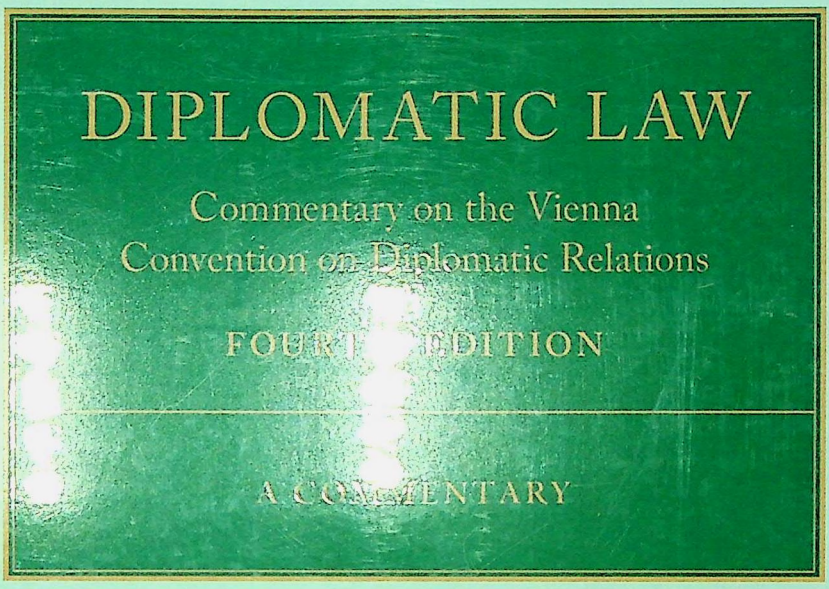

EILEEN DENZA

OXFORD

Diplomatic Law

Commentary on the Vienna Convention on Diplomatic Relations

FOURTH EDITION

EILEEN DENZA

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First published 2016
First published in paperback 2018

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 978–0–19–870396–9 (Hbk.)
ISBN 978–0–19–882565–4 (Pbk.)

Acknowledgements

I should like to express my gratitude—

to the late Sir Francis Vallat, Legal Adviser to the Foreign Office and Leader of the United Kingdom Delegation to the 1961 Vienna Conference, who first set me as a novice Assistant Legal Adviser to work on the development of the law of diplomatic relations. What was originally to have been a joint article grew and grew into my first edition;

to the late Sir Vincent Evans, his successor as Legal Adviser to the Foreign and Commonwealth Office, for his encouragement during the preparation of what became the first edition of *Diplomatic Law* and for very helpful comments on the manuscript;

to Professor Richard Gardiner, formerly a Legal Counsellor in the Foreign and Commonwealth Office, who preceded me to University College London, inveigled me into helping him to teach an LLM course on Foreign Relations Law in order to retain my interest in diplomatic law and to focus on a second edition, and who has continued to be a source of information and encouragement;

to the late Dr Luke Lee, a friend from our days at the Harvard International Law School, who invited me to assist and to contribute to his second edition of *Consular Law and Practice*, published in 1991, a valuable warm-up for the second edition of my own book;

to Oxford University Press, who galvanized me into a second edition and who by a judicious blend of carrot and stick have steered me along the road to the third and now the fourth. Thanks in particular to John Louth, to Dr Gwen Booth and—for this fourth edition—Merel Alstein, Emma Endean, and Emma Slaughter;

to the Department of State in Washington, who were immensely helpful in the provision of material not otherwise available and forthcoming in discussing difficult points of interpretation. Warmest thanks to Linda Jacobson, Assistant Legal Adviser for Diplomatic Law and Litigation, to Lawrence Dunham, Assistant Chief of Protocol, to Richard Massey of the Office of Foreign Missions, and to Stephen McCreary and Gilda Brancato of the Office of the Legal Adviser for their help with the second edition, and to James Gresser, Attorney Adviser in the Office of the Legal Adviser, and his colleagues for assistance with the third and fourth;

to Protocol Department in the Foreign and Commonwealth Office in London and to Joanne Foakes then Legal Counsellor in the FCO who responded generously to queries on UK policy and practice for the second and third editions and to Chanaka Wickramasinghe, Legal Counsellor, FCO, who has helped me with the fourth.

Eileen Denza
September 2015

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Abbreviations

AC	Appeal Cases (Law Reports)
AD	Annual Digest of Public International Law Cases
AFDI	Annuaire francais de droit international
All ER	All England Law Reports
AJIL	American Journal of International Law
ALR	Australian Law Reports
ARIEL	Austrian Review of International and European Law
ASDI	Annuaire suisse de droit international
AYIL	Australian Yearbook of International Law
B & C	Barnewall & Cresswell (English Reports)
BDIL	British Digest of International Law
Burr	Burrow (English Reports)
BYIL	British Yearbook of International Law
Can YIL	Canadian Yearbook of International Law
CB	Chief Baron (of the Exchequer)
Ch	Chancery (Law Reports)
CILJ	Cambridge International Law Journal
Cm	Command Papers 1986–
Cmd	Command Papers 1919–56
CMLR	Common Market Law Reports
Cmnd	Command Papers 1956–86
Crim LR	Criminal Law Reports
Dall	Dallas
DC	District of Columbia
DLR	Dominion Law Reports (Canada)
DUSPIL	Digest of United States Practice in International Law
ECR	European Court Reports
E & E, El & El	Ellis & Ellis (English Reports)
FCO	Foreign and Commonwealth Office
FO	Foreign Office
F 2d, 3d	Federal Reporter 2d, 3d Series
F Supp	Federal Supplement
GA	General Assembly
Havana Convention	Convention on Diplomatic Officers, Havana
HC Debs	House of Commons Debates (Hansard)
HL Debs	House of Lords Debates (Hansard)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Court Reports
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports

Imm AR	Immigration Appeal Reports
ITU	International Telecommunications Union
KB	King's Bench Division (Law Reports)
K & J	Kay & Johnson (English Reports)
LNTS	League of Nations Treaty Series
Misc (NY)	New York Miscellaneous
NYIL	Netherlands Yearbook of International Law
NYS	New York State
NY Supp	New York Supplement
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
P	Probate (Law Reports)
QB, QBD	Queen's Bench Division (Law Reports)
RBDI	Revue belge de droit international
RGDIP	Revue générale de droit international publique
SI	Statutory Instrument
SR & O	Statutory Rules and Orders
SYIL	Spanish Yearbook of International Law
TIAS	Treaties and International Agreements (US)
UKMIL	United Kingdom Materials in International Law
UKTS	United Kingdom Treaty Series
UN Doc	United Nations Document
UNTS	United Nations Treaty Series
USC	United States Code
USCA	United States Court of Appeals
WA	Written Answers (Hansard)
WLR	Weekly Law Reports

INTRODUCTION

The Vienna Convention on Diplomatic Relations codifies the rules for the exchange of embassies among sovereign States. These rules protecting the sanctity of ambassadors and enabling them to carry out their functions are the oldest established and the most fundamental rules of international law. The Convention is a cornerstone of the modern international legal order.

When the first edition of *Diplomatic Law* was completed the Vienna Convention had been in force for eleven years, and 112 States were Parties. Even then it was apparent that the Convention had received an overwhelming vote of confidence from the international community. The fourth edition of *Diplomatic Law* is being completed fifty-one years after the Convention's entry into force and 190 States are Parties. This is close to the entire number of independent States in the world. The Vienna Convention has become a universal Convention, and its provisions, even where at the time of their adoption they clearly marked progressive development of custom or resolved points where practice conflicted, are now regarded as settled law. There have been onslaughts on the protected status of diplomats, from those asserting that it cannot be justified in the face of abuse of immunity and from those claiming that it must give way when it appears to conflict with claims to access to justice or to human rights. In recent years diplomats have become conspicuous and highly vulnerable targets for terrorist attack. In the face of these attacks the Convention has survived unscathed.

The Vienna Convention on Diplomatic Relations has also continued to be used as a point of reference in the development of related areas of international law. Many of its provisions were adopted, with appropriate modifications, in the Vienna Convention on Consular Relations, and cases on the construction of particular phrases in one of the two related Conventions are often cited as authorities in the context of the other. With very few modifications, its provisions were adopted in the New York Convention on Special Missions. It has been used extensively to determine the treatment to be accorded to Heads of State in their personal capacity and to High Officers of and representatives to international organizations. As international rules on state immunity have developed on more restrictive lines there has always been a saving for the rules of diplomatic and consular law and an increasing understanding that although these sets of rules overlap they serve different purposes and cannot in any sense be unified.

There are a number of reasons why the Vienna Convention has been so successful in winning both formal support and a remarkably high degree of observance. First, the rules of law codified in the Convention had long been stable. By the time they were described by Vattel in *Le Droit des Gens*, published in 1758, they had developed as far as they could without the assistance of international agreements, and they remained constant for the following 200 years. Diplomatic law in a sense constitutes the procedural framework for the construction of international law and international relations. It guarantees the efficacy and security of the machinery through which States conduct diplomacy, and without this machinery States cannot construct law, whether by custom or by agreement on matters of substance. It was therefore entirely natural that as the modern legal order of sovereign States grew up, the rules for the exchange and the treatment of envoys between them were

the earliest to be firmly established as customary law. Subsequent developments in the functions of governments, the conduct of international relations, in trade, travel, and communications altered in only marginal respects the main functions of diplomatic missions—to represent the sending State and protect its interests and its nationals, to negotiate with the receiving State, to observe, and to report. The basic rules which enabled those functions to be carried out have therefore continued largely without change.

Secondly, reciprocity forms a constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State. Its own representatives abroad are in some sense always hostages. Even on minor matters of privilege and protocol, their treatment may be based on reciprocity. For the most part, failure to accord privileges or immunities to diplomatic missions or to their members is immediately apparent and is likely to be met by appropriate countermeasures. Only over the question of communications does this not apply. Sophisticated developments in electronic technology are not available equally to all States, and it has been in regard to communications that there have been conflicts of interest between States as well as widespread violation of the principles of the Convention. In the last few years there is more publicly available evidence of this disregard, but there is no sign of any willingness by States to modify the underlying rules or on the other hand to desist from intercepting each others' communications.

Thirdly, those in the International Law Commission who began the preparatory process which led to the Convention, as well as those who represented their governments at the Vienna Conference, never lost sight of the need to find solutions which would be acceptable to governments and to national Parliaments as a whole. The long dialogue between the International Law Commission, national governmental experts, and the Sixth Committee of the General Assembly was characterized not by the driving towards any political objective but by attentive listening to criticism and a search for realistic compromise. From the careful Commentary produced by the Commission on its draft articles and the published records of its debates it is usually easy to cast light on the background, meaning, and purpose of the final provision. The records of the Vienna Conference are far less helpful in showing the general understanding or purpose of individual amendments. But they do show that on a number of difficult occasions where a controversial solution could have been forced through by a vote, delegates stepped back and remembered that their first duty was to negotiate a text which could be widely supported. The question of the right to install and use a wireless transmitter on embassy premises was a case in point. The negotiators of the Vienna Convention did not forget that the international legislative process cannot be controlled by majority vote but depends ultimately on ratification by national Parliaments looking to national self-interest. Later negotiators of other law-making conventions (in particular the Convention on Special Missions) were not so successful in this respect. The long process by which the new United Nations Convention on Jurisdictional Immunities of States and their Property was prepared was similar in terms of care for national interests and realism, and gives some ground for optimism that this Convention may over time gain widespread acceptance by the international community.

Progressive development of the law

The Vienna Convention is a comprehensive formulation of the rules of modern diplomatic law. None of the earlier attempts at multilateral codification—the Vienna Regulation of 1815 regarding the classes and precedence of heads of mission, the

Resolutions adopted by the Institute of International Law in 1895 and 1929, the Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932—had covered the field so thoroughly. Almost every point was covered on which a legal rule existed or on which there was advantage in bringing into harmony divergent rules of state practice. There are a few matters only—such as *droit de chapelle*, embassy bank accounts, diplomatic asylum—omitted for various reasons from its provisions. On diplomatic asylum it is unlikely that specific rules going beyond those of inviolability of mission premises and the duty of diplomats to respect local laws and regulations could have been formulated by the Vienna Conference to the satisfaction of the majority of States. On embassy bank accounts, cases in many jurisdictions have built up a clear consensus now crystallized into customary law.

Six provisions of the Convention may be singled out as having been significant developments of the previous customary international law.

Article 22 established without any specific exception the inviolability of mission premises. The Convention leaves it in doubt exactly when inviolability begins and ends. But the clear description of the implications of inviolability, and the provision that no pretext of public emergency or abuse by the embassy of its immunity may justify entry by the authorities of the receiving State were crucial developments in the law. In spite of increases in mob demonstrations and violence directed at embassies, as well as in terrorist seizures of embassies themselves, this prohibition has remained central.

Article 27 sets out comprehensive rules for the protection of all forms of diplomatic communication—the most important to the functioning of a diplomatic mission of all its privileges and immunities. As with diplomatic premises, the Convention altered the previous customary law which had permitted supervised search of suspect diplomatic bags, with the sending State retaining the option of returning the challenged bag. The Convention provided simply that the diplomatic bag 'shall not be opened or detained'. The newer States seemed to gain a victory in the requirement that the installation of a wireless transmitter requires the consent of the receiving State, and this question was one of the most controversial at the Vienna Conference. But the assertion in the Vienna Convention of the right of the sending State to communicate by 'all appropriate means' was in the longer term probably more significant. Methods of communication have proliferated, undetected interception has become easier, so that the basic principle of the right to free communication is even more important as a guide to lawful conduct.

Article 31 finally settled what were the exceptions to the immunity of a diplomat from civil jurisdiction. The functional approach to immunity is apparent in the establishment of exceptions relating to the diplomat's private holding of real property in the receiving State and his professional or commercial activities there. The first of these exceptions has given rise to uncertainty and to much litigation over its scope. But it does strike a balance between the need to protect a diplomat from frivolous or malicious lawsuits which could impede his effectiveness in his post and the conflicting need to minimize abuse of diplomatic immunity where it is unjustified or might leave a claimant with no possible forum to resolve disputes over land. Article 31 also made an important change in the law in giving diplomats exemption from the duty to give evidence as a witness.

In Article 34 the functional approach to privileges is also evident in all the exceptions established to the basic principle of exemption from taxes. These exceptions fall into three categories—matters unrelated to a diplomat's official activities or to his normal life in the receiving State, dues which are not truly taxes but charges for services rendered, and taxes where refund or exemption would be administratively impractical. The Convention

established a clear framework which national authorities must apply to their own tax laws. Generally speaking it relieves the migrant diplomat and his family from the need to grapple with the tax regimes of successive host States while minimizing the possibility of his profiteering from extraneous activities or investments.

Article 37 of all the Convention provisions proved the most difficult to resolve in view of the great diversity of approach in different States to the treatment of junior staff of diplomatic missions and families. The only rule which could be said to be previously established customary law was the immunity of administrative and technical staff in respect of official acts. Even the terminology for the classification of junior members of a mission was extremely varied. Article 37, once again rigorously applying the principle of efficient performance of the functions of missions, limited the civil immunity of administrative and technical staff to acts performed by them in the course of their duties, while allowing them full immunity from criminal jurisdiction. Service staff were accorded an absolute minimum of privilege and immunity. For States which, like the United Kingdom and the United States, under their previous domestic law accorded full privileges and immunities to all members of the 'ambassador's suite', Article 37 drastically cut the armies of privileged persons in their capitals who by sheer numbers as well as by occasional irresponsibility threatened to bring into disrepute the entire system of diplomatic immunity. For some States which accorded only immunity for official acts to all subordinate staff, it would lead to increased privileges and immunities and was strongly resisted—though only a very few States made reservations in respect of the regime to be accorded to administrative and technical staff. For all States Article 37 offered a clear compromise rule to replace the previous confusion.

Finally, Article 38 debarred from all privileges and immunities (beyond the minimum of immunity for diplomats in regard to their official acts) nationals and permanent residents of the receiving State. The exclusion of permanent residents along with nationals of the receiving State was a new rule for most States and the meaning of the words was not made clear by the negotiators. The loss of privileges and personal immunities by permanent residents was, however, fully justified on grounds of principle. Nationals and permanent residents of the receiving State are much less likely to be career diplomats and the justification for according them extensive tax and customs privileges as well as exemption from social security obligations is correspondingly weaker. In general, they are unlikely to be harassed for political motives. In their case the alternative remedies which to some extent compensate for immunity from jurisdiction—the possibility of action in the sending State or recourse to the sending State itself—are much less likely to be effective. So long as nationals and permanent residents of the receiving State are accorded immunity for their official acts, their effectiveness in carrying out their functions is safeguarded.

Of these six provisions of the Vienna Convention which have been singled out as the clearest cases of progressive development of the law, the first two increased for the benefit of diplomatic missions themselves the degree of immunity over what was previously accorded. In the latter four provisions on the other hand, all of which relate to individual members of missions, the effect in most States was to decrease the privileges and immunities enjoyed by diplomats, other members of diplomatic missions, and their families. The unifying thread which ran through all these changes was the attempt to ensure, in the words of the Preamble to the Convention, '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'. The

functional approach was not regarded by those who prepared the Convention as merely an academic rationale—it guided them at every crucial point. The general effect was to tighten the protection given to the mission itself—its premises, communications, property, and archives. On the other hand, it reduced the occasions when privilege or immunity could be invoked in regard to essentially private activities of individuals, and it reduced the protection and privileges of junior members of the mission and of those who belonged to the receiving State. In these cases it was decided that possible abuse by mission staff of their privileges and immunities was more likely than their harassment for political motives.

How the Convention regime has changed

Revisiting the Vienna Convention on Diplomatic Relations for later editions of this book, the most striking impression is how it has stabilized the law. Reservations to the Convention—almost all to the provisions precluding search or detention of the diplomatic bag or to the privileges and immunities given to administrative and technical staff—are of very limited importance. In some cases they have been formally withdrawn, in others they have simply never been applied, and in others the Convention rules are applied ostensibly on the basis of reciprocity. To be sure of the meaning of many of its provisions it is still important to go back to the customary law, and many of the ambiguities in the Convention have been clarified by consistent state practice now hardened into new custom. Examples include the meaning of the terms 'members of the family forming part of the household' and 'permanently resident in the receiving State'. For most purposes the Convention has become the law. There were in earlier years many cases where national courts based their decisions almost entirely on the Convention even where one or other of the States involved was not yet a Contracting Party, and the same has been true of intergovernmental disputes. Reciprocity is still of great practical importance—but the latitude given by the Convention for restrictive applications, for custom, and for reciprocal agreements seems to have been used mainly as a method of forcing deviant States back into line with the Convention rules. Although many States wished to preserve more favourable treatment already extended on a bilateral basis, there is very little evidence of Article 47 being used as the basis for a new network of special regimes. In this respect diplomatic law is very different from consular law or the law relating to special missions or to international organizations.

The second point which can be made is that the Convention has proved remarkably resilient to external attacks. In the United Kingdom and in the United States in particular, the effect of a small number of appalling or bizarre instances of abuse of diplomatic immunity during the 1980s, and of widespread resentment of the flouting by diplomats and other privileged persons of parking restrictions, was a cry for revision of the Convention or for new ways of combating perceived abuse. It would indeed have been possible, had the political will been generally present, to have achieved some reduction of the protection given, in particular, to the diplomatic bag. But Western governments were too well aware of the overall need for protection of their diplomats and their missions abroad against terrorism, mob violence, and intrusive harassment from unfriendly States to dispense with the essential armour provided by the Vienna Convention. Their response was to tighten administrative control and supervision of foreign missions, to use the remedies already provided in the Convention more vigorously even where this carried

short-term political disadvantages, to invoke countermeasures on a basis of reciprocity, and to build up coalitions to apply pressure on States flouting normal rules of international conduct. Gradually these measures could be shown to have achieved some results, the instances of abuse of immunity came to be seen in a wider context, and the cries against diplomatic immunity died away. The Convention was left intact and in truth strengthened by the systematic re-examination it had undergone. Even in regard to diplomatic bags and couriers it was ultimately accepted that there was no general will to modify the Convention rules or to inflate the essential immunities already given to diplomatic couriers. In the past few years the increase in violence in many States has made the need for special protection even more obvious, but the result has often been the closure of permanent missions and the use of special defensive measures such as the use of private security firms and barriers preventing normal access to embassies.

In recent years there have also been claims that immunities—in particular those of Heads of State or Ministers which are less clearly delineated than those of diplomats—must cede place to human rights such as the right of victims to access to justice. These rights are said to have higher value as *ius cogens*. The *Pinochet* and *Arrest Warrant* cases raised as many questions over this conflict as they resolved. The clear description in Article 3 of the Vienna Convention of the functions of diplomatic missions, as well as judicial pronouncements emphasizing the unchallenged validity of rules of personal immunity for those still in office have, however, ensured that the impact of this challenge on the Convention regime has been very limited. In most countries it is accepted that the protection of human rights and the monitoring of human rights performance is central to diplomacy and properly within the diplomatic functions of observation and protection, so that—as noted below—the prohibition in Article 41 on diplomats interfering in the internal affairs of the receiving State is gradually becoming more circumscribed.

There is now a wealth of case law on the interpretation and application of many provisions of the Convention. The availability of so many of these cases in the International Law Reports has been of enormous importance in assessing the Convention as it now stands. Among the most interesting are those cases—particularly in the United States and in Australia—in which national courts have tried to balance the rights of embassies to protection against intrusion or damage, disturbance of their peace, and impairment of their dignity with the often conflicting human rights or constitutional rights of demonstrators to freedom of assembly and freedom of speech. Other important cases illustrate the way in which issues of diplomatic and of sovereign immunity are increasingly intertwined. More and more often, as state immunity has been cut back by national legislation reflecting the changing role of the State and the changing requirements of international law, plaintiffs find that it is profitable to sue an ambassador or a diplomat and in the same proceedings also to sue his sending State. These cases show how the differing reasons for diplomatic and state immunity may lead to different answers to the question of the jurisdiction of a national court. Some parts of this Commentary on the Convention have been completely rewritten so as to take account of the changing law on state immunity—though this book does not pretend to address questions of state immunity except where they are inextricably intertwined with the interpretation of the Vienna Convention. The adoption and signature by a substantial number of States of the UN Convention on Jurisdictional Immunities of States and their Property has helped to clarify some uncertainties in regard to the Vienna Convention on Diplomatic Relations. One area where this is so is that of employment disputes brought by members of a mission

or private servants of diplomats against the sending State—numerically the largest class of cases in national courts raising questions of state immunity.

Evidence of recent state practice on the Convention in many capitals is now widely available in national journals, monographs, and in the press. The first edition of *Diplomatic Law* as it admitted was heavily weighted in favour of UK practice. Since the United Kingdom was an early and active participant in the Convention regime faced with the need to formulate its interpretations from scratch, and the book was written from within the Foreign and Commonwealth Office in London by one of the labourers in this task, this bias was unsurprising. The second, third, and fourth editions range much more widely—but it is remarkable how frequently the UK practice established early in the life of the Convention has been broadly confirmed or followed by other States which were later in ratifying or acceding to the Convention. The UK approaches to the definition of 'member of the family forming part of the household' and of 'permanently resident', to take two examples, have been closely followed elsewhere. There is now extensive and valuable material on US practice publicly available through cases, through the Digest of United States Practice in International Law, and the American Journal of International Law. The author was most fortunate in the assistance provided directly by the State Department and the Office of Foreign Missions in confirming and supplementing this material for later editions. Internet sources, in particular the material now available on the State Department website and websites of other ministries of foreign affairs, have also been of great value in preparing the third and fourth editions.

The practice illustrates how very limited are the occasions when even under the most extreme provocation States have deliberately infringed or condoned the infringement of inviolability of premises, archives, or diplomatic bags. It is submitted that insofar as these few instances can be justified it must be on a basis of self-defence or of the overriding sanctity of human life. In the most fundamental aspects, this situation has not changed since the sixteenth century, when against the background of profound conflicts of religion and of numerous plots by ambassadors to bring about the overthrow of the sovereign to whom they were accredited, those sovereigns resisted advice from lawyers that treason justified exceptions to the inviolability of those ambassadors and confined themselves to expelling them. The longer term interest in the sanctity of envoys even then outweighed the short-term interest in trial and punishment. The detention of the US hostages in Tehran in 1979 and 1980 was a terrible aberration from this general pattern, and later incidents have shown Iran continuing to be cavalier in its approach to its Convention responsibilities. There is however nothing in the practice of other States to suggest that these events altered the law in any way. Threats to the security of diplomats and embassies are now so frequent and serious as gravely to impede their proper functioning. When embassies are forced to retreat into fortified bunkers and to limit access by the public, ambassadors cannot act effectively as the eyes and ears of the sending State. These threats do not, however, come from governments and they do not demonstrate change in compliance by States Parties to the Convention.

Study of recent practice shows, however, that there is now much greater flexibility among States in how they conduct their diplomatic relations. A relatively new feature is that most States maintain diplomatic relations with the majority of those other countries in the world which they recognize as States. Formerly States did not in general establish diplomatic relations with one another unless they sought to send and receive permanent missions. The modern practice by contrast is that establishment of formal diplomatic

relations, if it does not actually constitute recognition of a new State, follows hard upon such recognition. The establishment of diplomatic relations is, however, not necessarily followed by the establishment of permanent missions. Almost all States are under constraints as to their expenditure which preclude the establishment of full embassies in all the States with which they have diplomatic relations. The Convention offers a range of more limited alternatives—multiple accreditation under Article 5 or Article 6, and protection of interests under Article 45 where relations have been broken or under Article 46 where they may never have been established. Virtual embassies are a new possibility for smaller States. There is increased use of all these options. When relations deteriorate it is increasingly the practice to recall an ambassador for consultations or to recall the entire mission rather than to proceed to a formal breach of diplomatic relations. For all these situations the Convention makes clear provision, and its flexible framework allows a full mission to be set up or enlarged quickly. Flatpack missions designed for rapid response to emergency situations have become part of the new diplomacy. States share premises and information in order to cut costs and to function more effectively.

Two provisions of the Vienna Convention have been exceptions to the generally high standard of compliance. The first is Article 26 requiring a receiving State to ensure to members of diplomatic missions freedom of movement and travel within its territory. Many Communist States on ratification of the Convention continued their previous practice of barring large tracts of their territory to diplomats not given special permission. Though it was clear that these travel restrictions could hardly be justified as a 'restrictive application of the Convention' but were rather a breach of its provisions, there was very little diplomatic protest or recourse to remedies such as expulsion or breach of diplomatic relations. Instead, other States responded with precisely reciprocal restrictions of their own, elaborately policed. The problem has now largely vanished, but as a result of the disappearance of restrictions on movement in States which are no longer Communist rather than as a result of more robust reliance on Article 26. Civil wars and insurrections have become a far more serious obstacle to the free movement of diplomats.

Secondly, the fundamental duty on the receiving State under Article 27 to 'permit and protect free communication on the part of the mission for all official purposes' appears to be very widely disregarded by those States which have the technical capacity to intercept embassy communications. Discovery of implanted listening devices was a frequent occurrence during the Cold War. As with restrictions on free movement and travel, States did not generally respond to these discoveries by closing missions but rather by improving their own physical and technical defences against intrusion. Since the ending of the Cold War there have been fewer public exchanges between States complaining of violation of their right to free and secret communication, but there is increasing evidence of widespread disregard of the secrecy of diplomatic communications. Thus, for example, it was disclosed in 2001 that the FBI not only built a surveillance tunnel under the Embassy of the Soviet Union but organized conducted tours to demonstrate its listening capacities. There were widespread allegations of bugging, in particular by the United States, of fellow members of the Security Council during the diplomatic efforts in 2003 to secure a United Nations resolution explicitly authorizing the further use of force in Iraq. The revelations by WikiLeaks have confirmed the scale of disrespect for the confidentiality of diplomatic communications.

Finally, a matter of increasing controversy is the tension between the duty of a diplomat under Article 41 of the Convention not to interfere in the internal affairs of the receiving

State and the opinion of many liberal States that human rights in all countries are a matter of legitimate international concern whose active promotion is a major object of their foreign policy. Thus, for example, in 2000 Burma (Myanmar) accused the British Ambassador of overstepping 'universal diplomatic norms' by trying to make contact with the leader of the National League for Democracy Party, Daw Aung Suu Kyi, but the ambassador was strongly backed by the UK Government who stressed that human rights were a matter of general concern. The United States in recent years has openly supported non-governmental organizations in Belarus opposed to the Communist regime of President Lukashenko while withholding support from opposition political parties on the basis that this was prohibited by law. Ambassadors tread a delicate line in balancing their duties to promote universal human rights and to refrain from interference in local affairs.

The object of the book

The fourth edition of *Diplomatic Law* is, like its predecessors, a commentary on the Vienna Convention on Diplomatic Relations. It is intended principally as a practitioner's handbook. Each Article or group of Articles is placed in the context of the previous customary international law, the negotiating history is described insofar as it remains illuminating, ambiguities or difficulties of interpretation are analysed, and the subsequent state practice is described. It is impossible for a single commentator to cover state practice in relation to the Convention in a comprehensive way, and this Commentary is inevitably weighted in favour of UK and US practice. Practice in other States is, however, also covered insofar as it can readily be ascertained from materials in English, French, German, or Spanish, from the Press, from the increasing number of international law journals, Digests of State practice, and Internet sites, or from cases reported in the International Law Reports, and insofar as it illustrates how the Convention itself is interpreted and applied.

PREAMBLE

The States Parties to the present Convention

Recalling that people of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

The Preamble to the Vienna Convention on Diplomatic Relations has two important legal functions—to state the view of the participating States on the theoretical basis of diplomatic privileges and immunities, and to make explicit the relationship between the Convention and customary international law.

During the debate in the International Law Commission in 1957 on the draft articles prepared by the Special Rapporteur, Sir Gerald Fitzmaurice expressed the view that it would be useful to incorporate into the articles the view of the Commission on the basis of diplomatic privileges and immunities. The Rapporteur in his Commentary had set out the main theories—in particular the exterritoriality theory, the representational theory, and the theory of functional necessity. While acknowledging the important influence they had had on the development of the law, he had expressed criticism of all of them as the sole justification or basis for immunities, and he had put forward no view on their relative merits.[1] Sir Gerald Fitzmaurice himself expressed the conviction that the theory of functional necessity was the correct one:

> The theory of exterritoriality would not bear close examination, and the other opinions were open to serious criticism. The functional theory, on the other hand, though it had been criticized, was very near to the truth, for the simple reason that, in the last analysis, it was impossible for a diplomatic agent to carry out his duties unless accorded certain immunities and privileges.

Other Members of the Commission, however, were opposed to an express statement regarding the theoretical basis of privileges and immunities, on the ground that such theories did no more than attempt to explain rules and principles already in existence, and

[1] UN Doc A/CN 4/91, AEF Sandström, Special Rapporteur, *Report on Diplomatic Intercourse and Immunities* at pp 11–13.

that decisions on the interpretation and application of those rules were based less on theories than on appraisals of fact.[2]

In consequence, the Commission confined itself to including in the Commentary on its articles the following non-committal passage:

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the 'exterritoriality' theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the 'representative character' theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.
(2) There is now a third theory which appears to be gaining ground in modern times namely, the 'functional necessity' theory which justifies privileges and immunities as being necessary to enable the mission to perform its functions.
(3) The Commission was guided by this third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.[3]

At the Vienna Conference five proposals for a Preamble to the Convention were put forward. Hungary made a proposal which gave the appearance of a restatement of the principles of peaceful co-existence.[4] It included the statement that 'differences in constitutional, legal and social systems by themselves shall not prevent the establishment and maintenance of diplomatic relations'— which could have been misleading in the light of the rule clearly set out in Article 2 of the Convention that the establishment of diplomatic relations takes place by mutual consent. The five-power proposal which formed the basis for the Preamble was compiled from a variety of sources and constructed mainly for political effect, but it had the merit of stating clearly that the purpose of diplomatic privileges and immunities is 'to ensure the efficient performance of the functions of diplomatic missions'.[5]

Two important changes were made to this proposal before it was finally adopted by the Conference. The delegate of the Soviet Union reminded delegates that the International Law Commission had not endorsed the functional necessity theory as the sole justification for privileges and immunities, and he succeeded in incorporating by oral amendment to the text a reference to the theory that privileges and immunities are granted to diplomatic missions as representing States. The addition might be thought to confer in cases of difficulty some advantage to sending States at the expense of receiving States, but it accurately reflected one aspect of reality which continues to be relevant. The omission of any reference to the 'exterritoriality' theory may have finally discredited it except as a fiction of some historical importance. Exterritoriality continues, however, to enjoy an astonishing afterlife in popular consciousness.

Secondly, Switzerland succeeded in incorporating into the text of the Preamble a statement of the principle that the rules of customary international law should continue

[2] *ILC Yearbook* 1957 vol I pp 2, 3, and 8.
[3] *ILC Yearbook* 1958 vol II pp 94–5.
[4] UN Doc A/Conf 20/C 1/L 148.
[5] UN Doc A/Conf 20/ C 1 /L 329 (Burma, Ceylon, India, Indonesia, and the United Arab Republic); Kerley (1962) at p 93; Satow (5th edn 1979) paras 14.2, 3, and 4; Barker (1996) ch 3; Salmon (1994) paras 276 and 279.

to govern questions not expressly regulated by the Convention. Several delegates opposed this on the ground that it was superfluous, but the view of the majority was well expressed by the delegate of Israel: 'Even though it might be self-evident that the rules of customary international law would continue to operate in the absence of specific provisions on a particular point, that fact should be expressed in order to emphasize that there was no intention to stifle the development of diplomatic law.'[6] Many of the remaining pages of this Commentary will show the wisdom of this reference to the continuing role of customary international law in clarifying and elaborating the rules of the Vienna Convention. The development of diplomatic law has in no way been stifled by the Convention but rather constructively channelled.

[6] UN Docs A/Conf 20/C 1/L 322 subpara 1, A/Conf 20/14 pp 227–30; Bruns (2014) pp 131–5.

DEFINITIONS

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;
(b) the 'members of the mission' are the head of mission and the members of the staff of the mission;
(c) the 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
(d) the 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;
(e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;
(f) the 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission;
(g) the 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission;
(h) a 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
(i) the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Personnel

The definitions clause of the Convention was treated at the Vienna Conference as of central importance, and has given rise to some difficulties of interpretation and application, and yet until a comparatively late stage in the preparation of the draft articles they contained no definitions at all. The principal explanation was that the draft originally prepared by the Special Rapporteur to the International Law Commission gave identical privileges and immunities to all members of the mission including administrative and technical staff and service staff, to members of their families, and to their private servants, provided only that they were 'foreign nationals'.[1] As the articles passed through the successive stages of International Law Commission debate, comments by governments and by the Sixth Committee of the General Assembly and the Vienna Conference itself, the distinctions between the regimes applicable to what had originally been known as 'the ambassador's suite' became progressively more complex, and the importance of classification correspondingly greater.

[1] UN Doc A/CN 4/91 Art 24.

There had never previously been any accepted international usage distinguishing between different categories of embassy staff. Early writers considered the suite sometimes as the personal companions of the ambassador, sometimes as his personal servants, and even when subordinate diplomatic staff and the supporting personnel essential to a modern embassy such as typists, cipher clerks, and communications engineers became general, the manner of their categorization was normally left to the sending State. In a number of States, including the United Kingdom and the United States, differentiation was not of great legal importance since all classes were accorded the same degree of immunity. Privileges differed, but they were interpreted administratively and not by the courts. In States where distinctions were made as to the level of immunity, there does not seem to have been any challenge to the right of the sending State to classify as well as to appoint the staff of a diplomatic mission. Latin American States employed a special usage under which the terms 'diplomatic agent' and 'diplomatic officer' denoted only the head of the mission.[2] In contrast to the elaborate attempts made over several centuries to produce a satisfactory classification of heads of mission, there was until the Harvard Draft Convention of 1932 ('Harvard Draft')[3] no attempt to unify usage relating to subordinate staff or to the term 'family', which frequently caused difficulty.

The basis for Article 1 was a text proposed by The Netherlands in its comments on the 1957 draft Articles of the International Law Commission.[4] This defined all the terms now in Article 1, except 'premises of the mission', and of the definitions proposed only those in (a), (d), and (h) were later significantly altered. The Netherlands defined the 'head of the mission' as the 'person authorised by the sending State to act in that capacity', and the 'diplomatic staff' as those 'authorised to engage in diplomatic activities proper'. The International Law Commission in 1958 replaced these definitions which looked to the relations between the sending State and its envoys with the definitions in Article 1(a) and (d)—of which the definition of diplomatic staff in (d) looks to the formal appointment rather than the authorized duties.[5] Article 1(h) defining a private servant was amplified by a United States' amendment at the Vienna Conference which added the words 'and who is not an employee of the sending State'. These words make more explicit the distinction between private servants and members of the service staff of the mission.

Subsequent practice

It can be seen that the 'definitions' in Article 1(a) to (h) of the various categories of persons whose appointment, privileges, and immunities are prescribed by the Convention are almost entirely formal in character. The only objective definitions based on function are those of 'administrative and technical staff' and of 'service staff'.[6] Although there are

[2] See Convention on Diplomatic Officers, Havana, 1928 ('Havana Convention'): UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 419; Project of the International Commission of American Jurists, 1927:26 AJIL (1932 Supp) 171; amendment proposed by Guatemala: UN Docs A/Conf 20/C 1/L 8; A/Conf 20/14 p 72.

[3] 1927:26 AJIL (1932 Supp) 42, Art 1—Use of Terms.

[4] UN Docs A/CN 4/L 72 p 20 (suggestion in Sixth Committee); A/CN 4/114 Add. 1 p 13; A/CN 4/L 75 p 3; A/CN 4/116 p 11 (with observations of Special Rapporteur).

[5] *ILC Yearbook* 1958 vol I p 234.

[6] In *Saudi Arabia v Ahmed* [1996] 2 All ER 248; 104 ILR 629, the English Employment Appeal Tribunal pointed out that the expression 'members of the administrative and technical staff' is defined 'in a somewhat circular manner'. The finding of the Tribunal that a bilingual secretary in the Embassy of Saudi Arabia was a

borderline categories of staff such as doorkeepers and messengers, it is generally possible to distinguish administrative and technical service such as interpretation, secretarial, clerical, social, financial, security, and communications services from domestic service such as driving, cooking, gardening, and cleaning. For the most part sending States do classify mission staff in good faith, distinguishing between those actively carrying out the functions of the mission as described in Article 3, who are notified as having diplomatic rank, and those who provide support services in the above categories, among others, for the functions of the mission.[7]

The practice among States Parties to the Convention, at least in the early years of its operation, was to rely on this good faith on the part of the sending State. It was thought to be intrusive to enquire into how the mission organized its operations for the purpose of challenging notifications of mission staff made under Article 10 of the Convention. Except on an informal basis, notifications made were generally not questioned. If it was believed that a sending State was abusing the system by, for example, notifying private servants as service staff of the mission or by notifying all members of its mission, regardless of their functions, as having diplomatic rank, receiving States generally regarded the appropriate remedies as lying in Articles 9 and 11 of the Convention—in the power to declare mission staff *persona non grata* or not acceptable, or to place a ceiling on the size of the mission.

Since 1978, however, in the United States and since 1984 in the United Kingdom a more rigorous approach has been taken to classification by the sending State of its mission staff, responding to public concern at the abuse of diplomatic privileges and immunities. The United States in a Circular Note of 1 May 1985 to chiefs of mission asserted that 'the accreditation of diplomats is solely within the discretion of the Department of State' and that under the State Department policy it was a requirement that 'to be recognized as a diplomatic agent, a person must possess a recognized diplomatic title and *perform duties of a diplomatic nature*'. Supplementary criteria for accreditation were the possession of a valid diplomatic passport (or from States which do not issue such passports a diplomatic Note formally representing the intention to assign the person to diplomatic duties), holding a non-immigrant visa, being over twenty-one years of age, residing (with certain exceptions) in the Washington DC area, and performing diplomatic functions 'on an essentially full-time basis'.[8] While the essential requirements as to title and functions are clearly justified under international practice, the supplementary criteria cannot be brought within the definition set out in Article 1(e), though they might be justified under later provisions of the Convention. The United States in 2004 expelled several Saudi Arabians on the ground that their activities consisted in preaching outside the mission rather than carrying out diplomatic functions within it.[9]

The sending State may also have an interest in close control of the titles of its diplomatic staff. The Canadian Government offers the facility of co-location for officials of its constituent provinces within its embassies abroad, and such officials may exercise functions related to trade development, investment promotion, development assistance

member of the administrative and technical staff of the mission although her appointment had never been notified to the Foreign and Commonwealth Office was confirmed by the Court of Appeal.

[7] See Salmon (1994) paras 518, 519, 525.

[8] Text of Note supplied by State Department.

[9] 2004 RGDIP 494.

and immigration, limited to their own province. They are, however, given standard diplomatic titles which indicate that they act under the authority of the head of mission who represents the Canadian Government.[10]

Appointment of the staff of a diplomatic mission is discussed in greater detail under Article 7, and notification of staff appointments under Article 10 below.

Premises of the mission

The one definition contained in Article 1 which is clearly objective in character is the definition of 'the premises of the mission'. This had its origin in the Commentary of the International Law Commission on their 1958 draft Article on the inviolability of the mission premises. This was as follows:

> The expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park.[11]

At the Vienna Conference Byelorussia and Bulgaria proposed adding a somewhat shortened version of this descriptive Commentary to the definitions Article of the Convention. Japan then further proposed the addition of the words 'including the residence of the head of the mission'.[12] These additional words make it clear that private residences of members of the staff of the mission cannot be regarded as premises of the mission. They are of course entitled to inviolability under Article 30 of the Convention. If the sending State has title to or possession of them, it may also be able to claim sovereign immunity from jurisdiction over them—but this latter immunity does not derive from the Vienna Convention. Immunity from jurisdiction of the sending State over mission premises is discussed in the context of Articles 22 and 31.1(a) below.

The definition in Article 1(i) makes clear that the sending State need not hold title to its premises—and indeed under the laws of some States this is not permitted to a foreign State. Nor need the premises occupy the same building or group of adjacent buildings. Article 12 requires the consent of the receiving State to offices forming part of the premises of the mission in 'localities' other than those in which the mission itself is established—but as is explained in the context of Article 12, this does not restrict offices in a different part of or outside the city where the mission is established.

Article 1(i) of the Convention does not require a sending State to seek the approval of the receiving State before acquiring property for use as premises of its mission. Nor does Article 10 require notification of premises to be used or already in use as mission premises. On the other hand it has been customary for foreign diplomatic missions to be directed to a particular area of the seat of government of the receiving State or required to locate themselves within a diplomatic compound—in part for their own convenience and protection. Article 41.1 requires persons enjoying privileges and immunities to respect the laws of the receiving State. The view has therefore been taken by a number of receiving States that provided that the obligations imposed by Article 21 of the Convention in

[10] 1999 Can YIL 374.
[11] *ILC Yearbook* 1958 vol II p 95 (para (2)).
[12] UN Docs A/Conf. 20/C 1/L 25 and L 305.

regard to acquisition of mission premises are observed, it is fully compatible with Article 1(i) and with the Convention as a whole to control the particular premises in which foreign missions carry out their functions. Powers of this kind have been taken by the United States in the District of Columbia Code[13] and in the Foreign Missions Act of 1982[14] and by the United Kingdom in the Diplomatic and Consular Premises Act 1987.[15] In both the United States and the United Kingdom approval must be sought from the receiving State for the use of specific property as premises of a diplomatic mission. In the United Kingdom the consent of the Secretary of State is necessary for that property to acquire the legal status of mission premises and consent may be withdrawn in certain circumstances, provided that the Secretary of State 'is satisfied that to do so is permissible under international law'. A certificate issued by or under the authority of the Secretary of State is under the United Kingdom Act now conclusive evidence as to whether land is or was at any time mission premises. In the United States on the other hand, the Secretary of State is given no express power to certify the status of premises, and if a foreign mission were to disregard the requirement to seek consent, the State Department would probably accept that premises actually 'used for the purposes of the mission'—even without consent—were 'premises of the mission'.

