[139] which is the basis for the immunity of states from the jurisdiction of other states (*par in parem non habet imperium*). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government and that other states are not empowered to intervene in this matter. Were the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence.

Although practice on the point is not clear and although the Head of Government was not in the past considered as having the same 'majestic dignity' as the Head of State or as symbolizing the state,43 there are good reasons for extending to the former the absolute immunity from criminal jurisdiction granted to the latter. In many states it is the Head of Government who is the effective leader of the country.[140] Thus to arrest and detain him or her is as damaging to the autonomy of the state as is the case with Heads of State. However, the same cannot be said of other ministers (including the Foreign Minister).

They may represent the state but do not embody the supreme authority of the state and their removal does not signify a change in government of the state. While removing immunity for the Head of State and Head of Government goes to the root of the principle of equality of states, removing immunity for other senior officials on private visits does not have the same dramatic impact. Thus, by restricting the allocation of broad immunity *ratione personae* to Heads of State and Heads of Government, a balance is struck between sovereign equality and respect for the rule of (international and domestic) law. On this analysis, extending such broad immunity *ratione personae* to other ministers, as the ICJ did in *Arrest Warrant*, is erroneous and unjustified.

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[139] *Military and Para-military Activities in and against Nicaragua (Nicaragua v. United States) [1986] ICJ Rep 14, at para. 202.*

[140] *Fox, supra note 1, at 670 (n. 16) notes that in 1978 there were '68 States whose Heads were also Heads of Government'.*

3.3 Immunity of State Officials *Ratione Materiae* (Immunity Attaching to Official Acts)

State officials are, generally speaking, immune from the jurisdiction of other states in relation to acts performed in their official capacity ('functional immunity' or 'immunity *ratione materiae*').[141] As this type of immunity attaches to the official act rather than the status of the official, it may be relied on by all who have acted on behalf of the state with respect to their official acts. Thus, this conduct-based immunity may be relied on by former officials in respect of official acts performed while in office as well as by serving state officials.47 It may also be relied on by persons or bodies that are not state officials or entities but have acted on behalf of the state.[142]

There are two related policies underlying the conferment of immunity *ratione materiae*. First, this type of immunity constitutes or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state.[143] This rationale was cogently expressed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*; State officials are mere instruments of a State and their official action can only be attributed to the State.

They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[144]

One consequence of this function of immunity *ratione materiae* is that the immunity of state officials is not co-extensive with, but broader than, the immunity of the state itself. The

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[141] *Tomonori, supra note 1, at 269–273. For a consideration of US and UK law on the matter see Whomersley, supra note 1; Fox, supra note 1, at 458–459.*

[142] *Van Panhuys, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 ICLQ (1964) 1193, at 1201.*

[143] *Fox, supra note 1, at 94–97. In Attorney General of Israel v. Eichmann, 36 ILR (1962) 5, at 308–309, the Israeli.*

[144] *Prosecutor v. Blaškić (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, para. 38.*

official would be immune not only with respect to sovereign acts for which the state is immune but also in proceedings relating to official but non-sovereign acts. Secondly, the immunity of state officials in foreign courts prevents the circumvention of the immunity of the state through proceedings brought against those who act on behalf of the state. As was stated by the English Court of Appeal in ***Zoernsch v. Waldock*;**

> A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit.[145] In this sense, the immunity operates as a jurisdictional, or procedural, bar and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who carried out the act.

It is suggested that these arguments demonstrate a misunderstanding of the basis upon which state immunity is accorded and that they suggest a false conflict between the rule according state immunity and the relevant *jus cogens* norms. A more persuasive theory is suggested upon which removal of immunity *ratione materiae* can be based in criminal cases involving international crimes. It is argued that whilst international crimes can be official acts, immunity *ratione materiae* is removed as soon as a rule permitting the exercise of extra-territorial jurisdiction over that crime and contemplating prosecution of state officials develops.

On 17th April 1984, a peaceful demonstration took place outside Libyan embassy in London. Shots from the embassy were fired that resulted in the death of a police officer. After the siege, the Libyans left and the building was searched in presence of a Saudi Arabian diplomatic Weapons and other relevant forensic evidence were found.[146] The issue that was raised here was if in the light of **Article 45(a)** the search was permissible. A suggestion has been raised that the right of self-defense may also be applicable in this context.

It is a different issue when the mission premises have been abandoned. The United Kingdom for example has enacted the Diplomatic Consular Premises Act in 1987, under which states

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[145] *Wickremasinghe, supra note 1, at 396; Fox, supra note 1, at 455–463.*
[146] *Memorandum by the Foreign and Commonwealth Office, Foreign Affairs Committee report,p.5*

wishing to use land as diplomatic or consular are required to obtain consent from the secretary of state. Once such consent has been obtained, (Though not necessary in the case of land which had this status prior to the coming into of the Act), it could be subsequently withdrawn.[147]

The Secretary of State and Minister of Foreign Affairs in UK have the power to require that the title to such land be vested in him where the land has been lying empty, or without Diplomatic occupants, and could cause damage to pedestrians or neighboring buildings because of neglect, provided that he is satisfied that to do so is permissible under law. The Secretary of State is able to sell the premises, deduct certain expenses and transfer the residue to the person divested of his interest.[148]

An example of such a situation occurred with respect to the Cambodian embassy in London, whose personnel closed the building after the Pol Pot takeover of Cambodia in 1975, handing the keys over to the foreign office.[149] In 1979, the UK government formally withdrew its recognition of the Cambodian government after the Vietnamese invasion until in 1991 when a British Mission which became the British Embassy was opened in Phnom Penh following the 1993 elections.[150]

The premises were made the subject of Section 2 of the Diplomat Consular premises Act in 1988 and the secretary vested the land in himself. This was challenged by squatters and in **R v. Secretary of State for Foreign and Common Wealth Affairs, Exparte Samuel,** where Henry J held that the secretary of state had acted correctly and in accordance with the duty imposed under **Article 45 of the Vienna Convention.** However, the obligation to protect even after armed conflict occurs ceases if the premises cease to be used for diplomatic purpose.