The use of these powers in regard to the acquisition of mission premises is further considered under Article 21, in regard to commencement and termination of inviolability of mission premises under Article 22, and in regard to former mission premises after withdrawal of a mission or breach of diplomatic relations under Article 45 below.

In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Article 1(i) falls to be applied by agreement between sending and receiving State.[16] Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission. Article 3, which describes the functions of the mission, may be relevant in this context. Buildings used as information centres, as tourist offices, as cultural centres, libraries, embassy schools, or by ad hoc delegations[17] may well be open to challenge on this basis, or accepted as 'premises of the mission' only on the basis of the 'more favourable treatment' permitted under Article 47 of the Convention where it is justified by custom or agreement.

In 1985, for example, the UK Government in its Review of the Vienna Convention said:

> we have considered whether any existing diplomatic premises are being used for purposes which, although in themselves legitimate and even Governmental in character, are not properly diplomatic as the term is understood in the Vienna Convention and international practice. In the case of separate Tourist Offices our application of the phrase 'premises of a mission' may have been more

[13] Public Law 88–639 approved on 13 October 1964, described in Whiteman, *Digest of International Law* vol VII p 369.

[14] Title II of Public Law 97–241, 22 US Code § 4301, enacted on 24 August 1982, at §§ 4305 and 4306.

[15] c 46.

[16] See Salmon (1994) para 286: 'Il faut rechercher l'accord. A défaut il nous semble qu'ici le dernier mot doit appartenir à l'Etat accréditaire.'

[17] See eg *Kopytoff v Commercial Representation of the USSR*, 1931–2 AD No 184; *Russian Commercial Representation (Greece) Case*, ibid No 185.

generous than is strictly required by international law. Most other countries do not accord them diplomatic status. We therefore believe it is right in principle no longer to accord diplomatic status to separate Tourist Offices. With these considerations in mind we intend to withdraw diplomatic status from the small number of Tourist Offices in London that currently hold it.[18]

This measure could be implemented without the legislative powers which were needed for more extensive control of the acquisition and disposal of mission premises and which were taken by the Diplomatic and Consular Premises Act 1987 referred to above. Advance notice of the change of status was given to the States affected.

Members of the family forming part of the household

This expression is not defined in Article 1. Attempts to define it during the Vienna Conference and current practice are discussed under Article 37.1.

[18] Cmnd 9497, para 39(c). See Barker (1996) pp 141–4.

ESTABLISHMENT OF DIPLOMATIC RELATIONS

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

The Vienna Convention on Diplomatic Relations does not define diplomatic relations, nor does it define the 'States' which are entitled to establish and conduct diplomatic relations. Relations between States and international organizations, and between international organizations themselves, are excluded from the scope of the 1961 Vienna Convention.[1] In order to determine whether an entity has the 'right of legation' for the purposes of this Convention it is necessary to determine whether or not it is a State. Grotius[2] stated that the '*ius legationis*' was an attribute of sovereignty. Later writers on diplomatic law, such as Genet[3] and more recently Salmon,[4] discuss in detail which entities possessed it, with reference to unusual or disputed cases such as the Holy See, deposed sovereigns, members of the British Commonwealth, and national liberation movements.

With the possible exception of the Holy See, which is discussed below, the right to conduct diplomatic relations is now generally regarded as flowing from recognition as a sovereign State. In 1924, for example, a Greek court held that two defendants to a charge of attempted murder could not object to the jurisdiction of the court on the ground that they enjoyed diplomatic immunity as diplomatic agents of Armenia. 'The Treaty of Sèvres, Articles 88 to 93 of which set up an independent Armenian State, was not ratified, and accordingly the accused could not invoke diplomatic status as the representatives of that State.'[5] In February 1991 a UK Minister, answering a parliamentary question as to 'Her Majesty's Government's current policy regarding the granting of diplomatic accreditation to representatives of the Baltic states', said:

> The Baltic states do not fulfil the conditions for recognition as independent sovereign states. The question of diplomatic accreditation for their representatives therefore does not arise. We continue, however, to extend certain diplomatic courtesies on a personal basis to the sole surviving member of the pre-war Baltic legations.[6]

In the same month, Moscow recalled its Ambassador to Iceland in protest against the latter's decision to recognize Lithuania and to establish diplomatic relations with it at a time when Lithuania's unilateral declaration of independence was not accepted under

[1] On the right of legation of international organizations see Muller (1995); Macleod, Hendry and Hyett (1996) chs 7 and 8. On conduct of diplomatic relations by the EU, see Wessel (1999) pp 272–82; Denza (2002) pp 86–8, 164–6.

[2] De Iure Belli ac Pacis (1625) II.XVIII.III.2.

[3] (1931).

[4] (1994) paras 38–51.

[5] *In Re Armenian Charge d'Affaires*, AD 1923–4 No 172.

[6] Hansard HC Debs 26 February 1991 WA col 459. The sole surviving representative, administrator of the Estonian Legation, died in 1995: *The Times*, 4 December 1995.

Soviet constitutional procedures. In September 1991, however, following recognition of the Baltic Republics by the USSR State Council, the Ministers of Foreign Affairs of the Member States of the European Community met the Ministers of Foreign Affairs of Estonia, Latvia, and Lithuania 'to mark the restoration of sovereignty and independence of the Baltic States'. The meeting was 'a seal of the establishment of diplomatic relations' between them.[7] By February 1992 the United Kingdom had in addition recognized ten newly independent States from the former Soviet Union and invited each of them to open full diplomatic relations. Only Georgia had not been recognized as a State, in the absence of stability there, and Russia was accepted as 'the continuation of the former Soviet Union'.[8] The United States—though it had never recognized the annexation in 1940 of Estonia, Latvia, and Lithuania by the Soviet Union—nevertheless underlined the political significance of reestablishing diplomatic relations with Latvia in September 1991 by the conclusion of a Memorandum of Understanding setting out the basis for their future relations.[9] By February 1992 a White House Press Statement noted that the United States 'now has diplomatic relations with eleven of the twelve former Soviet Republics'—the one exception also being Georgia.[10] By contrast, Chechnya later sought to appoint ambassadors with a view to asserting its claim to independence from Russia, but these were not accepted elsewhere and were declared by Russia to be illegal.[11]

The Treaty between France and Monaco concluded on 24 October 2002 which established a new basis for their relations expressly endorsed the right of Monaco to conduct diplomatic relations and to send and receive ambassadors.[12]

Palestine—recognized as a State by Iraq—maintained an embassy in Baghdad entitled to inviolability there, and in 1997 it was reported by opposition sources to *The Jerusalem Post* that the building was being used for storage of documents relating to Iraq's build-up of chemical and nuclear weapons which were thereby beyond the reach of UN weapons inspectors.[13] In France, by contrast, a diplomat accredited to the Palestinian Authority was not regarded by a court as entitled to diplomatic immunity from a divorce suit brought by his wife.[14]

An unrecognized government—even where the relevant State is recognized—will be unable to establish diplomatic relations and its envoys will be accorded no diplomatic status by other States. The Taleban regime, even while it was in physical control of Afghanistan, was recognized only by Pakistan, the Union of Arab Emirates, and Saudi Arabia, and in 1998 the Saudi Government recalled its envoy from Kabul and asked the Taleban representative to leave. During the hijack of an Indian Airlines plane in 2000 by Afghan dissidents who sought refuge in Britain, a self-appointed representative of the Islamic Emirate of Afghanistan set up an 'embassy' in Stansted airport and sought to offer a diplomatic solution to the crisis without receiving any formal response from the British Government. In October 2001 a Taleban 'embassy' in Frankfurt was closed down by

[7] Agence Europe, 7 September 1991 No 5562; EPC Press Release 85/91, 6 September 1991.

[8] Hansard HL Debs 5 February 1992 col 271, in a debate on the Former Soviet Union: Implications of Change.

[9] Text of Memorandum of Understanding supplied by State Department.

[10] Statement by the White House Press Secretary, 19 February 1992.

[11] 1998 RGDIP 816.

[12] 2003 RGDIP 19–20.

[13] *The Times*, 7 November 1997.

[14] *Al Hassan c Nahila El Yafi* 2001/18887, 2004 RGDIP 1066.

German police authorities and found to contain a list of enemies of the Taleban targeted for killing.[15] Following the establishment late in 2001 of an Interim Government of Afghanistan, the United States resumed diplomatic relations, expressly stating that although it had not recognized the Taleban as a government, it regarded itself as having remained in continuing relations with Afghanistan.[16]

An intermediate possibility is to recognize insurgents as 'legitimate representatives of the people'—a term implying political approval and opening the way to the dispatch of informal envoys by the recognizing State and the setting up of 'representative offices' by the rebels, but leaving formally intact diplomatic relations with the incumbent regime. France was the first State in 2011 to declare the Libyan National Transitional Council to be the 'legitimate representatives of the Libyan people' following the beginning of the uprising against the Government of Colonel Gaddafi, and was soon followed by a number of European and other States.[17] In December 2012, President Obama recognized the Syrian Opposition Coalition as the 'legitimate representative of the Syrian people in opposition to the Assad régime'.[18] Such informal 'representatives of the people' do not enjoy rights or immunities under the Vienna Convention on Diplomatic Relations. They may, however, be entitled to control of the embassy account of the relevant sending State.[19]

On the same basis, the disappearance of a State implies the end of its diplomatic relations. The reunification of Germany in 1989, for example, led to the furling of East German flags over its embassies abroad, which were taken over by Germany. The formal reunification of North and South Vietnam in 1976 led to the transformation of the French Embassy in Saigon into a Consulate-General under the supervision of the French Ambassador in Hanoi.[20] For the United States there was a twenty-four year gap between the famous helicopter evacuation from the roof of the Embassy following the surrender of the South Vietnam Government in April 1975 and the opening on the same site in August 1999 of a rebuilt consulate under the supervision of the US Ambassador in Hanoi.[21] Following Iraq's annexation of Kuwait in 1990, on the other hand, other States refused to accept Iraq's order to close their diplomatic missions in Kuwait precisely because compliance could have implied recognition of Iraq's annexation and the end of their diplomatic relations with Kuwait as a separate sovereign State.[22]

Negotiating history

The debate on this Article in the International Law Commission and at the Vienna Conference centred on whether to include a reference to the right of legation. The draft Article proposed by the Special Rapporteur to the International Law Commission was as follows:

[15] *The Times*, 29 September 1998, 10 February 2000, 31 October 2001.

[16] 2001 DUSPIL 423.

[17] ASIL Insight by Stefan Talmon, 16 June 2011, available at www.asil.org/insights.

[18] 2013 AJIL 654–5.

[19] See *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* [2011] EWHC 2274, 147 ILR 667, 2011 BYIL 629.

[20] Réponse du secrétaire d'Etat aux affaires étrangères JO-Sen, 19 mai 1976 p 1051, quoted in 1976 AFDI 998.

[21] *The Times*, 17 August 1999.

[22] Security Council Resolution 667 (1990) declared that the Iraqi order to close diplomatic and consular missions in Kuwait was contrary to earlier Security Council Decisions, to the Vienna Conventions on Diplomatic and Consular Relations, and to international law.

If two States possessing the right of legation are agreed on instituting permanent diplomatic relations with one another, each may establish a diplomatic mission with the other.

Members of the Commission raised two objections to including in the draft this reference to the right of legation. The first objection was that the reference would not be helpful unless right of legation were defined. This might involve going outside the field of diplomatic law into such complex matters as the definition of a sovereign State, the constitutions of federal States, and the relevance of recognition to the right of legation.[23] The second objection raised was that the so-called 'right of legation' was in fact meaningless or unenforceable in that there was no corresponding duty on the part of the receiving State.[24] The classical writers were clear that the right of legation included the right to make representations and that there was a duty on the State addressed to hear them. Vattel, for instance, says that ad hoc emissaries as between States at peace may be refused a hearing only if good reasons are given, although the emissaries need not be admitted and the hearing could take place at the frontier.[25] Modern authorities are, however, more doubtful—perhaps because in the context of modern communications the procedure of hearing emissaries at the frontier is somewhat unreal. Oppenheim (ninth edition),[26] for example, says that 'it is controversial whether the sending and receiving of diplomats involves a right in the strict legal sense, or whether it is a matter of competence'. Salmon also says: 'S'il est vrai que les Etats ont la faculté d'entretenir des relations diplomatiques, qu'ils y ont vocation, car c'est un élément de leur capacité juridique en tant qu'Etats, il n'en demeure pas moins que l'exercice concret de cette faculté suppose le consentement des partenaires.'[27] It may also be significant that Article 2 of the New York Convention on Special Missions[28] provides that: 'A State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel.'

In the light of the doubts whether reference to the right of legation would serve a useful purpose, a revised text omitting it was accepted by members of the International Law Commission and, without further change, by the Vienna Conference. Renewed attempts were made by the Czechoslovak member in the 1958 meeting of the Commission[29] and by the delegate of Czechoslovakia at the Vienna Conference to reintroduce a reference to the right of legation. The view was, however, taken that the issue raised political problems and that the Preamble would be the appropriate context for debate on it.[30]

Article 2 in its final form was therefore confined to restating a principle which was firmly based on customary international law and entirely uncontroversial. The opinion was indeed expressed in the International Law Commission that the rule was so obvious as not to need restating, but the response was that the process of codification included the

[23] *ILC Yearbook* 1957 vol I p 11.
[24] Ibid at p 9 (Mr Garcia Amador).
[25] (1758) IV.V para 65. See also Grotius (1625) II.XVIII.III; Oppenheim (1955) p 772.
[26] (1992) vol I ch 10 para 464.
[27] (1994) para 33.
[28] Adopted by the General Assembly of the United Nations on 8 December 1969, Cmnd 4300. See also James (1991) at pp 364–6.
[29] UN Doc A/Conf. 20/14 pp 78–9.
[30] UN Docs A/Conf.20/C 1/L 6 and L 7; A/Conf.20/14 pp 78–9.

restating of the obvious and that it was desirable to begin the Articles with a basic general proposition of this kind.[31]

Subsequent practice

There are few public examples of a proposal to establish diplomatic relations being turned down—no doubt because the exchanges usually remain confidential. In 1990, however, the UK Government told Parliament that 'following the apparent thaw in early 1990 in Albania's attitude towards the outside world we renewed on 20th April our 1980 offer to establish diplomatic relations without preconditions'.[32] A further year elapsed before diplomatic relations were restored between London and Tirana.[33] The United States also stated publicly, in 1973, that it was willing to resume diplomatic relations with Albania, and that offer was publicly rejected by the Albanian Government.[34] In 1980 the United States on recognizing Vanuatu expressed the hope that the two States would establish diplomatic relations. A favourable response was received only in 1986, in the context of a general expansion by Vanuatu of its diplomatic relations.[35]

The Holy See

Although the Holy See since the conclusion of the Lateran Treaty with Italy in 1929 may be regarded as fulfilling the criteria of a State under international law, it was even before that accepted by the international community as a special case of an entity recognized as having international legal personality and the right of active and passive legation. Cardinale suggests that:

> the Pope was invested with two sovereignties—a spiritual one over the church universal and a territorial one over the Papal States, recognised as distinct entities by the international community. The more important of the two sovereignties was obviously the spiritual one, exercised through the medium of the Holy See. There is no doubt that it was not on account of his geographically restricted territorial sovereignty that the Pope was granted precedence over the Emperor and other rulers of nations.

The position was clearly demonstrated by the continued acceptance by other States of the Holy See's right of legation after the annexation by Italy of the Papal States deprived the Pope of sovereign rights over territory.[36]

It was, however, precisely because of concern at implied acknowledgement of this spiritual sovereignty that relations between the Holy See and certain non-Catholic States have been conducted in unusual fashions. For example, no permanent diplomatic envoy is accredited to the Holy See from Switzerland on account of political concern at compromising the religious neutrality of the federal State. In Britain, because of constitutional concerns which dated back to the Act of Supremacy 1559 and the Bill of Rights 1689,

[31] *ILC Yearbook* 1957 vol I p 11.
[32] Hansard HL Debs 19 July 1990 WA.
[33] European Report, 8 June 1991. James (1991) at p 358 also cites a rejection by Malawi of an offer made by the Soviet Union.
[34] 1979 DUSPIL 110.
[35] American Foreign Policy Current Documents 1986 p 502, in 1981–88 DUSPIL 264.
[36] Cardinale (1976) pp 83–9. See also Salmon (1994) para 48; Roberts in *The Tablet*, 15 February 2014 p 12.

there were no permanent diplomatic relations with the Holy See until 1923, when on a unilateral basis a legation to the Holy See headed by a Minister was established. In 1938 an apostolic delegate was accredited to the Catholic Hierarchy in Britain, but he was not accorded diplomatic status. Diplomatic status was accorded in 1979 to the apostolic delegate, but without at that time accepting him as head of a diplomatic mission. Only in 1982 were full diplomatic relations established on a normal basis. In the United States the constitutional obstacle to normal diplomatic relations was said to be the First Amendment to the Constitution and its implications for the relationship between church and state. Between 1848 and 1867 the US Government maintained a legation to the Holy See. Although the United States regarded itself as being in diplomatic relations with the Holy See, no reciprocal appointment was considered. In recent years successive Presidents appointed personal or special representatives without official diplomatic titles or status. In 1984, however, diplomatic relations were established on a normal basis and the US President announced his intention to appoint his Personal Representative as Ambassador to the Holy See.[37] On the basis of the Lateran Treaty of 1929, the Holy See refuses to accept any ambassador also accredited to Italy or amalgamation of mission premises. A British proposal in 2006 to locate the residence of its Ambassador to the Holy See in an annex to the residence of its Ambassador to Italy caused serious offence to the Pope and was dropped. The UK later located the two diplomatic missions on adjacent sites, explaining to Parliament that this enhanced security and permitted some resource savings while responding to the concerns of the Holy See.[38]

The successive stages of the diplomatic embrace

Article 2 by virtue of the reluctance of the negotiators to touch on some fundamental issues leaves a number of matters to inference or to custom. First is the distinction between recognition as a State and establishment of diplomatic relations. Although, as stated above, recognition as a State is a precondition for the establishment of diplomatic relations, the two steps are legally distinct. Kirghistan, for example, on 1 September 1994 drew up a list of States which recognized it—then 128 States—with the dates of recognition in each case, and a separate list of eighty-two States which had by that time established diplomatic relations with Kirghistan. In many cases where a State appeared in both lists, the date of establishment of diplomatic relations was somewhat later.[39]

The modern practice, however, is for establishment of diplomatic relations to constitute the act of recognition or to follow hard on recognition of a State. Salmon lists examples where the first indication of recognition by Belgium of a State was a joint announcement of agreement to the establishment of diplomatic relations.[40] The United States recognized the Government of the Republic of Angola on 19 May 1993, and on 8 June 1993 proposed establishment of diplomatic relations—an offer accepted by the

[37] Cardinale (1976) ch 8; Satow (5th edn 1979) paras 9.6 and 7; VII British Digest of International Law Phase One (BDIL) 551–62; Hansard HL Debs 4 December 1979 cols 683–4; HC Debs 11 December 1979 cols 560–1; HC Debs 25 January 1982 WA cols 245–6; 1979 DUSPIL 115; 1984 AJIL 427.

[38] *The Times*, 9 January 2006; *Catholic Herald*, 13 January 2006. For the current arrangements, see HC Debs 1 December 2010 WA col 470, UKMIL 2010 BYIL 641.

[39] There were also lists of States where Kirghistan maintained diplomatic missions and of States sending missions to Kirghistan.

[40] (1994) para 53.

Angolan Government on 17 June 1993. When Eritrea announced its independence from Ethiopia on 27 April 1993, the United States on the same day confirmed its recognition of Eritrea as an independent State and on the following day proposed establishment of diplomatic relations, whose establishment was agreed on 3 June 1993.[41] Following the acceptance by the Federal Republic of Yugoslavia that it would not be accepted as successor to the former Federal Republic of Yugoslavia and its admission as a new member State to the United Nations on 1 November 2000, the United States recorded the establishment of diplomatic relations with the Federal Republic of Yugoslavia by a formal Exchange of Notes between President Clinton and President Kostunica on 12 November 2000.[42] When the sovereignty of Iraq was reestablished on 29 June 2004 following its invasion and occupation, the United States, Australia, and Denmark immediately proposed to its Government the resumption of diplomatic relations. France awaited a proposal to the same effect from a sovereign Iraq, on the basis that Iraq had initiated a breach of diplomatic relations some years earlier.[43] The first contacts between the Ambassadors of Panama and Kosovo, constituting implied recognition of Kosovo by Panama, took place in The Netherlands in July 2013, and in August 2013 the two States announced their decision to establish diplomatic relations.[44]

It is now highly exceptional for any State not to establish diplomatic relations with another entity which it has recognized as a State, and such a step usually denotes extreme coolness between the two.[45] In 1995 there were only four States which the United Kingdom recognized as States but without maintaining diplomatic relations. With two of these diplomatic relations had been broken, leaving only Bhutan and North Korea where they had never been established.[46] Only in December 2000 did the United Kingdom and North Korea agree to establish diplomatic relations for the first time in fifty years, and relations with other European Union States were established shortly afterwards.[47] The position of the United States in 1995 was identical. A complete list of States is maintained by the Office of the Geographer in the State Department, and only Bhutan and North Korea were recognized by the United States without diplomatic relations ever having been established. The position in 2015 remains the same.[48]

The infrequency with which States formally recognize other States without proceeding to establishment of diplomatic relations has led to some unfortunate confusion between the two concepts. The European Community 1991 Guidelines for the recognition of New States in Eastern Europe and in the Soviet Union imposed preconditions for the grant of recognition regarding respect for the United Nations Charter and for human rights commitments, guarantees for rights of national minorities, respect for frontiers, acceptance of non-proliferation restraints, and commitments to peaceful settlement of

[41] 1993 AJIL 595 at 597.
[42] 2000 DUSPIL 563.
[43] 2004 RGDIP 1000.
[44] Joint Communiqué signed in Panama on 27 August 2013 by Ministers of Foreign Affairs.
[45] Satow (6th edn 2009) para 6.2.
[46] Hansard HC Debs 20 March 1995 WA cols 43–6. In 1982 the Republic of Comoros was the only State which the United Kingdom had recognized but without proceeding to establishment of diplomatic relations: Hansard HC Debs 29 January 1982 col 444.
[47] *The Times*, 13 December 2000; 1 May 2003; *Observer*, 17 March 2002; press statements from Pyongyang, March 2001. See also 2001 AYIL 330 on establishment of diplomatic relations and embassies between North Korea and Australia.
[48] Department of State Guidance on Diplomatic Relations, 1975.

disputes. These went well beyond the criteria normally applied by lawyers to determine whether an entity constitutes a State and were more relevant to a decision to propose establishment of diplomatic relations. The Community statement that 'commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations' suggests that no clear distinction was drawn between the two stages.[49]

A second distinction which emerges only by inference from the text of Article 2 and from the debate in the International Law Commission which preceded its adoption is that between establishment of diplomatic relations and establishment of permanent missions.[50] A corollary of the practice described above whereby recognition is almost always accompanied or followed shortly by establishment of diplomatic relations is that the establishment of diplomatic relations is now not necessarily followed by establishment of permanent missions. The text of Article 2 would seem to permit the possibility that a State might agree to the establishment of diplomatic relations, but not to the establishment of permanent missions. Such a state of affairs does seem to have existed in earlier centuries. Earlier editions of Satow, for example, said that refusal of consent to continuous residence of an embassy 'was the ancient practice of Far Eastern nations towards European States up to about the middle of the nineteenth century, and in the case of Korea until 1883'. But in view of long custom and universal consent, refusal of permission for permanent missions 'would require unanswerable reasons for its justification'.[51] James also says that 'it remains the customary position that a State in diplomatic relations with another does not refuse permission for the establishment by that other State of a diplomatic mission'.[52] Under the Vienna Convention on Consular Relations on the other hand a clearer distinction is drawn between establishment of consular relations and establishment of a consular post, and—in particular because of the authorization for staff of a diplomatic mission to perform consular functions—the refusal of consent to establishment of a separate or additional consular post is quite common and entirely compatible with the continuance of consular relations.[53]

The more usual situation, however, is not that consent to establishment of permanent missions is refused but that for a variety of reasons it is not sought. In modern times embassies are financed by the sending State and there are rigorous controls both on their expenditure and on the extraneous activities of diplomatic agents. Not only the newly established States but also the oldest establish a permanent mission only where a need can be shown, and the various methods of cost saving—multiple accreditation, protection of interests by a mission of a third State, reliance on occasional special missions or on contacts in the margins of the United Nations—are increasingly fashionable. Some of these forms of cut-price diplomacy are expressly regulated by later Articles of the Vienna Convention—for example, Articles 5, 6, 45, and 46.[54]

[49] Guidelines are in 1992 31 ILM. See Weller (1992) at pp 586–8; Denza (2011) pp 323 *et seq.*

[50] *ILC Yearbook* 1958 vol I pp 9–12.

[51] (1979) para 9.2.

[52] (1991) at p 360.

[53] See Art 3.2 of the Vienna Convention on Diplomatic Relations and Commentary below, Arts 2, 4, and 70.2 of the Vienna Convention on Consular Relations; Lee (1991) pp 45, 601–4; Lee and Quigley (2008) pp 41–51.

[54] For a comprehensive account of the possible successive stages—ascending and descending—of contacts and relations between States, see James (1991).

Kirghistan in 1994, as mentioned above, had established diplomatic relations with eighty-two States, but received only thirty-two diplomatic missions and despatched ten to other States, of which six were to Russia and to other neighbouring Republics from the former Soviet Union. From the other end of the age spectrum, the United Kingdom, also in 1994, maintained no permanent diplomatic mission in forty-seven States with which it regarded itself as being in diplomatic relations. Between 1968 and 1994 the total number of States with which the United Kingdom maintained diplomatic relations rose from 136 to 183—including twenty-two new States which emerged with the ending of the Cold War—but the overseas posts maintained by the United Kingdom fell from 243 to 215. The Foreign and Commonwealth Minister defended overseas spending plans to Parliament by emphasizing that: 'Our diplomatic service is fit, lean and streetwise. It is working to clearly defined objectives that serve the interests of our country in measurable and tangible ways.'[55] Four years later, following further reorganization, the discrepancy had widened—diplomatic relations in 1998 were maintained with 186 States while the number of permanent missions had fallen to 145.[56]

The distinction between diplomatic relations and maintenance of permanent missions is emphasized when a State withdraws its entire diplomatic mission while making clear that this step does not constitute or imply a breach of diplomatic relations. The United States, for example, on 10 November 1973 closed its embassy in Kampala and withdrew all diplomatic and consular representatives from Kampala. But in its Note to the Government of Uganda it said: 'The Government of the United States does not intend to request the Government of Uganda to take reciprocal action with regard to its diplomatic and consular representatives in the United States and accordingly does not intend by its action to initiate a severance of diplomatic relations between the two Governments.'[57] Relations between the United States and Libya after 1981 were described by the State Department as being at 'the lowest level consistent with maintenance of diplomatic relations' and no missions were exchanged until 2006 when the US Embassy reopened following recognition of the Transitional National Council as the Government of Libya. The same absence of missions has existed between the United States and Somalia since 1991.[58] In 1991, when the Allies withdrew their missions from Kuwait some months after Iraq's invasion, they emphasized that the temporary withdrawal was due simply to the impossibility of their functioning normally. It was in no sense a response to the demand by the Government of Iraq that diplomatic missions in Kuwait must close and their activities be conducted from Baghdad—a demand which the Security Council had ordered Iraq to rescind.[59] The various forms of cooling diplomatic relations without a full breach are discussed below, under Articles 45 and 46.

[55] Foreign and Commonwealth Office Departmental Report, 1994; Hansard HC Debs 22 March 1994 WA col 136; 24 Oct 1994 cols 649–86. In many of these forty-seven States the United Kingdom was represented by locally engaged staff and/or honorary consuls.

[56] 1998 RGDIP 1040. For the current position see www.fco.gov.uk/services.

[57] 1974 AJIL 313.

[58] Department of State Guidance on Diplomatic Relations, 1995.

[59] Security Council Official Records, UN Doc S/22020; Security Council Resolution 664, 1990 ILM 1328; Warbrick (1991) at p 488.

Virtual missions

The ultimate form of minimal representation in another State is the virtual embassy—an online website targeted at a particular State in which the 'sending State' has no permanent mission but wishes to make information about itself more easily available to citizens of the 'target State'. The virtual mission is set up for two alternative reasons—the first being the wish to save the expenditure and risk associated with establishment of a permanent mission, and the second being the wish to reach out to citizens of the target State where there are no diplomatic relations between the 'sending State' and the target State or States.

In the first category is the mission set up in May 2007 by the Maldives on Second Life's 'Diplomacy Island'. The Foreign Minister of the Maldives then said that its purpose was 'to provide information on the country, to offer our view point on issues of international concern and to interact with our partners in the international community'.[60] Virtual missions in this category can claim entitlement to free communication under Article 27 of the Vienna Convention, which is perhaps the only privilege relevant to their operations.

In the second category is the Virtual Embassy of the US in Tehran set up in December 2011 in the hope that 'in the absence of direct contact it can work as a bridge between the American and Iranian people'. The website offers information on US visas, consular and passport services for US citizens, study in the US, and US policies. As soon as it was announced, the Islamic Union of Iranian Students said that its operation in Iran would be blocked. In the absence of normal diplomatic relations between the US and Iran there appears to be no obligation on Iran under the Vienna Convention to allow it to operate there.[61] Israel for similar reasons in July 2013 opened a virtual embassy (in the form of a Twitter account) to the Gulf States of Saudi Arabia, Qatar, the UAE, Oman, Kuwait, and Bahrain.[62]

[60] *The Times*, 24 May 2007; and see Maldivesmission.ch.

[61] *The Times*, 2 November 2011, website on www.iran.usembassy.gov/about-us.html. Lee and Quigley (2008) at p 47 describe the establishment in the consular context of 'virtual presence posts', for example in the Gaza Strip.

[62] *The Jerusalem Post*, 8 September 2013.

FUNCTIONS OF A DIPLOMATIC MISSION

Article 3

1. The functions of a diplomatic mission consist *inter alia* in:
   (a) representing the sending State in the receiving State;
   (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
   (c) negotiating with the Government of the receiving State;
   (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
   (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

The functions of diplomatic missions, at least in their broad outlines, have altered surprisingly little during the last 400 years. All the writers of diplomatic handbooks list the three traditional functions of protection of interests of the sending State, negotiation, and observation.[1] Satow says:

> The functions of a diplomatic mission are . . . to represent the sending State, to protect its interests and those of its nationals, to negotiate with the government of the receiving State, to report to the sending government on all matters of importance to it, and to promote friendly relations in general between the two States. The mission should seek to develop relations between the two countries in economic, financial, labour, cultural, scientific and defence matters.[2]

The functions of diplomatic missions must be distinguished from the broader purpose of diplomacy, which was described by Satow as:

> the application of intelligence and tact to the conduct of official relations between the governments of independent states . . . or, more briefly still, the conduct of business between states by peaceful means.[3]

Prior to the Vienna Convention, there had been no listing of diplomatic functions in any formal legal instrument. The Convention regarding Diplomatic Officers signed at Havana in 1927 ('Havana Convention')[4] under the heading 'Duties of Diplomatic Officers' listed no positive functions, but only the prohibition on interference in the internal affairs of the receiving State and the procedural duty to communicate only with the Ministry of Foreign Affairs (now set out in Article 41 of the Vienna Convention).

[1] See eg Genet (1931) vol II ch IV, 'L'agent en action'; Satow (1st edn 1917) vol I para 206; Oppenheim (8th edn 1955) vol I p 785.

[2] (6th edn 2009) para 6.17.

[3] (5th edn 1979) para 1.1. See also Cahier (1962); Harold Nicolson (1939) and (1954); Wildner (1959); Luis Melo Lecaros (1984); Murty (1989); Salmon (1994). For contemporary proposals, see Mark Leonard, *Going Public: Diplomacy for the Information Society* (Foreign Policy Centre Report, 2000).

[4] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 420.

Negotiating history

The International Law Commission in 1957 decided to preface the draft articles with a list of diplomatic functions, to serve as an introduction and to assist interpretation of later articles. Many of these articles contain references to the functions of the diplomatic mission or of members of the mission. The provisions whose interpretation is most likely to be assisted by reference to Article 3 are Article 1(i) (which defines premises of the mission as premises 'used for the purposes of the mission'), Article 25 (which requires the receiving State to accord 'full facilities for the performance of the functions of the mission'), Articles 38 and 39 (which confer immunities limited to acts performed in the exercise of functions as a member of the mission) and Article 41 (which prohibits use of mission premises 'in any manner incompatible with the functions of the mission as laid down in the present Convention').

The draft originally prepared by the International Law Commission listed the three traditional functions of protection, negotiation, and observation. Before these in paragraph (a) was placed the function of representing the sending State—which the Commission described as 'the task which characterizes the whole activity of the mission'.[5] In response to suggestions by the Governments of the Philippines, Czechoslovakia, and Yugoslavia, the Commission in 1958 added the provision (which became paragraph 1(e)) 'promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations'.[6]

At the Vienna Conference there was prolonged discussion as to whether the function of 'protecting in the receiving State the interests of the sending State and of its nationals' should be qualified by some reference to the rules of international law. The demand for such a reference came from States which had more frequently been defendants to diplomatic claims and wished for political reasons to circumscribe the right of diplomatic protection. The International Law Commission had earlier addressed the point by inserting in its Commentary a paragraph stating that the inclusion of the function of protection did not prejudice the later provision prohibiting interference in the internal affairs of the receiving State (now in Article 41.1) or the international law rules requiring exhaustion of local remedies.[7] India, Mexico, and Ceylon, however, proposed to the Conference an express qualification in the text referring to the rules of international law.[8] Other States doubted the need for any amendment on the grounds that all the functions of the mission could be exercised only within the limits permitted by international law and that the entire Convention would operate within the framework of customary rules unless these were expressly altered. The insertion of such a proviso in one subparagraph of a single Article would be open to misconstruction or at least superfluous. Ultimately, however, most delegations accepted the need for reassurance in this particular context, and the words 'within the limits permitted by international law' were added by the Conference to the International Law Commission's draft.[9]

[5] *ILC Yearbook* 1957 vol I pp 2, 50, 200, vol II p 133; 1958 vol II p 90.

[6] *ILC Yearbook* 1958 vol I p 92; UN Docs A/CN 4/L 72 p 8; A/CN 4/114/Add. 1 pp 10, 22; A/CN 4/L 75 p 5; A/CN 4/116 p 14.

[7] *ILC Yearbook* 1958 vol I pp 91–2, vol II p 90.

[8] UN Docs A/Conf. 20/L 13, L 33, and L 27 ('by all lawful means'). A Cuban proposal (L 82) would have limited the sending State to 'helping to protect the rights enjoyed by nationals of the sending State'.

[9] UN Doc A/Conf. 20/14 pp 80–1.

Performance of consular functions

A second question which led to prolonged discussion during the negotiation of Article 3 concerned the entitlement of diplomatic missions to perform consular functions. There was a fundamental divergence between those States—in particular several Communist States—which claimed that customary international law gave to diplomatic missions a legal right to exercise consular functions which was not dependent on the consent of the receiving State, and other States whose internal law prohibited foreign diplomats from exercising consular functions in their territory or who claimed to have a right to withhold consent to this.[10]

The difficulty first emerged in the International Law Commission in 1958 when Mr Zourek of Czechoslovakia proposed the addition of a new provision 'to the effect that the establishment of diplomatic relations implied the establishment of consular relations, since nowadays the diplomatic function included, as a general rule, the consular function'. Mr Tunkin of the Soviet Union, while accepting that there was a link, saw practical difficulties in the proposal, and Sir Gerald Fitzmaurice of the United Kingdom emphasized that diplomatic and consular functions were distinct even if exercised by the same person. A diplomatic mission could not, as of right and without issue of an exequatur, assume consular functions.[11]

At the Vienna Conference, Spain proposed to add to the list of diplomatic functions in draft Article 3 the words: 'performing consular functions, if the receiving State does not expressly object thereto'. The intention of this amendment was in fact to enable countries which were short of staff and foreign exchange to combine their diplomatic and consular services. Those States which claimed a right under customary international law to perform consular functions, however, argued that the amendment would imply that the receiving State had power to prevent this. Most delegates accepted that it was customary for diplomatic missions to perform consular functions and that the Conference should regulate the question rather than leave it to be considered in the context of the work of the International Law Commission on consular relations. In the absence of agreement, Mexico put forward a compromise proposal which became the basis for paragraph 2.[12]

In plenary session of the Conference, Venezuela, one of the countries which did not permit diplomatic and consular functions to be combined, objected that the compromise wording could be construed so as to oblige the receiving State to accept such a combination. During the discussion other delegations suggested alternatives to assist Venezuela, but none received the necessary support. Paragraph 2 was finally adopted by the Conference on the basis that it did not affect existing practice.[13]

Vienna Convention on Consular Relations

Articles 2, 3, and 70 of the Vienna Convention on Consular Relations clarify the position to some extent. Article 2.2 of the Vienna Consular Convention provides that: 'The consent given to the establishment of diplomatic relations between two States implies,

[10] *ILC Yearbook* 1958 vol I p 92 (Mr Zourek); p 93 (Mr Tunkin); A/4164 p 10 (Comment of Czechoslovakia on 1958 Draft Articles of ILC); A/Conf. 20/14 pp 8, 82, 83 (Soviet Union representative); p 82 (Venezuela representative). Moore (1905) vol 4 para 629 notes the refusal of some governments, such as Italy and Venezuela, to recognize the union of consular with diplomatic functions.

[11] *ILC Yearbook* 1958 vol I pp 92–3. See also comment by Czechoslovakia on the 1958 draft in A/4164 p 10.

[12] UN Doc A/Conf.20/L 30, A/Conf. 20/14 pp 82–5.

[13] A/Conf. 20/14 pp 7–10; Kerley (1962) at pp 95–7.

unless otherwise stated, consent to the establishment of consular relations.' This provision corresponds to the practice whereby maintenance of consular relations without diplomatic relations may be an acceptable option where political difficulties exist (a possibility discussed below under Article 45), but the reverse situation is so improbable that no actual example can be found.[14] Article 3 of the Vienna Consular Convention states that: 'Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.' This makes clear that to the extent that a member of a diplomatic mission performs specifically consular functions, he does so in accordance with the terms of the Consular rather than the Diplomatic Convention. Article 70.1 also states that: 'The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.'

Article 70 further provides:

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. In the exercise of consular functions a diplomatic mission may address:
   (a) the local authorities of the consular district;
   (b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.
4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

In determining the legal rules applicable to members of a diplomatic mission exercising consular functions, it must be borne in mind that there is no clear dividing line between diplomatic and consular functions. Many of the detailed functions listed in Article 5 of the Vienna Consular Convention could be regarded as aspects of protecting in the receiving State the interests of the sending State and of its nationals, which is among the functions of a diplomatic mission. The key factor is usually not so much the nature of the function as how it is performed—and in particular whether it is performed through contacts with local authorities or through contacts with the Ministry for Foreign Affairs or other agreed ministries of the central government. In many cases it will be of little importance to the recipient of a service or to the authorities of the receiving State how a particular function is discharged. The following rules, however, emerge from taking together the provisions of the two Vienna Conventions and current state practice:

1. although amalgamation of diplomatic and consular services is increasingly practised for reasons of economy and effectiveness, the law or practice of the sending State may prohibit it or may provide that certain functions may be carried out only by diplomatic agents or by consuls;
2. most receiving States acquiesce in the performance of consular functions by diplomatic agents, but in a few States this may be prohibited or subjected to restrictions under local law;

[14] Lee (1991) p 602.

3. it is generally not necessary for a diplomatic agent to obtain an exequatur in order to perform consular functions on an occasional or even a regular basis, probably because he is not in fact the head of a consular post. The names of members of a diplomatic mission exercising consular functions on a regular basis must, however, be notified to the Ministry of Foreign Affairs of the receiving State;
4. for the avoidance of any possible difficulty it will usually be preferable that a member of a diplomatic mission who is likely to exercise consular functions on a regular basis is also given a consular appointment. An individual with a dual appointment will normally deal with local or with central authorities according to the capacity in which he is acting;
5. a member of a diplomatic mission exercising consular functions without a consular appointment should follow the practice set out in Article 70.3 of the Vienna Consular Convention, which points towards addressing the local authorities as a general rule;
6. a member of a diplomatic mission exercising consular functions—with or without a concurrent consular appointment—remains entitled to whatever immunities are conferred on him by the Vienna Diplomatic Convention.[15]

Other limits to the functions of a diplomatic mission

The boundaries of Article 3 of the Vienna Convention fall to be considered in the context of a number of other Articles of the Convention. Apart from the particular question of performance of consular functions, the limits have been considered in three kinds of case:

1. Where a distinction is to be drawn between functions of a mission and personal activities of its members

This aspect was considered by the Supreme Court of Austria in the case of *Heirs of Pierre S v Austria*.[16] The Austrian Ambassador to Yugoslavia in the course of an official hunt to which he had been invited by the President of Yugoslavia accidentally shot and killed the French Ambassador. In proceedings for damages by the widow and children of the French Ambassador the Austrian Court held that the function of representing the sending State and protecting its interests included taking part in activities allowing the fostering of personal contacts. 'The fostering of such contacts is a condition for the exercise of the office of ambassador and forms part of the fulfilment of his official duties.' The Supreme Court therefore held that the Austrian State was liable to pay compensation. The approach of the Austrian court may be contrasted with that taken by the New York District Court in *First Fidelity Bank NA v Government of Antigua and Barbuda*[17] where the Ambassador of Antigua and Barbuda had without authority taken out a loan and waived his government's immunity, subsequently investing the proceeds in a casino. The majority analysed the question of the validity of the loan and the waiver not in terms of whether the ambassador was acting in the exercise of his functions but in terms of his apparent authority under the New York law of agency.

[15] See Lee and Quigley (2008) ch 37 'Diplomats as Consuls'; Satow (6th edn 2009) paras 6.21–6.24, chs 19 and 20; Hackworth, *Digest of International Law* para 379 'Union of Consular and Diplomatic Functions'.

[16] Case No. 1 Ob 49/81, 86 *ILR* 546.

[17] 877 F 2nd 189, US Court of Appeals 2nd Cir., 7 June 1989; 99 ILR 125, described in 1990 *AJIL* 560.

More controversially, the Federal Constitutional Court of Germany held in 1997 in the case of *Former Syrian Ambassador to the German Democratic Republic*[18] that in knowingly and on instructions from his government permitting a member of a terrorist group to remove explosives stored in the Syrian Embassy to the German Democratic Republic (which were shortly afterwards used to cause an explosion in West Berlin in which one person died and twenty others were seriously injured) the Syrian Ambassador acted in the exercise of his official functions as a member of the mission. The court laid strong emphasis on the question of attribution to the sending State, and the conclusion was based on the finding that the Ambassador was 'charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending State'. He had not acted out of private interests, but 'sought the best solution for the embassy'. It was irrelevant that the conduct was illegal under the law of the Federal Republic of Germany. The applicability of the former Ambassador's continuing immunity from the jurisdiction of German courts was denied on other grounds, and the Federal Constitutional Court appears to have focused its attention on whether the conduct was 'official' rather than on whether it was 'in the exercise of his functions as a member of the mission'. The case is considered further under Articles 39 and 40 below.