In ***Westminster City council V Government of Islamic Republic of Iran,*** the issue concerned the payment of expenses arising out of repairs to the damaged and abandoned Iranian embassy in London in 1980. The council sought to register a land charge but the question of immunity of the premises under **Article 22 of Vienna Convention** was premises as they

[147] *Section 2*
[148] *Section 3*
[149] *Warbrila, Current Development, 38 ICIQ.1989,P.965*
[150] *http://www.cambodianembassy.org.uk (accessed on 10 June 2010)*

were not used for the purpose of the mission as required by Article raised. It was noted in the circumstances that the premises had ceased to be Diplomatic premises as they were not used for the purpose of the mission as required by **Article 20.**[151] Inviolability of the diplomatic premises however, should not be confused with extraterritoriality. Such premises do not constitute a part of the territory of sending state.[152]

3.4 International Crimes as (Non-) Sovereign or (Non-)Official Acts

It has been argued that state immunity applies only in respect of sovereign acts and that international crimes, particularly those contrary to *jus cogens* norms,[153] can never be regarded as sovereign acts.[154] Similar arguments have been made to the effect that acts which amount to international crimes may never be regarded as official acts. According to some, when a state engages in acts which are contrary to *jus cogens* norms it impliedly waives any rights to immunity as the state has stepped out of the sphere of sovereignty.[155] Essentially, the state has no authority to violate *jus cogens* norms and so these acts are not sovereign acts.

However, other courts have not been convinced. The claimants in the *Prefecture of Voiotia case* tried to enforce their claim in Germany but this was dismissed by the German Supreme Court which found that the argument applied by the Greek Supreme Court 'according to the prevailing view is not international law currently in force'.[156] In a later case regarding the Distomo massacre, the Greek Special Supreme Court held by a narrow majority that state immunity is still a generally recognized international norm which prohibits actions for damages in relation to crimes including torture, committed by the armed forces of another state.[157]

The Court held that there was not enough consistent or widespread state practice to demonstrate that there was an exception to the norm of state immunity. In the US case of

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[151] *F.R V Secretary of State Foreign and Common Wealth Affairs, Ex Parte Samuel, the Times, 10 September 1980.*
[152] *Supra note 1 at pg 575.*
[153] *Art. 53 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.*
[154] *Pinochet Case', 10 EJIL (1999) 237, at 265.*
[155] *Belsky, Merva, and Roht-Arriaza, supra note 58, at 394.*
[156] *Greek Citizens v. Federal Republic of Germany (The Distomo Massacre Case), 42 ILM (2003) 1030 (Germany: Sup. Ct, 2003), at 1033.*
[157] *Federal Republic of Germany v. Miltiadis Margellos, Case 6/17-9-2002 (Greece: Special Supreme Court, 2002).*

Prinz v. Federal Republic of Germany,[158] Prinz was a victim of the Nazi regime and claimed that Germany had impliedly waived its immunity when it violated *jus cogens* norms. The majority of the court rejected this argument, holding that 'an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit'.[159]

Only Judge Wald dissented from the majority opinion, arguing that 'when a state thumbs its nose at a *jus cogens* norm in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity'.[160] The Italian Supreme Court explicitly rejected the contention that violations of *jus cogens* do not qualify as sovereign acts or that there is an implied waiver of sovereign immunity in *Ferrini v. Federal Republic of Germany,*[161] while Lord Hoffmann summarily dismissed the argument in *Jones v. Saudi Arabia,* stating that the 'theory of implied waiver has received no support in other decisions'.

Whether or not an act is *jure imperii* or sovereign for the purposes of state immunity does not depend on the international legality or otherwise of the conduct, but on whether the act in question is intrinsically governmental. This in turn depends on an analysis of the nature of the act as well as the context in which it occurred.[162] International crimes committed by states usually occur in the context of the use of armed force or in the exercise of police power and these are acts which are as intrinsically governmental as any other.[163]

State immunity is not designed to shield states from the consequences of their illegal conduct, although it cannot be denied that it can have this effect.[164] The plea of state immunity does not mean that a state is not responsible in international law,[165] and it has never been the case that immunity is only available for those acts which are internationally lawful.

On the contrary, the very purpose of the rule according immunity is to prevent national courts from determining the legality or otherwise of certain acts of foreign states. Thus, it would be

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[158] *Prinz v. Federal Republic of Germany 26 F 3d 1166 (DC Cir. 1994).*
[159] *Ibid., at 1174. Other US cases where this argument has been dismissed include: Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F 3d 239 (CA, 2nd Cir., 1996)*
[160] *Ibid., at 1182.*
[161] *Ferrini v. Repubblica Federale di Germania, 87 RDI (2004) 539 (Italy: Cassazione), at paras 7 and 8.2.*
[162] *Lord Wilberforce in I Congresso del Partido [1981] 2 All ER 1064, at 1074 (HL).*
[163] *Nelson v. Saudi Arabia, 100 ILR (1993) 544, at 553 the US Sup.*
[164] *McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', 18 EJIL (2007) 903.*
[165] *International Law (3rd edn, 2010), 340, 351. See also Arrest Warrant case, supra note 9, at para. 59.*

illogical if the application of that rule depended on a prior determination that conduct was illegal or grossly illegal. To say that an act is sovereign is not to say that it is an act permitted by international law or within a sphere of permitted acts. In fact, one consequence of the restrictive immunity theory is that it is precisely in those circumstances where international law has something to say about the acts of states, i.e., governmental or public acts, that national courts are precluded from acting.[166]

For much the same reasons as those discussed above, the related argument that international crimes can never be considered official acts protected from scrutiny by immunity *ratione materiae* must be rejected.[167] This argument was relied upon by some judges of the House of Lords in the series of *Pinochet* cases in which it was held that a former Head of State is not immune in respect of torture committed whilst in office.[168] However, as stated above, whether or not acts of state officials are regarded as official acts does not depend on the legality, in international or domestic law, of those acts. Rather, whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done and the means through which the official carried them out.[169]

Conclusion

Acts which constitute international crimes are often carried out by individuals invested with state authority and regularly undertaken for state rather than private purposes. Thus, 'to deny the official character of such offences is to fly in the face of reality'.[170] Such acts are characterized as acts of the state for the purpose of imputing state responsibility,[171] and it would be artificial to impose a different test in the context of individual responsibility.[172]

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[166] *Annuaire de L'institut de Droit international (Basle, 1991), 338, 393–394.*
[167] *Tunks, supra note 7, at 659–660; Tomonori, supra note 1, at 283 ff.*
[168] *Pinochet (No.3), supra note 16, at 113, 166 (per Lords Browne-Wilkinson and Hutton); R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.1) [1998] 4 All ER 897, at 939–940, 945–946.*
[169] *Watts, supra note 1, at 56–57; Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', 13 EJIL (2002) 877, at 891.*
[170] *Barker, 'The Future of Former Head of State Immunity After Ex Parte Pinochet', 48 ICLQ (1999) 937, at 943.*
[171] *Arts 4 and 7, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001, UN Doc. A/CN.4/L.602.*
[172] *Jones v. Saudi Arabia, supra note 52, at paras 74–78 (per Lord Hoffmann).*

CHAPTER FOUR

CHALLENGES TO THE PRINCIPLE OF DIPLOMATIC IMMUNITIES UNDER INTERNATIONAL LAW

4.1 Overview

Diplomatic privileges and immunities have for long successfully protected diplomatic representatives and other foreign officials from intrusion with their freedom, which may be attendant upon penal proceeding, the objective of which is the limitation of financial or personal liberty in the interests of punishment or deterrence. However, everyday practice indicates that both States and diplomatic agents still have problems with interpreting the relevant provisions of the Vienna Convention on Diplomatic Immunity. Unfortunately, the diplomats are more likely those who rarely tend to misinterpret the extent of their privileges, abuse their inviolability and immunity[173]. The abuse of diplomatic privilege which always has been a source of tension among countries is considered to be the main problem regarding diplomatic immunity.

4.2 Challenges to the principle

4.2.1 Traffic violations

One of the widespread abuses of local laws by diplomats is traffic violations, however, it should be noted that offenders are often not "genuine diplomats" but rather members of their families, especially "sons of the rich who would flout the law whether protected by diplomatic immunity or not".[174] More serious cases of accidents are caused by reckless driving. To this effect it would be noteworthy to cite a Japanese writer; the reason for the high accident ratio of foreign diplomats would seem to be the way they drive. The awareness that they are free from arrest, fine, or other judicial or administrative sanction of the local authorities, even when they violate traffic regulations or cause accidents, is apt to lead to careless driving".[175]

Article 9[176] also provides an important legal restraint on absolute immunity. However, because the diplomat can be recalled to the sending State, immunity is usually preserved. If the sending State chooses to terminate the functions of a diplomat in the receiving State, then

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[173] *R. Vark 2003.*
[174] *Ch. W. Thayer 1959.*
[175] *R. Hatano 1968.*
[176] *Vienna Convention1964.*

the diplomat is no longer protected by immunity.[177] The efficiency of Article 9 may be deduced from the fact that there appear to be almost no cases where a receiving State has found it necessary to resort to its power under paragraph 2 of the Article 4[178] to refuse to recognize the person concerned as a member of the mission. In many cases the person is withdrawn before the receiving State can make any official notification.

Whether the request for withdrawal becomes public at all and the formality of the language in which it is described owe more to the circumstances and to the political pressures on the sending and the receiving States than to the nature of the behavior which has caused offence. It is not possible to come to firm conclusions on what is a "reasonable period" for the purposes of Article 9.[179] The cases show that where a receiving State has imposed a deadline for removal it has been much shorter than is granted in the case of normal termination of functions. Forty-eight hours' notice seems to be the shortest which could be justified as "reasonable". Those declared persona non grata or not acceptable leave well within any deadline.[180]

Thus, the PNG procedure is harsh and abrupt; however it is a convenient weapon by which receiving States may get rid of an undesirable diplomat. In this regard it would be interesting to bring the following incident; in October 1976 Denmark required the North Korean Ambassador and his entire diplomatic staff to leave on six days' notice on the basis that they have used the embassy for the illegal import and sale of drugs, alcohol and cigarettes. A few days later the Government of Finland declared persona non grata the North Korean Charge' d'Affaires and three other diplomats following the detection that Finland had been used as a staging post for drugs destined for other countries in Scandinavia. On the following day the North Korean Ambassador to Norway and Sweden was also declared persona non grata for similar reasons.

4.2.2 Abuses in case of civil liability

Diplomatic immunity also allows the diplomats to escape from civil liability in cases of personal injury. The diplomatic immunity has now evolved more into a loophole to prevent diplomats from paying damages and fines, which they would have to pay in its absence.

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[177] *V. L. Maginnis 2003.*
[178] *Vienna Convention1964.*
[179] *Ibid.*
[180] *E. Denza 1998.*

Diplomats and the offices in which they work are collectively referred to as a diplomatic mission. Creditors do not have the right to sue missions individually to get back money they owe. Thus, a person is left right less in case a diplomat refuses to pay the rent or any kind of debt back to the creditor. For this reason, it has been observed that the financial institutions do not extend any kinds of credit to diplomats, as they have no legal means to ensure the recovery.

4.2.3 Abuses through criminal act

Abuses of diplomatic immunities relating to criminal liabilities can mainly be divided into two main categories.[181] The first category relates to using diplomatic bag to smuggle goods either into or out of the receiving state and the second category related to the crimes that have been committed by the diplomats themselves.