2. Where a distinction is to be drawn between diplomatic functions and commercial activities

It is accepted in practice that the function of 'developing economic relations' between sending and receiving States is different in character from commercial activities whose purpose is to generate profits. Since under modern conditions an increasing number of States are engaged in trading and commercial activities abroad and embassies are often expected—particularly by national parliaments and the press—to justify their costs in terms of benefit to the business community of the sending State, this distinction is one of increasing importance and difficulty. It must often be applied to determine whether premises used, for example, as Tourist Offices, are 'used for the purposes of the mission' and thus entitled under Article 1(i) to the status of premises of the mission. The United Kingdom in its 1985 Review of the Vienna Convention on Diplomatic Relations[19] stated that diplomatic status would be withdrawn from premises not being used for purposes compatible with the legitimate functions of a mission:

> As a general rule we regard the following types of activity as being incompatible with the functions of a mission: trading or other activities conducted for financial gain (e.g. selling tickets for airlines or holidays, or charging fees for language classes or public lectures) and educational activities (e.g. schools or students' hostels).

The UK Government also withdrew diplomatic status from separate Tourist Offices, and in so doing emphasized that these purposes might be legitimate and governmental in character even though they were not diplomatic as the term was understood in the Vienna Convention.[20]

[18] Case 2 BvR 1516/96, 115 ILR 595.
[19] Cmnd 9497, para 39.
[20] On the application of similar principles under German practice, see Richtsteig (1994) pp 22–3.

In the case of *Arab Republic of Egypt v Gamal-Eldin*[21] the English Employment Appeal Tribunal considered the status of the medical office of the Egyptian Embassy in London whose function was to provide medical services and transport for Egyptian nationals in London. The Foreign and Commonwealth Office had confirmed by certificate that the office formed part of the premises of the mission under the Diplomatic and Consular Premises Act 1987. The tribunal held that 'The functions of the medical office are consistent with the non-exhaustive list of functions set out in art. 3 of the Vienna Convention.' Its purposes were not commercial but were 'within the sphere of governmental or sovereign activity. The medical office was used by the Government of the Arab Republic of Egypt to provide guidance, advice and expert care to patients referred by the Government of the Arab Republic of Egypt for medical treatment in the United Kingdom. The medical office acted throughout as a representative of the Arab Republic of Egypt and its embassy. The salaries of employees of the medical office were paid by the Government of the Arab Republic of Egypt and all payments to the medical office were made by the Government of Egypt.' It followed that Egypt was entitled to immunity by virtue of section 16(1)(a) of the State Immunity Act 1978[22] in respect of unfair dismissal proceedings brought by two Egyptian drivers employed as drivers at the medical office on the basis that these were 'proceedings concerning the employment of members of a [diplomatic] mission'.

An activity may be regarded by the receiving State as outside the functions of a diplomatic mission while at the same time being accepted as governmental in character and entirely legitimate and proper.

3. Where the function in question is a novel one

In the case of *Propend Finance Property v Sing and Commissioner of the Australian Federal Police*[23] it was argued by the plaintiffs that the first defendant, a member of the diplomatic staff of the Australian High Commission, was when engaged in police liaison work in relation to criminal investigations and matters of common concern acting as a police officer and outside his official diplomatic functions, so that either by virtue of Article 31.1 (c) he was not entitled to diplomatic immunity or by virtue of Article 39.2 he had lost any immunity when his functions in the United Kingdom came to an end. The English High Court held that although Mr Sing was directly responsible to the Australian Federal Police as well as to the head of the Australian diplomatic mission, 'the tasks which he carried out on behalf of the Australian Federal Police were a very function of his particular diplomatic role'. This finding was upheld by the Court of Appeal, and Leggatt LJ noted that: 'Some police functions may be clothed with diplomatic immunity just as the functions of military or cultural attachés may be.'[24] This decision illustrates that where activities performed by diplomatic officers are clearly official, and there is no element of commercial profit, the courts are not inclined to ring-fence diplomats within the traditional functions. Richtsteig, in stating that the limits of diplomatic functions are not definitively prescribed by the terms of Article 3, lists international cooperation in suppression of drug trafficking,

[21] [1996] 2 All ER 237; 104 ILR 673.
[22] C 33.
[23] Judgment of Laws, 14 March 1996, unreported; 111 ILR 611.
[24] Judgment of 17 April 1997, Times Law Reports, 2 May 1997; 111 ILR 611, at 653.

as well as police liaison, as new functions arising in consequence of international agreements.[25]

'protecting in the receiving State the interests of the sending State and of its nationals'

The function of a diplomatic mission to protect the interests of the sending State and of its nationals should be distinguished from the exercise of the right of diplomatic protection in the formal sense. In the draft articles drawn up by the International Law Commission in 2006, 'diplomatic protection' is described as consisting in 'the invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.[26] It is a right belonging only to a State and under international law it may be exercised only if the natural or legal person has (with narrow exceptions) first exhausted local remedies. The rules form part of the international law on state responsibility.

A diplomatic mission does not on its own initiative extend 'diplomatic protection' in this formal sense. The protection which it extends is broader and looser and may consist in advice on securing redress against the government of the receiving State or its authorities or in making informal representations on behalf of a national before the national has exhausted local remedies, as well as simply giving guidance and advice about conditions and opportunities in the host State. It cannot be sharply distinguished from consular protection of nationals, although the right of consular protection will normally be exercised through contacts with local authorities such as police or courts and not through contacts with the central government. The broad distinction is illustrated by the case of *R v Secretary of State ex parte Butt*[27] where it was argued unsuccessfully that the actual exercise of consular protection to British nationals on trial in Yemen gave rise to a duty on the part of the Secretary of State to go further and make diplomatic representations to have allegations of torture investigated and a retrial ordered.

Special rights of citizens of the European Union

In accordance with the provisions on citizenship of the European Union, a concept introduced in 1993 by the Treaty on European Union,[28] the Member States of the Union have drawn up arrangements whereby a citizen of the Union (that is a national of any one of the Member States) will be entitled to the protection of any Member State's diplomatic or consular representation if he finds himself in a place where his own Member State or another State representing it on a permanent basis has no accessible permanent representation or accessible honorary consul competent for the matter in question. The

[25] (1994) p 24.

[26] UN Doc A/CN.4/L 684. See also Okowa (2014) pp 481–94.

[27] Court of Appeal Civil Division P3 99/6610/4.

[28] UKTS No. 12 (1994), Cm 2485; [1992] 1 CMLR 573. The provisions are now to be found in Art 46 of the Charter of Fundamental Rights which forms part of the Treaty on European Union (TEU) as amended by the Treaty of Lisbon (Cm 7294), and in Art 20 of the Treaty on the Functioning of the European Union (TFEU). Article 23 of the TFEU confers implementing powers and duties.

implementing 1995 Decision of the Representatives of the Governments of the Member States meeting within the Council[29] requires diplomatic and consular representatives who give protection to treat a person seeking help as if he were a national of the Member State which they represent. The protection extended covers assistance in cases of death, accident or serious illness, arrest or detention, assistance to victims of violent crime and relief and repatriation of distressed persons. It may also cover other assistance in non-Member States insofar as this is within the powers of diplomatic or consular representatives. A parallel implementing Decision contains practical Guidelines in an Annex, and these were updated in 2006.[30] These arrangements clearly cannot impose obligations on non-Member States of the Union, and they have not been cast in terms of any of the possibilities permitted under the Vienna Convention on Diplomatic Relations, such as multiple accreditation (Article 6) or temporary protection of interests (Article 46)—nor the corresponding provisions of the Vienna Convention on Consular Relations. So far there has been no indication of resistance on the part of other States on the ground that such activities go beyond the function of protection as described in Article 3. The more politically sensitive aspects of assistance such as complaints of ill-treatment or petitions for pardon or early release are under the detailed arrangements to be taken in liaison with the Member State of which the detainee is a national—a precaution which may pre-empt difficulties under the Vienna Conventions.

Limits on proper diplomatic activity are discussed under Articles 9 and 41.

[29] OJ L314/73, 28 December 1995. See Denza (2002) pp 165–6.

[30] Council Doc 11107/95, revised in Council Doc PESC 534/COCON 14 with REV 1 and REV 2 adopted 26 June 2006. For details and analysis of practice, see Denza (2014).

APPOINTMENT OF HEAD OF THE MISSION

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Historical background

During the nineteenth century the practice of seeking confidential approval from the receiving State of an individual who the sending State proposed to appoint as head of its diplomatic mission began to harden from a general practice into a customary rule. In 1928 the Havana Convention on Diplomatic Officers provided in Article 8 that: 'No State may accredit its diplomatic officers to other States without previous agreement with the latter.' States Parties were not obliged to give reasons for their decision on *agrément.*[1] In 1931, however, Genet continued to state of *agréation:* 'Ce n'est d'ailleurs qu'un usage pur, et non une obligation rationnelle.'[2]

The most conspicuous dissenter from state practice in this regard was the United States. In 1885 the United States appointed Mr Keiley first as Minister to Rome, where the King of Italy declined to receive him on account of a speech he had made at a meeting in Virginia of Roman Catholics at which there had been protest at the annexation of the Papal States. Mr Keiley was then appointed to Vienna, which led to the Austro-Hungarian Minister at Washington being instructed:

> to the effect that since, as at Rome, scruples prevailed against this choice, he was to direct the attention of the United States Government, in the most friendly way, to the generally existing diplomatic practice to ask, previously to any nomination of a foreign minister, the consent (*agrément*) of the government to which he is to be accredited. It was added that the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and intolerable in Vienna.

The Austro-Hungarian Government also objected to the public statements of Mr Keiley. The US Secretary of State was, however, not prepared to accept either that it should seek advance consent for appointment of a head of mission, or the grounds of the Austro-Hungarian Government's refusal to accept Mr Keiley, and the US Legation was left for some time in the hands of a secretary as chargé d'affaires.[3]

At the beginning of the twentieth century the United States raised some of its legations to the status of embassies and began to seek *agrément,* though only for the appointment of ambassadors. In 1932 the Harvard Draft Convention adopted the principle of requiring *agréation* before appointment of a head of mission as reflecting contemporary

[1] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 420, Art 8; 26 AJIL (1932 Supp) 176.
[2] (1931) vol II p 274.
[3] Moore (1905) vol IV para 638; Satow (6th edn 2009) para 7.10.

international customary law as well as being conducive to the smoother functioning of diplomacy, but commented: 'While engaging in a practice now become universal, the United States has never apparently, claimed it as a right or acknowledged it as a duty.'[4]

The United Kingdom had also, at an earlier date, been a reluctant convert to the practice of *agréation*. In 1832 Tsar Nicholas I of Russia refused to receive Sir Stratford Canning as British Ambassador on the ground that his appointment had been made by Lord Palmerston and officially gazetted some days before the matter was mentioned to the Russian Ambassador in London. The British Government claimed to be free in its choice of ambassadors, and responded to the refusal by leaving the embassy vacant for three years. Although subsequently Britain conformed to the practice on *agrément*, it expected reasons to be given for a refusal. In 1917 Satow stated that:

> It is a matter of dispute whether a refusal must be accompanied by a statement of the grounds on which it is made, but it can be safely asserted that if in such a case the reasons are asked for, and they are not given, or if it appear to the Government whose candidate has been refused that the grounds alleged are inadequate, that Power may refuse to make an appointment, and prefer to leave its diplomatic representation in the hands of a *Chargé d'Affaires*.[5]

The temptation for the more powerful States to take for granted approval of a proposed appointment has persisted. In 2004 both the United States and the United Kingdom made public announcements of the names of those it intended to send as ambassadors to Iraq before sovereignty was restored to Iraq giving it the international capacity to accept or reject these individuals.

Negotiating history

Differences in the International Law Commission and at the Vienna Conference arose not over the content of the modern practice but over the method of codifying it. The Rapporteur's original draft for the Commission did not specify that the receiving State need not give reasons for refusal of *agrément*, but in the same draft article it was stated that the power to declare the head of mission *persona non grata* could be exercised 'without stating its reasons'. It was objected that this implied that in the case of refusal of *agrément* reasons were required. The Commission then answered this criticism by removing the explicit words 'and without stating its reasons' from the provision relating to declaration of *persona non grata*.[6]

At the Vienna Conference, however, Argentina moved an amendment to make explicit in the text the generally agreed principle that there was no obligation to give reasons for refusal of *agrément*. The amendment was resisted unsuccessfully by the United Kingdom on the ground that there could be implied from it an obligation to give decisions in respect of related decisions—for example, under Articles 5, 6, 7, and 8. It is, however, clear that such an implication was not intended by the Conference. Any argument to that effect could be resisted by reference to the provision in the Preamble 'that the rules of customary

[4] 26 AJIL (1932 Supp) 72–3.

[5] (1st edn 1917) vol I p 189, (5th edn 1979) para 12.5; cp. Pradier-Fodéré (1899) vol I p 353; Genet (1931) vol II pp 278–80.

[6] UN Doc A/CN 4/91, Art 2; *ILC Yearbook* 1957 vol I p 13 (Sir Gerald Fitzmaurice).

international law should continue to govern questions not *expressly* regulated by the provisions of the present Convention'.[7]

A number of States attempted at the Conference to require the receiving State to communicate its decision within 'a reasonable time'. Genet, writing in 1931, had suggested that after a long wait for a reply, the sending State was entitled to assume that no objection would be taken to the person proposed—or at least could not be made without giving offence—and that the appointment could be made.[8] Such an assumption would now be contrary to the explicit terms of Article 4 paragraph 1. The true position was set out by the representatives of Yugoslavia and the Soviet Union—that the sending State should 'draw the necessary conclusions' from a long silence and take it as a polite form of refusal.[9]

Scope of *agrément*

Article 4 is an exception to the general rule in Article 7 of the Vienna Convention which permits the sending State freely to appoint the members of the staff of the mission. The justification for the requirement lies in the particular sensitivity of the appointment of a head of mission and the need, if a head of mission is effectively to conduct diplomacy between two States, for him to be personally acceptable to both of them. It follows that the need for *agrément* is limited to heads of mission. Chargés d'affaires *ad interim*, who unlike chargés d'affaires *en titre* are not heads of mission, are not covered by Article 4. Articles 14 and 19 of the Convention make this clear, and amendments to spell the position out further in Article 4 were therefore resisted both in the International Law Commission and at the Vienna Conference.[10]

Procedure for *agrément*

Since the essence of the *agrément* procedure is its informality, the Convention prescribes no form or method for requesting or granting *agrément*. The approach may be made by the head of mission who is about to take his leave, it may be made through the embassy of the receiving State in the sending State or it may be made directly by one head of State or of government or Minister to another in a third capital or at the United Nations headquarters in New York.[11] It is usual for a curriculum vitae to be supplied. While the receiving State is not legally precluded from making public the fact of or the reasons for its rejection of a possible head of mission, it is international practice for it to observe discretion. Thus when Mr Khrushchev in the course of conversation with foreign diplomats in 1962 expressed highly critical opinions on a number of possible candidates for appointment to the post of Ambassador to Moscow from the Federal Republic of

[7] UN Docs A/Conf. 20/C 1/L 37; A/Conf. 20/14 p 87 (Committee of the Whole), p 10 (Plenary). Emphasis added.

[8] Genet (1931) vol II p 275.

[9] UN Docs A/Conf. 20/C 1/L 43 (Italy and the Philippines), L 28 (Ceylon) 'with the least possible delay'; A/Conf. 20/14 p 86.

[10] See UN Doc A/Conf. 20/CN 4/L 72 p 8 (SR 509, para 10); *ILC Yearbook* 1958 vol I p 100 (Mr Sandstrom, Sir Gerald Fitzmaurice); UN Doc A/Conf. 20/14 pp 60, 86, 87 (Spain, United States).

[11] Salmon (1994) para 219.

Germany—and this when *agrément* had not been sought for any of them—the remarks were regarded in diplomatic circles, as well as in Bonn, as tactless and contrary to usage.[12]

Agrément may be revoked after it has been given, provided that the new head of mission has not yet arrived in the territory of the receiving State. If he has, the appropriate options available to the receiving State would be a declaration of *persona non grata* or a request for withdrawal of the head of mission, and the head of mission would be entitled in this event to privileges and immunities by virtue of Article 39.1 of the Convention.[13] In May 1979 the Government of Iran, having already given *agrément* to a new US Ambassador, asked for his arrival to be delayed and subsequently asked for the appointment to be withdrawn. The reason related to passage of a Resolution by the US Senate concerning reports of secret trials and summary executions by Iranian revolutionary courts. The US Government, while complying with the request, made clear that it was not conducive to a constructive relationship between Iran and itself. The event predated by only a few months the seizure of the US Embassy in Tehran.[14] Another example occurred in 1968 when King Faisal of Saudi Arabia withdrew *agrément* to the appointment of Sir Horace Phillips as Ambassador on the ground that the Saudi Government had become aware that he had Jewish origins which had recently been made public in the British press.[15]

Reasons for refusal of *agrément*

Since the receiving State is not required to give reasons for the refusal of *agrément,* there are no legal constraints on its discretion in the matter. It is only if the procedure does not work as is intended that reasons for a refusal may become public, and many of the cases cited in the literature where the reasons have become public antedate the establishment of the rules now codified in Article 4 of the Vienna Convention. In general practice it is accepted that reasons for refusal of *agrément* should relate to the proposed head of mission personally rather than to the relations between the sending and the receiving State. Where, however, the reason for refusal relates to public utterances by the proposed head of mission in meetings or legislative debates in his home country, this distinction may be a fine one. In 1891, for example, the Government of China refused to accept Mr Blair as US Minister to China because of the part he had played—said to have included bitter abuse of China—in the US Senate when advocating the Exclusion Act 1888. The Chinese Foreign Office indicated that if the Exclusion Act were to be repealed, they would be prepared to receive Mr Blair.[16]

In 1977 Greece held up *agrément* for Mr William Schaufele as US Ambassador on account of remarks made by him during his confirmation hearing before the Senate Foreign Affairs Committee about the dispute between Greece and Turkey in the Aegean. The State Department maintained that these remarks had been mistranslated.[17] Remarks made to a Senate confirmation hearing also led to the US candidate for Ambassador to Venezuela, Larry Palmer, being rejected in 2010 by the President of Venezuela, Hugo Chavez.

[12] 1962 RGDIP 758.
[13] Richtsteig (1994) p 25.
[14] 1979 DUSPIL 574.
[15] See Dickie (1992) pp 178–80.
[16] Satow (5th edn 1979) para 12.11.
[17] 1977 RGDIP 827.

Mr Palmer had alleged that the Government of Venezuela was giving support to Colombian revolutionaries, and that morale in the Venezuelan army was low. The Venezuelan President proposed alternative candidates (more supportive of his regime), but the US refused to back down and left its Embassy for several years under a chargé d'affaires.[18]

A proposed head of mission may be rejected in the light of his previous postings. The provisional French Government in 1944 refused *agrément* to a proposed nuncio put forward by the Holy See on the ground that he had previously been accredited to the Vichy Government. In 1983 Kuwait refused *agrément* to a head of mission proposed by the United States who had served for three years as Consul-General in Jerusalem.[19] Religious affiliation of the proposed head of mission or members of his family may also play a part, as in the cases of Mr Keiley and Sir Horace Phillips described above. In 2002 Iran rejected the proposed appointment of David Reddaway as British Ambassador on the ground that he was 'a Jewish spy'. The British Government made clear that Mr Reddaway was neither Jewish nor an intelligence officer but was married to an Iranian and had previously served twice in the British Embassy in Tehran, and they responded to the rejection by downgrading the status of the Iranian Ambassador in London. An alternative candidate was accepted by Iran some months later.[20] In 2009, it was reported that Caroline Kennedy, Roman Catholic daughter of President Kennedy, had been rejected as US Ambassador to the Holy See on the grounds of her 'liberal views on abortion, stem-cell research and same-sex marriage'.[21]

Suspicion of involvement in criminal including terrorist activity, or in serious violations of human rights, would in democratic States at least always be a reason for refusal by the receiving State of *agrément* for a proposed head of mission.[22] In 1984 the United States rejected the nomination as Ambassador for Nicaragua of Nora Astorga who while active six years earlier on behalf of the Sandinista revolutionaries had lured a general of the National Guard of Nicaragua and adviser to the then President of Nicaragua to his assassination in her bedroom.[23] A further possible reason is the likelihood that the head of mission intends during his posting to continue professional or commercial activities for personal profit. In 1853, for example, the United Kingdom objected to receiving a chargé d'affaires from New Granada on the ground that he was 'engaged in commercial pursuits in this City'.[24] This will be further considered below in the context of Article 31.1(c) and Article 42.

On the selection of ambassadors and other diplomats by sending States, see Satow's *Diplomatic Practice*.[25]

[18] *The Times*, 7 January 2010, 20 December 2010, *Latin American Herald Tribune*, 26 September 2013.

[19] 1984 RGDIP 244. See Salmon (1994) para 223.

[20] *The Times*, 24 September 2002.

[21] *The Times*, 15 April 2009. She was later appointed US Ambassador to Japan (*The Times*, 25 July 2013).

[22] See Salmon (1994) para 223 and UK Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to 'The Abuse of Diplomatic Privileges and Immunities' (Review of the Vienna Convention), Cmnd 9497, para 20.

[23] Obituary of Nora Astorga, *Washington Post*, 15 February 1988. Information confirmed by State Department.

[24] VII BDIL Phase One 574–5.

[25] Satow (6th edn 2009) 7 paras 1–7. See also Dickie (1992) c II.

MULTIPLE ACCREDITATION

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States, it may establish a diplomatic mission headed by a *chargé d'affaires ad interim* in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

The practice of multiple accreditation is of long standing in the history of diplomatic relations. Textbook writers list numerous instances where a single envoy was accredited by two sovereigns, or by a single sovereign to two or more States. In 1825 the United Kingdom declined a proposal by Argentina to accredit a Minister who was also accredited to Paris in the following terms: 'Je crois, disait Canning, que ce n'est pas trop pour le cérémonial, d'exiger un ministre pour l'Angleterre seule.' Although other instances of rejection may have been masked by the general practice of confidential request for *agrément*, objections seem to have been unusual and limited to cases where there was some political sensitivity between the two possible receiving States.[1] No clear distinction was drawn between cases where an envoy was entrusted with the interests of a third State in consequence of a breaking of diplomatic relations (now covered by Article 45(b) of the Convention) and cases where there was formal accreditation by two States, the situation was intended to be indefinite and the motive was economy on the part of the sending State or States.

Article 5 of the Havana Convention of 1928 set out the position on multiple accreditation thus:

> Every State may entrust its representation before one or more governments to a single diplomatic officer. Several States may entrust their representation before another to a single diplomatic officer.

In this formulation there is no provision either for notification or for objection to the principle.[2] In the second case, the procedure of *agréation* gives the receiving State—who

[1] Genet (1931) vol II pp 25–7; Pradier-Fodéré (1899) vol I pp 186–8.

[2] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 420, 26 AJIL (1932 Supp) 176. See also Project of American Institute of International Law 1925, Art 7, Project of International Commission of American Jurists 1927, Art 7, ibid at pp 169, 172.

will be aware of the first appointment when approval for the second is sought—full opportunity to give or refuse consent to double accreditation. In the first case on the other hand, the second State to which the envoy is sent may not be aware of his other appointment when it grants *agrément*, and if the first State is not notified of the proposed second appointment, it would have under the Havana Convention no redress other than to ask for the recall of the envoy from its own capital.

Negotiating history

Article 5 originated in a suggestion by the United States, in its comments on the 1957 draft articles of the International Law Commission, that a paragraph should be added to cover situations where a head of mission and perhaps other staff of the mission were accredited also to one or more other States. The United States proposed that the sending State should first obtain the consent of each receiving State.[3] The general view taken in the debates in the International Law Commission in 1958 was that clarifying provision would indeed be helpful, but that explicit consent of the receiving States was neither required by practice nor necessary in principle. Sir Gerald Fitzmaurice proposed the text: 'Unless objection is offered by any of the receiving States concerned, the head of a mission to one State may be appointed head of a mission to one or more other States,' and this was accepted by the Commission.[4] Since this text imposed no obligation to notify either receiving State of the fact of multiple appointment, it would in practice have left unchanged the position set out in the Havana Convention.

At the Vienna Conference it became clear that although the principle of accrediting to two or more States was generally acceptable, and the smaller States in particular attached great importance to having the practice expressly safeguarded in the Convention, there was considerable difference of opinion over the question of consent of the receiving States. Some States preferred the International Law Commission's draft or would have deleted as unnecessary the provision in it allowing a receiving State to object. Others proposed that only the State of first accreditation should be given an opportunity to object, or should be required—if it wished to reserve its rights—to add a condition when giving its *agrément*.[5] The majority were, however, of the opinion that the political risks inherent in the practice were such that all the receiving States should be notified and entitled to object, and this view was reflected in the text which ultimately emerged.[6]

It is not clear from the records of the Conference whether the sending State, having given due notice of its intention to all the receiving States, is bound to await their express consent. The words used, which may be contrasted with those in Article 4, suggest that Article 5 permits objections, but does not expressly stipulate that the receiving States must consent, and this seems to have been the understanding of the Federal Republic of Germany. A contrary interpretation was, however, put forward by South Africa, and was confirmed by the Chairman. In Plenary Session, the Soviet Representative asked for deletion of the words 'unless there is express objection by any of the receiving States' on

[3] UN Docs A/CN 4/114 p 53; A/CN 4/L 75 p 4; A/CN 4/116 p 13.
[4] *ILC Yearbook* 1958 vol I p 101.
[5] UN Docs A/Conf. 20/C 1/L 83 (Ukraine), L 71 (Ceylon), L 75 (Finland).
[6] UN Docs A/Conf. 20/C 1/L 19 para 1 (United States); L 40 (Italy); L44 (Malaya); A/Conf. 20/14 pp 87–92.

the ground that they could be interpreted as requiring actual consent. The words were not deleted, and the suggestion was not contradicted.[7]

Paragraphs 2 and 3 of Article 5 resulted from amendments introduced at the Vienna Conference, and aroused little substantial controversy. Paragraph 2 was accepted as a logical corollary of paragraph 1 which reflected current practice.[8] Paragraph 3 generalized practice already current in Washington, Rome, and Vienna whereby the head or member of a mission acts as his country's representative to the Organization of American States, the Food and Agricultural Organisation, or the International Atomic Energy Agency. In Rome such double accreditation was expressly encouraged by the Government of Italy in view of the shortage of suitable diplomatic accommodation.[9] Paragraph 3 does not require that the international organization should have its headquarters in the capital of the receiving State, although this is usually the case. Nor, in contrast to paragraph 1, does it impose any requirement of notification or of consent. In Plenary Session the representative of Italy placed on record its understanding that such an obligation was implied, but an attempt by the representative of France to add to the text the words 'in the absence of any objection by the receiving State' was unsuccessful. As a rule it is unlikely that a receiving State would object on political grounds to a diplomat being accredited to an international organization as well as to itself. Belgium, for example, does not object to a double appointment of an ambassador to itself and to the European Union.[10] An exceptional case is Switzerland, where the Government is not prepared to accept a head of mission also appointed as Representative to the United Nations in Geneva.[11] The United States in a Circular Note of 1977 made clear that where a member of the diplomatic staff of a mission also acted as representative to an international organization, it regarded such arrangements 'as necessarily collateral and subordinate to the member's diplomatic duties'. They would not accept a position whereby an accredited diplomat performed duties under a full-time contract or appointment with an international organization.[12] The location of the United Nations Headquarters in New York means that most States would not find it satisfactory to appoint their ambassador to Washington as representative to the United Nations, and in fact in 1997 there were only five small States which did this.[13]

Article 6, though it represents a principle as well established as that in Article 5, appeared only as a result of a suggestion by Luxembourg in its comments on the 1958 draft articles of the International Law Commission, and an amendment submitted at the Vienna Conference by The Netherlands and Spain. Although doubts were expressed as to the utility of the new provision, the need for *agrément* for a joint appointment, as well as the possibility of objecting to the arrangement in principle safeguards the position of the receiving State. On a vote in Plenary Session, after very little debate, Article 6 was adopted with a number of abstentions but no votes against.[14]

[7] UN Doc A/Conf. 20/14 pp 91, 92, 10.
[8] UN Docs A/Conf. 20/14/C 1/L 41 (Czechoslovakia); A/Conf. 20/14 p 89.
[9] UN Docs A/Conf. 20/C 1/L 36 (Colombia); A/Conf. 20/14 p 89; Salmon (1994) para 245.
[10] 2002 RBDI 159.
[11] UN Doc A/Conf. 20/14 p 11; Salmon (1994) para 243.
[12] 1978 DUSPIL 537.
[13] State Department information.
[14] UN Docs A/4164/Add. 5 p 3; A/Conf. 20/C 1/L 22; A/Conf. 20 pp 89, 100, 12.

Subsequent practice

The increase since 1961 in the number of sovereign States, the trend towards maintaining diplomatic relations at the level of ambassador with a large number of States and the constraints in nearly all States on overseas expenditure have led to extensive use of the multiple accreditation possibilities of Article 5. In 1963 when the United Kingdom opened the first Western Embassy in Mongolia and accredited to Ulan Bator the chargé d'affaires normally resident in Peking, the procedure was relatively little used by larger States.[15] In 1992, however, when following the break-up of the Soviet Union the United Kingdom invited ten newly recognized States to open diplomatic relations, resident representation was established in only two new capitals, while eight were initially covered by cross-accreditation of Her Majesty's Ambassador in Moscow.[16] On the opening of diplomatic relations in the same year with Albania the UK Ambassador in Rome was also accredited on a non-resident basis to Tirana.[17] The United Kingdom for some years regularly accredited to Chad the Head of the West African Department of the Foreign and Commonwealth Office who remained normally resident in London.[18] In 2003 the Foreign Secretary announced that in a reversion to the practice of a century earlier HM Ambassador to Guatemala would be simultaneously accredited to El Salvador, to Honduras, and to Nicaragua. The United Kingdom would appoint an Honorary Consul in El Salvador and a chargé d'affaires in Honduras and in Nicaragua. Foreign Ministries in Honduras, Nicaragua, and El Salvador were informed of the proposed changes.[19]

France in 1987 due to budgetary constraints accredited a single Ambassador to the Soviet Union and to Mongolia, and also to Sri Lanka and to the Maldives.[20] Belgium carried out an even more extensive increase in multiple accreditation. Salmon records that in 1989 Belgium was represented in sixty-nine States by a head of mission also resident in another State, while by 1993 the number of such missions had risen to ninety-two.[21]

Even the United States in 1997 sent eleven Ambassadors accredited to more than one State. Of these eleven, two were accredited to three States, one to four, while the Ambassador to Barbados was also Ambassador to Antigua and Barbuda, to Dominica, to Grenada, to St Kitts and Nevis, to Saint Lucia, and to Saint Vincent and the Grenadines.[22]

The alternative form of multiple accreditation offered by Article 6 has proved less attractive. Confidentiality of instructions and archives must be secured, division and ownership of premises must first be negotiated if such an arrangement is to work well. There is always the risk of conflict of interest between two or more sending States, and there may be fear of diminution of sovereignty on the part of the smaller of two sending

[15] Satow (5th edn 1979) para 9.32. In the nineteenth century, however, the United Kingdom made use of the procedure in regard to the South American States. In 1900 the UK Representative at Guatemala was also accredited to Costa Rica, Honduras, Nicaragua, and El Salvador: VII BDIL 563.

[16] Hansard HL Debs 5 February 1992 col 271.

[17] Hansard HL Debs 23 June 1992 WA col 29.

[18] Satow (5th edn 1979) para 9.33.

[19] FCO Press Release, 21 March 2003.

[20] 1987 AFDI 1004.

[21] (1994) para 243. See also James (1991) at pp 360–4.

[22] State Department List of Chiefs of Mission, 30 June 1997.

States. The arrangement can work only among States of similar geographical and political outlook, one successful example being an integrated diplomatic mission in London representing several Eastern Caribbean States.[23]

Article J.6 of the Treaty on European Union signed at Maastricht on 7 February 1992 provided that:

> The diplomatic and consular missions of the Member States . . . in third countries . . . shall co-operate in ensuring that the common positions and common measures adopted by the Council are complied with and implemented. They shall step up co-operation by exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 8c of the Treaty establishing the European Community.[24]

The substance of this provision is now in Article 20 of the Treaty on European Union as amended by the Treaty of Lisbon.

In the implementation of the European Union's Common Foreign and Security Policy much progress has been made towards sharing certain diplomatic functions and premises. Several shared embassies are already in operation. Most highly developed is a scheme for shared facilities in Abuja, Nigeria, in which almost all the Member States of the European Union participate. In other States such as Belarus, Iceland, Kazakhstan, and Zaire there are more limited projects.[25] In 2003 the UK Foreign and Commonwealth Office reported that there were eleven UK diplomatic missions which shared facilities—known as co-location projects—with other Member States of the European Union and the European Commission.[26] In 2005 Germany had co-located missions with other European Union States in nine foreign capitals. As yet, however, there is no disposition for the Member States to accredit a single individual as head of mission in any third State, each Member State insisting that it can be represented abroad only by one of its own nationals. In some States (in particular France) it would require a constitutional amendment for national interests to be protected abroad other than by a national of the State concerned. Nor does sharing of diplomatic premises extend to the general sharing of archives or communications.[27]

Following the entry into force of the Treaty of Lisbon, the provisions relating to the Common Foreign and Security Policy were strengthened and the office of High Representative of the Union for Foreign Affairs and Security Policy was created. Declaration 15 attached to the Treaty, however, emphasizes that these provisions 'will not affect the responsibilities of each Member State in relation to the formation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations . . .'. The increase in the number and importance of EU delegations (which have replaced the former European Commission delegations) has

[23] James (1991) p 364; Richtsteig (1994) pp 27–8. Salmon (1994) para 246 says that in 1963 Niger, Upper Volta, Ivory Coast, and Dahomey were represented in Israel by the same head of mission.

[24] UKTS No. 12 (1994); Cm 2485; OJ C191/1.

[25] On the operation of the Common Foreign and Security Policy see Nuttall (1992); Macleod, Hendry and Hyett (1996) ch 24; Fink-Hooijer (1994). For a list of co-location projects planned or in operation see OJ C60/12, 26 February 1997.

[26] Hansard HL Debs 20 January 2003 WA col 67.

[27] *Observer*, 6 June 1996, 'Britain finds common ground in diplomatic tower of Babel'. On co-location and other forms of co-operation between diplomatic missions of European Union Member States, see Denza (2002) at pp 164–6; Denza (2012) at pp 491–2; Wessel (1999) at pp 272–82.

however led to the new possibility of co-location of an EU delegation and one or more embassies of EU Member States. Under a Memorandum of Understanding between the European External Action Service and Spain, for example, the Spanish Embassy will be established within the premises of the EU Delegation to Yemen.[28]

[28] EU Press Release, 10 December 2012 A 568/12. The first such Memorandum enabled the establishment of a Luxembourg Embassy within the premises of the EU Delegation to Ethiopia. See also House of Lords EU Committee 11th Report, 2012–13, *The EU's External Action Service*, paras 48–49; Wouters, Duquet, and Meuvissen (2014) at p 568.

APPOINTMENT OF THE STAFF OF THE MISSION

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

The first sentence of Article 7 sets out the general principle that the sending State has the right to choose all members of its diplomatic mission and that their appointment (except for the head of the mission) is not subject to the previous *agrément* of the receiving State. It is open to the receiving State, as provided in Article 9, to declare any member of the mission *persona non grata* or unacceptable before his arrival in the receiving State. The receiving State may not, however, require the sending State to select its staff from a previously prepared list or compel it to employ any person against its wishes.

The second sentence permits Contracting Parties to make an exception to the general principle in the case of defence attachés—appointments which are particularly likely to be questioned by a receiving State on security grounds. Article 11 of the Convention also permits a receiving State to refuse, on a non-discriminatory basis, to accept officials of a particular category, and it is therefore at liberty to refuse altogether to accept appointment of any defence attachés or some kinds of defence attaché. Submission of names of defence attachés for approval is not under Article 7 made obligatory. Some States, including the United Kingdom, do not require prior submission of the names of defence attachés.

Negotiating history

In the International Law Commission and at the Vienna Conference there was discussion of the relationship between the principle of free appointment and entry onto a diplomatic list or diplomatic register in the receiving State. There were at the Conference several proposals to extend the requirement of submission of names prior to appointment as a member of a mission, but none were acceptable. A French amendment would have added, after the first sentence in the Article, the words: 'Nevertheless, entry on the Diplomatic List of members of the diplomatic staff shall be subject to the agreement of the receiving State. Such entry shall constitute recognition of diplomatic rank by the receiving State.' Had this amendment been adopted it would have avoided the difficult situation which arises when a member of mission already in the territory of the receiving State is found unacceptable as soon as he is notified, but nevertheless claims immunities for a 'reasonable period'—a problem discussed below under Articles 10 and 39. The majority view was, however, that the significance of the diplomatic list or diplomatic register varies between different States and that it should not be a decisive factor in determining when immunity began. The International Law Commission text was therefore adopted unchanged.[1]

[1] UN Docs A/CN 4/114 p 53 (US comment on ILC draft); *ILC Yearbook* 1958 vol II pp 101–3; A/Conf. 20/C 1/L 32/Rev. 1 para 1; L 46; L 48/Rev. 1; L 1 (France); A/Conf. 20/14 pp 93–8.

Problems of construction of Article 7

Article 7 does not indicate whether the receiving State in case of rejection of a proposed defence attaché may be required to give its reasons. It would seem reasonable to apply by analogy the provision in Article 4 relating to *agrément* for a head of mission which specifies that reasons need not be given. The reasons why most States prefer non-disclosure of reasons for rejection seem to have equal validity in the case of defence attachés.

Exemption from immigration control

If the sending State's freedom to appoint members of its diplomatic mission is to be effective, it follows that the persons appointed must be admitted to the receiving State and treated as exempt from immigration restrictions so long as they remain in the service of the mission. Although entitlement to enter and remain in the territory of the receiving State is not explicitly spelt out as a privilege in the Vienna Convention on Diplomatic Relations,[2] it is in practice regarded as flowing from Article 7 and given effect in domestic immigration law insofar as this is necessary in some States.

Under the US Immigration and Nationality Act, for example, exemption from normal immigration requirements is given to the following classes of non-immigrant aliens:

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(A)(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families;

(A)(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above.[3]

In the United Kingdom, section 8(3) of the Immigration Act 1971[4] confers exemption from immigration control 'to any person so long as he is a member of a mission'. In *R v Secretary of State for the Home Department, ex parte Bagga and others*[5] the Court of Appeal, reversing earlier decisions of the Divisional Court and the Immigration Appeal Tribunal, held that exemption from immigration control applied to all members of diplomatic missions from their arrival in the United Kingdom to take up their appointment. Following some concern in the United Kingdom that individuals who had originally entered as visitors or students were seeking to evade deportation by finding employment in diplomatic missions,[6] the United Kingdom in 1988 limited exemption from

[2] This is in sharp contrast to the position regarding persons connected with international organizations.

[3] 8 USC § 1101(a)(15)(A).

[4] 1971 c 77. The provision was amended by Immigration Act 1988 s 4.

[5] [1990] 3 WLR 1013; [1991] 1 All ER 777; [1990] Imm AR 413; Times Law Reports, 19 April 1990. See comment by Staker (1990) at p 391.

[6] See Review of the Vienna Convention, Cmnd 9497, para 19: 'we have also been concerned about the appointment as locally engaged mission staff of persons who would not otherwise be permitted to stay and work in the UK. These include members of the service staff, e.g. chauffeurs and cleaners, who are thereby able to evade the enforcement of immigration rules.'

immigration control so that it applied to a member of a mission other than a diplomatic agent only if he entered the United Kingdom as a member of that mission, or in order to take up a post as such a member which was offered to him before his arrival. It was made clear to Parliament that the intention was to discourage missions from employing junior staff who would not otherwise be permitted to work in the United Kingdom. A Note sent to all diplomatic missions in London, however, explained that it might also be possible for other persons to be employed if the Foreign and Commonwealth Office were notified of the appointment and were satisfied that they were in bona fide employment. This flexibility would appear to be necessary in order to reconcile section 4 of the Immigration Act 1988 with Article 7 of the Convention.[7]

Immunity from employment claims

The freedom of the sending State to appoint members of the staff of the mission is generally regarded as extending to freedom to dismiss. This liberty has become of importance with the widespread introduction of limitations on the immunity of foreign sovereign States. Although in many jurisdictions individuals may now in certain circumstances bring proceedings against foreign States in respect of contracts of employment, there have until recently been virtually no cases where a member of a diplomatic mission has succeeded in bringing in the receiving State proceedings for unfair dismissal or for other breaches of his employment contract. In the United Kingdom the immunity of foreign States from such proceedings is expressly safeguarded by section 16(1)(a) of the State Immunity Act 1978,[8] which provides that the statutory limitation of immunity in respect of certain contracts of employment between the State and an individual 'does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention'. In the case of *Sengupta v Republic of India*[9] Browne-Wilkinson J, President of the Employment Appeal Tribunal, held in a situation where this Act did not apply (since it was not retroactive in its effect) that jurisdiction was excluded over claims by any member of a diplomatic mission:

> They are engaged in carrying out the public functions of the foreign State: an investigation of their claim might well require an investigation by the tribunal into the conduct of the diplomatic mission. Therefore, in our judgment, at common law a State is immune from claims for unfair dismissal brought by employees at a diplomatic mission who are engaged in carrying on the work of that mission.

The Tribunal was fortified in its conclusion by noting that it accorded with decisions in other jurisdictions which were helpful in establishing the rules of public international law.[10] In the later case of *United Arab Emirates v Abdelghafar and another*,[11] the UK

[7] See Hansard HL Debs 12 April 1988 cols 979–82 and HC Debs 26 April 1990 WA cols 305–6. The Circular Note to missions is in 1988 BYIL 478. The 1987 Memorandum on Diplomatic Privileges and Immunities describing the practice of Her Majesty's Government in the United Kingdom is in 1987 UKMIL 549. A 1990 revision on this point was noted in 1990 BYIL 535. On the absence of a requirement to obtain work permits for diplomatic mission staff and private servants, see Hansard HC Debs 16 November 2004 WA col 133, cited in 2004 BYIL 767.

[8] 1978 c 33; Dicey and Morris, *The Conflict of Laws* (12th edn 1993) vol I p 253.

[9] [1983] ICR 221 (EAT); 64 ILR 352.

[10] *De Decker v USA* 23 ILR 209 (Belgium, Court of Appeal of Leopoldville, Belgian Congo); *Conrades v United Kingdom* 65 ILR 205 (Federal Republic of Germany, Hanover Labour Court).

[11] 107 ILR 627, Employment Appeal Tribunal decision, 10 July 1995, unreported.

Employment Appeal Tribunal confirmed that section 16 of the State Immunity Act 1978 operated so as to confer state immunity even where the members of a mission seeking to bring proceedings against their employer were themselves not entitled to any privileges or immunities.

The question was considered in 1985 by the Sub-District Court of The Hague in the case of *MK v Republic of Turkey*[12] in which a Dutch national employed as a secretary at the Embassy of Turkey in The Netherlands brought proceedings to have her dismissal declared void. The Netherlands court held that the contract of employment was of a private law nature, paying no regard to its diplomatic character. In 1989, however, The Netherlands Supreme Court in the case of *Van der Hulst v United States*[13] held that there were exceptions to the private law nature of contracts of employment concluded by a foreign State. They said:

> In carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of a contract such as the present one to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check by stipulating a condition such as the present one. It cannot be assumed that a foreign State which enters into such a contract thereby loses its right to rely on immunity when terminating the contract on the ground of a security check of the kind mentioned above, no matter how much the contract itself is of a private law nature.

In the case of *O'Shea v Italian Embassy* in 2001, the Equality Officer in Ireland decided that the Director for Equality Investigations did not have jurisdiction to investigate a claim by an employee of a foreign embassy of discrimination under Irish equality legislation because the investigation process would involve critical analysis and investigation of the internal management practices of the employer and this in the case of a foreign mission would be inconsistent with the dignity of the foreign State and an interference with its sovereign functions.[14] In none of these cases was the right of the sending State freely to appoint the staff of its diplomatic mission drawn to the attention of the court.

Courts in other jurisdictions have, however, drawn a distinction between employment claims by embassy staff where engagement, dismissal, or reinstatement was in issue and those relating to purely financial obligations. In Italy, for example, the Court of Cassation in 1991 held in the case of *Norwegian Embassy v Quattri*[15] that Italian courts were competent to exercise jurisdiction over a claim by a secretary and administrative assistant for unpaid allowances, but not over her claim for reinstatement. In 1992 the same court held in the case of *Zambian Embassy v Sendanayake* that Italian courts were competent to exercise jurisdiction over a claim by a driver/interpreter to the embassy for unpaid remuneration.[16]

In the case of *Fogarty v United Kingdom*[17] the European Court of Human Rights considered whether the exclusion by the UK State Immunity Act 1978 of the possibility

[12] 19 NYIL (1988) 435; 94 ILR 350.

[13] 22 NYIL (1991) 379; 94 ILR 374. See also decision of Portuguese court in *Brazilian Employee Case*, 116 ILR 625.

[14] Equality Officer's Preliminary Decision DEC-E 2001/040, available at www.equalitytribunal.ie.

[15] Decision 12771/1991, Court of Cassation, 114 ILR 525.

[16] Decision 5941/1992, Court of Cassation; 114 ILR 532.

[17] Application 37112/97 (2002) 34 EHRR 12; 123 ILR 53.

of bringing a claim for sex discrimination during the process of recruitment for a position within the diplomatic mission of the United States violated the right of access to a court or tribunal accorded under Article 6 of the European Convention on Human Rights. The Grand Chamber of the Court held that in imposing procedural limitations on the right of access to a court a State Party to the Convention enjoyed a margin of appreciation. Any limitations must not impair the essence of the right of access to a court, they must pursue a legitimate aim, and there must be proportionality between the limitations and the aim pursued. Conformity with rules of international law on state immunity was in itself a legitimate aim. Given the diversity of state practice on the application of state immunity rules to employment in foreign diplomatic missions,[18] the United Kingdom was within accepted international standards and had not exceeded the permitted margin of appreciation. In a concurring judgment, Judges Caflisch, Costa, and Vajic, justifying the proportionality of the restriction imposed by the United Kingdom, suggested that a distinction could be drawn between disputes relating to appointment and other employment disputes 'once the individual concerned has been hired'. They explained:

> This is so by reason of the overarching importance, for each and every independent State, freely to conduct its foreign policy by using the services of whosoever it sees fit for that task. Important though it is, the right of access to court cannot prevail over that basic imperative.

Judge Loucaides, however, dissented, claiming that it had not been established that there was a rule of customary international law supporting the United Kingdom's restriction on access and that the applicant's claim related not to employment in the US Embassy but to discrimination in the recruitment process. But if the imperative character of the right to select mission staff is accepted, it should probably override any entitlement to non-discrimination in the process of selection.

The United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 16 December 2004,[19] under Article 11 permits national courts to exercise jurisdiction over disputes over contracts of employment in a diplomatic mission unless:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
(b) the employee is:
  (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961; . . .
  (iv) any other person enjoying diplomatic immunity;
(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
(d) the subject-matter of the proceedings is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employee State, such a proceeding would interfere with the security interests of that State.

These exceptions to local jurisdiction over contracts of employment with a State are drafted more narrowly than is section 16(1)(a) of the State Immunity Act 1978, but taken

[18] See Garnett (1997); Yang: (2003) p 330, especially pp 386–408.
[19] UN Doc A/RES/ 59/38.

together they appear to be more than sufficient to safeguard the right of a sending State to free choice in the appointment and dismissal of staff of its diplomatic mission. They would permit local courts to exercise jurisdiction over some claims of discrimination by junior staff of a diplomatic mission relating to their contract terms, for example, unpaid wages, unequal pay, or conditions of service. They have been criticized as leaving uncertainty (for example, as to the meaning of the expression 'particular functions in the exercise of governmental authority') and permitting unduly wide assertions by a defendant State that proceedings resulting from dismissal would 'interfere with the security interests of that State'.[20]

Two later cases were decided by the Grand Chamber of the European Court of Human Rights on the basis that the 2004 UN Convention could be regarded as customary international law—a proposition which at least in the case of a provision as complex and detailed as Article 11 on contracts of employment must be open to question.[21] In *Cudak v Lithuania*[22] the applicant, who worked as a secretary and switchboard operator in the Embassy of Poland in Vilnius, claimed to have suffered sexual harassment by a diplomat in the Embassy which led to her absence from work and subsequently to her dismissal. She claimed compensation for unlawful dismissal and the Lithuanian Supreme Court upheld Poland's claim to state immunity on the ground that the relationship between the applicant and Poland was of a public law character and concerned the exercise by Poland of its sovereign functions. The Grand Chamber of the ECtHR however found that the applicant's duties in no way implicated Poland's sovereign interests or its security interests, so that the finding of immunity violated the applicant's right to access to a court under Article 6 of the ECHR.

In *Sabeh el Leil v France*[23] the applicant was head accountant in the Embassy of Kuwait in Paris, carrying out administrative tasks and acting as staff representative. His employment was terminated in the context of a wider 'restructuring of all the Embassy's Departments'. The Paris Court of Appeal and the French Court of Cassation upheld Kuwait's claim to State immunity on the basis that his activities were in the interest of the public diplomatic service. The Grand Chamber of the ECtHR applied Article 11 of the 2004 UN Convention (which at the time France had not yet ratified), but found that its terms did not justify Kuwait's claim of immunity. It found that his activities did not involve the exercise of governmental authority or implicate the security interests of Kuwait. In the view of the ECtHR, the French courts had misapplied the international rules on State immunity and the applicant's right of access to a court had therefore been violated.

In both these cases the Court of Human Rights applied the 2004 UN Convention which was not in force and had not been ratified by either of the defendant States, but did not consider Article 7 of the Vienna Convention on Diplomatic Relations which was binding on all the States concerned. The decision in *Sabeh el Leil v France* in

[20] Garnett (2005). The article was written before the adoption of the UN Convention, but the relevant provisions are unchanged. In criticizing both UK legislation and the *Fogarty* judgment of the European Court of Human Rights Garnett makes no reference to Art 7 of the Vienna Convention on Diplomatic Relations. See also Pingel (2000); 2002 RGDIP 893 at 899; 2003 Journal de Droit International 1115; and comment and cases cited in Pingel (2004) at pp 12–13.

[21] Bedermann (2012) strongly criticized the Grand Chamber's decision on that basis.

[22] Application No 15869/02, Judgment of 23 March 2010.

[23] Application No 34869/05, Judgment of 29 June 2011. See Bedermann (2012).

particular—where the ground for dismissal was restructuring of Embassy Departments—clearly affected the right of France as sending State to free choice of its mission staff.

In reliance on the cases of *Cudak v Lithuania* and *Sabeh el Leil v France*, the UK Employment Appeal Tribunal in the cases of *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya*,[24] hearing claims brought by members of the service staff of the Embassies of Sudan and Libya which related to dismissal as well as to non-payment of wages and breach of Working Time Regulations, found that section 16 of the UK State Immunity Act was incompatible with Article 6 ECHR which could be enforced in the UK by virtue of the Charter of Fundamental Rights of the European Union. The Tribunal did not consider Article 7 of the Vienna Convention on Diplomatic Relations, or Article 11 of the 2004 UN Convention, but held that the claims relating to Working Time Regulations and to racial discrimination and harassment were within the material scope of European Union law. On appeal, however, the relevance of Article 7 of the Vienna Convention was considered by the Court of Appeal and by the Supreme Court. Lord Sumption held that:

> Article 7 of the Vienna Convention has only a limited bearing on the application of state immunity to claims by embassy staff. I would accept that the right freely to appoint embassy staff means that a court of the forum may not make an order which determines who is to be employed by the diplomatic mission of a foreign state. Therefore it may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed. But a claim for damages for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal. No right of the foreign state is infringed by the assertion of jurisdiction in the forum state to carry out that adjustment. Therefore no right under the Vienna Convention would be prejudiced by the refusal of the forum state to recognise the immunity of the foreign state as regards a claim for damages.[25]

Freedom to classify mission staff

The freedom conferred by Article 7 on the sending State to appoint and dismiss members of the staff of the mission includes the freedom to specify the functions they are to perform and accordingly whether they are to be classified as diplomatic staff, administrative and technical staff, or service staff. Article 1 of the Convention, as explained above, gives the receiving State very little influence in the matter of classification of mission staff short of declaring individuals *persona non grata* or unacceptable (Article 9) or limiting the size of the mission (Article 11). The UK Government in their Review of the Vienna Convention[26] listed problems of abuse or attempted abuse arising out of the interpretation of Article 7 of the Convention, including notification as diplomatic staff of persons who should more properly be regarded as administrative and technical staff, disproportion between diplomatic staff and administrative and technical staff, and 'notification of staff (such as students and teachers) whose functions do not appear properly or fully to fall within those of a diplomatic mission'. The Government pointed out that any doubts about the official status of duties were rarely apparent from the notification form, but that

[24] [2013] UKEAT 040_12_0410.
[25] [2017] UKSC 62, at para. 70.
[26] Cmnd 9497 at paras 19–27. See also Richtsteig (1994) pp 28–9.

in certain cases they had refused to accept notifications which had then been withdrawn by the mission concerned. Missions were also asked to specify who a new arrival was replacing, and if there was no such person, to explain the functions of the new appointee. 'Even if there were a previous incumbent we do not necessarily accept that he should automatically have a successor.' Such cross-examination of a mission in respect of matters of internal staffing would, however, not be in accordance with general international usage and could arguably be contrary to Article 7 of the Convention. The evidence given by the Foreign and Commonwealth Office in June 1984 to the Foreign Affairs Committee of the House of Commons was in somewhat softer terms, namely: 'We also sometimes try informally to persuade missions to withdraw a nomination in cases where the appointee is clearly fulfilling an administrative and technical rather than a diplomatic function; or is not carrying out any of the functions of the mission as described in Article 3 of the Convention.'[27]

Since the entry into effect on 29 December 1978 of the Diplomatic Relations Act, giving effect in US law to the Vienna Convention on Diplomatic Relations, the Department of State have developed clear criteria for recognition as a diplomatic agent. These criteria have already been described and considered in the context of Article 1. The key requirement for diplomatic agents is that 'a person must possess a recognized diplomatic title and *perform duties of a diplomatic nature*'.[28] The Department have also developed a clear practice for the purpose of assigning non-diplomatic staff to the relevant classification of administrative and technical or service staff. A Circular Note from the Secretary of State requested diplomatic missions to provide 'the most accurate and descriptive job tide that currendy applies to the duties performed . . . The Office of Protocol will then assign each individual to the appropriate functional category.' The Department do not challenge the description by a mission of duties performed, but they expect certain job descriptions to be placed in what they have determined to be the appropriate category of mission staff. 'Security guard', for example, is regarded as a service staff category and 'security officer' as administrative and technical. Refusal to conform might be penalized by withholding of accreditation and corresponding benefits.[29]

The designation from 1979 onwards of Libyan diplomatic establishments as 'People's Bureau' gave rise to considerable difficulty, in Washington and in other capitals, in assigning Bureau personnel to the appropriate category of staff of the mission. Following prolonged correspondence, the State Department in a Note to the People's Bureau of 15 May 1980 said that:

> the Secretary of the People's Committee will be treated as equivalent to a chief of a diplomatic mission; the members of the People's Committee will be treated as equivalent to members of the diplomatic staff of a diplomatic mission; and the other members of the People's Bureau will be treated as equivalent to the members of the administrative and technical staff or the service staff of a diplomatic mission, as appropriate to their functions.

The people's Bureau, while continuing to insist that it was not a diplomatic mission and its personnel were not diplomats, accepted informally that the State Department was

[27] Minutes of Evidence before the House of Commons Foreign Affairs Committee, p 8, printed with the First Report from the Committee, Session 1984–5. See Brown (1988) at pp 54–6.

[28] Circular Note of 1 May 1985 to chiefs of mission in Washington, supplied by State Department.

[29] 1978 DUSPIL 532 at 538.

entitled to make such determinations for the purposes of privileges, immunities, and protection.[30] The UK Government came to a similar arrangement set out in a Diplomatic Note of 12 June 1980 to the Foreign Liaison Bureau in Tripoli.[31]

Short-term appointments

There is no requirement in Article 7, or elsewhere in the Convention, that appointments of mission staff should be of any particular duration. Provided that a person is performing diplomatic functions therefore, there is no reason why a visitor sent for a particular short-term negotiation or other task should not be appointed as a diplomatic agent if it is important that he or she should be entitled to privileges and immunities going beyond those given under customary international law to agents of a foreign State. Entitlement to privileges and immunities as a member of a special mission can only be guaranteed if sending and receiving States agree that a proposed visit should constitute a special mission. If such prior agreement exists, members of the special mission will be entitled to privileges and immunities under customary international law or under the New York Convention on Special Missions of 1969.[32] But in the absence of time to negotiate an agreement for a special mission, it may be preferable to appoint a visitor as a member of the staff of the permanent diplomatic mission in the receiving State, though such a course is unlikely to be acceptable to ministerial or other high-level visitors.

Appointment of employees of independent contractors

The Convention does not require that members of a diplomatic mission must be employees of the sending State, provided that they are carrying out functions on behalf of that State. In recent years it has become more frequent for some States to engage private military and security companies (PMSCs) to discharge protective functions for their embassies in dangerous capitals, for example in Iraq and Afghanistan. The UK has made clear that it is its policy to notify security officers as administrative and technical staff where justified by their functions even though they are employed by PMSCs and not by the UK Government.[33]

[30] 1979 DUSPIL 571; 1980 DUSPIL 286.

[31] House of Commons Foreign Affairs Committee First Report, 1984–5 paras 69–72, Minutes of Evidence paras 4–7, and Annex A to FCO Memorandum.

[32] *Khurts Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin); [2012] 3 WLR 180; 147 ILR 633; Sanger (2013). A certificate giving the visit of Tzipi Livni for a conference in the UK the status of a special mission was issued in 2011 by the FCO; see Crown Prosecution Service statement of 6 October 2011, *Guardian*, 6 October 2011, *Jewish Chronicle Online* 6 October 2011. She and other Israeli leaders had cancelled earlier planned visits because of the risk of arrest for war crimes at the instance of Palestinian activists.

[33] Response by the Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee of the House of Commons, quoted in UKMIL, 2009 BYIL 835–6. See also 2010 BYIL 641.

NATIONALITY OF DIPLOMATIC STAFF

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.
2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Historical background

Although it has always been regarded as anomalous and in general undesirable that a diplomat should be a national of the State to which he is accredited, it has always been permissible under customary international law. A well-known example of the practice in the seventeenth century was Wicquefort, a citizen of The Netherlands who acted as agent of the Duke of Lüneburg to the United Provinces and was imprisoned for communicating the State secrets of The Netherlands. While in prison he wrote the well-known handbook *L'Ambassadeur et ses Fonctions* which *inter alia* set out his view that consent of the receiving State was not necessary for such an appointment.[1] In the eighteenth century both Bynkershoek[2] and Vattel[3] acknowledged the possibility that a subject of the receiving State could act as envoy of another State, although they differed as to his legal position.

A distinction must, however, be drawn between the permissive rule of customary international law and the domestic rules of many States which forbid their subjects to accept employment as diplomatic agent of a foreign State, refuse to accept one of their own subjects as envoy of a foreign State to themselves, or accept him only on condition that he remains within their own jurisdiction. In the year in which Wicquefort's book claimed the right of a State to appoint without specific consent a national of the receiving State as its representative, The Netherlands passed a decree which made clear that a Dutch national would henceforth be accepted by them only on condition that he remained within their jurisdiction.[4]

Many States simply refused to accept appointment of their own nationals as diplomatic agents, dealing with each case as it became known or issuing a general prohibition to all their subjects. The United States has always fallen into this category. The Foreign Service Act of 1980[5] provides that only US citizens may be appointed to diplomatic posts abroad. The United States 'as a matter of policy, does not normally accept the accreditation of its

[1] (1681) I Section XI.
[2] *De Foro Legatorum* (1721) ch XI.
[3] *Le Droit des Gens* (1758) IV. VIII. para 112.
[4] Bynkershoek (1721) ch XI, Decrees of States General of 19 June 1681 and 10 October 1727.
[5] Public Law 96–465, 22 USC 3901 *et seq*, described in 1980 DUSPIL 291.

own nationals or permanent residents as diplomatic agents', but this rule has been applied with some flexibility.[6]

In the United Kingdom it was proclaimed in 1786 that British subjects accredited to London would not be entitled to entry on the Sheriff's List and thus, under the Diplomatic Privileges Act 1708, to immunity from jurisdiction.[7] During the nineteenth century it became British practice to refuse to accept British subjects in a diplomatic capacity. Occasional exceptions were made for Secretaries to the oriental legations and in such cases it was specified that they would not be entitled to privileges and immunities. Without such a stipulation the courts applied the presumption that under customary international law the diplomat was entitled to immunity.[8] Modern British practice is more flexible and requests are examined individually on merit. In 2005 the Foreign and Commonwealth Office stated to Parliament that they saw no problem in the appointment as diplomats of persons who were British citizens as well as nationals of the sending State—although in fact there were at that time only ten such persons in diplomatic posts in London.[9]

France also refused to accept her own subjects as envoys of other States. Under a law of 26 June 1889 a French citizen who accepted such an appointment and failed to comply with a government directive to resign it within a reasonable time, forfeited his rights of citizenship.[10] Exceptions were very rare.[11]

Even with the larger States, exceptions were occasionally made in favour of reception of a national of the receiving State, and with newer and smaller States the practice, in spite of its political risks and disadvantages, was more frequent. Article 7 of the Havana Convention on Diplomatic Officers may, however, be taken as reflecting the modern rule of customary international law in specifying that consent of the receiving State was needed to appoint its national as a diplomat. The Harvard Draft Convention on Diplomatic Privileges and Immunities specified that the express consent of the receiving State was required.[12]

Negotiating history

The Rapporteur reflected the customary rule in his original draft: 'The head and other members of the mission may, with the consent of the receiving State, be chosen from among the nationals of that State.' Both in the 1957 debates of the International Law Commission and at the Vienna Conference there were some who favoured complete deletion of the Article either on the ground that the practice was falling into disuse or that to mention it might be thought to imply approval. Supporters of the provision, on the

[6] State Department Guidance for Law Enforcement and Judicial Authorities, printed in 1988 in 27 ILM 1617 at 1623, revised version of July 2011 (available online) at p 5; Satow (5th edn 1979) para 12.17.

[7] *London Gazette*, 8 July 1786; Satow (4th edn 1957) para 237.

[8] Satow (5th edn 1979) paras 12.12–17; Reports of Law Officers, 26 August 1884; VII BDIL 575; *Macartney v Garbutt LR* [1890] 24 QBD 368.

[9] Hansard HL Debs 21 March 2005 WA col 6; Satow (6th edn 2009) paras 7.15–17.

[10] Callières (1716) ch VI: 'Le roi de France ne reçoit plus de ses sujets en qualité de ministres des autres princes'; Genet (1931) pp 166–8.

[11] An earlier exception was M Pozzo di Borgo, a French citizen who was accepted in 1815 as Ambassador of Russia in Paris and later, in 1835, as British Ambassador in Paris: Salmon (1994) para 237.

[12] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 419; 26 AJIL (1932 Supp) 67 at 176.

other hand, argued that the practice was not forbidden under customary international law, that it was still of value to developing States and that there was no reason to circumscribe their choice in the matter. The receiving State's interests were protected by the requirement for its consent to any appointment, and omission of any provision might suggest that this consent was not needed.

The UK amendment which was adopted to form the text of Article 8 expanded and clarified the Commission's draft. It made clear the exceptional character of such appointments and it made separate provision for nationals of a third State. There were no clear rules under customary international law regarding appointment of nationals of a third State. The original version of the amendment required 'express' consent of the receiving State, but the Conference agreed to delete the word 'express'. States which waive their right to give or refuse consent to appointment of their nationals as diplomats of other States are not therefore obliged to change their practice.[13]

The requirement for consent of the receiving State under Article 8 applies only to appointment of diplomatic staff. In the International Law Commission Mr Tunkin of the Soviet Union proposed extension of the requirement to appointments of administrative and technical staff. The proposal was rejected by the Commission on the grounds that it would be inconsistent with existing practice, that it would unduly hamper performance of the mission's functions and that other methods of control under domestic legislation or by declaring individuals unacceptable were quite adequate.[14]

Modern practice

There is little evidence of recent change in national practices regarding either the appointment or the reception of diplomats not having the nationality of the sending State. The Protocol Guidelines issued by the Australian Department of Foreign Affairs and Trade, for example, state that 'A person who is an Australian citizen or permanent resident will not be accepted as a Head of Mission by the Australian Government unless there are exceptional circumstances'. The same rule is applied to other diplomatic agents.[15] Guidance issued by the Ministry of Foreign Affairs of Israel also makes clear that Israel will not accept an Israeli citizen or permanent resident as head or as a member of the diplomatic or administrative and technical staff of a foreign mission.[16]

The privileges and immunities to be accorded to members of a diplomatic mission who are nationals of the receiving State are dealt with in Article 38.

[13] UN Doc A/CN 4/91 Art 4; *ILC Yearbook* 1957 vol I p 19; UN Docs A/Conf.20/C 1/L 137; A/Conf.20/14 pp 98–100, 60–7. In 1977 Colombia refused to accept as ambassador a Puerto Rican nominated by the newly elected President Carter, claiming that it was inappropriate for a person of Hispanic origins to represent the United States in a Latin American Republic: 1977 RGDIP 826.

[14] *ILC Yearbook* 1958 vol I pp 104–8.

[15] Guidelines, 2.2 and 4.1.4, available at www.dfat.gov/protocol/Protocol_Guidelines/02.html.

[16] 'Being a Diplomat in Israel' (available online) at 3.3 and 4.10.

PERSONA NON GRATA

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Historical background

The fundamental principle that the receiving State need not continue to suffer in a diplomatic capacity an individual who had become unacceptable to it existed from the earliest period of diplomatic practice. In virtually all the early instances the conduct complained of consisted in political intrigue against the sending State. The authorities were agreed that the receiving State was fully entitled to 'expel' the offending diplomat at short notice and the debate concerned only whether it had competence to try him for a criminal offence.[1]

An early and celebrated case was that of Don Bernardino de Mendoza, Spanish Ambassador to Queen Elizabeth I of England, who was ordered to leave within fifteen days when investigations disclosed his involvement in a plot aimed at deposing the Queen and replacing her with Mary Queen of Scots. Queen Elizabeth sent an emissary to Spain to try to show that her quarrel was with Mendoza personally and not with the sending State—from whom another ambassador would be welcome. Although this attempt to continue friendly relations was unsuccessful, the practice of expelling a diplomat whose misdemeanour was deemed to be personal and not attributable to his sending State, became general.[2] Other celebrated cases where the facts became known were Bruneau, Secretary to the Spanish Ambassador, who was expelled by Henri IV of France, and Cellamare, a later Spanish Ambassador escorted to the frontier when his part in a conspiracy against the French Regent was discovered. Vattel, writing in 1750 when immunity from criminal jurisdiction had become a settled rule, emphasized that the receiving State should expel a diplomat only after appealing to the sending sovereign for justice or for recall of the offender.[3]

[1] Gentilis (1585) vol II chs XIII, XVII, XVIII, XIX, XXI; Hotman (1603) pp 65–71; Grotius (1625) II. XVIII.IV. 5–7; Bynkershoek (1721) chs XVII–XX.

[2] Satow (6th edn 2009) para 15.7; Adair (1929) p 49; Bynkershoek (1721) ch XVIII.

[3] Satow (1st edn 1917) vol I pp 246–8; Vattel (1758) IV.VII. 93, 98; Martens (1827) vol I p 149; Martens-Geffcken (1866) p 187 n 2.

The practice advocated by Vattel became general during the more placid political climate of the nineteenth century. 'Expulsion' cases disappeared and requests for recall were complied with discreetly and without public demands for reasons, although the facts often became known and appeared in diplomatic handbooks. The United States complied with this practice by recalling their chargé d'affaires at Lima in 1846 after he had described a decree officially communicated to him by the Peruvian Ministry of Foreign Affairs as 'a compound of legal and moral deformities presenting to the vision no commendable lineament, but only gross and perverse obliquities'. The Secretary of State commented in his dispatch to Mr Jewett that:

> if diplomatic agents render themselves so unacceptable as to produce a request for their recall from the government to which they are accredited, the instances must be rare indeed in which such a request ought not to be granted. To refuse it would be to defeat the very purpose for which they are sent abroad, that of cultivating friendly relations between independent nations.[4]

Britain, however, as in the similar case of *agréation* discussed under Article 4, was unwilling to observe this new discretion—it expected reasons to be given for a request for recall and reserved the right to examine these reasons. Lord Palmerston, on the occasion of the dismissal of Sir Henry Bulwer, British Ambassador in Madrid, formulated British practice in these words:

> The Duke of Sotomayor, in treating of that matter, seems to argue as if every government was entitled to obtain the recall of any foreign minister whenever, for reasons of its own, it might wish that he should be removed; but this is a doctrine to which I can by no means assent . . . it must rest with the British government in such a case to determine whether there is or is not any just cause of complaint against the British diplomatic agent, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him, or by maintaining him at his post.[5]

These different views of the law came into direct conflict in 1888 when Lord Sackville, British Minister in Washington, became *persona non grata* with the US Government on the publication during an election campaign of a letter in which he had advised a former British subject how he should vote. The Marquis of Salisbury set out the British position thus:

> It is of course open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.[6]

The United States had in fact furnished its reasons for requesting recall, but it maintained that Britain was under a duty to comply with its request and quoted Calvo as the true international rule:

> When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offence committed by the

[4] Moore (1905) vol IV pp 484–553, esp pp 494 (Jewett), 499 (Marcoleta), 502 (Catacazy), 531 (Poussin); Hackworth, *Digest of International Law* vol IV pp 447–52, Satow (6th edn 2009) para 15.8.

[5] Letter to Senor Isturiz, 12 June 1848: Moore (1905) vol IV pp 538–9.

[6] Moore (1905) vol IV p 538.

agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not, at its pleasure, communicate the reasons on which it bases its request; but such an explanation cannot be required.[7]

In 1917 Satow concluded that it was impossible to reconcile these conflicting positions and wrote: 'The conclusion to be drawn is that any government has the right of asking for the recall of a foreign diplomatic agent on the ground that his continuance at his post is not desired, and the Government which has appointed him has an equal right of declining to withdraw him.'[8]

The Harvard Research in 1932 set out similar principles, but added the important proviso that: 'If a sending State refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as a member of a mission to have been terminated.'[9] Strictly, the receiving State can only refuse to receive or accept a member of a foreign mission—it cannot with any effect 'dismiss' him or 'declare his functions to be terminated'. The effect of the Harvard Research formulation was, however, in line with the general practice whereby the receiving State's wish for recall prevailed over any resistance from the sending State.

Negotiating history

There was general agreement in the International Law Commission and at the Vienna Conference that the preferable rules were that a request for recall must be granted and that reasons for such a request need not be given. There was debate only on whether the absence of obligation to give reasons should be expressly stated as in the Rapporteur's original draft and in the final text of Article 9. A revised text submitted to the Commission in 1958 by Mr Tunkin and accepted by them was silent on the need to give reasons, although the Commission in its Commentary said that this was to be interpreted as meaning that the question was left to the discretion of the receiving State. At the Vienna Conference the French representative argued that once Article 4 had stated expressly that reasons need not be given for refusal of *agrément* there was risk of uncertainty unless similar provision was made in Article 9.[10]

Another amendment introduced by Belgium at the Conference spelt out the generally agreed principle that a person could be declared *persona non grata* prior to entry into the territory of the receiving State.[11] In such a case he could be denied leave to enter and would not acquire under the terms of Article 39(1) any entitlement to privileges or immunities.

Article 9 followed Article 13 of the Harvard Draft in providing for subordinate embassy staff a procedure analogous to that of *persona non grata* notification, but not involving the

[7] Calvo, *International Law* (4th edn) vol 3 p 213.

[8] (1st edn 1917) vol I p 406.

[9] 26 AJIL (1932 Supp) 79; *Grant and Barker* (2007) at p 172.

[10] UN Doc A/CN 4/91 Art 3; *ILC Yearbook* 1957 vol I pp 12–15, vol II pp 133–4, 1958 vol II p 91, para (6) of Commentary; A/Conf. 20/C 1/L 3 (French amendment); A/Conf. 20/14 pp 101, 103.

[11] UN Doc A/Conf. 20/C 1/L 63.

same formalities of diplomatic communication. The term used—'not acceptable'—is an improvement on the expression used in the Harvard Draft—'Objectionable Personnel'.[12]

Subsequent practice

Article 9 has proved in practice to be a key provision which enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere in the Convention. During the last twenty years it has been used in response to conduct by members of diplomatic missions which was barely contemplated when the Convention was drawn up.

In the *Case concerning United States Diplomatic and Consular Staff in Tehran* (*Hostages Case*),[13] the International Court of Justice (ICJ) considered the suggestion by Iran's Minister of Foreign Affairs that the seizure of the US Embassy and detention of its diplomatic and consular staff as hostages should be examined in the context of 'continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms'. The ICJ held that even if established, these alleged criminal activities could not justify Iran's conduct 'because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'. They stressed that Article 9 provided a remedy for abuse of diplomatic functions and, because it imposed no obligation to give reasons, took account:

> of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3(1)(d) of the 1961 Convention, of 'ascertaining by all lawful means conditions and developments in the receiving State' may be considered as involving such acts as 'espionage' or 'interference in internal affairs'.

Article 9 formed part of a 'self-contained regime' which foresaw possible abuse by members of missions and specified the means to counter such abuse. Iran had at no time declared any member of the diplomatic staff in Tehran *persona non grata,* and did not therefore 'employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains'.[14]

Espionage

In the early years of the operation of the Vienna Convention, suspicion of spying was the most common reason for declaring a diplomatic agent *persona non grata* or 'requesting his recall'—the euphemistic expression standard in diplomatic usage. The most sensational example occurred in 1971 when, following repeated warnings to the Soviet Union to reduce the numbers of their KGB agents in diplomatic and trade establishments in London, the British Government requested the withdrawal of 105 Soviet officials. The

[12] 26 AJIL (1932 Supp) 79.
[13] 1980 ICJ Reports 3.
[14] At paras 81–7 of Judgment. On Security Council response, see Angelet (1999) at pp 151–2.

Aide-Mémoire handed to the Soviet chargé d'affaires set out how the growth of intelligence gathering activities by Soviet officials in Britain constituted a direct threat to the security of the country, and stated that the recurring need to request withdrawals had imposed strains on Anglo-Soviet relations. It concluded:

> The Soviet Embassy is therefore requested to arrange for the persons named on the attached list, all of whom have been concerned in intelligence activities, to leave Britain within two weeks from the date of this aide-mémoire. Henceforth:
> (a) the number of officials in (i) the Soviet Embassy (ii) the Soviet trade delegation and (iii) in all other Soviet organizations in Great Britain will not be permitted to rise above the levels at which they will stand after the withdrawal of the persons named in the attached list;
> (b) if a Soviet official is required to leave the country as a result of his having been detected in intelligence activities, the permitted level in that category will be reduced by one.

The officials were withdrawn within the two week period laid down and the ceiling imposed was rigorously policed and enforced—though not for some years—by a few further requests for withdrawal.[15] Other Western States also found it necessary to declare *persona non grata* large numbers of Soviet Union diplomats—Bolivia expelled 119 in 1972, Canada thirteen in 1978, France forty-seven in 1983 and a further twenty-five in 1985.[16]

The end of the Cold War diminished the number of diplomats declared *persona non grata* 'for activities incompatible with their status'—the standard euphemism for espionage. But in May 1996 Russia publicly accused Britain of running a spy ring and insisted on the withdrawal of four diplomats.[17] In 1990 the United States asked for the withdrawal of four Russian diplomats following the arrest of Robert Hansen, an FBI agent accused of having spied for Russia. The Russian Foreign Minister first said that Russia would expel exactly the same number of US diplomats, and on the following day four US diplomats were duly required to leave.[18] Poland and Estonia have also in recent years required the withdrawal of Russian diplomats found to be engaged in 'activities incompatible with their status'.[19]

Requests for withdrawal of diplomats from friendly countries on grounds of espionage are extremely rare. In 1988, however, Britain requested the withdrawal of an attaché at the Israel Embassy, suspected of working for the Israeli intelligence agency Mossad. Another diplomat who had left was told he would not be permitted to return. In this case, however, it was made clear that the embassy could replace the two diplomats.[20]

In 1999 the Democratic Republic of Congo expelled for 'espionage' a British diplomat as well as a number of army and government officials. British Ministers publicly insisted that the team had been on a fact-finding tour as part of contingency planning for evacuation of British citizens in the event of an emergency in Kinshasa.[21]

[15] Satow (6th edn 2009) para 15.13; Dickie (1992) ch IX 'Spies and Diplomacy'.
[16] 1978 RGDIP 1094; 1983 RGDIP 865; Salmon (1994) para 630; Rousseau (1970) para 131 at pp 168–9; Grzybowski (1981) at p 55.
[17] *The Times*, 7 and 24 May 1996.
[18] *The Times*, 23 and 24 March 2000.
[19] 2000 RGDIP 506; 2000 RGDIP 1019.
[20] *The Times*, 18 June 1988.
[21] *The Times*, 11 and 12 March 1999.

Involvement in terrorist or subversive activities

Although the earliest cases of expulsion of diplomats were on grounds of involvement in conspiracy against the receiving sovereign, requests for recall for such reasons were very unusual when the Vienna Convention was drawn up. In recent years they have been more frequent, and during the regime of Colonel Gaddafi often involved Libyan representatives. The use of the term 'expulsion' has returned—although this is usually no more than convenient shorthand to denote use of the procedure in Article 9. In June 1976 the Libyan Ambassador to Egypt was declared *persona non grata* after being detected distributing leaflets hostile to the regime of President Sadat and suspected of involvement in a clandestine operation against the Egyptian Government.[22] In April 1980 the US Department of State, following information that kidnappings and assassinations of opponents of the Libyan regime of Colonel Gaddafi might be attempted in the United States, declared two members of the Libyan diplomatic mission in Washington *persona non grata* for having engaged in unacceptable conduct and required them to leave the United States within forty-eight hours. A further four members of the mission were also expelled in the following month. Although the Libyan People's Bureau claimed that it was not a diplomatic mission (a separate issue discussed under Article 7 of the Convention) so that Article 9 of the Convention was not applicable, the individuals were duly withdrawn.[23] In June 1980 the Head of the Libyan People's Bureau in London was declared *persona non grata* following his comments on violent incidents involving Libyan dissidents in the United Kingdom.[24] Following the breach of relations between the United Kingdom and Libya in April 1984, Libyan interests in the United Kingdom were protected by Saudi Arabia. In December 1995 the head of the Libyan Interests Section of the Saudi Arabian Embassy—a Libyan diplomat—was required to leave following concern that he was involved in intimidation and surveillance of those opposed to Colonel Gaddafi's regime.[25]

In 1989 Burundi broke off diplomatic relations with Libya and expelled all Libyan nationals residing in Burundi, stating that this course had been taken because Libyan diplomats in particular, and Libyan nationals in general, 'had been participating in activities of destabilization putting the peace and general security of the Republic of Burundi in danger'. An ad hoc arbitral tribunal in *LAFICO and the Republic of Burundi* confirmed the right of Burundi to expel Libyan diplomats, while saying that the expulsion of other nationals was subject to some judicial control. The tribunal noted that: 'The circumstances in which requests for the recall of diplomatic agents can be made are quite different from the conditions for the expulsion of aliens in general. Paradoxically, the former group are less well protected than the latter group.'[26]

Diplomats from other States have also been required to leave following discovery of their implication in the threat or use of violence. In 1991 Germany required an Iraqi diplomat to depart on forty-eight hours notice following his illegal import of a Kalashni-

[22] *The Times*, 1 July 1976; Satow (5th edn 1979) para 21.24.
[23] 1980 DUSPIL 326.
[24] House of Commons Foreign Affairs Committee Report 1985 paras 61–9; Review of the Vienna Convention, Cmnd 9497, paras 31, 82.
[25] *The Times*, 12 December 1995.
[26] 96 ILR 279 at 313.

kov rifle used to threaten Kurdish demonstrators outside the Embassy of Iraq.[27] In 1995, the United Kingdom declared *persona non grata* an attaché in the Embassy of Iraq accused of collecting information for the Iraq Directorate-General of Intelligence about dissident students in Britain.[28] Three Syrian diplomats were declared *persona non grata* by the West German Government in 1986 following revelation of their complicity in supply of explosives used in terrorist attacks in Berlin.[29] Iranian diplomats were expelled in 1994 from Argentina after an investigating judge found evidence linking them to the bombing of the Argentine–Jewish Mutual Aid Association which had killed nearly a hundred people.[30]

There have been several attempts by members of diplomatic missions to kidnap and repatriate opponents of the government of the sending State. In 1964, following the discovery in an Egyptian diplomatic bag at Rome airport—bound, gagged, and drugged—of an Israeli citizen who had formerly been an interpreter at the Egyptian Embassy in Rome, the Italian Government declared two Egyptian diplomats *persona non grata*.[31] In 1984 the implication of members of the Nigerian High Commission in the kidnapping of Umaru Dikko, a former Nigerian Minister living in London, and the attempt to remove him in a crate bearing labels addressed to the Nigerian Ministry of Foreign Affairs led to the expulsion of two members of the mission. The Nigerian High Commissioner was recalled for consultations in Lagos and it was indicated that his return to the United Kingdom would not be welcome.[32] Four Cuban diplomats attempted in 1985 to kidnap a Cuban refugee—formerly a Cuban Minister—from the streets of Madrid, were expelled by the Spanish Government, and left on the following day.[33] In 1994 the Government of Venezuela expelled four Iranian diplomats for kidnapping an Iranian dissident and holding him prisoner in a hotel with five members of his family. When the Iranian Ambassador protested he was himself also declared *persona non grata*.[34]

In 1989, following discovery by French intelligence services of a plot between South African officials and Ulster Loyalists to exchange arms and surface-to-air missile secrets, three South African diplomats in Paris who were implicated were required to leave by the French Government. The following week the British Government in response required three South African diplomats in London to leave—while making it clear that they were selected at random and were not involved in improper activities. The use of Article 9 in this way by the UK Government, without alleging any personal impropriety by those required to leave, appeared to be without precedent.[35] In 2007, however, the UK Government expelled four diplomats from the Russian Embassy as one of a number of responses to Russia's failure either to extradite Andrey Lugovoy—a Russian national—to stand trial in Britain for the murder of Alexander Litvinov by poisoning with polonium-210 or to co-operate with the United Kingdom in finding a solution. The measure was

[27] *The Times*, 10 April 1991.
[28] *The Times*, 26 October 1995.
[29] 1987 RGDIP 594.
[30] *The Times*, 10 September 1994.
[31] Ashman and Trescott (1986) pp 122–3.
[32] House of Commons Foreign Affairs Committee Report 1985 paras 106–10.
[33] 1986 RGDIP 424.
[34] *The Times*, 10 August 1994.
[35] *The Times*, 6 May 1989. cp evidence by Sir Antony Acland, then Permanent Under-Secretary, Foreign and Commonwealth Office, to the Foreign Affairs Committee of the House of Commons, printed in the Evidence to their 1985 Report at Q 66.

described to the House of Commons by David Miliband, the Foreign Secretary, as a 'clear and proportionate signal to the Russians', but it was not suggested that the four diplomats selected were themselves involved in the murder.[36] A Declaration by the Presidency of the European Union on the case two days later expressed disappointment at Russia's failure to co-operate constructively, but stopped short of endorsing the UK expulsions of Russian diplomats.[37]

In 1988 the Government of Singapore asked for the recall of a US diplomatic agent on grounds of interference in Singapore's domestic affairs, namely seeking to persuade lawyers opposed to the Government to stand in forthcoming elections.[38] Also in 1988 Nicaragua expelled the US Ambassador and seven other diplomatic agents on grounds that they were destabilizing Nicaragua and inciting revolt. Both these actions were followed by retaliatory expulsions in Washington.[39] In 2008, Serbia expelled the Ambassadors of Macedonia and Montenegro in response to the recognition of Kosovo by the two sending States.[40]

In most of these cases of espionage and involvement in subversion or terrorism, the unacceptable activities would have been authorized or at least condoned by the sending State. It is usual in these circumstances for the sending government whose diplomats are required to leave to plead their innocence, to claim that the requirement to withdraw them was unjustified, and to carry out a reciprocal expulsion. In the case of the large scale expulsions of Soviet Union diplomatic staff described above, however, there were no retaliatory expulsions—either because the numbers of foreign diplomats in Moscow were too small for reciprocal expulsions to be possible or because it was made clear to the Soviet Union that retaliation would lead to further expulsions of their diplomats from Western capitals. Since the power given under Article 9 is not subject to control by objective assessment of reasons or evidence, retaliation cannot be said to be a contravention of the Convention, and in the case of retaliation there is no practice that the diplomats selected should at least be suspected of improper activities.

Diplomats required to leave one receiving State in such circumstances are not normally dismissed from the service of the sending State and they may be appointed to other States. In May 1984, however, in the wake of the shooting of a British policewoman from the Libyan People's Bureau in London, the UK Secretary of State Sir Leon Brittan urged European Ministers of Justice to agree that diplomats expelled from any European State on grounds of involvement in terrorism should be regarded as unacceptable in any of the others.[41] The Summit Seven States in Tokyo on 5 May 1986 adopted a Statement on International Terrorism directed against States 'clearly involved in sponsoring or supporting international terrorism' which included the following measure: 'denial of entry to all persons, including diplomatic personnel, who have been expelled or excluded from one of

[36] Hansard, HC Debs 16 July 2007 cols 21–8, Satow (6th edn 2009) para 15.16. Hartmann in 'The Lugovoy Extradition Case', 2008 ICLQ 194, sets out the facts and comments on the extradition aspect of the dispute.

[37] Council Doc 11976/07 (Presse 174).

[38] *The Times*, 12 May 1988.

[39] *The Times*, 13 and 16 July 1988; 1988 AJIL 803.

[40] Press releases from Ministry of Foreign Affairs, Belgrade, 9 and 10 October 2008.