4.2.4 Using Diplomat related props to smuggle goods

It was in year 2011, when two Polish embassy's employees were found with a contraband cargo while attempting to cross the Belarus-Polish border. The cargo contained around 100,000 cigarettes and was hidden in a car having a diplomatic plate. It has been alleged that the smugglers were aiming to make profit due to difference in rates of cigarette in Russia and EU.[182] A Venezuelan general was arrested on charges of smuggling drugs in Aruba, but was released soon when the Venezuelan government protested against this act. The Venezuelan government raised the issue of his diplomatic immunity and threatened sanctions in case Aruba did not release him.[183] Diplomats and officials who are involved in drug smuggling have thus been benefited from diplomatic immunity. Such instances are common and can be found in almost every country. Use of diplomatic boxes, cars and other official objects for smuggling has become really common. Also, in most of the cases, the diplomats are not punished for the same by the receiving state, due to international laws, and by the sending state, because they do not want to.

4.2.5 Crimes committed by diplomats themselves

It has been observed that the diplomatic agents, on many occasions have acted as principal perpetrators. There are no statistics to support the claim and no comprehensive study has

[181] *Leslie Shirin Farhangi, Insuring Against Abuse of Diplomatic Immunity, 38 Stan. L.RVol. 6 (1986).*
[182] *Yuliya G. Zabyelina, The Untouchables: Transnational Organized Crime Behind Diplomatic Intercourse And Immunities, (last visited 06/02/2015).*
[183] *Netherlands Says Venezuelan Detained in Aruba Has Immunity,*

been done to determine the sheer number of crimes that have been committed by those who are protected by diplomatic immunity. However, several cases have come up recently which support the claim that the crimes committed in such a case are unprecedented. The following are a few instances from the same. Paris Iraq Gunfire Incident[184]; this incident occurred in Paris in 1978.

A policeman who was escorting a Palestinian from their embassy was killed by a gunshot which was fired from the Iraqi Embassy. A huge controversy raged over this gunshot, but the culprits had to be let away. The French President's spokesperson publicly acknowledged the gravity of the crime but stated that the suspects were covered by diplomatic immunity. The only thing that the French government did was to make a request to the Iraqi government to put the three suspects on trial.

Sri Lanka Burma pyre Incident[185]; the Burmese Ambassador to Sri Lanka in 1979, got infuriated by seeing his wife getting out of the car of a night club band member. The next day, neighbors around the embassy noticed the ambassador building a pyre on the back lawn of the embassy. The police were prevented from entering the embassy as the diplomat claimed that this was a part of Burmese territory. He later placed his wife's corpse on the pyre and set it alight. **United States Brazilian Gunfire Incident**[186]in 1982, Brazilian Ambassador's grandson shot an American citizen outside a local club. The victim filed the suit against the ambassador and the country. These charges were dismissed on the grounds of public immunity.

US Guatemalan kidnapping Incident [187]two Guatemalan Diplomats were involved in 1983 in kidnapping of wife of **El** Salvador's former ambassador to the United States in 1983. She went missing from her home in Florida and was held for1.5million dollar which the kidnappers called as a "war tax." The diplomats who were involved in the case were taken into custody but only after the State Department, was successful in negotiating with the Guatemalan Government for the waiver of their diplomatic immunity.

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[184] *Randy G Taylor, Shootout at the Iraqi Embassy in Paris.*
[185] *Final Approaches: A Memoir by Gerald Hensley, (2006, Auckland University Press, NZ).*
[186] *Veronica L. Maginnis, Limiting Diplomatic Immunity: Lessons Learned From The 1946 Convention On The Privileges And Immunities Of The United Nations, 28 Brook. J. Int'l L. 989.*
[187] *Leslie Maitland Werner , 4 More Held In Abduction Of Ex-Envoy's Wife, .*

United states North Korea sexual assault Incident [188]Nam Chol, a North Korean diplomat was allegedly accused of assaulting a woman in a park In New York in the year 1983. He was under the protection of North Korean Embassy for 10 months. He was forced out of the embassy when his senior was threatened for expulsion. Post this Mr. Chol surrendered to the authorities who ordered him to leave the country.

London Libyan "People's Bureau" Incident [189]one of the prime cases that the world has witnessed in the recent time is that which happened on April 17, 1984 at the London Libyan "People's Bureau". A group of Libyan protestors opposing Colonel Muammar el-Qaddafi, the Libyan Leader, were protesting the leader's treatment to students in Libya before the People's Bureau. The protest was a peaceful one but suddenly the crowd was struck by machine gun fire coming from the bureau. More than ten persons were injured, and five were injured seriously. The gun fire also killed one police officer who was controlling the protestors.

Further the British Police surrounded the Bureau so as to prevent any entry or exit from there. The British Home Secretary demanded that Libya should allow the British police to enter the building to gather evidences and to find suspects. The Libyan officials rejected this demand. The Libyan Government claimed diplomatic immunity for each and every embassy occupants and the British Government declared the diplomats as persona non grata and expelled them. The British Government also broke off relations with Libya and this was all it could do under the Vienna Convention.

Britain Nigerian Kidnapping Incident [190]This incident also occurred in Britain and is related to an ex-member of the former Nigerian government, Alhaji Umaru Dikko. Mr. Dikko was kidnapped from his London house and was drugged and hidden in a diplomatic crate bound to Nigeria in the year 1984. The accused involved in the kidnapping were also hidden in the crate. When the British government wanted to take an action, the Nigerian government refused to cooperate. All that the British Britain could do was to expel the diplomats involved with the incident of kidnapping.