[41] *Guardian*, *Daily Telegraph*, 1 June 1984.

our States on suspicion of involvement in international terrorism or who have been convicted of such a terrorist offence'.[42]

Other breaches of criminal law

The House of Commons Foreign Affairs Committee Report of 1985, drawn up in the wake of the 1984 shooting from the Libyan People's Bureau, concluded that the UK Government had shown itself reluctant to use the very wide powers conferred by Article 9 of the Convention. In the light of evidence of particular incidents, the Committee noted: 'a reluctance to act without watertight evidence and of a reluctance to take strong measures once unacceptable behaviour was identified. These are the sort of cases we would expect to be pursued more strongly in the future.'[43]

Responding to the Committee's recommendation in their 1985 Review of the Vienna Convention, the UK Government set out in detail the more stringent policy they would apply in regard to persons entitled to diplomatic immunity who were alleged to have been involved in serious offences. For this purpose a serious offence was one that would in certain circumstances carry a maximum penalty of six months or more imprisonment. Although the Government agreed with the House of Commons Foreign Affairs Committee that the numbers were small in percentage terms, they stressed that since 1952 it had been practice to ask for a waiver of immunity in such cases on the basis that if immunity were not waived, withdrawal of the individual would be requested. The policy which had been drawn to the attention of heads of mission was:

> As a general rule espionage and incitement to or advocacy of violence require an immediate declaration of *persona non grata*. Those involved in violent crime or drug trafficking are also declared *persona non grata* unless a waiver of immunity is granted. In addition the following categories of offence normally lead to a request for withdrawal in the absence of a waiver:
> (a) firearms offences;
> (b) rape, incest, serious cases of indecent assault and other serious sexual offences;
> (c) fraud;
> (d) second drink/driving offence (or first if aggravated by violence or injury to a third party);
> (e) other traffic offences involving death or serious injury;
> (f) driving without third party insurance;
> (g) theft including large scale shoplifting (first case);
> (h) lesser scale shoplifting (second case);
> (i) any other offence normally carrying a prison sentence of more than 12 months.
>
> The criteria for dealing with alleged offences are applied with both firmness and discretion, but not automatically. Full account is taken of the nature and seriousness of the offence and any inadequacies in the evidence.[44]

There are numerous examples of the application of this policy by the United Kingdom. In 1988 a third secretary in the Vietnamese Embassy was required to leave the country on twenty-four hours' notice after he was photographed brandishing a handgun at a crowd of protesters outside his embassy. Renewed warnings were issued to missions that diplomats faced expulsion if found carrying illegal firearms. But only a few days later the Ambassador

[42] 1986 AJIL 951.
[43] House of Commons FAC Report 1985, *The Abuse of Diplomatic Immunities and Privileges* paras 64–7.
[44] Review of the Vienna Convention, 1985, Cmnd 9497, paras 60–71, esp para 69; 1986 ICLQ 433 at 434.

of Cuba and a commercial attaché were expelled following a shooting incident on the streets of London.[45] British policy is not notably different from that applied in other capitals, but has been applied more publicly since the shooting from the Libyan People's Bureau in 1984 because of the need to be seen to act firmly against abuse of diplomatic immunity. Figures released annually to Parliament show that the firmer policy resulted in some reduction in the number of serious offences drawn to the attention of the Foreign and Commonwealth Office and to the number of diplomats withdrawn at the Government's request. In 2012 there were drawn to the attention of the Government—out of a community of 22,500 people entitled to diplomatic immunity—twelve allegations of serious offences, of which ten were driving-related.[46]

In 2003 a Saudi Arabian diplomat was required to leave following allegations that he had bribed a Metropolitan police officer to provide him with secret information about citizens of Middle Eastern countries living in London. The police officer concerned was charged with misconduct in a public office.[47]

In October 1976 Denmark required the North Korean Ambassador and his entire diplomatic staff to leave on six days' notice on the ground that they had 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 chargé d'affaires and three other diplomats following the discovery 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.[48] In 1999 the United Kingdom required the withdrawal of a Liberian diplomat found to be smuggling arms in breach of a UN arms embargo on Liberia. The diplomat claimed that the item in question (an armoured car for the Liberian President) had no offensive capacity.[49]

The United States has made clear in Guidance for Law Enforcement Officers issued in 1988 that although Article 9 does not require a receiving State to justify a declaration of *persona non grata,* the Government regards itself as subject to inherent constraints:

> Even though their immunity may deprive such persons of due process in the formal sense, it is felt that in most cases this remedy should be employed only when there is reasonable certainty that a criminal act has actually been committed. The United States reputation for being a society governed by the rule of law is not served if it may be pointed to as having acted in an arbitrary, capricious or prejudiced manner in invoking the extreme diplomatic tool of declaring a foreign diplomat PNG. Similarly, any PNG action which the U.S. government is not able to defend in appropriate detail may be understood by the other country involved as a political action and might thus result in the reciprocal PNG of an entirely innocent American diplomat.[50]

[45] *The Times*, 7 and 8 September 1988, *Daily Telegraph*, 12 September 1988; *The Times*, 13 and 14 September 1988, esp article by Michael Evans.

[46] Hansard HC Debs 8 March 1979 col 750; 6 June 1980 WA cols 871–2; 29 January 1991 WA col 458; 18 April 1994 WA col 5; 11 July 2013 c32WS.

[47] *The Times*, 15 August 2003.

[48] *The Times*, 16, 21, 22, and 23 October 1976; Satow (6th edn 2009) para 15.14.

[49] *Observer*, 25 July 1999.

[50] Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, printed in 1988:27 ILM 1617 at 1633. A similar approach is taken in the 2011 Revised Version, 'Diplomatic and Consular Immunities, Guidance for Law Enforcement and Judicial Officers' which stresses that requiring the departure of a person entitled to immunity is 'an extreme diplomatic tool . . . used only after the most careful consideration'.

It has, however, been confirmed by a Canadian court in the case of *Copello v Canada (Minister of Foreign Affairs)*[51] that the individual has no right to judicial review of the decision to expel him. Article 9 did not form part of Canadian domestic law and the Government of Canada was under no duty to act fairly. A similar position was taken by the Belgian Conseil d'Etat in the case of *T v Belgium* where the court, dismissing the application of a diplomat of the Democratic Republic of Congo for review of the request for his recall under Article 9, maintained:

> Such a request is a matter for the relations between States. By reason of its nature, the act by which the receiving State informs the sending State that a member of its diplomatic staff is *persona non grata* is not subject to review by the *Conseil d'Etat* for *ultra vires*.[52]

The United States has taken steps to bar the re-entry into the United States of persons expelled for serious offences. Their names are entered into a worldwide automated visa lookout system, any diplomatic visa is cancelled, and, if the person has left before this is done, the mission is informed that he cannot be replaced until the visa is renewed. Like the United Kingdom, the United States regard failure to comply with applicable law on the possession or carrying of firearms as a serious crime, and if a waiver is not forthcoming when a person entitled to immunity is found carrying unauthorized weapons they require his departure unless there are 'extraordinary circumstances'.[53]

Where withdrawal is requested on grounds of involvement in criminal activity other than espionage, subversion, or terrorism, the likelihood of retaliatory action is substantially smaller. Generally the sending State has not authorized the conduct, and diplomats recalled may face discipline or dismissal.[54]

Parking offences

The UK Government's 1985 Review of the Vienna Convention emphasized the concern of the Government at the high level of illegal parking by diplomatic vehicles and their determination to reduce it substantially. Heads of mission had been notified 'that persistent and deliberate failure by individual diplomats to respect parking regulations and to pay fixed penalty notices will henceforth call into question their acceptability as members of diplomatic missions in London'. Records of unpaid parking tickets would be kept and cases would be drawn to the personal attention of heads of mission with warnings about possible consequences. 'Further unpaid parking tickets incurred by individual cars will lead to a request for the transfer or the withdrawal of the offender.'[55] The UK Government did demand the recall of a few persistent offenders. The demands brought about payment of the outstanding fines and were then withdrawn. Although the

[51] [2002] 3 FC 24, noted in 2002 Can YIL 557.

[52] Conseil d'Etat, 9 April 1998; 115 ILR 442.

[53] Statement by Selwa Roosevelt, Chief of Protocol, before the Senate Committee on Foreign Relations, 5 August 1987, printed in McClanahan (1989) at p 247; circular Note to Chiefs of Mission at Washington of 19 December 1988, 1989 AJIL 558.

[54] See text of a speech by the Parliamentary Under-Secretary of State in 1987 to the Royal Institute of International Affairs, 1987 BYIL 561 at 564.

[55] Review of the Vienna Convention on Diplomatic Relations, 1985, Cmnd 9497, para 80. Extracts from the Review are printed in 1985 BYIL 437. The circular sent to Heads of Diplomatic Missions in London is in 1985 BYIL 436.

use of the *persona non grata* procedure in this context was without precedent, it was reluctantly accepted by the diplomatic corps in London that it was within the powers of the receiving State under Article 9. The effect on systematic abuse by diplomats of their immunity from enforcement of parking restrictions was dramatic. The number of parking tickets cancelled on grounds of diplomatic immunity fell from 108,845 in 1984 to 60,000 in 1985, to 6,551 in 1990, and to 2,328 in 1993.[56]

Procedure

The effectiveness of Article 9 may be deduced from the fact that there appear to be virtually no cases where a receiving State has found it necessary to resort to its power under paragraph 2 of the Article to refuse to recognize the person concerned as a member of the mission.[57] One such exceptional case was that of a Cuban diplomat, Mr Imperatori, who maintained his innocence of the charges made against him by the United States and publicly expressed his wish to defend himself in a US court. Following the expiry of the period given to him to leave, he was, however, deported by the US authorities to Canada.[58] In most cases—particularly where a diplomat has been detected in some personal misconduct—he leaves or is withdrawn without the receiving State making any formal notification withdrawing his recognition as a member of the mission.[59] 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 State than to the nature of the conduct which has caused offence.

It is not possible to come to a firm conclusion on what is a 'reasonable period' for the purposes of Article 9. The practice shows that where a receiving State has imposed a deadline for departure it has been much shorter than is granted in the case of normal termination of a diplomat's functions and the application of Article 39 of the Convention. 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.[60] In 2006, the issue of arrest warrants by a French judge against nine Rwandans for the murder of the former President of Rwanda led Rwanda to recall its Ambassador to Paris, to require the French Ambassador to Rwanda to leave within twenty-four hours and other French diplomats within seventy-two hours. These exceptionally short deadlines were, however, imposed in the context of a total breach of diplomatic relations.[61] In the partial award made in *Diplomatic Claim, Eritrea's Claim 20 (Eritrea v Ethiopia)* the Arbitral Tribunal

[56] Review of the Vienna Convention on Diplomatic Relations, 1985, Cmnd 9497, para 74; Hansard HL Debs 4 May 1988 col 670; 7 May 1991 WA col 41; 11 May 1993 WA col 60; 16 April 1994 WA col 2. The numbers levelled off at that point.

[57] One anomalous—and questionable—exception was the *Diplomatic Immunity from Suit Case*, 61 ILR 498, where the Provincial Court of Heidelberg upheld the immunity from prosecution of a student whose original notification as a member of the mission of Panama had been rejected by the German Government and who following an accident due, it was alleged, to his drunken driving, had also been declared *persona non grata*. The court said that if the diplomat was not withdrawn his immunity subsisted until the receiving State gave actual notice under Art 9.2.

[58] 2000 AJIL 534.

[59] Hansard HC Debs 29 June 1981 WA cols 284–6, printed in 1981 BYIL 435 at 436.

[60] Richtsteig (1994) p 32; Salmon (1994) paras 636, 637.

[61] *The Times*, 25 November 2006.

held, responding to Eritrea's allegation that periods of twenty-five and forty-eight hours notice given to diplomats to leave were unduly short, that they were not—under the circumstances of an outbreak of hostilities between the two States—in breach of Article 9 since they did in practice allow the diplomats expelled to gather their families and belongings before departure.[62]

[62] 135 ILR 519; RIAA Vol XXVI 381.

NOTIFICATION OF STAFF APPOINTMENTS AND MOVEMENTS

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
   (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
   (b) the arrival and final departure of a person belonging to the family of a member of the mission, and where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
   (c) the arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
   (d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.
2. Where possible, prior notification of arrival and final departure shall also be given.

The duties of notification now laid down by Article 10 were not previously imposed by customary law. Notification was, however, expected in most capitals as a matter of domestic administrative practice. From the notifications received from each embassy the receiving State usually compiled a general list. The use made of the diplomatic register or list thus formed varied from State to State.

In some States negotiation over entry on the diplomatic list amounted almost to an *agrément* procedure for subordinate diplomatic staff. In the case of *Engelke v Musmann* the Attorney-General explained that it was then British practice:

> that for the purpose of obtaining recognition of the members of an ambassador's staff exercising diplomatic functions, a list of such members is furnished from time to time to the Secretary of State by every ambassador. The list is not accepted as of course on behalf of His Majesty; and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number of persons for whom status is claimed appears to the Secretary of State to be excessive.[1]

France indeed favoured amending Article 7 of the Convention so as to make entry on the diplomatic list subject to the approval of the receiving State, but that proposal was not accepted by the Vienna Conference.[2]

A second possible purpose of the general list was to indicate when privileges and immunities began and ended. In most States, however, it was accepted that because of delays and omissions in notifications of new appointments and termination of functions,

[1] [1928] AC 433 at 458.
[2] UN Docs A/Conf. 20/C 1/L 1; A/Conf. 20/14 pp 94–5.

the list could not be conclusive of entitlement. Thus in *Engelke v Musmann*, Lord Buckmaster explained that the Diplomatic Privileges Act 1708:[3]

> does contemplate the preparation of a list of people for whom immunity is claimed and its publication in the manner provided. The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, stating that a particular person at the critical moment is qualified to be on the list.[4]

The purpose of the Sheriff's List required under the Act of 1708 was in fact to establish the persons on whom it was a criminal offence to serve process. There is no record that proceedings for this offence were ever taken, but the lists served to guide tradesmen and others as to those entitled to exemption from taxes on goods and immunity from jurisdiction. The Sheriff's List and the offence created by the Act of 1708 were abolished by the Diplomatic Privileges Act 1964.

In the United States a Statute of 1790 modelled on the Act of 1708 also provided for lists to be posted in the office of the marshal of the District of Colombia, and the purpose of the lists was similarly limited.[5]

Negotiating history

In discussion within the International Law Commission a clear distinction was drawn between the list to be submitted by each diplomatic mission and the comprehensive list usually compiled by the Ministry of Foreign Affairs in each capital. The communication of lists by each mission, which had been prescribed under the Harvard Draft Convention, was of considerable practical use to the authorities of the receiving State, but it could not be regarded as conclusive evidence of entitlement to immunity. Whether a comprehensive list was compiled, and the use made of it, were matters for the practice of individual States, and should not be regulated by the Convention.[6]

The comprehensive wording of Article 10 was introduced at the Vienna Conference in an amendment by Czechoslovakia, based on the corresponding provision of the draft Articles on consular relations (which later became Article 24 of the Vienna Convention on Consular Relations). The Conference made two changes to that text. By providing that appointments as well as arrivals of members of the mission must be notified to the receiving State it was made more practicable for that State to declare a person *persona non grata* or not acceptable before his arrival, as permitted under Article 9. The addition of the words 'or such other ministry as may be agreed' after the reference to the Ministry for Foreign Affairs of the receiving State resulted from a UK amendment intended to safeguard the practice in London and other Commonwealth capitals where business between Commonwealth countries was conducted through a ministry—the Commonwealth Relations Office—specially responsible for relations with those countries. The additional words were added to all references throughout the Convention to 'the Ministry for Foreign Affairs'.[7]

[3] 7 Anne c 12. On the function of the list prepared under the Act see *Heathfield v Chilton*, 1787, 4 Burr 2015.

[4] [1928] AC 433 at 444.

[5] 1927:26 AJIL (1932 Supp) 74–5.

[6] *ILC Yearbook* 1957 vol I pp 15–17, 140–1.

[7] UN Docs A/Conf. 20/C 1/L 49, L 10, and L 12; A/Conf. 20/14 pp 13, 104–6, 113–14.

Subsequent practice

Taking Article 10 together with Articles 7 and 39.1, and in the light of the negotiating history, it is clear that notification is not a limitation on the right of the sending State freely to appoint members of its diplomatic mission. If when appointed they are outside the territory of the receiving State, the Convention requires prior notification of their appointment only 'where possible'. They may be declared *persona non grata* or unacceptable before their arrival, but if this has not happened, they are entitled to enter the territory of the receiving State and from the moment of entry they are entitled to privileges and immunities by virtue of Article 39.1. If already in the territory of the receiving State, however, their entitlement begins only when their appointment is notified.

In a number of cases in the courts of the United Kingdom it was held that Article 10—though not included in the Schedule to the Diplomatic Privileges Act 1964 and so not incorporated into the law of the United Kingdom—supported the view that entitlement to immunity was dependent on some form of express or tacit acceptance of the individual by the authorities of the receiving State. In *R v Lambeth Justices, ex parte Yusufu*[8] it was argued on behalf of Major Yusufu, committed for trial on a charge of attempted kidnapping of Umaru Dikko in a diplomatic crate, that although he had never been notified to the Foreign and Commonwealth Office as a diplomatic agent, he was entitled to immunity as a diplomatic agent. It was submitted that notification was evidentiary in relation to the question whether Yusufu was properly to be regarded as a diplomat. The Divisional Court held that it was incumbent on the sending State to ensure that Article 10 was complied with, and they endorsed the principle that it was a condition of entitlement to immunity that a diplomatic agent should have been accepted by the receiving State. In the later case of *In re Osman (No. 2)*[9] Lorrain Osman, resisting extradition to Hong Kong for trial on charges of dishonesty, submitted that the Embassy of Liberia had on 29 October 1985 notified him as their diplomatic agent, though not in the standard form prescribed by the Foreign and Commonwealth Office for such notifications. In the Divisional Court Mustill LJ, following earlier cases on the need for acceptance of a diplomat as a condition of immunity, went further on the question of notification. His view was that 'if the receiving State has an unfettered right to decide whether to recognise the diplomatic status of the nominee, it must also be at liberty to set its own administrative conditions which must be fulfilled before it reaches the stage of forming an opinion on recognition'. These cases were, however, reviewed in 1990 by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Bagga and others.*[10] The Court of Appeal held that they had been wrongly decided on the point that immunity under the Diplomatic Privileges Act 1964 depended on notification and acceptance. Leggatt LJ said:

> There is nothing in the Act which imports any requirement of notification, nor any stipulation that a person is not to become a member of the staff of a mission until the Foreign Office has been informed of the fact that that has happened . . . it is clear from Article 10 that . . . notification is not constitutive of the status of a member of a mission, but a consequence of it. *A priori* there is

[8] [1985] Crim LR 510; [1985] Times Law Reports 114. See comment in 1985 BYIL 329 and text of FCO affidavit, ibid p 431.

[9] *R v Governor of Pentonville Prison, ex parte Osman (No. 2)*, Divisional Court, 21 December 1988, Times Law Reports, 24 December 1988.

[10] [1990] 3 WLR 1013; [1991] 1 All ER 777; [1990] Imm AR 413. See comment in 1990 BYIL 391.

therefore no ground for introducing a requirement for notification as a condition precedent to the acquisition of the status.[11]

While this is certainly a correct statement of the position under the Convention, it may pose difficulties for the receiving State where the person who has been appointed as a member of a mission entitled to immunity is already the subject of criminal investigation or charges: this will be further considered under Article 39.

The practice, at least in those States sensitive to the problem of abuse of diplomatic immunity, is that notifications are carefully scrutinized and may be questioned on an informal basis. As explained by the UK Government in their 1985 Review of the Vienna Convention, responding to the Foreign Affairs Committee of the House of Commons: 'In certain cases we refuse to accept notifications and they are withdrawn by the mission concerned.'[12] The procedure for doing this is described in some detail in an affidavit submitted by the Vice-Marshal of the Diplomatic Corps to the Divisional Court in the *Osman* case described above.[13] Persons performing functions on behalf of a mission may be properly notified as members of the mission even though they are employed not by the government of the sending State but by private military and security companies.[14] United States' requirements and procedures for implementing Article 10 were set out in a circular Note of 1978 to diplomatic missions in Washington, now replaced by Diplomatic Notes of 30 October and 8 December 2003.[15] A US court, however, in the case of *Vulcan Iron Works Inc v Polish American Machinery Corp*,[16] commented that the State Department did not have unlimited discretion to accept or reject notifications of individual members of missions.

In the case of 'persons resident in the receiving State' (informally described as 'locally engaged'), the sending State is required to notify their appointment as members of the mission or private servants only if they are 'entitled to privileges and immunities'. Most such locally engaged staff will in fact be permanently resident in the receiving State and so disqualified under the terms of Article 38.2 from entitlement to privileges or immunities. In the case of *Jimenez v Commissioners for Inland Revenue* in 2004, the UK Special Commissioners decided, following the *Bagga* case described above, that 'enjoyment of diplomatic immunities by a person (such as Mrs Jimenez) who is already in this country does depend on notification by reason of Article 39 of the 1961 Convention'. Mrs Jimenez's appointment as a locally engaged cook for the Namibian High Commission had never been notified to the Foreign and Commonwealth Office (as the Commissioners were informed in a certificate under the authority of the Secretary of State), which led to the conclusion that she was regarded by the High Commission as permanently resident in the United Kingdom and not entitled to exemption from tax. Even if the High

[11] [1990] Imm AR 433–4.

[12] Cmnd 9497 at para 21. cp Salmon (1994) para 519.

[13] Printed in 1988 BYIL 479; para 6 at p 480 describes the procedure on receipt of a notification of a member of a mission's diplomatic staff. See also the circular of 27 March 1985 to diplomatic missions at pp 481–2.

[14] Response of the Secretary of State for Foreign and Commonwealth Affairs to the House of Commons Foreign Affairs Committee Report on Human Rights, Session 2008–9, Cm 7723, 2009 BYIL 835–6.

[15] 1978 DUSPIL 532. Diplomatic Notes of 2003 available at www.state.gov/ofm/31311.htm.

[16] 479 F Supp 1060 (1979). See also *United States v Sissoko*, Case 96–759-Cr.-Moore, US District Court, Southern District of Florida, 995 F Supp 1469 (1997); 121 ILR 600, where immunity was denied in the absence of any notification.

Commission were wrong in their assessment of her residence status, she was 'in any case prevented from enjoying any such exemption because there was no appropriate notification of her appointment as required by Article 39(1) of the Convention.'[17]

Consideration has been given by some governments to requesting curricula vitae additional to those already provided for prospective heads of mission. These could not be required under the Convention but could become standard on a basis of reciprocity or of courtesy. Experience has shown, however, that they are unlikely to reveal any tendency to engage in unacceptable activities.[18] Members of diplomatic missions—although they cannot be denied entry unless declared *persona non grata* or not acceptable before their arrival—are not exempt from any requirement imposed by the law of the receiving State to obtain a visa, and a receiving State is more likely to find useful information by pursuing its own enquiries before granting a visa.

In many States (for example, Germany, the United States, the United Kingdom, and Belgium) notifications received under Article 10 lead to the issue of diplomatic identity cards which may provide helpful guidance for local law enforcement officers.[19] Such cards are, however, never regarded as providing conclusive evidence of entitlement to immunity.

[17] Decision of Special Commissioners for Income Tax [2004] UK SPC 00419 (23 June 2004). See also below, under Art 38, for further comment on this case.

[18] Cmnd 9497, para 24; Richtsteig (1994) p 33. The United States requires biographic data for five years prior to appointment: 1978 DUSPIL 533; Department of State forms for Notification of Appointment of Foreign Diplomatic Officer and Foreign Government Employee.

[19] Richtsteig (1994) p 34; US Department of State Guidance for Law Enforcement Officers, 1988:27 ILM 1617 at 1629; 1988 BYIL 481; Salmon (1994) paras 262, 461.

SIZE OF THE MISSION

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category.

Article 11 created new international law. In the seventeenth century in particular—when the prestige of an embassy was determined by the numbers and magnificence of the ambassador's suite—a number of receiving States suffered difficulties from the presence on their territory of inordinately large numbers of staff belonging to certain diplomatic missions who on occasion abused their privileges and immunities. Measures to control the problem in earlier times usually took the form of reducing the privileges and immunities given to subordinate staff. Even when preparation of the Vienna Convention began it was apparent that large numbers were again causing problems in some capitals. The Rapporteur's draft was the first attempt to address the problem by giving the receiving State a power to control the size of a mission. The power has been used more frequently in recent years to address concerns over terrorism and other forms of abuse of immunity.

Negotiating history

The debates in the International Law Commission showed that almost all members agreed that it would be helpful to formulate some rule rather than leave the size of the mission to be settled by negotiation between conflicting interests. There was also general agreement in the Commission that a balance must be struck between the interests of the sending and the receiving State. Beyond this there was a fundamental difference of approach to the formulation of a new rule. Some members—in particular Mr Ago—started from the customary law principle (now reflected in Article 7 of the Convention) that once consent had been given to the establishment of diplomatic relations, the number sent to staff the mission and its internal organization were *prima facie* within the discretion of the sending State. The receiving State had, of course, the power to declare *persona non grata* any member of the mission, but it was accepted that excessive numbers in a mission was not an appropriate justification for such a step. Other members—notably Sir Gerald Fitzmaurice—believed that the basic principle was the need for the receiving State to consent to any mission at all, and that control over existence must logically imply control over numbers.

The Rapporteur's original draft provision: 'The receiving State may limit the size of the staff composing the mission. It may refuse to receive officials of a particular category' followed this second approach, but was weighted too heavily in favour of the receiving State to be acceptable. The compromise produced by the International Law Commission

in 1957 shifted the emphasis towards the sending State, emphasizing that agreement was the normal method of effecting limitation of numbers of mission staff and giving the receiving State power to limit only 'within the bounds of what is reasonable and customary, having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission'. This wording provided an objective standard.[1]

At the Vienna Conference, however, under the influence of the smaller States the balance swung back in favour of the receiving State. The Conference by a narrow majority accepted an Argentine amendment replacing the objective test of 'what is reasonable and normal' by the subjective test of what the receiving State 'considers reasonable and normal'. The question of normality in the size of a particular mission thus became one which in the absence of agreement could be determined unilaterally, subject to prescribed constraints, by the receiving State.[2]

'and on a non-discriminatory basis'

The specific prohibition of discrimination in paragraph 2 of Article 11 had its origins in a reformulation of the text by Sir Gerald Fitzmaurice in the International Law Commission. He explained that they appeared in paragraph 2 only, because in the context of paragraph 1 which dealt with numerical limits they might be construed as requiring absolute numerical equality of all missions in a given capital, which would obviously be absurd. It was, however, pointed out by The Netherlands in commenting on the Commission's text that this isolated reference to non-discrimination could create the false impression that the principle of non-discrimination did not also apply to the other Articles.[3] The United States was also unhappy with the Commission's text because it omitted any mention of the principle of reciprocity.[4] One result of these criticisms was the formulation by the Rapporteur of a general provision on non-discrimination and reciprocity which ultimately became Article 47 of the Convention.

It would have been more satisfactory if the words 'and on a non-discriminatory basis' had thereupon been deleted from Article 11, leaving Article 47 to determine the application of non-discrimination and reciprocity, but no amendment for this purpose was proposed. It seems fairly clear, however, that Article 47 is sufficiently general to apply to Article 11 paragraph 2, with the result that refusal by State A to accept military attachés from State B only, for example, would not be unlawful if it was a response to the refusal of State B to admit military attachés from State A.[5]

Subsequent practice

Ceilings are most usually imposed when diplomatic missions have been found to be involved in espionage or terrorism. A ceiling was imposed by the United Kingdom on the diplomatic mission and other agencies of the Soviet Union in 1971 following the

[1] UN Doc A/CN 4/91, Art 5; *ILC Yearbook* 1957 vol I pp 21–6, 30–3; 1957 vol II p 134.
[2] UN Docs A/Conf. 20/C 1/L 119; A/Conf. 20/14 pp 106–8; Bruns (2014) pp 177–8.
[3] *ILC Yearbook* 1957 vol I pp 22, 32; UN Docs A/CN 4/L 75 p 8; A/CN 4/114/Add. 1 pp 12, 14; A/CN 4/116 p 24.
[4] UN Docs A/CN 4/L 75 p 8; A/CN 4/114 p 56; A/CN 4 116 p 23.
[5] UN Docs A/4164 p 17; A/Conf. 20/14 pp 107, 108; A/Conf. 20/C 1/L80; Kerley (1962) pp 98–9.

expulsion of 105 Soviet diplomatic and other officials for 'inadmissible activities'. The decision to reduce the ceiling by one on each subsequent occasion when a Soviet official was required to leave the country as a result of having been detected in intelligence activities was justified under Article 11 of the Vienna Convention on the basis that the 'needs of the particular mission' did not include those 'diplomats' whose activities were not properly diplomatic.[6] The Soviet Union, which during the Vienna Conference had opposed giving receiving States a right unilaterally to require reduction in the size of diplomatic missions, on ratifying the Convention made a 'reservation' to the effect that it 'considers that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State'. Several other Communist States made similar declarations on ratifying. Most other States appear to have taken the view that these amounted to statements of interpretation rather than reservations, and there were very few objections to them.[7] The Soviet Union, however, did impose a ceiling on the UK Embassy in Moscow.

Practice indicates that the imposition of a ceiling on a diplomatic mission is normally followed by reciprocal or retaliatory action in the capital of the State whose mission has been capped. This is explicitly stated in the United Kingdom Government's 1985 Review of the Vienna Convention. The Government in their Review considered and rejected a general policy of restricting the size of all missions. They commented that: 'the level of unacceptable activities would not necessarily be reduced by imposing overall limits. Such a policy could make us vulnerable to reciprocal action, and retaliation against British missions overseas would almost certainly follow.'[8]

In addition to cases of involvement in espionage or terrorism the United Kingdom also have regard to 'the pattern of behaviour of certain missions, or Governments, which suggest possible future involvement in unacceptable activities'—which might justify imposing or agreeing ceilings before any incident occurred. Thirdly, they compare the size of a mission in London with that of the UK mission in the relevant State, bearing in mind the reasons for any significant discrepancy. Missions in London may be larger than the corresponding UK mission overseas because of the importance of London and because it is used by some States as a base for missions also covering other countries in addition. The UK Government accepted in their 1985 Review of the Vienna Convention the need to be 'significantly readier than in the past to use the power to limit the size of a mission in cases where there is cause for concern about the overall nature of the mission's activities'. They would, however, do so only on a case by case basis and would have regard to the state of relations with the country concerned and the likelihood of retaliation. As a general rule they would not publicize the imposition or the details of specific ceilings since this would further damage relations and be more likely to attract retaliation. 'In some cases however the reasons for it can serve a useful purpose by showing up a particular type of activity as unacceptable or to deter others from practising it. We shall be ready to use it in any case where it is appropriate to do so.'[9]

[6] Satow (6th edn 2009) para 7.21; Dickie (1992) ch IX 'Spies and Diplomacy'; Review of the Vienna Convention, Cmnd 9497, para 31.

[7] Belgium, Luxembourg, and the Federal Republic of Germany objected. See Bowett (1976) at p 68; Salmon (1994) para 248.

[8] Cmnd 9497, para 29.

[9] Cmnd 9497, paras 28–32.

Readiness to impose ceilings on diplomatic missions involved in terrorist activities was shared by the other Summit Seven States. The United States had in 1979 made use of its powers to reduce the numbers in the Embassy of Iran in Washington to fifteen persons in an early response to the seizure of the US Embassy in Tehran and the holding of members of the mission as hostages against fulfilment of Iranian 'demands'. At the London Economic Summit in 1984 the Heads of State and Government, expressing their serious concern at abuse of diplomatic immunity, supported proposals for 'use of the powers of the receiving State under the Vienna Convention in such matters as the size of diplomatic missions and the number of buildings enjoying diplomatic immunity'. Two years later a stronger statement at the Tokyo Economic Summit on 5 May 1986 listed among measures which the Seven would apply 'in respect of any State which is clearly involved in sponsoring or supporting international terrorism' strict limits on the size of the diplomatic and consular missions and 'where appropriate, radical reductions in, or even the closure of, such missions'.[10] There appear, however, to be few subsequent examples of the imposition of ceilings by the Summit Seven States—at least few that have been publicly disclosed.

The United States' application of Article 11 of the Convention was considered in 1984 by the US Court of Appeals in *US v Kostadinov*. This was an appeal from the District Court for the Southern District of New York which had dismissed an indictment for espionage against Kostadinov, Assistant Commercial Counsellor in the Bulgarian Trade Office in New York. The United States had recognized the New York Office as premises of the Bulgarian Embassy in Washington and had accepted the Commercial Counsellor who headed the office as a member of the mission. From 1963 onwards the United States had consistently made clear that only the Commercial Counsellor would be entitled to diplomatic immunity. This reflected longstanding US policy that all members of diplomatic missions, with the sole exception of the senior financial, economic, or commercial officer of each mission maintaining a New York office, must reside in Washington. The District Court held that Kostadinov was a member of the Bulgarian diplomatic mission and that the United States was not under the Vienna Convention entitled to withhold diplomatic immunity. On appeal this was reversed and the Court of Appeals held that Kostadinov had never been regarded as a member of the mission. The court carefully considered the background of the Convention and Article 11 and concluded:

> The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely assistant commercial counsellors based in New York. Furthermore, it did so on a nondiscriminatory basis.[11]

In 1985 the US Congress decided that over a period of three years parity of numbers should be achieved between the Soviet diplomatic mission in Washington and the US mission in Moscow. The ceiling to be achieved was 225 members of the diplomatic, administrative, and technical staff. In October 1985 there were 263 members of the Soviet Embassy in the relevant categories of staff, and fifty were expelled in order to meet the requirements of Congress. The Soviet Union retaliated by ordering the withdrawal of a large number of US Embassy employees who were Soviet nationals, so forcing the

[10] 1979 DUSPIL 574. Text of the Declarations in Levitt (1988) pp 113, 116. The Tokyo Declaration is in 1986 AJIL 951.

[11] USCA 2nd Cir 1133, Judgment of 10 May 1984; 99 ILR 103.

United States to use its staff entitlement to supply chauffeurs and cleaners rather than diplomats from the United States.[12] This experience appears to have dampened United States' enthusiasm for the imposition of ceilings on diplomatic missions. The United States, however, also rely on Article 11 in order to limit the size of diplomatic missions which are heavily in debt—arguing that sending States which cannot afford their current level of diplomatic representation should reduce it. The reduction is brought about by refusing to accept replacement appointments rather than by imposition of a rigid numerical ceiling.[13] This is an unusual application of Article 11, but it can be argued that it is not 'reasonable and normal' that the financial shortfall of a lavish diplomatic mission should in effect be financed by private creditors in the receiving State.

In 2015, President Maduro of Venezuela required the US to reduce its diplomatic staff to seventeen, the same number that Venezuela maintained in its Embassy in Washington. Relations between the two States had deteriorated following an accusation of US support for an attempted coup against the socialist Government in the previous month. The charge was strongly denied both by the US and by the opposition.[14]

The imposition of ceilings on a basis of numerical equality across all diplomatic missions in a particular capital is very rare. In 1973, however, Gabon determined that missions in Libreville should not exceed a ceiling of ten diplomatic, administrative, and technical staff.[15]

The difficulty in establishing what numbers are 'reasonable and normal' for any particular diplomatic mission is shown by the example of the US Embassy in Baghdad when sovereignty was restored to Iraq following its invasion in 2003 and diplomatic relations formally re-established. The Embassy in 2006 housed 1,000 staff performing normal diplomatic and ancillary functions as well as 3,000 additional persons including security staff, but it appears that criticism of these extraordinary numbers came not from the Government of Iraq but from the US Congress.[16]

Article 11—in spite of the new powers which it gave to the receiving State— has proved a much less effective weapon for controlling abuse of diplomatic immunity than Article 9. As the United Kingdom were well aware when they conducted their Review of the Convention in 1985, it is not possible to make use of Article 11 without provoking strong diplomatic hostility and—almost certainly—some form of retaliation. This is in part because it cannot be targeted even approximately at those individuals who have offended and it is therefore seen as an unfriendly act towards the sending State calling for countermeasures.

[12] 1981–8 DUSPIL 910; 1987 RGDIP 618.
[13] Information supplied by State Department.
[14] *The Times*, 4 March 2015.
[15] 1974 RGDIP 509.
[16] Congressional Research Service Report for Congress CR52, 29 June 2006.

OFFICES AWAY FROM THE SEAT OF THE MISSION

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Background

No previously established rule of customary law required the sending State to base its diplomatic mission at the capital or seat of government of the receiving State. Nor was the sending State required by international law to seek permission in order to acquire offices in a part of the country other than that where the principal seat of the mission was established. The general practice was for missions to be established in the city or town which was the seat of government of the receiving State and to follow that government if it moved either permanently or to a summer residence. This was, however, a matter of convenience reflecting the need for the mission to conduct business with the government, and there were exceptions.

In China, for example, between 1927 and 1937 many of the diplomatic missions were permitted to remain in Peking although the Government had moved to Nanking. In Saudi Arabia the Foreign Office was in Jedda and missions were required to reside there rather than in Riyadh, the seat of government. In Israel most diplomatic missions remained in Tel Aviv because a move to Jerusalem would imply acceptance of Israel's establishment there of its seat of government.[1] The US Congress has sought to place pressure on the President to move the US Embassy to Jerusalem by passing a Jerusalem Embassy Act, but the Act permitted a waiver by the executive 'to protect national security interests' and such a move has never taken place.[2]

The Holy See, because of the very small size of the Vatican City State, is unable to accommodate the premises of all the missions accredited to it. Missions are therefore established in Rome, outside the territory of the receiving State. Under Article 12 of the Lateran Treaty Italy guarantees their privileges and immunities, rights of access and communication, even where the sending States do not have diplomatic relations with Italy, 'and their residences can continue to remain in Italian territory'.[3] The Holy See, however, (as already explained in the context of Article 2 above) will not accept co-location of a mission to itself with the diplomatic mission of the relevant State to Italy even where the sending State tries to justify such a move on grounds of security or

[1] UN Doc A/Conf. 20/14 p 109 (representative of Saudi Arabia); Lecaros (1984) p 93.
[2] 2003 AJIL 179.
[3] Cardinale (1976) pp 216–17.

economy. The UK, however, now makes some savings by locating its Embassy to the Holy See on the same site as its Embassy to Italy, though in a separate building.[4]

Negotiating history

There were both practical and political obstacles to formulating a rule which would require diplomatic missions to follow the seat of the government of the receiving State. The International Law Commission text therefore dealt solely with prohibiting the establishment of offices 'in towns other than those in which the mission itself is established'. Discussion, however, made clear that the members of the Commission were concerned at the difficulty for the receiving State in ensuring privileges and immunities if missions were set up away from the seat of government, and also at preventing abuses. Mr Bartos, for example, commented that: 'Ambassadors with little diplomatic business to transact in Yugoslavia had even been known to establish themselves in watering places, arguing that if they had been accredited to two countries, they might have had to operate from Rome or Vienna, so there could be no objection to their operating from a Yugoslav watering place.' The Commission's Commentary stated that the Article had been included 'to forestall the awkward situation which would result for the receiving Government if mission premises were established in towns other than that which is the seat of the Government'.[5]

At the Vienna Conference Switzerland and Mexico proposed amendments to require missions to be established at the seat of government of the receiving State. Although the representative of Switzerland argued that such a provision would reflect a recognized principle of international law, the amendments met with general opposition and were withdrawn.[6] The customary position was thus left unchanged on the question of establishing missions at the seat of government.

Article 12 was thus confined to requiring prior express consent of the receiving State before offices forming part of the mission can be set up in towns other than that of the seat of the mission. The addition, by UK amendment, of the words 'forming part of the mission' brought out clearly that the object was not to prevent a State from setting up, for example, an embassy library, information centre, or commercial office separate from the mission itself. Establishments of this kind would not be entitled to privileges or immunities and would need only those building or operating consents necessary under the general law of the receiving State. The objective was to ensure that premises which were entitled to privileges and immunities were adequately known to and subject to the control as well as the protection of the receiving State.

The United Kingdom also proposed an amendment to replace the word 'towns' in the International Law Commission's draft by 'localities', on the basis that the word 'towns' had a restrictive connotation. This amendment was accepted, but in fact it introduces some ambiguity in that it could be argued to apply to offices in a different area of the same town or city, or to a summer residence outside but close to the capital city. It is, however, clear from the negotiating history, and appears to have been accepted in practice, that

[4] UKMIL, 2010 BYIL 641.

[5] UN Docs A/CN 4/L 75 p 8; A/CN 4/114/Add. 1 p 14; A/CN 14/116 p 25 and Add. 1, Art 7 para 3; *ILC Yearbook* 1958 vol I p 113, vol II p 92.

[6] UN Docs A/Conf. 20/C 1/L 56 (Mexico), L 107 (Switzerland); A/Conf. 20/14 pp 108–10.

Article 11 does not apply to these situations. Mission premises in several buildings situated in different parts within or around a city may indeed give rise to questions which are considered under Article 1(i) of the Convention. They are not, however, subject to prior express consent of the receiving State under Article 12.[7]

Subsequent practice

Although neither customary international law nor Article 12 requires that diplomatic missions should be established at the seat of government of the receiving State, such a requirement is sometimes imposed by national law or by administrative decree. The Government of Switzerland, for example, have made it a condition for granting privileges and immunities that diplomatic missions should be based at Berne, the Federal capital. Their particular concern was that other States might wish to accredit their representative to the United Nations in Geneva to the Government of Switzerland, which would not accept such an arrangement.[8] Also, The Netherlands require diplomatic missions to be based in The Hague, the centre of public administration, rather than in Amsterdam.

In 1972, when Brazil moved her capital from Rio de Janeiro to Brasilia, she imposed a time limit for diplomatic missions to move to the new capital. Despite the practical difficulties of incomplete buildings and high rents for temporary premises in Brasilia, it was made clear that missions which had not moved to Brasilia would be struck off the Diplomatic List and would lose their entitlement to privileges and immunities.[9] But in other cases where a capital is moved, for example when the capital of Germany was moved to Berlin, diplomatic missions have been left to make their own decisions on the basis that political and practical considerations will in any event dictate a move to the new seat of government. The move of the German capital from Bonn to Berlin was completed in mid-1999, and a year later a new British Embassy building was formally opened by the Queen in Berlin.[10] In 1991, when the capital of Nigeria was moved from Lagos to Abuja, no requirement was imposed on embassies to follow, and transfers were gradual. In 2005, the Government of Burma transferred its administrative capital from Rangoon to Nay Pyi Daw, a city then in the process of construction, and virtually no embassies have as yet followed.

The United States has since 1816 expected foreign missions to reside in Washington. The Secretary of State commented in 1828:

> If the President has, in one or two instances, acquiesced in the residence of foreign ministers in a distant city of the Union, it has been because they have but little business to transact with this government, and because their residence there has given rise to no complaint of breach of privileges on the one hand or of personal injury to American citizens on the other.

The State Department also expected US envoys to maintain their normal post of duty at the seat of government of the receiving State, even in times of physical danger.[11] In 1939 the Chief of Protocol of the State Department formally stated that 'the only foreign

[7] UN Docs A/Conf. 20/C 1/L 53 paras 1 and 2; A/Conf. 20/14 pp 108–12.
[8] 1961 ASDI 127.
[9] Do Nascimento e Silva (1973) p 51; 1973 RGDIP 793.
[10] Richtsteig (1994) pp 36–7; *The Times*, 19 July 2000.
[11] Moore (1905) vol IV para 645.

diplomatic officers . . . permitted to reside and maintain offices in New York City will be the ranking commercial or financial officer'. Circular Notes confirming this policy were sent to all diplomatic missions in Washington in 1974, 1977, and 1978. The policy was considered and endorsed by the US Court of Appeals in the case of *US v Kostadinov*,[12] discussed above under Article 11. In holding that Kostadinov, Assistant Commercial Counsellor in the Bulgarian Trade Office in New York, was not a member of the Bulgarian mission, the Court of Appeals relied mainly on Article 11 entitling the United States to limit the size of the Bulgarian mission. The same result could, however, have been based on application of Article 12. Since the United States could have refused permission for trade offices in New York to form part of diplomatic mission premises, it followed that they were entitled to grant permission limited to a single officer.

[12] USCA 2nd Cir 1133, Judgment of 10 May 1984; 99 ILR 103.

COMMENCEMENT OF FUNCTIONS AND PRECEDENCE OF HEADS OF MISSION

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.
2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.

. . .

Background

Article 4 of the 1815 Regulation of the Congress of Vienna provided that: 'Les employés diplomatiques prendront rang entre eux, dans chaque classe, d'après la date de la notification officielle de leur arrivée.'[1] This rule ended centuries of unseemly squabbling caused by the previous practice of determining precedence among heads of mission by the rank of the sending sovereign.[2] But there remained uncertainty whether '*notification officielle*' meant the official notification of arrival sent with a copy of the credentials of the new head of mission, or the later formal audience at which he presents his original sealed credentials to the receiving sovereign. Among the signatories to the Vienna Regulation practice varied—Britain and France determined precedence by the date of official notification of arrival, but Sweden, Austria, and Russia used the date of formal presentation of credentials to the receiving sovereign.[3] Most other States chose to follow the latter practice.[4] The difference might be of importance if a change of government in the sending or in the receiving State meant that new credentials were required, but it came to be accepted that at least in this case the earlier precedence should not be altered.

[1] Satow (4th edn 1957) p 162; Genet (1931) vol I p 267; *ILC Yearbook* 1958 vol II pp 93–4.

[2] For some examples, see Satow (6th edn 2009) paras 3.9–3.29.

[3] Pradier-Fodéré (1899) vol I p 288; Genet (1931) vol I pp 403–4; Satow (4th edn 1957) pp 171, 256; (5th edn 1979) para 13.10; UN Doc A/CN 4/116 p 31.

[4] *ILC Yearbook* 1958 vol II p 93; UN Doc A/Conf. 20/14 p 112 (representative of Czechoslovakia); Satow (5th edn 1979) para 13.10.

Negotiating history

The International Law Commission devoted much effort to the attempt to formulate a single rule to regulate precedence. It became clear that in their practice States applied the same rule to regulating commencement of functions and to determining precedence among heads of missions. Although there was no need for the same rule to apply in both contexts, it was obviously convenient that it should, and States made this clear in commenting on the draft articles. There were arguments in favour of both practices. In States where credentials can only be presented when the monarch is holding court there may be a long interval between arrival and presentation of credentials. Functioning of the mission would be impeded if the new head of mission could not meanwhile act for the sending State or officially call on diplomatic colleagues following his arrival. Basing precedence on formal presentation of credentials on the other hand gave the receiving State more control over their form and—at least in former times—allowed it some discretion to determine the order in which credentials were presented and the consequential precedence.

The International Law Commission also tried to draw up a rule to regulate commencement of the functions of the head of mission. They accepted that this date would not determine the beginning of entitlement to privileges and immunities, but could be important in other contexts. The receiving State might need to determine whether an act of his was to be regarded as an act of the sending State, whether to address an official communication to him rather than to the chargé d'affaires *ad interim* or whether he was entitled to act under an appointment held *ex officio* under the law of the receiving State.

Ultimately the Commission concluded that there seemed to be no need or desire for a single rule. They decided to leave to the receiving State in both contexts whether to apply the date of notification of arrival or the date of presentation of the original credentials. In each case, however, the practice chosen must be 'applied in a uniform manner'.[5]

The Vienna Conference decided that it was preferable that a receiving State should be required to apply the same practice—whichever it preferred—both to commencement of functions and to precedence among heads of mission. They accepted a Malayan amendment under which Article 16 referred back to Article 13, so that precedence among heads of mission would be determined by the date on which each one commenced his functions. The arrangement of the Articles would have been improved if Article 13 had then been incorporated in or placed next to Article 16, as suggested by one representative, but this change was not made.[6]

The Conference also added paragraph 2 to Article 13, thus removing the earlier discretion which allowed a receiving State to determine—perhaps with discriminatory effect—the date of formal presentation of credentials. Whichever practice is selected by a State in order to determine the time of taking up functions by a head of mission, it is now the actual date of arrival in the receiving State which secures precedence and its accompanying advantages such as a prior right to audience with the Head of State or Minister of Foreign Affairs.[7]

[5] *ILC Yearbook* 1957 vol I pp 40–3, 46–7; vol II pp 134–6; UN Docs A/CN 4/L 75 pp 9, 11; A/CN 4/116 pp 25–7, 31–2; A/4164 pp 30–1; *ILC Yearbook* 1958 vol I pp 114–16; vol II p 93.

[6] UN Doc A/Conf. 20/C 1/L 111; A/Conf. 20/14 pp 113, 120–3.

[7] UN Docs A/Conf. 20/C 1/L 87 and Add. 1; A/Conf. 20/14 pp 113–15.

'in a uniform manner'

These words suggest that no room is left in this context for the application of the principle of reciprocity. If reciprocity were permitted to vary the rule selected to determine commencement of functions and seniority, particularly if Article 47.2 could be applied, there could be considerable uncertainty and confusion in determining the position in a particular capital. This appears to have been the intention both of the International Law Commission and of the Vienna Conference.[8]

[8] *ILC Yearbook* 1958 vol II p 93, Commentary on draft Art 12; UN Doc A/Conf. 20/14 p 114 (representative of France).

CLASSES OF HEADS OF MISSION

Article 14

1. Heads of mission are divided into three classes, namely:
   (a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
   (b) that of envoys, ministers and internuncios accredited to Heads of State;
   (c) that of chargés d'affaires accredited to Ministers for Foreign Affairs.
2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Articles 14 to 16 and Article 18 of the Vienna Convention are a restatement in modern terms of the rules enunciated in 1815 by the eight signatories of the Regulation of Vienna: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden.[1] The historical significance of the Regulation was that by establishing only three classes of envoy and providing that in each class precedence should be determined by the date of official notification of arrival it greatly reduced both disputes over precedence and proliferation of ranks of head of mission. Only monarchies and republics of equivalent standing were in 1815 accepted as entitled to send ambassadors—holding as of right the title of Excellency and the privilege of personal audience at any time with the receiving sovereign.[2] Heads of mission in the second class, though also accredited to the receiving head of state, lacked these privileges and ranked below ambassadors. Proliferation of titles arose as a result of the constant struggle to secure precedence by those States which lacked either the political power or the financial resources to maintain full embassies abroad.

The title of nuncio denoted a permanent diplomatic representative of the Holy See. In 1965 the Holy See established the new rank of apostolic pronuncio, like the apostolic nuncio a diplomatic representative within the first class, but accredited to those States which did not confer on the representative of the Holy See the status of dean, or doyen, of the diplomatic corps. According to Cardinale, who set out the origins of the titles and functions of the Papal representatives: 'The prefix *pro* precedes the name *nuncio* so as to insinuate the idea of substitution. In other words, the Holy See hopes some day to accredit a nuncio with *de jure* deanship to a given post, but in the meantime sends a pro-nuncio.' In 1994, however, the title of pro-nuncio was placed in abeyance for the purpose of new diplomatic appointments. New appointments from 1994 onwards in all capitals were

[1] Règlement sur le rang entre les agents diplomatiques: Satow (4th edn 1957) p 162; Genet (1931) vol I p 267; *ILC Yearbook* 1958 vol II pp 93–4; Salmon (1994) para 135.

[2] On the virtual disappearance in modern times of the right of access to the receiving head of state, see Satow (5th edn 1979) para 11.11.

given the title of nuncio and no longer expected to enjoy automatic deanship of the diplomatic corps. The change may have been for the purpose of reducing the number of diplomatic titles, particularly since pro-nuncio was not a title recognized in the Vienna Convention.[3]

Internuncios were originally Papal representatives who might not be permanent, but by the time of the 1815 Vienna Regulation were permanent representatives within the second class. Apostolic delegates by contrast are not accredited to a sovereign or Minister of Foreign Affairs but to the Church and the Catholic population in a prescribed region.[4]

The measure of general acceptance which other States, from courtesy or convenience, accorded to the Vienna Regulation is demonstrated by the very small amount of change that was required to adapt it to modern diplomatic usage.

Article 14 paragraph 1 of the Vienna Convention replaces Article 1 of the 1815 Vienna Regulation. Only three changes were made to the text. Since the classification in the Vienna Convention is of 'heads of mission', it was necessary to remove from the first class the Papal legates, since these were invariably ad hoc emissaries in the Papal diplomatic service.[5] Within the first class were added 'and other heads of mission of equivalent rank' in order to cover High Representatives of States in the French Communauté and High Commissioners of States within the British Commonwealth. These heads of mission are not accredited, since the sending and receiving States share the same Head of State. The additional words, in an amendment proposed by Ghana at the Vienna Conference, replaced a UK amendment which had been criticized as too specific for a general international convention.[6] The second class was altered by deleting from the 1815 text the words 'ou autres' which had been taken to refer to ministers resident (who were in 1818 covered as a separate third class by the Protocol of Aix-la-Chapelle[7]), to ad hoc emissaries to heads of state, and to internuncios.[8] Ministers resident, already a dwindling class in 1815, had become obsolete, and ad hoc emissaries were relegated by the Conference for separate and later treatment (in the New York Convention on Special Missions), leaving only internuncios—who were expressly added.

Reduction in the classes of head of mission

The most controversial question relating to the classes of heads of mission in the Vienna Convention was whether the process of simplification should not be carried a stage further by reducing the classes to two. This had in fact been attempted in 1927. The Committee of Experts for the Progressive Codification of International Law set up by the Council on

[3] Noonan, Jr (1996) at pp 92–3. Thanks are due to Canon Michael Brockie, to Mgr Joseph Marino, First Counsellor in the Apostolic Nunciature in London and to Mgr Vincent Brady, Secretary to the Nunciature for information on the change of practice by the Holy See.

[4] Cardinale (1976) pp 136–50; Satow (5th edn 1979) paras 11.12–16; Noonan, Jr (1996) 92–3.

[5] Maulde-la Clavière (1892) pp 328–8; *ILC Yearbook* 1958 vol II p 9 para 1(a) of Commentary on Arts 13–16; UN Doc A/Conf. 20/14 p 119 (representative of Holy See).

[6] UN Docs A/Conf. 20/C 1/L 11 (UK), L 177 (Ghana); A/Conf. 20/14 pp 115–20. The history of the amendments thought necessary to ensure that special inter-Commonwealth rules and practices could be retained is recounted in Bruns (2014) at pp 41–2 and 171–3.

[7] Protocole de la Conférence du 21 novembre 1818 instituant une nouvelle classe d'agents diplomatiques: Genet (1931) vol I p 268; Satow (4th edn 1957) p 163.

[8] UN Doc A/CN 4/116 p 30 (comment of Rapporteur on observation of Switzerland); *ILC Yearbook* 1958 vol I p 118 (Mr Sandström).

the request of the Assembly of the League of Nations appointed a subcommittee which recommended reducing the classes of diplomatic agent to those of ambassador and of chargé d'affaires. They argued that one purpose of the classification drawn up by the Congress of Vienna was to secure for the representatives of the Great Powers, who then enjoyed the exclusive entitlement to send ambassadors, continued precedence. With the obsolescence of those privileges which constituted the 'representative character', all heads of mission should be styled by the same title, since they represented the same interests and performed the same functions. Authorities on diplomatic law including Pinheiro-Ferreira, Pradier-Fodéré, Suarez, and Fiore were quoted to that effect. The Committee of Experts therefore circulated to governments the following question:

> Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative case, to what extent should the existing classes of diplomatic agents be amalgamated, and should each State be recognised to have the right, in so far as existing differences of class remain, to determine at its discretion in what class its agents are to be ranked?

Of the twenty-seven States addressed, eleven were opposed to any modification of the existing position, and since they included Great Britain and other Commonwealth countries, France, Germany, and the United States—the most powerful States and those with the longest diplomatic traditions—there was little hope of agreement on a revision. Opponents of the proposals maintained that they did not correspond to the facts of political life or to the need to preserve a hierarchical structure within the diplomatic service of each State. Belgium, supporting the opponents of change, observed that some States sought by maintaining relations at the level of ambassador to give greater significance to their relations or to emphasize close links between them.[9]

Over the next thirty years the trend towards appointing ambassadors accentuated. The Soviet Union in 1941 reverted to appointing ambassadors—its early egalitarian decision of 1918 to send only 'plenipotentiary representatives' having met with a general response of placing them in the lowest class of chargés d'affaires. When the United States and Switzerland (in 1957) began to accredit and to receive ambassadors it became clear that neither a republican constitution nor the small size of a State was any longer a bar. The United Nations was under Article 2 of its Charter based on the sovereign equality of its members, and inequality of classes of representatives appeared to be inconsistent with that principle.

In the light of these developments, the Rapporteur's original draft for the International Law Commission again proposed reduction of the classes of head of mission to two—those of ambassador and of chargé d'affaires. While members of the Commission accepted that there were no surviving legal distinctions between ambassadors, envoys, and ministers and that the use of different grades to convey political distinctions could be seen as contrary to the principle of the sovereign equality of States, it was also pointed out that some States would face constitutional difficulties. The general reaction was that amalgamation might be premature and lessen the chances of a Convention being generally acceptable. Although there were few modern examples of the exchange of envoys or of

[9] Text of replies in League of Nations Publication C 196.M 170.1927. V. Analysis in Genet (1931) vol I pp 286–92; Satow (4th edn 1957) p 173; *ILC Yearbook* 1956 vol II pp 145–6; Hill (1927) p 737; Salmon (1994) para 140.

ministers, the rank was selected usually to denote a certain coolness in the relations thereby established.[10]

At the Vienna Conference amendments were put forward by Mexico and Sweden, and by Switzerland, to acknowledge modern practice and to reduce the categories to those of ambassador and of chargé d'affaires. The reaction in the Conference was, however, that expressed by the representative of Tunisia: 'To eliminate that class would be premature and might make it difficult for some States to become parties to the convention. It would be better to leave events to follow their natural course.' The Conference therefore left the three categories contained in the 1815 Vienna Regulation. Paragraph 2 of Article 14, expressly limiting the significance of the different classes to precedence and etiquette, had to suffice as an expression of the legal equality between sovereign States.[11]

Article 15 does not imply that the heads of mission exchanged between two States must belong to the same class. As the International Law Commission commented, there are instances where that has not been the case.[12]

Subsequent practice

Ten years after the conclusion of the Vienna Convention, heads of mission in any class other than that of ambassador had almost disappeared. In the United States, the Bulgarian Legation was the last survivor, in Paris, Monaco and San Marino still maintained legations, while in Brussels there remained five ministers.[13] In 1982 the United Kingdom upgraded its mission to the Holy See to an embassy, in the context of establishing full diplomatic relations. In a written answer to Parliament, the Minister commented: 'The maintenance at the Holy See of our only remaining Legation was an anomaly, based on historical considerations which have long lost their significance.'[14] Relations between the United Kingdom and China constituted another anomaly, but in 1972 in the context of a political settlement in which the United Kingdom 'took note' of China's position on Taiwan they were raised from the level of chargés d'affaires to that of full ambassadors. Relations between the United Kingdom and Albania also resumed in 1991 at the level of chargé d'affaires and only in 1996 were they raised to the level of ambassadors.[15] By 1990 the process appeared to be complete and in the major capitals at least all permanent heads of mission were ambassadors or of equivalent rank.[16]

In 1992, however, the Security Council in a resolution imposing sanctions on Yugoslavia in the context of its disintegration required UN Member States to 'reduce the level of the staff at diplomatic missions and consular posts of the Federal Republic of Yugoslavia (Serbis and Montenegro)'. In response, many States withdrew their ambassadors from Belgrade and replaced them with charges d'affaires *en titre*.[17]

[10] UN Doc A/CN 4/91 Art 7 and Commentary pp 15–16; *ILC Yearbook* 1957 vol I pp 33–9, vol II pp 93–4.

[11] UN Docs A/Conf. 20/C 1 L 57 (Mexico and Sweden) and L 108 (Switzerland); A/Conf. 20/14 pp 115–20, 14.

[12] *ILC Yearbook* 1958 vol II p 94, para (3) of Commentary on Arts 13–16; UN Doc A/Conf. 20/14 p 115 (representative of Switzerland).

[13] Salmon (1994) para 142; *US v Kostadinov*, USCA 2nd Cir 1133, Judgment of 10 May 1984; 99 ILR 103.

[14] Hansard HC Debs 25 January 1982 WA cols 245–6; 1982 BYIL 416.

[15] Satow (5th edn 1979) para 11.5; *The Times*, 22 February 1996.

[16] Lecaros (1984) p 77; Salmon (1994) para 142; Richtsteig (1994) p 38; London Diplomatic List June 1996 pp 75–7.

[17] SC Res 757, 30 May 1992; Satow (6th edn 2009) para 7.31.

PRECEDENCE AMONG HEADS OF MISSION

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.
2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
3. This Article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Articles 16 to 18 complete the sequence of Articles in the Vienna Convention which restate in modern terms the rules first set out in the 1815 Regulation of Vienna.[1] Paragraph 1 of Article 16 has already been discussed along with Article 13 of the Convention.

Paragraph 2 of Article 16 resolved an ambiguity in the text of Article 4 of the 1815 Vienna Regulation. This provided that heads of mission should take precedence within each class 'd'après la date de la notification officielle de leur arrivée'. If '*notification officielle*' were taken to refer to the notification of arrival, sent with a copy of the credentials of the new head of mission to the Ministry of Foreign Affairs, then it was clear that a constitutional change whether in the sending or the receiving State which made fresh credentials necessary would not affect relative precedence in the receiving State. If on the other hand '*notification officielle*' referred to the formal presentation of credentials to the head of the receiving State, a change of government in the sending State might mean that the head of mission lost his seniority. A change in the receiving State could involve precedence among all heads of mission there being determined afresh by the date of presentation of new credentials. In Paris after the revolutions of 1830 and 1848 and on the establishment of the Second Empire in 1852, it was agreed among the heads of missions that the previously established precedence should continue. This was obviously a more convenient rule, and during the nineteenth century it came to be followed in other

[1] See Commentary on Arts 14 and 15 above.

capitals, including those which in general determined precedence according to the date of formal presentation of credentials.[2]

The International Law Commission approved the established rule relating to change in credentials, while suggesting drafting changes which made it explicit that it did not apply where the head of mission was given fresh credentials on appointment to a different class.[3]

Precedence of the representative of the Holy See

Paragraph 3 of Article 16 corresponds to the provision in Article 4 of the 1815 Vienna Regulation: 'Le present règlement n'apportera aucune innovation relativement aux représentants du pape.' The Rapporteur's original draft merely repeated this wording, but discussion in the International Law Commission made it clear that there were three ways in which it could be interpreted. According to the first interpretation, the practice under which the representative of the Pope was, in Catholic States to which he was accredited, given automatic precedence so as to be as of right the doyen of the diplomatic corps, was regarded by the signatories of the Vienna Regulation as a rule of practice and formally restated in the Vienna Regulation to make clear that it was obligatory. Under the second interpretation the purpose was the exact opposite—to restrict application of the rule by confining it to those States where it was already established practice. By the third interpretation the intention of the provision was permissive—a State was entitled to introduce or to discard the practice, and the purpose was to make clear that if it did adopt, continue, or discard the practice it would not thereby contravene the general rule on precedence which formed the first part of Article 4 of the Vienna Regulation.[4] The first interpretation seems improbable, given that only four of the original signatories of the Vienna Regulation were Catholic States, and the second interpretation is not consistent with the fact that other States, notably the Latin American Republics, later adopted the practice without the Regulation being regarded as any obstacle. The third interpretation appears most consistent with the likely intentions of the parties and with later practice.

The International Law Commission's formulation was: 'The present regulations are without prejudice to any *existing* practice in the receiving State regarding the precedence of the representative of the Pope.' The Commission were aware of the need not to give undue emphasis to a practice then applied by only a minority of States, but it does not appear that they consciously decided to endorse the second of the three interpretations described above and thus to prohibit other States from later adopting the practice of giving precedence to the Papal representative.[5]

At the Vienna Conference an amendment introduced by the Holy See replaced the word 'existing' by 'accepted', so making clear that States were entitled if they wished to adopt in the future the practice of giving precedence to the representative of the Holy See. This was opposed, both in Committee and on a separate vote on paragraph 3 in plenary

[2] See Commentary on Art 13 for practice in regard to the ambiguity in Art 4 of the Vienna Regulation. See also Satow (4th edn 1957) pp 255–6; (5th edn 1979) para 20.10; Pradier-Fodéré (1899) vol I pp 290–1; Salmon (1994) para 145.

[3] *ILC Yearbook* 1957 vol I p 43.

[4] *ILC Yearbook* 1957 vol I p 44: Mr Spiropoulos, Mr Francois, Mr Ago. The second restrictive interpretation was officially endorsed in 1856 by the United Kingdom: see Satow (5th edn 1979) para 11.14.

[5] *ILC Yearbook* 1957 vol I p 43 (Mr El Khouri), vol II p 136 (para 9 of Commentary on draft Arts 10–13).

session, only by representatives of the Communist States, and was adopted by the Conference.[6]

In recent years more States adopted the practice of giving automatic precedence to the Papal representative so that a nuncio rather than a pro-nuncio is accredited. As explained above in the context of Article 14, until 1994 the Holy See accredited a nuncio only when the receiving State granted him *de jure* deanship of the diplomatic corps. States which adopted this practice included a number of former Communist States in East Europe—Poland, Hungary, Estonia, Latvia, and Lithuania—and for a short period beginning in 1994 also included the United Kingdom.[7] In other capitals, however, the Holy See now sends a representative with the title of nuncio who takes his precedence in the diplomatic corps along with ambassadors and High Commissioners in accordance with the date of notification of his arrival.

Functions of the doyen of the diplomatic corps

Application of the rules set out in Article 16 determines which head of mission becomes doyen of the diplomatic corps, whether by virtue of seniority of date of arrival or—in the case of the representative of the Holy See—by virtue of local custom. The Vienna Convention does not, however, mention the role of doyen or prescribe his functions. For his diplomatic colleagues the doyen acts as spokesman on matters of common concern, notably matters of status and protocol, privileges, and immunities. He speaks for the diplomatic body on public occasions. He informs colleagues of developments of general interest to them and may give advice on aspects of local protocol and etiquette. For the government of the receiving State the doyen is the main channel of communication and consultation, although at least in those capitals with a large body of resident diplomats the modern tendency is to communicate general matters by means of circular notes sent to all heads of mission. The doyen acts as spokesman on the basis of informal consultation with colleagues and is not expected to become involved in political questions.[8]

Precedence among members of the diplomatic staff

Article 17, which has no counterpart in the 1815 Vienna Regulation, was introduced at the Vienna Conference by an amendment proposed by Spain. It was accepted without question that precedence determined by date of arrival related to heads of mission only and that precedence among subordinate staff of each mission was for the sending State to determine. As with other Articles mentioned above the wording was adjusted to allow for maintenance by States within the British Commonwealth of a separate ministry dealing only with these States—in London between 1947 and 1968, the Commonwealth Relations Office.[9]

[6] UN Docs A/Conf. 20/C 1/L 120; A/Conf. 20/14 pp 120–3, 14–15.

[7] Cardinale (1976) pp 140–5, 155–61; Salmon (1994) p 78; London Diplomatic List June 1996.

[8] Satow (5th edn 1979) paras 20.1–8; Salmon (1994) paras 130, 131; Cardinale (1976) pp 161–2.

[9] UN Docs A/Conf. 20/C 1/L 95 para 2; A/Conf. 20/14 pp 121–3. See Satow (6th edn 2009) paras 28.18–19. In 1968 the Foreign Office and Commonwealth Office merged to form the Foreign and Commonwealth Office.

Presentation of credentials

Article 18 of the Vienna Convention restates the principle of Article 5 of the 1815 Vienna Regulation. Neither the form of an ambassador's credentials, the terms of the speech which normally accompanies their formal presentation, nor the details of the ceremony of presentation are prescribed by the Vienna Convention or by customary international law. The examples provided in Satow's *Diplomatic Practice* show that there is considerable variation in practice between different capitals. In many States it is the practice to arrange ceremonies for several ambassadors at the same time.

A degree of grandeur is expected for the formal presentation of credentials to the receiving sovereign. In the eighteenth century ambassadors to London began their entry by barge from Greenwich to the Tower of London and thereafter proceeded by carriage, accompanied by British royal carriages, to the Court of St James. Heads of mission are still taken by open State carriages to present their credentials at Buckingham Palace. Even in 1994 *The Times* reported that a group of American tourists, left open-mouthed by the passing of the procession of the new US Ambassador, William J Crowe, to the Palace enquired: 'Gee! Where do you get tickets for that ride?'[10]

[10] Satow (5th edn 1979) chs 8, 13, 20; *The Times*, 6 June 1994.

CHARGÉ D'AFFAIRES AD INTERIM

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act provisionally as head of the mission. The name of the *chargé d'affaires ad interim* shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Chargés d'affaires *ad interim* are distinct from the 'chargés d'affaires accredited to Ministers for Foreign Affairs' who are listed under Article 14 of the Convention as forming the third class of heads of mission. The latter are often described as 'chargés d'affaires *en pied*', and can be traced back to the eighteenth century 'agents'. Chargés d'affaires *ad interim* on the other hand derive from the 'secrétaire de l'ambassade' who would be left in charge during temporary absences of the head of mission. The distinction between the two offices became clear during the nineteenth century, and the chargé d'affaires *en pied* was given precedence on the ground that the chargé d'affaires *ad interim* sent no official notification of arrival and copy of credentials entitling him to acquire seniority under Article 4 of the 1815 Vienna Regulation. In some countries in Latin America, however, it seems that only a single category of chargé d'affaires was recognized.[1]

Negotiating history

A separate Article to regulate the appointment of a chargé d'affaires *ad interim* was introduced by Mr Bartos at the International Law Commission in 1957.[2] It was generally agreed that a new Article would be helpful. The text as proposed and as finally adopted makes clear that the chargé d'affaires *ad interim* is not accredited to the receiving State and is not actually a head of mission—he can merely 'act provisionally as head of the mission'. In his case the formalities of notification set out in Article 19 replace the *agrément* procedure required under Article 4 for heads of mission proper. Subsequent discussion, however, showed that on a number of points state practice was not uniform. The three disputed issues were the circumstances in which it was appropriate to appoint a chargé

[1] Vattel, writing in 1750, does not mention either title in listing categories of diplomatic agent. See Pradier-Fodéré (1899) vol I pp 286–7; Genet (1931) vol I pp 283–7; Satow (4th edn 1957) pp 170, 256; (5th edn 1979) paras 11.17 and 18. On the attempt by Chile to have this practice incorporated in the Vienna Convention, see Lecaros (1984) pp 78–9 and UN Doc A/Conf. 20/14 p 126.

[2] *ILC Yearbook* 1957 vol I p 45.

d'affaires, the method of notification of an appointment to the receiving State, and the persons who could be appointed or presumed to be in charge.

Need for appointment of a chargé d'affaires

Some States regarded temporary incapacity of a head of mission or his absence from the capital as occasion for the appointment of a chargé d'affaires *ad interim*, while others, including the United Kingdom and the United States, regarded the head of mission as remaining in charge so long as he was within the territory of the receiving State.[3] The wording of Article 19 was left sufficiently vague to accommodate both practices. Although the International Law Commission commented that the 'question must be answered according to the practice in the receiving State',[4] it will normally be the sending State which decides that its head of mission is 'unable to perform his functions', and proceeds accordingly to the appointment of a chargé d'affaires *ad interim*. It may be reluctant to make such a decision—for example, throughout the months in which the UK Ambassador to Uruguay, Sir Geoffrey Jackson, was held captive following his kidnapping, the UK Government did not appoint a chargé d'affaires *ad interim*. It would be very unusual for the receiving State to insist on an interim appointment against the wishes of the sending State.[5] The receiving State can, however, refuse nomination of a chargé d'affaires as being unnecessary, and the United States do so if the relevant ambassador remains within the United States.[6]

Notification of the appointment of a chargé d'affaires

It was generally agreed that the most usual procedure was for the head of mission to notify the receiving State before his departure of the name of the person appointed as chargé d'affaires during his absence. If, however, the head of mission died or was incapacitated, the position was less clear. Mr Bartos' original proposal to the International Law Commission contained the provision: 'In the absence of notification to the contrary, the member of the mission placed immediately after the head of mission on the mission's diplomatic list shall be presumed to be appointed.' This, however, was not acceptable to a number of governments. The United Kingdom commented:

> Normally Her Majesty's Government require the appointment of a chargé d'affaires ad interim to be notified to them by the accredited head of mission prior to his own departure from the country. Should such notification be impracticable, Her Majesty's Government require the appointment of the chargé d'affaires to be notified to them by the Minister for Foreign Affairs of the sending State. An exception to this general rule might arise in the case of an emergency caused by the death of the head of the mission, when in the absence of any contrary notification from the Government of the

[3] *ILC Yearbook* 1958 vol I p 116 (Mr Bartos and Mr Tunkin on practice in Yugoslavia and the Soviet Union respectively); comments on 1957 draft Arts in UN Docs A/CN 4/L 75 p 9, A/CN 4/114 Add. 1 p 22, A/CN 4/116 p 28.

[4] *ILC Yearbook* 1958 vol II p 94.

[5] German practice is similar to that of the United Kingdom—see Richtsteig (1994) p 42.

[6] Information supplied by State Department. It was suggested that the motive for an appointment in such circumstances was often to secure an attractive invitation for the proposed chargé.

sending State Her Majesty's Government would regard the charge of the mission as devolving upon the senior member of the diplomatic staff.[7]

The International Law Commission therefore deleted the provision for presumption of appointment. The Vienna Conference further tightened the procedure, by adopting an amendment proposed by Italy which made it clear that the chargé d'affaires *ad interim* could not notify his own appointment.[8]

Who may be appointed chargé d'affaires?

The customary rule was that only a member of the diplomatic staff could be appointed chargé d'affaires, and some countries refused to accept as chargé anyone holding a rank below that of second secretary.[9] But where the head of mission had no subordinate diplomatic staff under him it would be necessary in case of his absence or incapacity to leave the embassy building and archives in charge of a non-diplomatic member of the staff. Denmark, in its comments on the International Law Commission's 1957 draft and by amendment at the Vienna Conference, proposed that this practice should be formally recognized for the convenience of States unable to maintain well-staffed missions abroad.[10]

There was some protest from States unhappy with an appointment of this nature, but it was welcomed by the smaller States. The addition of the words 'with the consent of the receiving State' was believed to be adequate to protect its interests, while other drafting improvements emphasized the strictly limited nature of the appointment which could be made under paragraph 2 of Article 19. The person so designated would not be entitled to represent the sending State or exercise diplomatic functions on its behalf, and would remain entitled only to the privileges and immunities of administrative and technical staff.

[7] UN Docs A/CN 4/L 72 p 11 (Philippines), L 75 p 10 (Australia); A/CN 4/116 p 27 (United States); A/CN 4/114 Add. 1 p 22 (United Kingdom).

[8] UN Docs A/Conf. 20/C 1/L 100; A/Conf. 20/14 pp 124–8.

[9] See UN Doc A/Conf. 20/14 p 125 (representative of Venezuela).

[10] UN Docs A/CN 4/L 75 p 10, A/CN 4/114 p 18, A/CN 4/116 p 28; A/Conf. 20/C 1/L 170; A/Conf. 20/14 pp 124–8.

FLAG AND EMBLEM OF THE SENDING STATE

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

The right to fly the flag and display the emblem of the sending State on the premises of the embassy does not appear as a separately listed privilege in diplomatic treatises before the nineteenth century. To earlier authors the literal concept of the exterritoriality of the embassy would have necessarily implied such a right, but as writers ceased to regard the embassy as a portion of foreign soil it became necessary to assert it in specific terms. Pradier-Fodéré described the practice as almost universal, 'mais il n'y a pas de règle absolue sur ce point: c'est l'usage particulier de chaque gouvernement, de chaque cour qui décide'. In Paris, for example, the custom was that flags were flown only in times of exceptional danger for nationals of the sending State, and this was done by embassies during the siege of 1870.[1] Where flags could be flown, local custom also prescribed the appropriate occasions—normally including at least the national day of the sending State, the national day of the receiving State, and the national days of those other missions who had informed the embassy of their intention to fly their own flag.[2] The continuing symbolic importance of the Embassy flag was well illustrated on the resumption of diplomatic relations in August 2015 between the US and Cuba after a breach of over fifty years. The Foreign Minister of Cuba and the US Secretary of State together watched

> ....the final thaw of the Cold War. The stars and stripes were raised over the seven-storey embassy on the Havana sea front by US Marines in dress uniform, in the presence of three of their former comrades in arms, now old men, who took the flag down when the mission was closed by President Eisenhower in 1961.[3]

Where a flag was flown in accordance with local custom or with permission of the receiving State, international law imposed a particularly high duty of protection on the receiving State. The symbolic character of the flag has long made it an attractive target for demonstrators. In Berlin, for example, in 1920, the flag being flown on the French Embassy for the 14th of July was removed by an intruder, while a crowd below hurled insults at it. The German Government acknowledged that international law required them to make appropriate reparation for the incident.[4] In 1968, during a protest in Prague against the war in Vietnam, North Vietnamese students tore down the flag and shield from the US Embassy and threw the flag in the river Vltava. Although during the same afternoon Czech students brought back the shield and a new flag to the Embassy

[1] (1899) II p 244. On Belgian laws of 1830 and 1834 giving diplomats specific rights to fly the flag, see Salmon (1994) para 289.

[2] Genet (1931) vol I pp 463–4; Satow (4th edn 1957) pp 263–4; (5th edn 1979) paras 20.23–5; (6th edn 2009) paras 14.10–12.

[3] *The Times*, 15 August 2015.

[4] XXVII RGDIP (1920) 358; Moore (1905) vol IV para 658.

with apologies for the conduct of the others, the United States still made a formal protest and received an apology from the Czech Government.[5]

The Government of Czechoslovakia suggested in its comments on the 1957 draft articles of the International Law Commission that provision should be included for the right of a mission to use its flag and emblem on the official premises of the mission, on the residence of the head of the mission and on his means of transport. The draft article formulated in response by the Rapporteur was left unchanged by the International Law Commission and by the Vienna Conference.[6] Amendments were moved at the Conference to qualify the right by a reference to local regulations, and it was suggested that the provision would entitle a mission to fly its flag all the year round—which had not been general practice before. Other delegates, however, pointed out that like other privileges in the Convention it would be subject to the rule now set out in Article 41—that it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State. No special mention was needed for this particular Article. It was on this basis that the text was left unchanged.[7]

The position is thus that the right of the mission to fly the flag on its premises and on the residence of the head of mission is qualified by a substantive duty to respect laws and regulations relating to the occasions when flags should or may be flown, provided that these regulations do not undermine the privilege conferred by Article 20. This broadly reflects the position under previous customary law.

Although many States have domestic laws making disrespect of the national flag a criminal offence, only a very few make it a criminal offence to abuse the flag of a foreign State. There appears to be greater acceptance of disrespect of the national flag or emblem of a foreign State—possibly on the basis that it amounts to a form of freedom of speech, or possibly because protest by the offended State (most usually the United States) would be likely to exacerbate underlying political tensions. Japan does make such conduct criminal, but requires the foreign State concerned to protest. In 2011 Russia called for the prosecution of Japanese radicals who in the context of the long-standing dispute between the two countries over the Kurile Islands had desecrated the Russian flag by dragging it along the ground in front of the Embassy. The Foreign Ministry emphasized that it had carried out a thorough investigation, although it does not appear that any prosecution took place.[8]

The right to use the flag or emblem on the means of transport of the head of mission went beyond previous customary law, though not beyond general practice. The main purpose of the privilege is to enable the authorities of the receiving State to extend special courtesies and priority in traffic. Identifiable registration numbers are also issued in many capitals, and these serve the same purpose. As Lecaros points out, however, the threat to diplomatic vehicles in recent years has made easy identification of the vehicle of a head of mission a dangerous privilege.[9] The right extends only to the means of transport of the head of the mission and not to the means of transport of the mission itself. It may therefore be open to question whether a chargé d'affaires *ad interim*, who strictly speaking is not a head of mission although he is entitled to act provisionally as such, is entitled to

[5] 1969 RGDIP 177.

[6] UN Docs A/CN 4/114 Add. 1 p 10; A/CN 4/116 p 33; A/CN 4/116 Add. 1 Art 14A.

[7] UN Docs A/Conf. 20/C 1 L 101 (Italy) and L 136 (Philippines); A/Conf. 20/14 pp 128–30.

[8] RIA Novosti, Moscow, 8 February 2011. Further information supplied by Tomonori Mizushima of Nagoya University.

[9] (1984) p 96.

the privilege. On this point, Satow comments: 'An acting head of mission, or a chargé d'affaires will usually fly it only when he is making an official visit. It is as well to observe the locally accepted practice in these matters.'[10]

It was stressed at the Vienna Conference that 'means of transport' in this context while wide enough to include private boats and planes as well as motor vehicles, did not extend to public transport used by the head of mission.[11] In 1916 a Spanish ship carrying Papal nuncios to Argentina and Colombia was permitted to fly the flag of the Holy See—the object was, however, to protect the vessel from attack by submarines.[12]

[10] (5th edn 1979) para 20.24.
[11] UN Doc A/Conf. 20/14 p 129.
[12] 1916 RGDIP 606.

ASSISTANCE IN OBTAINING ACCOMMODATION

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

The first statement of a specific duty on the part of the receiving State to ensure that a diplomatic mission was not barred from acquiring premises adequate for its purposes in the receiving State was in Article 2 of the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities. This stated that: 'A receiving State shall permit a sending State to acquire land and buildings adequate to the discharge of the functions of the latter's mission, and to hold and dispose of such land and buildings in accordance with the law of the receiving State.'[1] But although no legal duty of this kind had previously been formulated in textbooks or in restatements, there appear to have been no recorded instances of refusal of permission to acquire suitable premises. The Harvard Draft provision therefore merely reflected existing practice. The terms were wide enough to cover private residences of mission staff, and the Commentary stressed that 'acquisition' might be of title to a freehold estate or of a leasehold interest, according to the law of the receiving State.

Negotiating history

A proposal to add to the draft articles provision on the lines of the Harvard Draft was made by Sir Gerald Fitzmaurice in the International Law Commission in 1957.[2] Subsequent debate in the Commission and at the Vienna Conference centred principally on two issues. The first arose from the desire of a number of governments to ensure that the wording of the article would not oblige them to change their constitutional or domestic property law. Two kinds of domestic rule were liable to cause difficulty. One was a prohibition on aliens or on foreign States from holding land. Unless there was a specific exception—as there was in the United States[3] and in the Union of South Africa[4]—such rules would make it necessary for title to be vested personally in the ambassador or preclude the foreign State from holding more than the leasehold to its embassy. The second kind of rule which produced a similar effect was provision that all land was the

[1] 26 AJIL (1932 Supp) pp 49–50; Denza (2007) at pp 161–2.

[2] *ILC Yearbook* 1957 vol I p 54.

[3] Extracts are in 26 AJIL (1932 Supp) p 50. For amendments to New York and District of Columbia property law see Whiteman, *Digest of International Law* vol VII pp 362–4.

[4] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 332.

property of the State.[5] Rather than make clear that the words 'acquire and hold premises' did not necessarily imply a freehold title, the International Law Commission formulated a provision with two alternatives: 'The receiving State must either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.'[6]

Introduction of this alternative obligation 'to ensure adequate accommodation' gave rise to the second issue of difficulty under the draft article—the extent of the duty laid on the receiving State where there were no legal barriers to acquisition by a foreign mission. Although the Commentary to the International Law Commission's 1957 draft contained the passage: 'If the difficulties are due to a shortage of premises, the receiving State must facilitate the accommodation of the mission as far as possible', several governments protested in their comments that a duty to 'ensure' adequate accommodation for residences of all members of missions would be excessive.[7] At the Vienna Conference several amendments were presented with the aim of reducing this obligation on the receiving State.[8]

The final result of the Conference negotiations was an unhappy combination of the amendments submitted by India and by Venezuela. The alternative obligation, applicable where there are local legal bars to acquisition of premises, was reduced from one to 'ensure adequate accommodation' to one to 'assist . . . in obtaining accommodation in some other way'. On the other hand the original obligation 'to permit the sending State to acquire' became 'to facilitate the acquisition . . . in accordance with its laws'. This goes beyond absence of local legal barriers and seems to impose a positive duty on the receiving State to take administrative action to smooth the way for the mission. The US representative asked for an explanation of the term 'facilitate', but this was not forthcoming.[9] Article 21 thus appears to require that in all cases—even where there are no local legal bars to purchase or lease by a foreign State of mission premises—the receiving State must provide administrative assistance on request. The duty, however, is not one of result, so that housing or building difficulties will not lead to a breach of the Convention. Paragraph 2 imposes a similar obligation, but applies only 'where necessary'. Article 21 is in fact a specific aspect of the more general duty imposed on the receiving State by Article 25 of the Convention to 'accord full facilities for the performance of the functions of the mission'.[10]

Subsequent practice

In 1964 the US Congress made additions to the District of Columbia Code to restrict the right of foreign governments to construct or occupy mission premises for use as a chancery in land designated as a residential district or zone. Buildings already in use as mission premises were exempted.[11] The Foreign Missions Act enacted by Congress in 1982

[5] UN Laws and Regulation p 412 (legislation of Yugoslavia).

[6] *ILC Yearbook* 1957 vol I pp 60–3, vol II p 136, Art 15.

[7] UN Docs A/CN 4/L 75 p 12; A/CN 4/114 pp 34, 42; A/CN 4/116 p 35; *ILC Yearbook* 1958 vol I pp 126–7.

[8] UN Docs A/Conf. 20/C1/L113 (Malaya); L 122 (China); L 128 (Mexico); L 142 (Venezuela); L 157 (Switzerland); L 160/Rev. 1 (India); L 169 (Vietnam); A/Conf. 20/14 pp 133–5.

[9] See Kerley (1962) at p 101; Hardy (1968) pp 33–4.

[10] Lecaros (1984) pp 93–4; Richtsteig (1994) pp 43–4.