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[188] *THE REGION; Korean Diplomat Heads for Home.*
[189] *Libyan embassy shots kill policewoman.*
[190] *Adeoye Akinsanya, The Dikko Affair and Anglo-Nigerian Relations, 34 The Int. Com. L.Q 602 (1985).*

United States Zimbabwe Child abuse Incident [191]In 1987 Karamba, a commercial attach of the Zimbabwean mission to UN was accused of severely abusing his children. Though, the US did not charge him with any crime due to his diplomatic immunity, he was sent back to Zimbabwe as soon as possible.

Romania US marine hit and run Incident[192]; in 2004, Christopher van Gothem, an American marine working with the embassy, collided with a taxi and killed a musician in Bucharest, Romania. His blood alcohol content was higher than the permitted limits when tested from a breath analyzer. He refused to provide a blood sample for further testing and rushed back to US before charges could be framed against him.

US India Incident [193]; in 2013, an Indian consular official Devyani Khobragade was accused of allegations regarding non-payment of U.S. minimum wages and for fraudulently lying about the wages to be paid on a visa application for her domestic worker. Thorough investigation started against her and she was detained, strip-searched and held in a prison in New York. India registered a strong protest against this investigation process and initiated a review of privileges provided to American consular officials in India as a result. These cases are a few of the many-recorded instances when the diplomatic immunity provided by the international law has been thoroughly misused by the ones holding it.

These are not a comprehensive list of instances, but these do shed some light over the current scenario. Diplomatic immunity has been providing a loophole for diplomats to first commit a crime and then run away from the consequences of the same. The hands of the receiving state are tied and in most of the case they are unable to proceed with any kind of action against the perpetrators. The receiving state may try to take help from the sending states, but this is also most of the times futile. Even if the diplomats are sent back to the sending state, the sending states most of the time do not take cognizance of the crime and thus, the diplomats are not punished for their acts.

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[191] *Court Won't Bar Return of Boy In Abuse Case to Zimbabwe.*
[192] *Marine charged in Romanian rock star's death.*
[193] *India's foreign minister: Drop charges against diplomat.*

4.3 The Potential for Abuse of Diplomatic Immunity and Privileges

M. P. Tandan[194] establishes that, "it is a duty of a diplomatic agent to represent his country in its multifarious phases and facets its political approach, social tradition, economic activities and cultural heritage. He has to maintain the reputation and prestige of his country." However, the writer has not indicated that the diplomatic agent has any duty not to abuse the diplomatic immunities accorded to him. Hence, the researcher brought out the obligation of the diplomatic agent not to abuse the diplomatic immunities he/she is accorded. Akehurst[195] argues that the increase in the number of serious crimes committed against diplomatic envoys and diplomatic missions, such as the murder and kidnapping of envoys, and attacks directed against the premises of legation, led to adoptions by the United Nations General.

Assembly on 14th December 1973, of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including diplomatic agents. However, the writer does not go further in writing what measures can be taken in case the diplomatic agents themselves commit these serious crimes against ordinary people or members of the diplomatic envoys. Thus, the researcher examined the possibility of diplomats being held accountable for crimes they commit. Malcolm N. Shawn[196] contended that "the field of diplomatic immunity is one of the most accepted and uncontroversial of international law topics as it is the inherent of all states ultimately to preserve an even tenor of diplomatic relations". However, the worldwide threat of terrorism has made the field of diplomatic immunity to be one of the most controversial topics in International Law. The researcher therefore, sought to highlight issues which make the issue of diplomatic immunity controversial.

Moreover Ian Brownilie[197] argues that "the essence of diplomatic relations is the exercise by the sending state government on state functions to the territory of the receiving state by license of the latter". However, the author does not fully explain the essence of diplomatic relations. The researcher found out what considerations are put in place while appointing a diplomatic agent to represent his or her country to a receiving state.

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[194] *M. P. Tandan Public International Law, 14th Edition.*
[195] *Akehurst A modern Introduction to International Law, 1997.*
[196] *Supra note I.*
[197] *Ian Brownilie, Principles of International Law, Cambridge University Press, 1990.*

The reaction of the receiving state to criminal offences committed by diplomatic agents depends largely on the gravity of the alleged offence.[198] However, when crimes that are more serious are committed and admonition is not considered as satisfactory punishment, it is more likely that the receiving state will request the sending state to waive the immunity of the offending diplomat so that the later could be tried in court. The request for waiver of immunity is raised when the criminal offense in question is of such a degree that if the sending state does not waive the immunity, the receiving state can no longer accept protection of the diplomat agent. The fact that waiver is a remedy of the sending state is well elaborated in ***Public Prosecutor v Orhan Olme.***[199]

Waiver must be express.[200] The rationale for this is the fact that it reduces the possibility that the receiving state mistakenly considers an oral statement from the sending state as not a valid waiver of immunity as held in the case of **High commissioner of India v Ghosh.**[201] The waiver is irrevocable.[202] It has to be borne in mind that proceedings in the same case but on different stages are to be regarded as a whole and thus one waiver is enough. The ILO (International Labour Organization) also stated that proceedings, in whatever court are considered as an indivisible whole and that immunity cannot be invoked on appeal if an express waiver was given in the court of first instance.[203] The remedy of waiver has been applied in several countries including Zambia, Colombia and the United States of America.[204]

Zambia for instance speedily waived the immunity of an official at its London embassy suspected of drug abuse in 1985. Moreover, this remedy was also exercised by Colombia to enable questioning by the police of an embassy official and one of his family members in connection with a murder inquiry. The US State Department has the practice of requesting waiver of immunity in every case where the prosecutor advises. The remedy was also applied in the case involving the second highest ranking diplomat for the republic of Georgian in the United States, Gueorgui Makharadza.[205]

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[198] *Supra note 24.*
[199] *[1987]1 ILR 6.*
[200] *Article 32 paragraph 2.*
[201] *(1960) I QB 134.*
[202] *D.H.N Johnson, International and Comparative Law Quarterly: The Rationale of Diplomatic Immunity, Volume 11, pg 1204.*
[203] *ILC, Yearbook, 1985, vol. 11, p.99.*
[204] *Rene Verk, Personal Inviolability and Diplomatic Immunity in Regard to Serious Crime, Juridica International, 2003.*
[205] *Supra note 24 at Pg. 118.*

He was involved in a tragic automobile accident that resulted in death of a sixteen year old girl, a Brazilian national on 3rd January 1997 in Washington DC. He-was driving at a high speed of eighty miles per hour and under the influence of alcohol and he was given a blood test; however, due to his diplomatic status he was released. This incident was followed by public uproar particularly when Georgian President declined to recall the diplomat. Finally, due to intense public pressure, the Georgian president agreed as a moral gesture to voluntarily waive Makharadza's immunity. The diplomat consequently pleaded guilty and currently is serving his sentence in the United States.[206]

The aspect that it is a remedy of the sending state was stated in the decision of the Court of Appeal in ***Fayed V Al Tajir.***[207] A reference was made to an apparent waiver of immunity by an ambassador made in pleadings by way of defense. ***Kerr L J*** correctly noted that both under international and English law, immunity was the right of the sending state and therefore only the sovereign could waive the immunity of its diplomatic representatives.

4.4 How Diplomatic Immunity has been abused

There have been many abuses of Humanitarian Law and customary international Law stemming from official policy decisions that loom large in history. According to Rene Veke[208], it is unfortunate that diplomats are likely to misinterpret the extent of their privileges and thus abuse their inviolability and immunity. However, such abuses may still be tolerable by the receiving state in the name of securing effective performance of diplomatic functions, if these abuses involve mere minor offences or crimes. But a question arises as to whether the receiving states and the international community have to tolerate personal inviolability and diplomatic immunity in case of serious crimes involving murder and conspiracy as well as war crimes against humanity.[209] The researcher therefore addressed such issues and examined possible solutions to these problems and possible remedies against abuses of diplomatic status.

According to Higgins it is noted that, for about 15 years it was fairly generally felt that the provisions of the Vienna Convention did, indeed provide a fair balance between the interests

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[206] *M.S., Zaid. Diplomatic immunity: To Have Or Not To Have, That Is The Question - ILSA Journal of International Practitioners, 1998, vol. 4 no 2.*
[207] *(1998) QB 712.*
[208] *Supra note 21.*
[209] *Supra note 21.*

of the sending and receiving states.[210] In many of the major capitals of the world, it came to be felt that diplomats were abusing the privileged status given to their vehicles and in particular parking illegally, causing obstructions and failing to pay traffic fines.

In the period 1974-mid- 1984, there were 546 reported occasions on which persons avoided arrest or prosecution for alleged serious offenses such as those that could carry a potential sentence of 6 months' imprisonment or greater because of diplomatic immunity. This implies that some diplomats' intentionally commit offences, because they are rest assured of their immunity against prosecution. The researcher explored possible ways in which the loopholes in the diplomatic law can be amended to make it easy for countries to handle cases of diplomatic agents who participate in serious crime.

More still, Higgins points out that, in the mid-1970s, more worrying problems were developing when certain diplomatic missions were bringing into the host country firearms through the diplomatic bags, contrary to the provisions of local law. In recent years in various western countries, there have also been terrorist incidents, in which it was believed that the weapons used were provided from diplomatic sources. It was also widely thought that certain foreign governments were promoting state terrorism against dissident exiles, through the involvement of their embassies in the country concerned. This can clearly be seen when the normal diplomatic communication with the Libyan Embassy in London was complicated by the fact that so-called revolutionary committees had taken over the embassy which they renamed Libyan People's Bureau and refused to designate a person in charge of the mission. The bizarre events and the response of the United Kingdom Government are beyond the scope of these editorial comments.

This according to the researcher was contrary to the provision on inviolability on the premises of the mission by the Vienna Convention.[211] In 2009, a Canadian junior envoy was arrested after it was reported that he spat at a traffic policeman on duty in the middle of a traffic jam in the Banana district on the outskirts of Dar-es-Salaam, Tanzania and later at a

[210] *Article 27(4) of the Convention, s provides that the bag may contain only diplomatic documents or articles intended for official use.*
[211] *Vienna Convention, Article 22(2).*

journalist. Canada's High Commissioner Robert Orr was summoned by the Tanzanian foreign ministry over the incident and decided to recall him from Tanzania.[212]

Violation of the law by diplomats has included espionage, smuggling, child custody law violations, and even murder. In London in 1984, policewoman Yvonne Fletcher was killed on the street by a person shooting from inside the Libyan embassy. The incident caused a breakdown in diplomatic relations until Libya admitted "general responsibility" in 1999.[213]

More still, diplomatic immunity can be used as a base to enhance terrorism acts. For instance, on one occasion that happened on 20th April 1984 when a bomb exploded in the luggage hail of Heathrow airport injuring 25 people. The Government reserved its position but there was wide press speculation that this was connected to the St. James's Square. Termination of diplomatic relations with Libya was scheduled for 6:00pm on 22 April and all diplomatic staff and other persons in the Bureau were to leave by midnight 29-30 April.

Various measures were announced' by the Home Secretary for tightening the exercise of his discretionary powers in respect of Libyans already in the country or wishing to enter. The Bureau was evacuated on 27th April 1984 upon which those leaving were questioned and electronically searched. Diplomatic bags that left the Bureau were not searched or scanned. The Bureau was sealed, and on 30th April 1984 was entered by the British authorities in the presence of a representative of the Saudi Arabian Embassy, and searched upon which weapons and relevant forensic evidence were found.

Diplomatic immunity from local employment and labor law when employing staff from the host country has precipitated abuse. When the employer is a diplomat, the employees are in a legal limbo where the laws of neither the host country nor the diplomat's country are enforceable. There is an inherent conflict of interest as the diplomat is the chief representative of his country and its laws and is not forced to obey local law, so that an abusive diplomat employer can act with virtual impunity. Diplomats have ignored local laws concerning minimum wages, maximum working hours, vacation and holidays as well as sexual abuse.