[11] Public Law 88–639 approved on 13 October 1964, described in Whiteman, *Digest of International Law* vol VII pp 369–72.

required notification to the Department of State of proposed acquisitions and disposals, and changes of use of real property by diplomatic missions. Addresses and relevant documentation were also to be supplied. The Act, which was intended 'to promote the orderly conduct of international relations' and to facilitate the application of the relevant privileges and immunities, permitted the Secretary of State sixty days to review a proposed acquisition, disposal, or change of use before the mission was permitted to proceed. Non-compliance could result in the mission being required to divest itself or forgo the diplomatic use of the relevant property. A Circular Note sent to chiefs of mission on 1 January 1993 makes clear that it is State Department policy 'that all diplomatic missions locate their chanceries and chancery annexes in the District of Columbia in locations and buildings appropriate for such use'.[12]

The Foreign Missions Act was also intended to ensure that the US Government was able adequately to discharge its international obligation to facilitate the provision of adequate and secure facilities to foreign diplomatic missions and provide reciprocity for States which had been helpful to the United States over the acquisition of overseas diplomatic property. The criteria and their administrative application were carefully reviewed in the case of *Embassy of the People's Republic of Benin v District of Columbia Board of Zoning Adjustments*.[13] The court noted that the objections raised by local residents to the placing of a new Benin Embassy were local in character, relating to such matters as parking and security, but that the zoning authority was also required to take account of wider international responsibilities. The United States intervened in strong support of Benin and the court, confirming the decision, gave summary judgment in its favour. The US authorities also offered strong support within the framework of the Foreign Missions Act to Azerbaijan in its efforts to secure suitable embassy premises in Washington, stressing that pursuant to a bilateral Agreement on Diplomatic and Consular Properties the authorities in Azerbaijan had given extensive assistance to the United States, even arranging for existing tenants of properties adjacent to the US Embassy to be resettled and compensated so that the properties could be acquired as US diplomatic residential accommodation.[14]

In the United Kingdom the Diplomatic and Consular Premises Act 1987[15] required a State desiring that land should be diplomatic premises to apply to the Secretary of State for his consent to the land becoming such premises. States were not required to make applications in respect of premises accepted as diplomatic immediately before the entry into force of the Act. The Act was primarily concerned with control of premises which would be entitled to inviolability and with management and disposal of premises of discontinued missions, and is considered in more detail in the context of Article 1, of Article 22, and of Article 45. It was, however, also hoped that the scheme of consent by the Secretary of State would enable the Foreign and Commonwealth Office to persuade foreign missions to occupy premises which would be suitable for their purpose and conducive to harmonious relations between embassies and the general public. Section 1

[12] Title II of Public Law 97–241 22 US Code 4301 enacted on 24 August 1982, described in 1981–8 DUSPIL 914. Circular Note of 1 January 1993 to chiefs of mission supplied by State Department. See also UN Doc A/AC 154/249 of 25 January 1984 regarding application of the Act to Permanent Missions to the United Nations.

[13] 534 A 2nd 310 (DC 1987), described in 2001 DUSPIL 540.

[14] 2000 DUSPIL 626.

[15] 1987 c 46.

(5) of the Act requires the Secretary of State, in giving or withdrawing consent or acceptance of land as mission premises, to have regard, *inter alia*, to public safety, national security, and to town and country planning. Presenting the Bill to Parliament, the Foreign and Commonwealth Office Minister said:

> we cannot prevent diplomatic missions setting up their offices in sensitive parts of the capital, for example near the Palace of Westminster or the Royal palaces. However blameless and friendly the mission, it is a fact of life that today any mission can attract crowds which are noisy or even, regrettably, violent. This would clearly be inappropriate in some parts of London.[16]

It was accepted that it would be necessary in the context of the Act to provide administrative assistance to missions seeking suitable embassy premises.

Where States have sought unusual assistance regarding the acquisition or construction of embassy premises, the modern practice has been to conclude special international agreements rather than rely on the somewhat weak provisions of Article 21 of the Vienna Convention. The United States in 1969, 1972, and 1977 concluded with the Soviet Union successive Agreements providing for long-term leases, free of charge for a period of eighty-five years, of land for construction of complexes of embassy buildings in Moscow and in Washington. Each State would own the embassy buildings to be constructed by them and at their own expense on the plots of land made available.[17] The US Embassy in Grosvenor Square, London is held on a long lease and the rent is paid by the UK Government under reciprocal arrangements between the two governments. For several years the State Department for security reasons sought an alternative site set back at least 100 feet from any public right of way, and there were also proposals for road closures round the existing embassy, supported by neighbours as well as by the US Ambassador, but opposed by the Metropolitan Police and the City Council.[18] Instead there was undertaken a Perimeter Security Project to improve the safety and appearance of the embassy at a projected cost of US$15 million to the US Government.[19] The US Embassy in Grosvenor Square is however to be sold and the Embassy moved in 2017 to a new site in Nine Elms, Wandsworth. Security was also a major consideration for the construction of a new US Embassy in Baghdad—reported to be on completion in September 2007 the size of the Vatican City and the largest and (at a cost of $700 million) the most expensive embassy ever built.[20]

In 2003 the United States concluded an agreement with the People's Republic of China on the construction of new embassies in Beijing and Washington. The agreement contained specific terms providing for the premises to be treated as premises of the mission 'from the date of delivery of possession' and for papers on construction and design of the embassies to be regarded as archives of the mission in both States.[21]

The United Kingdom in 1987 concluded an agreement with the Soviet Union for mutual provision of new embassy sites, but replaced its provisions in 1991 with an

[16] Hansard HL Debs 14 May 1987 cols 804–5. Extracts from debate and Circular Note to diplomatic missions in 1987 BYIL 540. See also Barker (1996) pp 141–4.

[17] TIAS 6693; 20 UST 789; TIAS 7512; 23 UST 3544; TIAS 8629; 28 UST 5293; 1978 DUSPIL 565. Lee (2nd edn 1991) at pp 379–80 describes the background to the agreements and disputes over their implementation.

[18] *The Times*, 18 December 2000 and 27 July 2006.

[19] News at www.usembassy.org.uk.

[20] *The Times*, 1 September 2007.

[21] Extracts from the Agreement of 17 November 2003 are in 2003 DUSPIL 256.

Exchange of Notes containing provision for existing embassy premises to be retained by each government for ninety-nine years at a nominal rent. In 1996 these arrangements were supplemented by two agreements, on the Leases of New Embassy Premises in Moscow and London, and on the Design and Construction of Embassy Buildings in London and Moscow. The latter of these agreements dealt in detail with such questions as compliance with local design and construction regulations, import of construction materials, site security and access, and commencement of the status of premises of the mission for the purposes of the Vienna Convention.[22] A detailed agreement concerning the Vacation of the British Embassy Compound in Muscat and the Provision of New Embassy Premises was also concluded between the United Kingdom and Oman in 1993.[23]

In 1998 President Lukashenko of Belarus ordered the severing of water, electricity, and sewerage services to the US and European ambassadors' residential compound in Drozdy, Minsk, which he claimed was part of his own residence. In protest at this breach of obligations under the Vienna Convention, all European Union governments recalled their ambassadors to Belarus and required ambassadors of Belarus in European capitals to return home for consultations. The ambassadors of the United States and Japan were also recalled. The dispute was resolved some months later by a Joint Declaration by the President of the Council of the European Union and the Minister for Foreign Affairs of Belarus which acknowledged that the residences of heads of mission were inviolable under the Vienna Convention notwithstanding that the relevant territory 'has meanwhile been declared to be the residence of the President of the Republic of Belarus'. The Declaration continued:

> 2. The Republic of Belarus will, through its active support and cooperation, endeavour to secure long-term contractual arrangements for the Heads of Mission to move into new residences, in accordance with the provisions of the Vienna Convention on Diplomatic Relations. The Missions concerned will, for their part, endeavour to keep the period of time required to contractual agreements concerning the taking-over of the new residences as short as possible. In this period of time, the renting of temporary residences might be necessary.

Detailed arrangements were made for interim access by the heads of mission, for termination of existing lease agreements, and for compensation by Belarus following vacation by ambassadors of their residences in the compound.[24]

A recent development which may somewhat diminish the need for reliance on Article 21 of the Vienna Convention is the use of 'rapid reaction embassies' in inhospitable capitals, comprising prefabricated accommodation as well as satellite communications, encryption devices, computers and generators. The concept was copied from military mobile field headquarters and is intended to enable a mission to be totally self-sufficient under any circumstances.[25]

[22] 1987 Agreement in UKTS No. 42 (1987), Cm 207; 1991 Exchange of Notes in UKTS No. 27 (1992), Cm 1930; 1996 Agreements in UKTS 1 and 2 (1997), Cm 3502 and 3503.

[23] TS No 45 (1993), Cm 2298.

[24] *Observer*, 21 June 1998; *The Times*, 23 June 1998; Text of Joint Declaration in *Bulletin of the EU* 12–1998 point 1.3.7; 1998 BYIL 525 and 1999 BYIL 485; 1998 AFDI 778; 1998 RGDIP 1027.

[25] *The Times*, 16 July 2002.

INVIOLABILITY OF THE MISSION PREMISES

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Concept of inviolability

Inviolability in modern international law is a status accorded to premises, persons, or property physically present in the territory of a sovereign State but not subject to its jurisdiction in the ordinary way. The sovereign State—under the Vienna Convention the receiving State—is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises, persons, or property. The receiving State is also under a positive duty to protect inviolable premises, persons, or property from physical invasion or interference with their functioning and from impairment of their dignity.[1]

The Vienna Convention confers inviolability on a range of premises, persons, and property. Some kinds of property are, however, given specified immunities which fall short of inviolability—for example, the means of transport of the mission and the diplomatic bag.

Paragraphs 1 and 3 of Article 22 spell out in relation to mission premises the first duty of abstention and paragraph 2 spells out the positive duty of protection.

Historical background

The inviolability of embassy premises is mentioned in diplomatic literature before Grotius—in the sense that the receiving sovereign was required to abstain from enforcing his laws. Grotius stated that established practice forbade arrest of members of the embassy suite or the levying of execution on embassy premises. Use of the premises for granting asylum, however, required a special concession by the receiving State.[2] By the second half

[1] Parry, in VII BDIL 700, suggests: 'that the term "inviolability", as used in the Convention, is not particularly precise. But it no doubt implies immunity from all interference, whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interferences or from mere insult, on the part of the receiving State.' Mann (1990) in his essay '"Inviolability" and Other Problems of the Vienna Convention on Diplomatic Relations' lists several definitions at p 326, but virtually ignores the 'protective' aspect of the term.

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of the seventeenth century the inviolability of embassy premises was observed in state practice to a greater degree than the writers believed was justified—while the use of embassy premises to grant asylum became widespread there were few cases in which protest by the receiving State was followed by forcible entry and seizure of the fugitive. In two cases where this did happen—the taking of Ripperda in 1726 from the British Embassy in Madrid and the taking of Springer in 1747 from the British Embassy in Stockholm—Britain claimed an exceptional privilege to protect political refugees.[3]

Grotius had remarked that ambassadors were, by a legal fiction, deemed to be outside the territory of the State where they were residing. By the middle of the eighteenth century this remark had led to a situation whereby under the doctrine of exterritoriality diplomatic missions were regarded in law as portions of the territory of the sending State. In a few capitals—Rome, Madrid, Venice, and Frankfurt-am-Main—sending States claimed '*franchise du quartier*' so as to exempt not only the embassy buildings but the entire surrounding suburb from duty on provisions imported for use and from the visit of any law enforcement officer. These *quartiers* became dens of criminals and there was a reaction against such an exaggerated concept of exterritoriality. Vattel, writing in 1750, and quoting the precedent of Ripperda, denied any right to grant asylum in diplomatic premises and maintained that in extreme and urgent cases of danger to the receiving State, the head of that State could order entry in order to arrest a fugitive.[4]

During the nineteenth century reliance on exterritoriality declined. Writers emphasized that exterritoriality was a convenient way of expressing the fact that the receiving State had no powers of law enforcement within mission premises—but it did not mean that crimes or legal transactions occurring within inviolable premises must be deemed to have occurred in the territory of the sending State.[5] There were numerous decisions of national courts to the same effect. In *Tietz and others v People's Republic of Bulgaria*, the Supreme Restitution Court for Berlin, a court established by the Allies in 1953 and composed of three German judges and four judges of other nationalities, commented of the doctrine of exterritoriality that: 'In fact it is an older doctrine of international law which has not found any modern-day legal acceptance... at its best the supposed rule was an artificial legal fiction which does not appear to be accepted as sound law anywhere in the world today.'[6]

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[5] eg Hall (1895) p 186: 'If an assault is committed within an Embassy by one of two workmen upon the other, both being in casual employment, and both being subjects of the state to which the mission is accredited, it would be little less than absurd to allow the consequences of a fiction to be pushed so far as to render it even theoretically possible that the culprit, with the witnesses for and against him, should be sent before the courts in another country for a trivial matter in which the interests of that country are not even distantly touched.' See also Hurst (1926) p 145; Hackworth, *Digest of International Law* vol IV pp 564–6; Report of Subcommittee on Diplomatic Privileges and Immunities, League of Nations Doc C 196.M 70 1927 V p 79.

[6] Cases in several jurisdictions are described by Lyons (1953) at pp 130–6. See, in particular, *Trochanoff Case* 1910 Journal de Droit International Privé 551; *Munir Pacha v Aristarchi Bey* ibid 549; *Couhi Case* ibid 1922 p 193; *Angelini Case* AD 1919–22 No 206; *Legation Buildings (Turnover Tax) Case* ibid No 207; *Immunities (Foreign State in Private Contracts) Case* ibid No 79; *Status of Legation Buildings Case* 1929–30 AD No 197; *Gnome and Rhône Motors v Cattaneo* ibid No 199; *Afghan Embassy Case* 1937:64 Journal de Droit International 561, 1933–4 AD No 166; *Basiliadis Case* 1922 Journal de Droit International Privé 407; *Consul Barat v Ministère Public*, 1948 AD No 102; *Regele v Federal Ministry of Social Administration* 26 ILR 544; *Tietz and others v People's Republic of Bulgaria* 28 ILR 369 at 379. There was no English authority on the point until *Radwan v Radwan* [1972] 3 All ER 1026, where it was held that a talak divorce granted within the Egyptian Consulate in London was not obtained 'in any country outside the British Isles' for the purposes of the Divorces

At the same time, the duty to protect embassy premises came to assume greater importance. As the duty to protect all foreign property became more firmly established in international law, the special duty towards foreign missions increased correspondingly to a higher level. The 1895 Resolution of the Institute of International Law used the term 'inviolability' to denote the duty 'to protect, by unusually severe penalties, from all offence, injury, or violence on the part of the inhabitants of the country'. 'Exterritoriality' was used in the same draft to cover the duty to abstain from measures of law enforcement.[7] Many States passed legislation which banned even purely political or symbolic injury—such as insult to the flag or protest demonstrations—or prescribed particularly severe penalties for trespass or acts of violence towards mission premises. In the United States in 1938 a Joint Resolution of the Senate and House of Representatives made it unlawful within the District of Columbia[8] to display a flag or placard intended to intimidate or bring into ridicule foreign diplomatic representatives, to interfere with performance of diplomatic duties within 500 feet of any embassy premises except in accordance with a police permit, or to congregate within the same area and refuse to disperse on police orders.[9]

As regards the duties of law enforcement, some national legislation was limited simply to provision of 'inviolability', leaving the consequences to be defined by international law.[10] Communist States, however, tended to make specific provision regarding the powers of law enforcement agencies. For example, the Soviet Regulations concerning the Diplomatic and Consular Missions of Foreign States in the Territory of the USSR provided in 1927:

> Premises occupied by diplomatic missions and premises in which the persons referred to in Article 2 and their families reside shall be inviolable. No search or seizure may be carried out on the said premises except at the request or with the consent of the diplomatic representative and in the presence of a representative of the Procurator's Department and a representative of the People's Commissariat of Foreign Affairs if there is such a representative in the locality. Such premises may not be sealed. Access to them otherwise than with the consent of the diplomatic representative shall be prohibited. The inviolability of the said premises shall not, however, confer a right to detain any person whatsoever therein by compulsion or to grant asylum therein to any person a warrant for whose arrest has been issued by a competent organ of the U.S.S.R. or the Union Republics.[11]

and Legal Separations Act 1971 s 2. This was followed by the Supreme Court of Zimbabwe in *S v Mharapara* 84 ILR 1 at 9–10. See also *McKeel v Islamic Republic of Iran* 81 ILR 543 (US Court of Appeals); *Swiss Federal Prosecutor v Kruszyk and others* 102 ILR 176 (Swiss Federal Tribunal).

[7] 26 AJIL (1932 Supp) 162 (Art 3); Denza, 'Diplomatic Privileges and Immunities' in Grant and Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein, 2007) pp 162–3.

[8] Text in 32 AJIL (1938 Supp) 100 and in UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 375. See Stowell (1938) p 344. The Joint Resolution was upheld as constitutional by the US Court of Appeals, District of Columbia in *Frend and others v United States* 1938–40 AD No 161.

[9] Discussed below in the context of demonstrations against mission premises.

[10] eg Commonwealth States including Australia ('UN Laws and Regulations') p 9; Canada (ibid p 57); Ceylon (ibid p 59); New Zealand (ibid p 218).

[11] 'UN Laws and Regulations' p 337. See also Cuba (ibid p 72); Guatemala (ibid p 149); Hungary (ibid p 162); Netherlands (ibid p 200); Poland (ibid pp 242, 243).

British practice was relatively slow to give effect to the inviolability of mission premises. It was not mentioned in the Diplomatic Privileges Act 1708[12] although by then it was well established in international practice. Following the arrest of Mr Gallatin's coachman in 1827—there was uncertainty whether this took place on mission premises which were then undefined—the Attorney-General advised:

> that I am not aware of any instance since the abolition of Sanctuary in England where it has been held that any particular place was protected from the intervention of criminal process; and I am of opinion that the premises occupied by an Ambassador are not entitled to such a privilege by the Law of Nations. At the same time I wish to add that it is most agreeable to the spirit of that law and the courtesy due to foreign Ministers that their houses should not be entered without their permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender.[13]

In 1896 Sun Yat-Sen, later to be President of the Republic of China but at that time a political refugee from the Chinese Government, was found to be held hostage in the Chinese Legation in London with the apparent intention of returning him to China. On application being made for a writ of habeas corpus, the English court declined to make an order on the ground that the matter was one for diplomatic intervention. The Chinese Minister was formally requested to release the prisoner on the ground that his detention was unlawful and an abuse of diplomatic privilege, and this was done. From the absence of any mention of the possibility of forcible entry to effect release it can be seen that the United Kingdom by then fully recognized the inviolability of the premises of the mission.[14]

A different kind of abuse of the inviolability of mission premises—their use in Tokyo by gamblers seeking to avoid police action—was considered by the Foreign Office Legal Adviser in 1907. He advised that the British Chargé d'Affaires had acted correctly in authorizing police entry solely for pursuit of the gamblers, and commented:

> So, in the inconceivable circumstance of a foreign chef de mission in London allowing a part of his residence to be used as a ready money betting shop by the British Public, we should, I think, immediately protest against a claim for immunity if made for the purpose of covering the persons who resorted to his residence for such purposes, as a misuse of diplomatic privilege.[15]

In 1966 a Chinese engineer visiting The Hague for a conference of welding engineers was discovered seriously wounded outside the house where he was staying and taken to hospital. On the same day he was removed by several Chinese people to the Chinese diplomatic mission and he died there on the following day. The Netherlands (not at that time party to the Vienna Convention) sought to carry out a judicial enquiry into the facts and the cause of death, and they issued subpoenas against the dead engineer's colleagues,

[12] 7 Anne c 12. In 1823 the Law Officers confirmed that a seizure of goods, effected in error on the premises of the US legation, was not within the scope of the Act: FO 83. 2205: USA, cited in McNair (1956) vol I p 192.

[13] FO 83.2206: USA; Moore, *Digest of International Law* vol IV p 656; McNair (1956) at p 195; VII BDIL 889.

[14] 1896 RGDIP 693; McNair (1956) vol I p 85; Genet (1931) vol I p 545; Moore, *Digest of International Law* vol IV p 555; VII BDIL 898. In the comparable case of the forcible detention in 1929 of the wife and daughter of M Biezedowsky, a diplomat in the Soviet Embassy in Paris, the French Government authorized forcible entry on the basis that Biezedowsky was entitled to give consent in the absence of the Soviet Ambassador.

[15] VII BDIL 889.

who had taken refuge within the Chinese mission premises but were not entitled to immunity. When the Chinese Government rejected the Dutch demand, the Chinese Chargé d'Affaires was declared *persona non grata* and asked to leave within twenty-four hours. The Netherlands then set up a five-month siege of the Chinese mission to prevent the other engineers being smuggled out of the country without testifying. During these five months The Netherlands Chargé d'Affaires in Peking—who had also been declared *persona non grata*—was, in contravention of Article 44 of the Convention, not permitted to leave China. Ultimately China agreed that they should be questioned by the Public Prosecutor within the mission premises. The incident shows that The Netherlands took the view that their authorities were entitled to enquire into a death taking place on mission premises though in consequence of acts performed elsewhere but not—even in response to Chinese behaviour both in The Hague and in Peking—to take any coercive measures within the mission premises themselves.[16]

Diplomatic asylum

The possibility of formulating a rule on diplomatic asylum was one of the issues of difficulty during the deliberations of the International Law Commission. In the 1957 proceedings of the Commission Sir Gerald Fitzmaurice proposed the addition of a new paragraph to the draft article on mission premises to read:

> Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds.

His alternative formulation was:

> Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds.

Mr François objected that the Commission would be acting ultra vires if it discussed the question of diplomatic asylum, since the proceedings in the Sixth Committee which had led to the formulation of General Assembly Resolution 685 (VII) which set out the mandate for the Commission to consider diplomatic privileges and immunities, made it clear that the subject of diplomatic asylum was not intended to be covered. The subject was one of considerable complexity and no preliminary study of it had been made by the Rapporteur. Most members of the Commission agreed with Mr François that the question of diplomatic asylum should be left aside—on the understanding that under modern international law and practice a failure by the mission to comply with the rules on diplomatic asylum did not entitle the receiving State to enter mission premises.[17]

[16] The incident is described and analysed in Barnhoorn (1994) p 39. On inquests following death of diplomat, see under Article 31.1, at p 235 below.

[17] *ILC Yearbook* 1957 vol I pp 54–7; Bruns (2014) p 127. On diplomatic asylum see Art 6 of Harvard Draft Convention 26 AJIL (1932 Supp) 62 at 66; Havana Convention on Asylum, *Hudson: International Legislation* vol IV p 2412; Genet (1931) vol I pp 550–6; Satow (4th edn 1957) pp 219–23; (5th edn 1979) paras 14.17–23; (6th edn 2009) paras 8.21–7; *Asylum Case* 1950 ICJ Reports 266, 1951 p 71, AD 1950 No 90, 1951 No 113; VII BDIL 905; Ronning (1965); Sinha (1971); 1971 RGDIP 849 (MFA statement of French

Governments evidently shared the view that the proposed Convention was not the place in which to attempt to formulate rules on the controversial and sensitive question of the granting of diplomatic asylum. No suggestion was made by them in comments on the International Law Commission's draft articles or at the Vienna Conference that express provision on asylum should be added. So far as the Vienna Convention is concerned, the question of asylum depends on the application of Article 41 paragraph 1—the duty of persons enjoying immunities to respect the laws and regulations of the receiving State and not to interfere in the internal affairs of that State—and Article 22 itself. Article 22 allows no exception to the inviolability of the premises of the mission. The sending State may, however—at least where there is immediate danger to the life or safety of a refugee—claim a limited and temporary right to grant diplomatic asylum on the basis of customary international law. In the Preamble to the Vienna Convention the Contracting Parties affirm 'that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'. Any limited and temporary right belongs not to the refugee individually but to the sheltering State and is best seen as an aspect of humanitarian protection. The individual seeking shelter within an embassy is not a 'refugee' as defined by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[18]

There have, however, been some recent cases where impasse between a sheltering embassy's claim to give protection and the refusal of the receiving State to grant safe passage to the fugitive has led to prolonged disputes. In 2008, the Libyan authorities arrested and charged two Swiss businessmen with visa offences following the arrest in Geneva of a son of Colonel Gaddafi and his wife. The business men, released on bail, took refuge in the Swiss Embassy in Tripoli where they remained for seventeen months. Both were convicted in absentia and although one was later cleared, the other, Max Göldi, surrendered and served his four-month prison sentence only when—in the face of widespread diplomatic protest—the Libyan authorities threatened to storm the Embassy.[19]

In 2012, Bolivian senator Roger Pinto who had accused the Bolivian Government of corruption and complicity in drug trafficking took refuge in the Brazilian Embassy in La Paz, claiming to have received death threats. Brazil granted him asylum, but Bolivia refused him safe passage and he remained in the Embassy for fifteen months. He was then spirited in a diplomatic car out of Bolivia to Brazil by Eduardo Saboia, the Brazilian chargé d'affaires, who was concerned for the mental health of the fugitive. Brazil's Foreign Minister resigned on hearing of the unauthorized escape.[20]

Even longer, and with far less justification under the rules of international law, was the 'asylum' granted by Ecuador in June 2012 to the WikiLeaks founder Julian Assange. Before taking refuge in the Ecuador Embassy in London, Assange had exhausted legal

practice); Salmon (1994) paras 334–40. For a fuller account of the Convention and customary law and practice see Denza (2011). See also Behrens (2014).

[18] Denza (2011) pp 1426–31, 1433–4. See also *R (on the application of 'B' and Others) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, [2005] QB 643, at paras 80–97, where the UK Court of Appeal held at para 96 that 'To have given the applicants refuge from the demands of the Australian authorities for their return would have been an abuse of the privileged inviolability accorded to diplomatic premises. It would have infringed the obligations of the United Kingdom under public international law'.

[19] *The Times*, 23 February 2010, BBC News Africa, 14 June 2010.

[20] *Guardian*, 27 August 2013; *The Times*, 28 August 2013.

appeals against extradition to Sweden where he was wanted for questioning on charges of sexual assault. He claimed to fear onward transfer to the US and prosecution there on charges arising from his leaking of diplomatic cables and other documents. Although these fears were dismissed by many legal commentators, Ecuador continued to afford shelter within its Embassy and to request safe passage for Assange. The UK authorities threatened in August 2012 to withdraw the status of the premises on the grounds that they were not used exclusively for the purposes of the mission, using the provisions of the UK Diplomatic and Consular Premises Act 1987,[21] but this was presented by Ecuador and its friends as a violation of the Vienna Convention and the threat was not carried out. Instead the UK continued its surveillance of the premises (the cost of which had risen to £12.6 million by October 2015 when it was scaled down) in order to prevent escape by Assange either in disguise or in a diplomatic vehicle.[22]

In August 2015 it was reported that all but one of the allegations against Assange were about to expire, and that Sweden had expressed willingness to interview him within the Ecuador Embassy but that Ecuador had denied permission for this course of action, while the US said that no 'sealed indictment' against Assange existed. He, however, said that he intended to remain in the Embassy—even if the arrest warrant against him were withdrawn—unless guaranteed safe passage to Ecuador by the UK Government. In response, the UK Government delivered a formal protest to the Government of Ecuador, describing the long-running grant of asylum and the continuing failure to expedite the Swedish prosecutor's interview on the question of the allegation of rape as 'a stain on the country's reputation'.[23]

In 2009, Honduras instituted proceedings against Brazil before the International Court of Justice after the former President of Honduras Jose Manuel Zelaya Rosales took refuge with a number of his supporters in the Embassy of Brazil—thereby evading arrest and exile following an attempt to extend the time limit of his rule. Honduras claimed that the refuge afforded by Brazil violated the duty of non-intervention in the domestic affairs of Honduras which was at the time preparing for presidential elections. The application was, however, withdrawn the following year before the ICJ had made any ruling on the substance of the complaint.[24]

Collective shelter

Some older textbooks on diplomatic law distinguished between diplomatic asylum sought by individual refugees and collective shelter. Taking shelter in a foreign mission to emphasize grievances was particularly a custom in Persia. Satow recounts one incident in the nineteenth century when about 300 wives of the Shah sought 'bast' or shelter in the British Legation in protest at the Shah's decision to marry a girl who was sister to one of his wives and daughter of a gardener. The British Minister was ready to grant sanctuary and tents were pitched and sheep purchased—but the Shah capitulated before the ladies

[21] 1987 c 46. The Act is discussed in detail below, and in the Commentary on Arts 1 and 45.

[22] *The Times*, 20 June 2012, 17, 20, 22, and 25 August 2012, 26 April 2014, 7 June 2014, 6 February 2015, 13 October 2015; *Observer*, 19 August 2012, UKMIL 2012 BYIL 492–7; Behrens (2014).

[23] *The Times*, 13 and 14 August 2015.

[24] ICJ Press Release No 2009/30, 29 October 2009.

arrived.[25] There were during the Spanish civil war some episodes of grant of diplomatic shelter on a large scale—particularly in the Swiss Embassy.[26]

In Tehran in 1979, the Canadian Embassy gave covert shelter and assisted the escape of six US diplomats who evaded capture and detention as hostages during the lengthy seizure of the US Embassy. The events were later dramatized in the 2012 film *Argo*.[27]

In August and September 1989 the events which led to the destruction of the Berlin Wall were set in motion when hundreds of East Germans—newly entitled to travel without visas to Czechoslovakia and Poland—entered West German embassies. Although the Czech authorities took measures to try to control access to the West German Embassy there was no attempt to demand eviction of the refugees. At first the West German authorities tried to stem the inflow, even by temporary closure of its missions, and to negotiate travel to West Germany only for refugees already in the compounds. But as soon as refugees departed to West Germany, travelling from Warsaw in specially sealed trains, the influx into the embassies resumed. It became apparent that the East German restrictions on travel to the West could no longer be sustained.[28] In 1990 similar events took place in Albania when demonstrations for greater political freedom were followed by hundreds of Albanians taking refuge in foreign embassies and refusing to leave until granted passports. Again, security forces tried to prevent access to embassy premises until this became futile and passports were granted.[29]

The strategy was again imitated in 2002 for the benefit of various groups of people from North Korea who sought refuge in sympathetic Western embassies in Beijing. The incursions were planned by a German doctor, Norbert Vollertsen, who had worked in North Korea and recalled the earlier success of the East German refugees. In spite of efforts by Chinese police to cordon off the target embassies and increased security by the embassies themselves, many refugees were successful. Twenty-five North Korean defectors forced their way into the Spanish Embassy and following negotiations between China, Spain, South Korea, and the Philippines they were returned via Manila to Seoul.[30]

Droit de chapelle

Another aspect of the special status of mission premises considered during the preparation of the Convention was the right to maintain within the mission a chapel and to practise the faith of the head of the mission. The privilege known as *droit de chapelle* was mentioned in the older diplomatic handbooks separately from the inviolability of mission premises, no doubt because it conferred on the staff of the mission a substantive right to perform activities which might otherwise be unlawful under the law of the receiving State. The publicists debated whether the right extended to heads of mission below the rank of ambassador, whether it existed when public exercise of the religion in question was permitted in the receiving State, whether it included a right to toll a bell or hold processions outside the premises, or an obligation on the receiving State to allow its

[25] (5th edn 1979) para 14.23. For a more detailed account of 'bast' see VII BDIL 923.

[26] Scelle (1939) p 210.

[27] Green (1981) pp 132, 144–7. The film, directed by Ben Affleck, was criticized for its omission of the assistance also provided by the UK and New Zealand Embassies to the escaping diplomats.

[28] *The Times*, 2 October and 11 November 1989; 1990 RGDIP 123; Salmon (1994) p 340.

[29] *The Times*, 6 July 1990.

[30] *The Times*, 15 March 2002; 2002 RGDIP 650; Denza (2011) pp 1436–7.

subjects to attend services in the embassy.[31] In England its extent was a matter of controversy between the Government and foreign missions in the wake of the 1745 rebellion by supporters of the Catholic Charles—the Young Pretender to the throne. The British Government accepted that foreign priests in the service of foreign missions were exempt from laws outlawing Catholic practices, but argued that British priests could not rely on such a privilege.[32]

The International Law Commission stated that:

> The inviolability of the premises of the mission undoubtedly includes freedom of private worship, and nowadays it can hardly be disputed that the head of the mission and his family, together with all members of the staff of the mission and their families, may exercise this right, and that the premises may contain a chapel for the purpose. It was not thought necessary to insert a provision to this effect in the draft.[33]

The effect of this decision is, however, that the Convention 'expressly regulates' the question of freedom of worship only by Article 22—which does not confer any substantive exemption from prohibitions imposed by the laws of the receiving State—and by Article 41, which requires persons enjoying immunities to respect the laws and regulations of the receiving State. Given that the years since the Vienna Convention have seen in some countries a decline in tolerance of different religious practices, it might be necessary to uphold the old right to freedom of private worship on the basis of customary international law. The Preamble to the Convention affirms 'that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'. Customary international law would in regard to freedom of worship be of greater assistance to the mission than in the matter of diplomatic asylum discussed above.

Negotiating history: emergency on the premises of the mission

The issue which caused greatest controversy during the formulation of this Article concerned the position if an emergency endangering human life or public safety occurred on mission premises. The Rapporteur's original draft of paragraph 1 gave the agents of the receiving State a power of entry: 'in an extreme emergency, in order to eliminate a grave and imminent danger to human life, public health or property, or to safeguard the security of the State. In such emergencies the authorization of the Ministry of Foreign Affairs must, if possible, be obtained.'[34] The corresponding provision in the Harvard Draft Convention had contained no express exception to inviolability, but the Commentary stated:

> The draft does not undertake to provide for well-known exceptions in practice, as when the premises are on fire or when there is imminent danger that a crime of violence is about to be perpetrated upon the premises. In such cases it would be absurd to wait for the consent of a chief of

[31] Adair (1929) pp 177–97; Vattel (1758) IV.VII para 104; Satow (4th edn 1957) p 226; Phillimore (3rd edn 1879) vol II p 244; Martens-Geffcken (1866) pp 113–18; Pradier-Fodéré (1899) vol II pp 227–32; Genet (1931) vol I pp 450–5; VII BDIL 931.

[32] Martens (1827) vol II pp 22–5.

[33] *ILC Yearbook* 1957 vol II p 137, para (5) of Commentary on Art 16.

[34] UN Doc A/CN 4/91 p 2, Art 12.

mission in order to obtain entry upon the premises. Like acts of God and force majeure these are necessarily implied as exceptions to the specific requirement of prior consent for entry. Whether or not the circumstances are sufficiently extraordinary to justify non-observance of the rule would be a matter for diplomatic reclamation.[35]

It was, however, difficult to find examples of state practice before the Vienna Convention supporting the existence of such an implied exception to the inviolability of mission premises. The evidence, and the examples cited in the International Law Commission debate, showed rather that heads of mission decided on each occasion and in the light of all relevant considerations whether to invite assistance. There had been refusals of consent even when fire or yellow fever was raging. The Commission agreed that any definition of circumstances in which entry could be made without prior permission could lead to more controversy than it would avoid. Any incursion by an unfriendly State could be alleged to be 'to safeguard the security of the State'—a claim which it would be very difficult for the sending State to disprove. The exception was accordingly deleted. In 1958 a milder formulation would have referred to the duty of the sending State to co-operate with the agents of the receiving State in case of emergency. The Commission, however, concluded that such an addition was inappropriate and unnecessary.[36]

The Vienna Conference went over the same arguments, with the same outcome. Amendments which would have permitted the receiving State to take 'such measures as are essential for the protection of life and property in exceptional circumstances of public emergency and danger', or specified that 'the head of the mission shall co-operate with the local authorities in case of fire, epidemic or other extreme emergency' were withdrawn. Most delegations, and in particular all the Communist delegations, were of the opinion that it would be dangerous to allow the receiving State to judge when 'exceptional circumstances' existed and that it was in a time of 'extreme emergency' that it was most necessary to preserve the principle of inviolability of mission premises. The Conference clearly determined that under Article 22 the inviolability of mission premises should be unqualified. Subsequent practice has confirmed that in the extremity of fire or riot, missions will struggle to protect or to destroy their archives rather than call on local emergency services. An incident where during a fire in the US Embassy in Moscow the local 'fire-fighters' proved to be KGB agents illustrates why this is so.[37]

Expropriation

A similar approach was taken by the International Law Commission and the Vienna Conference to the question of a possible exception where the receiving State wished to expropriate the mission premises in the public interest. The proposal to add a paragraph stating that 'The inviolability referred to above shall not prevent expropriation in the

[35] 26 AJIL (1932 Supp) 52. cp Genet (1931) vol I p 542.

[36] *ILC Yearbook* 1957 vol I pp 55–6, 1958 vol I p 129.

[37] UN Docs A/Conf. 20/C 1/L 129 (Mexico), L 163 (Ireland and Japan); A/Conf. 20/14 pp 135–43; Kerley (1962) pp 102–3; *Hardy* (1968) p 44; Bruns (2014) pp 127–9. *Lee* (1991) at p 393 explains why a different solution was appropriate in Art 31 of the Vienna Convention on Consular Relations, where the consent of the head of the post may 'be assumed in case of fire or other disaster requiring prompt protective action'.

public interest by the receiving State' was generally considered by the Commission to be contrary to existing law and practice. Cases were cited where receiving States had tolerated great inconvenience in constructing public works because of the reluctance of an embassy to move to different premises. The Commission's view was that such differences should be dealt with through negotiation and that in the last resort the refusal of the sending State to vacate premises could not be overridden. The United States argued on the other hand in their comments on the draft that international law did not absolutely preclude requisition of diplomatic property or taking 'by exercise of the right of eminent domain', although the right could be exercised only in very exceptional circumstances and on condition of prompt compensation and assistance to the mission in finding alternative accommodation.[38]

At the Vienna Conference Mexico proposed a new paragraph to permit a receiving State which needed for public works land on which mission premises were situated to inform the sending State with a view to agreement on a reasonable period for vacation of the premises. Although Mexico stressed that no coercive measures were involved, the new provision was seen as adding little and was withdrawn.[39]

The inviolability of mission premises was thus upheld without exception, and consent is needed for any interference by the receiving State with the mission's right to peaceful enjoyment of its premises. In 1963, a stormy period in the relations between Cuba and the United States, Cuba by decree expropriated US mission premises in Havana then being used by Switzerland as protecting power for US interests. Although none of the three States was yet bound by the Vienna Convention which each had signed but not yet ratified, Rousseau noted that virtually no precedent could be found for such a clear breach of international law: 'Le gouvernement hitlérien lui-même, qui n'avait pourtant pas un grand respect pour le droit international, n'a jamais saisi les ambassades ou les legations des Etats avec lesquels il était en guerre.' The United States formally protested through the Swiss Embassy in Havana that the decree contravened Articles 22 and 45 of the Vienna Convention, and the decree was never in fact implemented.[40] The US State Department in 1965, during hearings on the Vienna Convention before the Senate Committee on Foreign Relations, stated that they did not 'interpret Article 22 as precluding the exercise of the right of eminent domain for public purposes, if prompt and adequate compensation is given and if the sending State is assisted in obtaining replacement accommodations'.[41] But the United States as a party has in practice proceeded by agreement.

In London in 1966 the consent of foreign missions was sought to the construction of the Jubilee Line Underground railway beneath their premises. The general compulsory procedures were not used in relation to diplomatic missions because of the need to respect their peace and dignity as well as the duty to abstain from any kind of taking of their rights. No mission objected, although several asked for confirmation that compensation would be paid in the event of resulting damage to their premises.

[38] *ILC Yearbook* 1957 vol I pp 66–9, vol II p 137; UN Docs A/CN 4/L 75 p 14; A/CN 4/114 p 60; A/CN 4/116 p 38, cp Hackworth, *Digest of International Law* vol IV p 563.

[39] UN Docs A/Conf. 20/C 1/L 129; A/Conf. 20/14 pp 135–43.

[40] 1963 RGDIP 896; Whiteman, *Digest of International Law* vol VII p 396.

[41] Whiteman, *Digest of International Law* vol VII p 374.

Subsequent practice: abstention from enforcement on premises

The clear insistence of the negotiators of the Vienna Convention on unqualified inviolability of mission premises has helped to ensure a very high degree of conformity. In nearly all the cases where enforcement activity has taken place on mission premises it has been fleeting or accidental, and in the face of protest of breach of international law it has not been justified by the receiving State. In 1963, for example, a refugee of Soviet nationality but of German origin was pursued into the embassy premises of the Federal Republic of Germany in Moscow by a Soviet policeman who tried, but failed, to seize him. The German Government protested at the violation.[42] In 1985 South African police entered the mission premises of The Netherlands and rearrested a Dutch anthropologist who had escaped from detention under the Internal Security Act on grounds of assisting the African National Congress. The police subsequently claimed to be unaware of the status of the building. In the face of vigorous Dutch protests and a threat to recall their ambassador the prisoner was released and apologies made for the violation of the premises.[43] A more serious incursion in 1976 by Uruguayan police into the Embassy of Venezuela, and the arrest of a fugitive, led to breach of diplomatic relations between the two States.[44] In the *Dorf Case* in 1973, the Supreme Court of Norway laid emphasis on the accidental nature of a police arrest of a suspect in the apartment of an Israeli diplomatic agent, as well as the functional justification for inviolability in holding that international law did not prohibit the holding in custody of a person arrested on inviolable premises who was not entitled to personal inviolability.[45]

The inviolability of the mission premises of Libya in London was tested under extreme circumstances in April 1984 following the fatal shooting of a policewoman who had been protecting the premises during a demonstration by Libyan dissidents. The Libyan Government refused consent to a police search of their mission premises for the weapon and the suspected murderer. The British Government upheld the inviolability of the premises, but in the face of continued refusal to co-operate in the investigation they broke diplomatic relations with Libya a few days later. The House of Commons Foreign Affairs Committee, who were advised during their inquiry by Professor Rosalyn Higgins (later a Judge and President of the International Court of Justice), considered whether inviolability might have been lost by virtue of the unlawful terrorist acts perpetrated from the premises. They concluded that the drafting history of Article 22 'probably makes this principle inappropriate, especially as a "remedy" for violation is provided in the form of a severing of diplomatic relations'. The Committee also considered whether the concept of self-defence would have justified forcible entry into the Libyan mission premises. They noted a difference of view among international lawyers who had given evidence to them on whether the international law concept of self-defence could apply to shooting from mission premises. The Legal Adviser to the Foreign and Commonwealth Office had suggested that the classic requirements of self-defence 'would be met where there was

[42] 1963 RGDIP 605. A similar incursion occurred in 1990 when Albanian secret police entered the Greek Embassy and arrested an Albanian seeking political asylum: *EUROPE*, 3 May 1990.

[43] 1986 RGDIP 180.

[44] 1977 RGDIP 330. Following a communication by the mother of the victim, the UN Human Rights Committee found Uruguay responsible for breaches of the Covenant on Civil and Political Rights: *Almeida de Quinteros v Uruguay* 79 ILR 168.