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[212] *33 BBC News, Canada Recalls Spitting Diplomat, 14th December 2009.*
[213] *34 BBC News, Libyan Embassy Shot Kills Policewoman 17th April 1984.*

The worst abusers have imprisoned the employees in their homes, deprived them of their earned wages, passports and from communication and access to the outside world, abused them physically and emotionally, deprived them of food and invaded their privacy. In the case of corrupt countries and abusive diplomats, it has been virtually impossible to enforce payment of wages or any standards whatsoever. South Africa for example, was criticized for claiming immunity from labor laws at their ambassador's residence in Ireland.[214]

It is noted that, another particular problem is the immunity of diplomatic vehicles to ordinary traffic regulations such as prohibitions on double parking.[215] Occasionally such problems may take a most serious turn, when disregard for traffic rules leads to bodily harm or death.[216] To illustrate how widespread this problem is,[217] an example is given of France, where between November 2003 and 2004, there were 2,590 cases of diplomatic cars caught speeding by automatic radars.

The Autobahn 555 in Germany was also nicknamed in Cologne the Diploma tenrennbahn" (Diplomatic Raceway), back when Bonn was the capital of Western Germany, because of the numerous diplomats that used to, speed through the highway under diplomatic immunity. Certain cities for instance the Hague have taken to impounding such cars rather than fining their owners. A diplomat cannot demand the release of an impounded car based on his status.

4.5 The Need to Reconsider Diplomatic Relations

Referring to the International Court of Justice, in the case of ***United Slates Diplomatic consular Staff in Tehran***[218] the ICJ defined the rules of diplomatic law as "a self contained regime who do on one hand lay down the receiving states 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 of the disposal of the receiving state to counter any such abuse". This does not reflect the possibility of the diplomatic agents to violate the provisions of the immunity when it concentrates on the agents' inviolability.

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[214] *www.irishtmes.corn (accessed on 10 June 2010), American Civil Liberties Union: ACLU Charges Kuwait Government and Diplomats with Abusing Domestic Workers.*
[215] *36 Wikipedia the Free Encyclopedia, Diplomatic Immunity:*
[216] *CNN, Georgian Diplomat Convicted in Fatal Crash, Goes Home 30 June 2000.*
[217] *38 Supra note 26.*
[218] *19803 at paragraph 86.*

In regard to the 20th April 1984 terrorist bombings at Heathrow, there was a general outrage, the public and many legislators were clearly deeply disturbed that the international law of diplomatic immunity apparently prevented the Bureau from being entered and those responsible from being arrested. More specifically, it was widely felt that diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations and that some way should be found of searching diplomatic bags that were suspected of containing either drugs or weapons.

This calls for review of the protection given the diplomatic bag.[219] Higgins further points out that, through a widespread sentiment, premises which are turned into a base for unlawful acts should not be accorded inviolability[220] implying that the agents of the receiving State may not enter them, except with the consent of the head of the mission and that a proper interpretation of the Vienna Convention should support the view that immunity and inviolability fall away when diplomats and missions abuse their positions.[221]

however, notwithstanding popular and ill- informed views to the contrary, that inviolability of premises is not lost by the perpetration from them of unlawful acts) but that if the Vienna Convention makes these desirable outcomes impossible, then the Convention should be amended or denounced. Still to note about is that, there is need for the Vienna Convention to provide for remedies not only to the diplomatic agents but also to the receiving state in case the diplomatic agent acts in breach of the diplomatic immunity particularly on the issues of relationship of general treaty, principles and the concept of self-defense towards the notions of inviolability.

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. This can clearly be seen in **Aurelius Capital Partners, LP et al v The Republic of Argentina** when on May 28th 2010, the United States Court of Appeals for the Second Circuit issued a summary order[222], which vacated an earlier order holding the Republic of Argentina in civil contempt. A previous order to provide discovery in regards to the location and movement of certain assets was

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[219] *40 Article 27(3) of the Vienna Convention provides that the diplomatic bag shall not be opened or detained.*
[220] *41 Article 22(1) of the Convention provides that "[t]he premises of the mission shall be inviolable.*
[221] *Article 22(3) "the premises of the mission shall be immune from search, requisition artachent or execution."*
[222] *Docket no. 09-250 l-ev.*

unfulfilled due to the Republic of Argentina's alleged lack of control over the Administration National de Seguridad Social who possessed this information.

The District Court then held the Republic in contempt. The researcher established what amendments could be fit into, the existing laws to protect the citizens of the receiving country from any harm that can likely be caused by diplomatic agents and the procedures that can be allowed for in self defence.

Conclusion

The laws on Diplomatic immunity have been fluctuating over the years, with no definite internationally accepted codified law in place. While the Vienna Convention has largely identified and brought the importance of diplomats to the international for a, it is insufficient in scope and practice, as it does not involve crimes committed by insurgents or actors within the receiving state but are not in control of the receiving state. Further, the convention also does not make mandatory the enforcement of the articles prescribed, and no sanctions are imposed by the international community in case of violation of the terms of the Convention. There exist differences in the immunities provided by different receiving states. This sort of disparity is based on the political as well as societal growth of that particular state. The criminal immunities provided are a more standardized between states as the violation of these legal rules would lead to a penalization by way of punishment. Such a punishment not only harms the diplomat, but also the reputation of the sending state.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The foregoing four chapters have discussed the concept of diplomatic immunity, how it came into being, its sources, and the privileges given to diplomats, their families and staff. Further it indicates the various instances of diplomatic abuse and how inadequate their remedies are.

The research concludes that diplomatic immunity has existed from time immemorial, and diplomats are provided with immunity to build international relations. However, the immunity poses a threat when on certain occasions, it is abused by some diplomats, and yet the remedies provided are not adequately addressing the abused party.

The paper also explains why diplomatic immunity is important, has been important and will continue to be important, although diplomats have time and again abused the privileges provided under the Vienna Convention. The dissertation has, for instance, illustrated abuses in respect of parking spaces, drug trafficking and abuse, assault of family members and citizens of the receiving state.

Further the dissertation has discussed the various remedies offered by the Vienna Convention when diplomatic immunity is abused which include; waiver, declaring of diplomatic agents' persona non grata and severing of diplomatic relations. It has also highlighted how inadequate these remedies particularly because some of them are optional and the fact that they do not seek to redress the transgressed individual but the state.

The following recommendations are therefore proposed to address these concerns;

5.2 Recommendations

There is need for the amendment of the Vienna Convention on Diplomatic Relations. In this regard, the dissertation has highlighted various issues that need to be- considered.

There is need to address the immense abuse of diplomatic immunity. There is need to impose a requirement for the buying of insurance policy by diplomat and the staff.

The establishment of claim funds' to allow for enumeration of compensation for damages suffered from criminal acts is necessary.

There is also need to stress international co-operation by isolating offending nations to develop a fund to compensate victims of diplomats of sending state and suing offending diplomats in their sending state.

Most proponents favor amending the Vienna Convention to give power to the International Court of Justice to suspend a non-complying country from the United Nations.[223] For this to be effective countries should provide monetary bonds to the ICJ as a security against offences committed by their diplomatic personalities. Worth noting is the aspect that the ICJ is likely to face lack of co-operations among nations.[224] Moreover, there .has also been the suggestion for the establishment of a permanent international diplomatic court.

Such a proposal to amend the Vienna Convention calls for flexibility in detaining and searching suspected diplomatic baggage with opportunity to the receiving state to arrest and try suspected diplomatic wrongdoers.

Lastly, the amendment of the Vienna Convention should take into consideration the aspect of excluding immunity in case of grave crimes, and limiting immunity to official acts.

5.2.1 Purchase of Insurance

The insurance is to be purchased by the sending state for its diplomats through a pool of supervised private insurers. To solve the problem of insurance companies being reluctant to take the potentially high risk in writing such insurance, the companies should be compelled to insure to satisfy the larger goal of international harmony.

Any country that allows its insurance to lapse would have its diplomats declared persona non-grata. Moreover, victims would take direct action against the insurer to circumvent a diplomatic claim of immunity. However for this proposal to be effective states are supposed to come to an agreement as to who is to supervise and compel the insurers.

5.2.2 Creation of a Permanent International Court

Ideally, the alleged offender would be brought to answer for the crime in front of his peers. In order for this to be implementable, it must be possible to bring the accused to court to answer

[223] *Supra note 24 at 118.*
[224] *Ibid.*

for the crime. Secondly, a jury has to be formed composed of enough countries to prevent bias.[225] Thirdly, one must account for a drastic difference in the underlying fabric for each countries value. Fourthly, the maintenance of the infrastructure for the international court needs to be considered especially in regard to who is going to pay for it.

Moreover, other countries could take the United States example of making it a crime for someone to misuse diplomatic immunity for example in 1987, the senate of United States passed a resolution making it a felony for anyone with diplomatic immunity to use a firearm to commit a felony with the exception of self-defense. Several factors have to be considered in order to enforce this and other recommendations. They involve the aspect of sovereignty.[226]

5.2.3 Isolation of the Offending State

This is an attractive solution mainly because most countries would opt to avoid abuse by their diplomats than agree to the long-term economic and political isolation by their trading partners when the economic well being of its own citizen is uncertain. However, before implementation of such a policy, several aspects have to be agreed upon including; when and how to isolate an offending country, who decides on the isolation of an offending nation and how and for what reason the isolation is to be lifted.

5.2.4 Excluding Immunity in Case of Grave Crimes

In case of serious offenses the immunity of a diplomat should not become a basis for impunity. This might cause problems since there is no universal definition of the different degrees of crimes, as it is up to the national laws of different individual states to divide crimes according to the gravity. The simple fact is that an offence considered minor and legal in one state may be considered major and criminal in another.

Such serious crimes could include crimes against humanity and war crimes. To solve the above problem states could refer to international instruments as they contain descriptions of possible serious crimes that many states have agreed upon.

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[225] *http://law.jrank.org/pages/6137/Diplomatic-Immunity.html">Diplomatic Immunity (accessed on 18 June 2010).*

[226] *C. W.Jenks, International Immunities, London, Stevens & Sons, 1961, p.12.*

5.2.5 Limiting Immunity to Official Acts

Diplomatic agents should enjoy their diplomatic immunity only in connection with actions forming part of their official functions.[227] That would mean that any illegal acts, which are personal in nature or committed in connection with private acts are under the jurisdiction of the receiving state and the latter could adjudicate over the offending diplomat. Such offences could include murder, rape, assault and battery causing serious bodily injuries, kidnapping, war crimes and crime against immunity.

5.2.6 Hierarchy of Norms

One way of excluding diplomatic immunity in case of serious crimes is to establish hierarchy between norms granting such immunity and norms protecting certain fundamental value such as human life and then show that the latter norms have priority over the former norms. This line of argument is to be followed most likely in the case of human rights and international humanitarian law, which may not be derogated from at all or in on particular occasions if need be.

5.3 Conclusion

In light of the arguments made in the dissertation which examine criminal activities engaged by diplomats, this study makes a strong case for the revisiting of diplomatic immunity. The dissertation is a contribution to the efforts towards controlling serious crimes as well as governing the conduct of the diplomats. Thus the study stimulates further debate for possible amendments of the law on diplomatic immunity and recommends the mandating of courts to make diplomats accountable for their misconduct.

[227] *S.L Wright, Diplomatic: A Proposal For Amending The Vienna Conventions To Deter, Violent Criminal Acts- Boston University International LAW Journal, 1987, vol. 5 pp. 177 – 211.*

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