[45] 71 ILR 552.

continued firing of weapons from the premises of an Embassy, and where every other method has been tried and has failed to stop the shooting'. The Committee concluded that 'whatever answer is given to the question of whether self-defence is a concept applicable to the circumstances of St James's Square, it could not have acted as a lawful basis for the forcible entry of the Bureau premises'. The UK Government accepted that conclusion.[46]

There have, however, been a very few occasions where a State in the face of a serious threat to national security or a flagrant abuse of diplomatic immunity has deliberately authorized forcible entry of mission premises. In 1973 the Pakistan Ministry of Foreign Affairs informed the Iraqi Ambassador of evidence that arms were being brought into Pakistan under diplomatic immunity and stored at the Embassy of Iraq in Islamabad. When the ambassador refused permission for a search, a raid by armed police took place and huge consignments of arms—apparently destined for rebel tribes in Baluchistan—were found stored in crates. The Pakistan Government sent a strong protest to the Iraqi Government, declared the ambassador *persona non grata*, and recalled their own ambassador. Ten weeks later relations were restored at ambassadorial level by a joint communiqué in which Iraq declared its respect for the territorial integrity of Pakistan.[47] In 1978, following a tenancy dispute between some members of the mission and local nationals, the Egyptian police on the instructions of President Sadat entered the Bulgarian Embassy in Cairo, made several arrests and seized arms. Diplomatic relations were broken by Bulgaria on the following day.[48] Following the murder of an Iraqi refugee in Aden in 1979 by security guards of the Iraq Embassy and the refusal by Iraq to surrender the suspects, South Yemen troops forcibly entered the premises and made three arrests. Iraq in retaliation recalled its ambassador and arrested the entire Yemen diplomatic staff in Baghdad. The Government of South Yemen maintained that its action in storming the Iraq Embassy was justified, while the Iraq retaliation was unlawful. The South Yemen courts, without commenting on the legality of the original arrest, later released two of the murder suspects on grounds of diplomatic immunity and sentenced the third to ten years' imprisonment.[49] During their armed intervention in Panama in 1989 for the purpose of seizing General Noriega, US military forces searched the residence of the Nicaraguan Ambassador. A Security Council Resolution declaring the search a violation of diplomatic immunity was vetoed by the United States. All other Members voted in favour except the United Kingdom which abstained. Nicaragua in response expelled twenty of the twenty-eight US diplomats accredited to Managua. The US troops did not, however, enter the premises of the Vatican mission where General Noriega took refuge, although they harassed it in ways which will be considered below. The Pope, if he did not have more divisions than the Government of Nicaragua, had more US voters.[50]

[46] House of Commons Foreign Affairs Committee 1st Report, 1984–5, paras 88–95; Review of the Vienna Convention, Cmnd 9497, para 83. See comments by Sutton (1985) p 193; Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent U.K. Experience', 1985 AJIL 641 and 1986 AJIL 135; Lord Denning in Hansard HL Debs 16 May 1984 col 1454.

[47] *Observer*, 11 February 1973; 1974 RGDIP 511.

[48] 1979 RGDIP 756; Lecaros (1984) p 132.

[49] Grzybowski (1981) at p 51.

[50] 1990 RGDIP 495, 803; *The Times*, 28 and 30 December 1989; *Observer*, 31 December 1989. The US apologized for the intrusion into the residence of the Nicaraguan Ambassador some time later: Talmon (2006) n 181.

The practice, however, does little to support the view that exceptions may be implied to the strict inviolability prescribed by Article 22. Suspicion of abuse of the premises by violation of local laws or by continued shelter of an asylum seeker is clearly not a justification for entry by law enforcement officers in contravention of inviolability. Because the Vienna Convention provides its own system of remedies by way of declaration of *persona non grata* and breach of diplomatic relations, even manifest abuse cannot be relied on to justify forcible entry as a form of reprisals for breach of the obligation under Article 41 of the Convention to respect the laws and regulations of the receiving State. The International Court of Justice emphasized this in the *Hostages Case*, saying: 'The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State.'[51] The position was confirmed in the award made by the Arbitral Tribunal in *Diplomatic Claim, Eritrea's Claim 20 (Eritrea v Ethiopia)*, where it was held that allegations of hostile activity within could not justify the forcible entry, search, and ransacking by Ethiopia of the premises of the Embassy of Eritrea.[52]

It seems therefore that any legal justification for forcible entry would have to rest on self-defence. States would clearly be unwilling to exclude this possibility—however reluctant they were to incorporate into the Convention any express exception in terms capable of political manipulation. It will, however, always be essential in case of emergency to try every means of securing consent from the head of mission if he is available, and otherwise from the most senior diplomat or from the government of the sending State. (The liberation from the siege of the Iranian Embassy in London in 1979, for example, could not be authorized by the Iranian Ambassador who was held hostage inside the building, and consent was instead sought both from the senior diplomat not inside the Embassy and from the Government in Tehran.) Governments authorizing such action will always be conscious of the possible danger to their own embassy and diplomats in the sending State and will normally wish to avoid argument over the facts by conducting any search or arrest in the presence of a diplomat of the sending State. If the entry is not perceived as justified by the circumstances it is likely that the sending State will break diplomatic relations. In the last resort, however, it cannot be excluded that entry without the consent of the sending State may be justified in international law by the need to protect human life.[53]

Service of process

It is clear that personal service of legal process is prohibited by the terms of Article 22, whether it occurs within the premises of the mission or at the door.[54] Where it is

[51] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at paras 83–7.

[52] Partial Award of 19 December 2005, 135 ILR 519; RIAA Vol XXVI 381.

[53] Mann (1990) in '"Inviolability" and the Vienna Convention' at p 336 says: 'In conclusion it is suggested that the inviolability of a mission's premises is by no means absolute, but must give way if the mission has allowed such dangers to arise in its premises as to provoke the receiving State and take measures reasonably necessary to protect the security of the life and property of the inhabitants.' See also Bowett, *Self-Defence in International Law* (1958) p 270; Herdegen (1986); Vicuna (1991) at p 48.

[54] See *Adams v Director of Public Prosecutions* [2001] 2 ILRM 401; [2000] IEHC 45, where an Irish court held that service of proceedings on the British Ambassador to Ireland was illegal under Art 22 of the Vienna Convention on Diplomatic Relations.

appropriate for proceedings to be begun by personal service of a writ, this should be transmitted through the diplomatic channel. In 2014, the Department of Foreign Affairs, Trade and Development of Canada sent a Circular Note to all missions stressing that service of judicial or administrative documents on a foreign State should properly be 'accomplished diplomatically through transmission by the forum State's Ministry of Foreign Affairs, through its diplomatic mission accredited to the defendant State, to the headquarters of the defendant State's Ministry of Foreign Affairs in its capital. Service on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the Vienna Convention on Diplomatic Relations or of Article 31 of the Vienna Convention on Consular Relations, which respectively provide for the inviolability of the premises of diplomatic missions and consular posts'.[55]

Whether service of process by post is a breach of inviolability was, however, initially somewhat unclear. The question was discussed by the International Law Commission both in 1957 and in 1958, and most Members took the view that although service by post would not be effective in many circumstances or at all under the law of some States, it would not in itself be a breach of inviolability. The Commission's Commentary on the 1958 draft articles stated that: 'There is nothing to prevent service through the post if it can be effected in that way.'[56] At the Vienna Conference Japan proposed to clarify the text in the sense of the Commission's Commentary by adding a new paragraph 4: 'No writ may be served by a process server within the premises of the mission.' The amendment met with a mixed reception from those few delegations who addressed the point, and was withdrawn by the representative of Japan 'on the understanding that it was the unanimous interpretation of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission'.[57]

The view that service by post on mission premises is prohibited seems to have become generally accepted in practice. The United States had consistently favoured permitting service by post, and US courts at first took the view that it was not contrary to Article 22. In the case of *Renchard v Humphreys & Harding Inc*, a District of Columbia court said that: 'The purposes of diplomatic immunity are not violated by registered mail service upon the embassy.'[58] During the passage of the Foreign Sovereign Immunities Act through Congress, however, the State Department concluded that it would not be safe for the Act to permit service by registered or certified mail to the head of mission of the defendant State. In a Note to chiefs of mission in Washington they observed that 'the Vienna Convention on Diplomatic Relations, which has been ratified by the United States, forms part of the law of the United States, and any method of service inconsistent with the provisions of that Convention, as illuminated by the negotiating history, may be subject to challenge in the courts'.[59] The Act was therefore changed to exclude the

[55] Circular Note No JLA-1446 of 28 March 2014.

[56] *ILC Yearbook* 1957 vol I p 65, vol II p 137, 1958 vol I pp 130–2, vol II p 95.

[57] UN Docs A/Conf. 20/C 1/L 146, A/Conf. 20/14 pp 135–41. Service by post was specifically prohibited under Prussian legislation: 26 AJIL (1932 Supp) 56.

[58] Civil Action Nr 2128–72, 381 F Supp 382 (DDC 1974) 1973 AJIL 789, 1975 AJIL 182 and 889. See also Kerley (1962).

[59] Text of Note in 1975 AJIL 146. The Foreign Sovereign Immunities Act, Public Law 94–583, is in 63 ILR 655. Paragraph 1608 provides, in the absence of special agreement, for service of process through diplomatic channels to the foreign State. See Fox and Webb (2013) 11–12, 244.

possibility. In *Realty Corporation v United Arab Emirates Government* a New York court held that service by fixing a copy to the premises concerned, with a copy by post to the Permanent Mission of the UAE (which was entitled to the status of premises of a diplomatic mission) was invalid so that the court had no jurisdiction.[60] In the case of *Swazey v Merrill Lynch*, the US State Department confirmed this view in an *amicus curiae* brief which said that under Article 22 'the premises of a diplomatic mission are inviolable, and a court order requiring service of legal documents upon an embassy is contrary to this inviolability'.[61]

In the United Kingdom the State Immunity Act 1978[62] also provided for a writ against a State to be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the defendant State. This method of service was selected not only because of the probable invalidity of service on the premises of a diplomatic mission but also because it was considered that it would more reliably ensure that the proceedings came to the attention of the government of the defendant State. The procedure does, however, cause great practical difficulty where no permanent UK diplomatic mission exists in the foreign capital. Following the destruction of the Iranian Embassy in London by fire following a (successful) storming by the Special Air Services in order to release hostages, the City Council took steps to make the building safe. The Council later sought to recover their expenses in securing the structure from the Government or Iran as owner of the building, and when their demands were not met they tried to register them as charges against the land. In *Westminster City Council v Government of the Islamic Republic of Iran*,[63] Iran objected on the grounds that the premises were premises of its diplomatic mission and entitled to state immunity. The Swedish Embassy which was protecting British interests in Tehran was unwilling to effect service of the proceedings on the Iranian Ministry of Foreign Affairs as was required by the State Immunity Act 1978, and the English court was unwilling, given the existence of a dispute, to proceed in the absence of valid service on the Iranian Government. In the case of *Kuwait Airways Corp v Iraqi Airways and Republic of Iraq*,[64] the House of Lords considered how service of process should be effected on Iraq in the absence of a UK mission in Baghdad. The plaintiffs had sent the writ to the Iraq Embassy in London asking if the documents could be forwarded to the Ministry of Foreign Affairs in Baghdad. The request was not carried out, and the House of Lords held that the attempted service was ineffective. The United Kingdom has generally taken the position that there is compliance with Article 22 so long as service by post on mission premises is regarded as ineffective by the courts and that accidental service on mission premises, or on the residence of a diplomatic agent (entitled to the same inviolability by virtue of Article 30), is not a breach of the Convention.

In *Reyes v Al-Malki*,[65] however (a case discussed in detail under Article 31.1(c) below), the English Court of Appeal after reviewing the uncertainty left by the records of the Vienna Conference, the US case of *Renchard v Humphreys & Harding* (described above), and the difficulties of serving process through the diplomatic channel where the plaintiff claims that the defendant is not entitled to immunity (also discussed above) concluded

[60] 63 ILR 135.
[61] NY App Div 2011.
[62] C 33, s 12.
[63] [1986] 3 All ER 284; [1986] 1 WLR 979; 108 ILR 557; described in 1986 BYIL 423.
[64] [1995] 1 WLR 1147.
[65] [2015] EWCA Civ 32.

that under Article 22 service of process could be effected by posting the documents to the mission or to the private residence of a diplomatic agent.

The Superior Provincial Court of Cologne in the *Garden Contamination Case*,[66] a claim against the Soviet Union for contamination following the accident at the nuclear reactor at Chernobyl, refused to allow service of the writ by sending it to the Soviet Ambassador in the Federal Republic of Germany. Belgian practice is to serve all judicial process on the Ministry of Foreign Affairs of the relevant foreign State, with a copy for information to their embassy in Brussels. Salmon argues that no distinction can be drawn between the presence of a process server and delivery of process by post, since the objection is not to the physical presence of the official—who might lawfully enter in some different capacity—but to the summons implied in serving the document.[67]

Given that many individuals resident in such premises may not be entitled to immunity from jurisdiction, Article 22 as interpreted in practice already makes proceedings against such persons difficult. It is unfortunate that the original understanding of the International Law Commission was not reflected in the final text of Article 22 or in subsequent state practice. A consensus that service by post on mission premises was not permissible under Article 22 appeared to be emerging, but this has been cast into further confusion by the decision of the English Court of Appeal in *Reyes v Al-Malki*.

Immunity from jurisdiction of the sending State

Paragraph 3 of Article 22 provides that mission premises and property thereon 'shall be immune from search, requisition, attachment or execution'. This provision is of even greater practical importance now that most States apply restrictive rules of state immunity which provide a much greater likelihood of judgments, including default judgments, against foreign sovereign States. In the English case of *A Company Ltd v Republic of X*,[68] Saville J held that an injunction could have no effect on property within Article 22 of the Vienna Convention. It was not possible for the protection from enforcement jurisdiction given by Article 22 to be waived by a prior agreement between the parties. Neither Article 22.3 nor any other provision in the Convention, however, expressly confers on the sending State immunity from adjudicative jurisdiction—not involving attachment or execution—in respect of mission premises.

Originally there would have been no possibility of such proceedings both because no exceptions to the rule of sovereign immunity had been developed and because the inviolability of the premises would have been regarded as precluding actions calling into question the sending State's title or possession. The modern law, however, draws a clear distinction between inviolability and immunity from jurisdiction, and the inviolability and immunity from jurisdiction of diplomatic agents are dealt with in separate Articles of the Convention. Inviolability as described above and as elaborated in Article 22 does not in the absence of specific provision confer protection from the jurisdiction of the courts of the receiving State. There is in Article 23 specific exemption for the sending State from taxation on mission premises, but in Article 22 there is no corresponding immunity from

[66] 80 ILR 367.
[67] (1994) para 302. On service of writs on consular premises, see Lee (1991) ch 24.
[68] Times Law Reports, 9 April 1990; 87 ILR 412.

jurisdiction. In most States the restrictive doctrine of state immunity permits a foreign State to be sued in respect of land which it holds within the jurisdiction.

The question was thoroughly examined by the German Federal Constitutional Court in the *Jurisdiction over Yugoslav Military Mission (Germany) Case.*[69] Yugoslavia was the registered owner of land used for its military mission. The plaintiff brought an action for rectification of the land register in favour of himself and for possession. The claim for possession was dismissed, but the Federal Court after extensive review of cases in several jurisdictions, of draft codes, and of the Vienna Convention, held that no rule of international law precluded German courts from exercising jurisdiction in cases concerning mission premises of a foreign State, provided that there would be no interference with the performance of diplomatic functions. An action for rectification of the land register was not an action which would interfere with performance of diplomatic functions.

On the other hand, many of the cases cited to the German court concerned premises whose use for mission purposes was long discontinued or not begun, so that under the terms of Article 1(i) of the Vienna Convention they would not qualify as premises of the mission at all. The owning of land for purposes of a diplomatic mission is obviously *iure imperii*, and although it may be argued that the reason for the exception to state immunity in regard to land is the pre-eminent need for the receiving State to control title to its own land and the absence of any alternative forum, a strong case can be made that this exception should not extend to land used for mission purposes. There is also evidence that the International Law Commission did not contemplate the possibility of actions against the sending State in respect of mission premises. In drafting exceptions in Article 31 to the immunity of a diplomatic agent, words were expressly inserted to preclude proceedings against a diplomatic agent holding mission premises in his own name.[70] It would be anomalous if a State by placing its mission premises in the name of its head of mission could secure for them a higher degree of immunity.

The European Convention on State Immunity[71] does not resolve the problem. Article 9 provides an exception to immunity in regard to a State's rights or interests in or use or possession of immovable property in the territory of the forum State, as well as related obligations. Article 32 provides that: 'Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.' The Commentary makes clear the intention that in the event of conflict between the State Immunity Convention and the Vienna Conventions on Diplomatic and on Consular Relations the latter are to prevail, but does not specifically address the problem of a State's immunity in regard to mission premises. In the United Kingdom the State Immunity Act 1978[72] in section 16 provides that the Convention exception in regard to immovable property 'does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission'. This leaves open the possibility of proceedings against another State in respect of related obligations, for example, payment of rent or performance of covenants. These, however, are inherently much less disruptive to the functioning of a diplomatic mission.

[69] 38 ILR 162 (1962 decision) and 65 ILR 108 (1969 decision).
[70] *ILC Yearbook* 1957 vol I pp 94–6, especially Sir Gerald Fitzmaurice and Mr Tunkin.
[71] Cmnd 5081.
[72] C 33. See Fox and Webb (2013) pp 202, 424–5.

The US Foreign Sovereign Immunities Act 1976[73] also provides an exception to immunity in any case where 'rights in immovable property situated in the United States are in issue', but has no specific provision regarding premises of a diplomatic mission. Nor is there provision in the Diplomatic Relations Act 1978.[74] US courts are therefore enabled to exercise adjudicative jurisdiction in cases involving title to or possession of diplomatic mission premises, provided that any adverse judgment is not enforced so as to breach their inviolability. The issue arose in 1993 in the case of *767 Third Avenue Associates and Another v Permanent Mission of the Republic of Zaire to the United Nations.*[75] The Permanent Mission of Zaire to the United Nations defaulted on rental payments for its premises which under international agreements were entitled to the same inviolability as premises of a diplomatic mission. The landlords sued for unpaid rent, lawyers' fees, and possession, and at District Court level obtained an order which directed the US Marshal to evict if Zaire had not left the premises by a prescribed date. The Court of Appeals, however, rejected the submission that inviolability related only to sudden or unexpected intrusions and they reversed that part of the order granting the landlords immediate possession and directing US Marshals to evict the Permanent Mission. The Zaire Mission did not challenge that part of the order which awarded monetary damages to the landlord and it was affirmed.

The position established by the German and US cases described above is confirmed by the terms of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property.[76] Article 13 of the Convention, on ownership, possession, and use of property, provides that:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:
>
> (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

There is no exception in Article 13 for premises of a diplomatic mission. The premises of the mission are protected from pre-judgment or post-judgment measures of constraint under Part IV of the Convention, but the relevant provisions would permit enforcement against mission premises if there has been express consent to the taking of such measures or earmarking of the premises for the satisfaction of the claim which is the object of the proceedings.[77]

Embassy bank accounts

Another question of direct concern to diplomatic missions where Article 22 leaves a lacuna to be filled by customary international law is whether bank accounts held by a mission in order to fund its operations in the receiving State are subject to attachment or

[73] Public Law 94–583 § 1605, in 63 ILR at 657.
[74] Public Law 95–393.
[75] 988 F 2d 295 (1993); 99 ILR 194.
[76] UN Doc A/RES/59/38.
[77] Fox and Webb (2013) p 425.

execution. Although under Article 24 of the Convention the archives of a mission are inviolable 'wherever they may be', Article 22.3 gives immunity from search, requisition, attachment, or execution only to property on the premises of the mission, and accounts are not held on the premises. As in the case of immunity from suit in respect of mission premises, the question has become of practical importance with the general limitation in the extent of state immunity. If a judgment is obtained against a foreign State, the most significant asset which the defendant State has within the jurisdiction is likely to be its embassy bank account. In some States, attachment and execution are still not permitted against foreign sovereigns, while in others they may be permitted only against property which is directly linked to the cause of action, which will preclude the possibility of action against embassy accounts. In other States, however, attachment or execution against foreign States is permitted on a wider basis, and this has brought into focus the absence of specific protection in Article 22 for the embassy's accounts.

In most jurisdictions where the possibility arises, superior courts have concluded that embassy bank accounts maintained to cover a mission's costs and running expenses are not subject to enforcement. The leading case, *Philippine Embassy Bank Account*, was decided by the German Federal Constitutional Court in 1977. The court concluded that there was a general rule of international law that execution of judgment against a foreign State was:

> inadmissible without the consent of the foreign State if, at the time of the initiation of the measure of execution, such property serves sovereign purposes of the foreign State. Claims against a general current bank account of the embassy of a foreign State which exists in the State of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the State of the forum.

The rule applied even though some transactions through the account might be in the context of relationships and activities which were *iure gestionis*. It could not be proper for the authorities in the receiving State to question the purposes for which the sending State intended funds to be used, for this would amount to prohibited intrusion into the internal operations of the diplomatic mission.[78]

In 1984 the House of Lords in *Alcom v Republic of Colombia*[79] determined the question in the context of the State Immunity Act 1978, which allowed execution against property 'which is for the time being in use or intended for use for commercial purposes', and gave an extended meaning to 'commercial purposes'. The Act had no express provision for embassy accounts. The House of Lords found the *Philippine Embassy Bank Account Case* convincing that public international law required immunity from execution to be given to the current bank account of a diplomatic mission used for mission expenses. On the construction of the Act they held that the account was not susceptible to 'dissection into the various uses to which monies drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceedings'. Unless the account could be shown to be earmarked, save for *de minimis* exceptions, solely to settle liabilities incurred in commercial transactions, it remained immune from execution under the Act. The House of Lords judgment reversed that of the Court of Appeal, and enabled a number of

[78] 65 ILR 146, esp at 164 and 187–91.

[79] [1984] AC 580; [1984] 2 All ER 6; [1984] 2 WLR 750; 74 ILR 170. See critical comment by Crawford in 1984 BYIL 340 and by Fox in 1985 ICLQ 115.

diplomatic missions in London—which had been sufficiently concerned by the threat to their accounts to move their accounts offshore—to resume normal operation. The importance of an embassy account to the functioning of a diplomatic mission was emphasized in 2013 when two banks—HSBC and the Vatican Bank—required a substantial number of embassies to close their embassy accounts because of concerns over money laundering. There were widespread protests at the disruption to diplomatic activities.[80]

In 1986 the Supreme Court of Austria, in *Republic of 'A' Embassy Bank Account Case*,[81] also concurred with the judgment of the German court and held that, due to the difficulty of judging whether performance of embassy functions was endangered, 'international law made the area of protection enjoyed by the foreign State very wide and determined it by reference to the typical abstract danger and not to the specific threat to the ability to function'. Also in 1986 The Netherlands Council of State in *MK v State Secretary for Justice*[82] upheld the immunity from attachment of a bank account which the Turkish Embassy had stated was set aside for the purpose of meeting its running costs. *In the Matter of the Application of Liberian Eastern Timber Corporation v The Government of Liberia*[83] in 1987 saw the US District Court uphold the immunity of embassy bank accounts, relying on Article 25 of the Vienna Convention as well as on the Foreign Sovereign Immunities Act 1976. Incidental use of part of the account for commercial purposes 'would not cause the embassy bank account to lose its mantle of sovereign immunity'. In the case of *Cicippio v Islamic Republic of Iran*,[84] when an attempt was made to attach Iranian diplomatic accounts frozen in the context of the taking of diplomatic hostages in Tehran, the State Department argued that protection from enforcement for such accounts continued to apply even where there were no diplomatic relations between the United States and Iran. They invoked Article 45 of the Vienna Convention which requires the receiving State following breach of relations to 'respect and protect' property of a former mission as well as the need for the executive to have continuing control of frozen accounts for the purposes of inter-governmental negotiations.

In Italy the Court of Cassation in 1989 followed the prevailing tendency towards immunity for embassy bank accounts in *Banamar Capizzi v Embassy of Algeria*,[85] again emphasizing that any attempt by a domestic court to check whether embassy funds were used for sovereign purposes 'would inevitably result in an undue interference in the affairs of the diplomatic mission'. In Switzerland the Federal Tribunal in 1990 in *Z v Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*[86] agreed that funds allocated for the use of a foreign diplomatic mission could not be attached. In 1995, however, a Belgian court held in the case of *Iraq v Dumez*[87] that it could attach an account

[80] *The Times*, 2 October 2013, National Catholic Reporter 1 October 2013.

[81] 77 ILR 489.

[82] 1988 NYIL 439; 94 ILR 357.

[83] 89 ILR 360. See also *Foxworth v Permanent Mission of the Republic of Uganda to the United Nations*, Southern District of New York 1992, 99 ILR 138.

[84] 18 F Supp 2d 62 (DDC 1998). The State Department arguments to the court are set out in 2000 DUSPIL 548. See also *Bennett v Islamic Republic of Iran* No 9-5147, decided 10 September 2010 (discussed below under Art 45) where the US Court of Appeals applied Art 45 to preclude Iran's former diplomatic properties from attachment under the Terrorism Risk Insurance Act. In *Wyatt v Syrian Arab Republic* in 2015, Case 1:08-cv-00502 (RCL) a US District Court, somewhat strangely, blocked an attempted transfer by Syria to satisfy a judgment in favour of their lawyers in respect of legal fees.

[85] 87 ILR 56.

[86] 102 ILR 205.

[87] Civil Court of Brussels, 1995 Journal des Tribunaux 565; 106 ILR 285.

held by Iraq in order to enforce a judgment given against the State even though Iraq argued that the funds were held in order to acquire an embassy building. The court stated that it was not incompatible with the letter or spirit of the Vienna Convention for national courts to consider the nature of funds deposited by an embassy. The court in this case was clearly influenced by Iraq's general behaviour and its failure to provide any proof that the funds in question were allocated for the performance of diplomatic functions.

In 2002, the Court of Appeal of Brussels held that—although immunity from attachment of an embassy account under the Vienna Convention depended on the intended allocation of funds in the account—there was a presumption that such funds were held for sovereign purposes. The Court made no reference to cases in other jurisdictions.[88] In *Avelar v Cotoia Construction*,[89] in 2011, a New York Court held, in confirming that embassy accounts used for diplomatic purposes were immune from execution under Article 25 of the Vienna Convention, that a 'sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes'. It was not necessary to examine the mission's budget and accounts. There may, however, be some doubt as to whether embassy bank accounts are protected from post-judgment discovery—given the judgment of the US District Court in New York in *Thai Lao Lignite (Thailand) Co Ltd v Government of Lao People's Democratic Republic*.[90]

The New York Convention on Special Missions[91] adopted by the General Assembly in 1969 under Article 25 accords inviolability to premises of special missions in terms which follow closely Article 22 of the Vienna Convention on Diplomatic Relations, but under paragraph 3 immunity from search, requisition, attachment, and execution is extended to 'other property used in the operation of the special mission', thus avoiding altogether the difficulty over bank accounts. The United Nations Convention on Jurisdictional Immunities of States and Their Property[92] also provides in Article 21 that 'property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State' is not to be 'considered as property specifically in use or intended for use by the State for other than government non-commercial purposes'. The effect is that in the absence of express consent or earmarking an account for the satisfaction of a claim, embassy accounts are not available for the purposes of pre-judgment or post-judgment measures of constraint or execution. The legal position in customary international law as confirmed by decisions of national courts has thus been reflected in multilateral treaties agreed among States.[93]

Means of transport of the mission

Paragraph 3 of Article 22 accords the means of transport of the mission immunity from 'search, requisition, attachment or execution'. This is something less than the full inviolability accorded to the mission premises under paragraph 1. By contrast, section 3

[88] Court of Appeal of Brussels (Ninth Chamber), 127 ILR 101.

[89] 2011 WL 5245206 (EDNY 2011).

[90] 924 F Supp 2nd 508. The State Department maintained that diplomatic accounts were protected from discovery.

[91] Cmnd 4300.

[92] UN Doc A/RES/59/38.

[93] For a fuller account of cases in national jurisdictions see Salmon (1994) paras 311–13; 2002 AFDI 792; Fox (2002) pp 404–7.

of the General Convention on the Privileges and Immunities of the United Nations provides that: 'The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.'[94] The more obvious forms of police enforcement by stopping and searching are excluded by the wording of Article 22 paragraph 3, and violations will lead to immediate diplomatic protest.

One such violation occurred in Czechoslovakia in 1981, when a British Embassy car with diplomatic registration was stopped, a window smashed, and tear gas used to arrest two diplomatic agents inside.[95] In Zimbabwe, in 2008, shortly before the run-off presidential vote between President Robert Mugabe and the opposition leader Morgan Tsvangirai, two convoys of US and UK diplomatic vehicles returning from an attempt to assess violence during the campaign against opposition activists were stopped at a roadblock by government militia and police and the diplomats inside forced (in the case of the US car by threats and violence) to go to a local police station and be detained for several hours. Both the US and the UK made strong protests at these violations of the immunities required by the Vienna Convention.[96]

The clamping of illegally parked diplomatic vehicles is not in itself 'search, requisition, attachment or execution'. When wheel clamps were introduced in London in 1983, the view initially taken was that it was permissible to use them against cars identifiable as means of transport of a diplomatic mission or of a diplomat. As the Review of the Vienna Convention explains, however, a more considered view was:

> that clamping (unlike towing away) is a measure which must be regarded as penal in intent and effect, and thus contravenes Article 31.1 of the Vienna Convention which provides that a diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving State. The Minister... therefore announced in the House of Lords on 12 December 1983 that the clamping of cars belonging to diplomats would be discontinued.[97]

Towing away a vehicle which is causing serious traffic obstruction is by contrast carried out not primarily to penalize the driver but in order to keep the highway clear, and since it does not fall squarely within the forms of interference specifically prohibited by Article 22.3 the view has been taken in most congested capitals that it is permissible in relation to diplomatic vehicles. In London this is done if enquiries have failed to trace the driver, the vehicle is causing serious obstruction, and cannot be moved to an alternative position nearby. The person claiming the car is not required to pay the normal removal charge, excess parking charge, or fixed penalty as a condition of reclaiming the vehicle, although offers to pay any of these are accepted. The offence will be noted for the purposes of the system of control discussed under Article 9 of the Convention.[98] Practice in Berne is similar, although in 1966 it was suggested that where a diplomat was clearly causing obstruction he should be liable for removal charges, since removal was not penal but in the public interest.[99] On the practice in Bonn, Richtsteig comments that towing away of

[94] UKTS No. 10 (1950), Cmnd 7891.
[95] 1981 BYIL 434.
[96] *Telegraph*, 5 June 2008, *The Times* and *Guardian*, 6 June 2008.
[97] Cmnd 9497, para 77, 1986 BYIL 552.
[98] Hansard HL Debs 11 May 1981 col 436.
[99] 1966 ASDI 102; 1971 RGDIP 552.

means of transport of the mission can only be justified in case of emergency such as obstruction to the entrance to a hospital.[100] In Washington the State Department earlier took the view that 'punitive action such as the towing of the automobile' was not open to local enforcement agencies. But a tougher policy which became effective on 1 January 1994 now permits towing away of mission vehicles which create a public hazard. This is defined as being parked 'in a morning or afternoon rush-hour no-parking zone; in a loading zone; in an emergency no-parking zone; in front of a fire hydrant; on a sidewalk; in a bus zone; in a handicapped zone; obstructing an intersection; or blocking a crosswalk'.[101]

Protection against intrusion

The first aspect of the special duty of protection imposed by paragraph 2 of Article 22 requires the authorities of the receiving State—normally the police—to prevent unauthorized intrusion on mission premises and on the request of the head of the mission to expel intruders. Expulsion has sometimes caused difficulty because it requires the police to enter mission premises and carry out enforcement functions which in the absence of request from the mission would be unlawful. In 1963, for example, police in Washington on the written request of the Minister of the Iranian Embassy entered the premises and removed fourteen Iranian students who had entered to deliver a petition and refused to leave. Upholding the conviction of the students for unlawful entry, in *Fatemi v United States*,[102] the court said:

> We do not think it unreasonable to hold that a police captain can enter the Iranian Embassy and make an arrest for a misdemeanour committed in his presence when he has been called by one who purports to be the Minister of the Embassy and is given a letter on official Iranian stationery asking the police to disregard, for this one instance, the diplomatic rule of inviolability of the embassy and to lend aid in the ejection of violators. There can be no doubt that the Minister intended to renounce the privilege of immunity of the Embassy.

In the United Kingdom some difficulties were initially experienced in giving proper effect to this aspect of inviolability. In the case of *Agbor v Metropolitan Police Commissioner*,[103] the Court of Appeal questioned whether the right of the police to expel intruders from diplomatic premises extended to the expulsion of any person who was in possession under a claim of right. Salmon LJ said: 'When it is a question of taking appropriate steps to recover possession of property, the steps which we normally consider appropriate involve legal process.' The position was believed to be unsatisfactory as regards intruders or squatters on diplomatic premises, and the opportunity was taken in the Criminal Law Act 1977[104] to make it a criminal offence knowingly to trespass on the premises of a diplomatic mission. The police were given power to arrest offenders.

[100] (1994) p 47.

[101] State Department Note of 17 December 1984 in 1985 AJIL 1049 at 1050. State Department Circular Note to chiefs of mission of 22 December 1993 supplied by State Department.

[102] 192 At 2nd 525 (DC Ct A 12 July 1963), noted in 1964 AJIL 192 and Whiteman, *Digest of International Law* vol VII p 379. For recommended procedure for requests for police protection see Whiteman, ibid p 381.

[103] [1969] 2 All ER 707; [1969] 1 WLR 703. The case is discussed further under Art 30.

[104] C 45.

1980 was the high-water mark of embassy sieges—in that year it was estimated that in the previous twelve months twenty-six embassies or consulates had been occupied by revolutionaries or protesters. Extreme measures were taken to combat intruders on mission premises following the siege of the Iranian Embassy in London in 1980 in which the chargé d'affaires and other members of the diplomatic staff were held hostage and under threat of death for five days by a group of commandos hostile to the Islamic regime in Tehran. They were liberated only by action of the Special Air Service which led to the death of all the terrorists except one who was later tried for murder and other crimes.[105] In Bogota a group of sixteen guerrillas seized control of the Embassy of the Dominican Republic during a reception and held twelve ambassadors hostage for two months while demanding a large ransom and the release of hundreds of political prisoners. The demands were refused and finally the guerrillas left for Cuba, taking with them five ambassadors who were there released and returned unharmed.[106] The Spanish Embassy in Guatemala was taken over, again in 1980, by protesters seeking the establishment of a Committee of Enquiry. No violence occurred until a rescue operation launched on the orders of the Guatemalan Government but against the express wishes of the ambassador led to a fire in the Embassy which caused thirty-nine deaths. Spain immediately broke diplomatic relations, and there was protest by the entire diplomatic corps who demanded assurances that such an operation would not be launched again without the agreement of the head of mission.[107]

In December 1996 guerrillas from the Tupac Amaru Revolutionary Movement seized control of the residence of the Japanese Ambassador to Peru during a diplomatic reception in Lima and took 480 hostages, including twelve ambassadors and the Foreign Minister of Peru. The guerrillas demanded the release from prison of 458 members of their group, expulsion of all foreign investors from Peru, money, and safe passage to the Amazon jungle in Eastern Peru. They threatened to begin killing the hostages if their demands were not met. The siege lasted over four months, with the numbers of those held gradually dwindling so as to leave only those hostages with the greatest bargaining value. None of the demands were met, and the Peruvian Government received advice and assistance from counter-terrorist and police authorities in other States, in particular London Metropolitan Police negotiators. In April 1997 the siege was ended by Peruvian Government troops who burst in from secretly drilled tunnels, killed all the guerrillas, and freed the hostages. Only one hostage and two soldiers died in this operation. It became clear, however, that the Japanese Government had not been warned of the planned attack. President Fujimori of Peru expressed regrets to Prime Minister Hashimoto of Japan that he could not give advance notification, and the Japanese Prime Minister, while regretting this, expressed understanding for the situation and gratitude for the successful ending of the siege. The following month the Peruvian authorities charged nineteen police officers with negligence and disobedience in having allowed the original seizure of the ambassador's residence. In Japan the Government accepted their ambassador's resignation on the same ground of failure to anticipate the attack.[108]

[105] 1980 RGDIP 1134.

[106] 1980 RGDIP 856; Lecaros (1984) pp 150–1. Among the hostages was the writer on diplomatic law and practice Do Nascimento e Silva, then Brazilian chargé d'affaires.

[107] 1980 RGDIP 866; Lecaros (1984) p 129.

[108] *The Times*, 20 and 21 December 1996; 23 and 24 April 1997; 2 and 14 May 1997; *Observer*, 27 April 1997; *Japan Times*, 23 April 1997; transcripts of press conferences by Prime Minister Hashimoto and by Foreign Ministry Spokesman on 23 April 1997 (supplied by Yasue Mochizuki).

Following the successful resolution of the siege of the Japanese Embassy in Lima and the stronger resistance developed to acceptance of unlawful demands by hostage takers there appears to have been a decline in embassy sieges. In August 2002, however, Iraqi dissidents attacked and took over the Embassy of Iraq in Berlin and held diplomatic staff hostage, apparently by way of protest at resistance by the German Government to threats from the United States to remove Saddam Hussein. The siege was ended peacefully by German specially trained anti-terrorist police after six hours.[109]

Attacks on embassies have increased following the Arab Spring and the accompanying civil disorder. In April 2011, a mob in Libya attacked and burned the British Embassy in Tripoli and damaged the embassies of France, the US and Qatar. In default of satisfactory apology or reparation the UK expelled the Libyan Ambassador a few days later.[110] In September 2011, pro-Palestinian revolutionaries in Egypt staged a particularly violent attack on the Israeli Embassy in Cairo. They began by tearing down a defensive wall which had been erected following the tearing down three weeks before of the Israeli flag, but then invaded the embassy premises, ransacking rooms, hurling documents from windows and forcing the evacuation of the entire staff of the mission from Egypt by military planes.[111] Egyptian police ultimately took control and the assailants were subsequently tried and punished. In November 2011, following the Arab League decision to suspend Syria for its failure to implement the Arab League plan to end the violence there, thousands of supporters of Assad attacked the embassies of Saudi Arabia, Qatar, Turkey, and France. France had been particularly active in mobilizing the UN Security Council to impose sanctions on Syria. There was no police protection given, but following widespread international condemnation of the violation of the obligation to protect mission premises, the Syrian Foreign Minister did apologize for the attacks on the following day.[112]

In all these cases the receiving State, if not always with skill or with success, accepted their duty to prevent intrusion into mission premises. The acquiescence by the Government of Iran in the seizure of the US Embassy in Tehran in November 1979 was on the other hand an unprecedented abandonment by a receiving State of its responsibilities under the Vienna Convention. The International Court of Justice (ICJ) in the *Hostages Case* found that: 'the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion'. As to the second phase, during which the occupation of the mission premises by militants continued, this 'clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff'. The ICJ deplored the frequency of disregard by individuals of the principles of international law governing diplomatic relations, but the seizure of the embassy in Tehran was 'unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at

[109] *Suddeutsche Zeitung. Die Welt*, *The Times*, 21 August 2002.
[110] HC Debs 9 May 2011 c 989 W.
[111] *Observer*, 11 September 2011, *The Times*, 12 September 2011.
[112] *The Times*, *New York Times*, 14 November 2011.

naught the inviolability of a foreign embassy, but the government of the receiving State itself'.[113]

The conduct of the Iranian Government was so manifestly in breach of Article 22 and of other Articles of the Vienna Convention, so inconsistent with the previous practice of that Government and even with their attitude at the same time in other capitals—during the siege of the Iranian Embassy in London early in 1980 they vigorously insisted that the United Kingdom's authorities must meet its obligations under the Convention—and so categorically condemned by the ICJ and by the international community generally that it cast no doubt on the legal rules established in the Convention.

The unique disregard by Iran of its obligation to protect embassies has however persisted. In 1987, following the deaths of over 300 Iranian pilgrims during a riot in Mecca, crowds in Tehran sacked the Embassies of Saudi Arabia and Kuwait and stoned the Embassy of France. France had broken diplomatic relations a few days before for unrelated reasons, and their embassy was already under siege. The Government of Iran made no attempt to discourage the attacks or to provide protection for the embassies.[114] In 2010, supporters of the Iranian regime attempted to attack the Italian Embassy and held demonstrations outside other European missions in protest at the European stance and its calls for sanctions against Iran in response to its suspect nuclear programme.[115]

In 2011, in response to new financial sanctions imposed on Iran following a report from the International Atomic Energy Agency suggesting that it was pursuing a nuclear weapons programme, the Iranian Parliament and Guardian Council approved legislation calling for the expulsion of the British Ambassador. On the following day demonstrators attacked the British Embassy and diplomatic compound with stones and petrol bombs, tore down the flag of the mission, ransacked offices and destroyed portraits of the Queen and other property and burnt an embassy car while Iranian police stood by. On the following day, the UK closed its Embassy in Tehran and gave Iranian diplomats in London forty-eight hours to leave the UK. There was widespread diplomatic support for the UK from European and other States—several closing their embassies, withdrawing their ambassadors for consultation, or registering complaints with Iran. The Iranian Government made one perfunctory expression of regret for the events in Tehran and its official mouthpiece Press TV claimed—with no justification—that mobs had attacked the Iranian Embassy in London.[116]

In the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* before the ICJ, Uganda made a counterclaim based on three attacks on the Ugandan Embassy in Kinshasa in which Congolese soldiers were alleged to have stormed and later occupied the mission premises, demanded the release of certain Rwandan nationals, stolen property, and maltreated persons on the premises. Although the facts relating to the attacks were disputed, the ICJ found unanimously that there had been a long-term occupation of the Ugandan Embassy by Congolese armed forces and attacks on persons on the premises which constituted a breach by the

[113] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3, at paras 63, 76, and 92; Barker (2006) pp 76–87 for full analysis of the judgment.

[114] *The Times*, 18 July and 3 August 1987.

[115] *The Times*, 12 February 2010.

[116] *The Times*, 30 November, 1 and 2 December 2011, *Guardian*, 29 November 2011, *Washington Post*, 30 November 2011, Hansard HC Debs 30 November 2011 col 959 *et seq*.

Democratic Republic of the Congo of its obligations under Article 22 of the Vienna Convention. They stressed that:

> The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others—such as armed militia groups—from doing so (see *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980 pp. 30–32, paras. 61–67*).[117]

Al Quaeda has on a number of occasions deliberately targeted foreign embassies. The list began most strikingly with the attacks on the US Embassies in Kenya and Tanzania in August 1998 and continued with a bomb attack in October 2000 on the British Embassy in Yemen (shortly after the attack on the USS Cole) and on the British Consulate-General in Istanbul (which had been the British Embassy until Turkey moved its capital to Ankara in the 1920s). But although these attacks have given rise to questions of responsibility for protection and for compensation which are discussed below, they did not raise any question of complicity or acquiescence by the governments of the receiving States, so that no charges of breach of the duty to protect mission premises were made.[118] The level of physical protection against such attacks has, however, made it difficult for vulnerable missions to carry out their diplomatic functions effectively.[119]

Protection against damage

Where a receiving State has failed in its duty to protect against intrusion or damage, it is clearly liable to pay reparations to the sending State. Thus, the International Court of Justice in its judgment in the *Hostages Case* decided 'that the Islamic Republic of Iran is under an obligation to make reparations to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events'. In this particular case, however, the matter of compensation was settled ultimately in the agreement of January 1981, achieved through the mediation of Algeria, which brought about the release of the US hostages. Under the terms of the settlement, the United States agreed to withdraw 'all claims now pending against Iran before the International Court of Justice'.[120] When the Embassy of Pakistan in Afghanistan was ransacked in 2003 by protesters who smashed furniture and equipment, President Karzai of Afghanistan immediately announced that he would apologize for the attack and would compensate Pakistan for damage caused by the mob.[121]

Following the US bombing of the Chinese Embassy in Belgrade during the NATO campaign in 1999 against Serbia for the liberation of Kosovo, the United States paid the Chinese Government US$28 million for the damage to its premises as well as US$4.5 million in compensation for those killed or injured in the attack. In Beijing there were attacks in response by demonstrators—limited in extent by Chinese paramilitary police

[117] Judgment of 19 December 2005, 2005 ICJ Reports at paras 306–45, esp para 342.

[118] *Observer*, 16 August 1998; *The Times*, 14 October 2000, 21 November 2003; Cowper-Coles (2012) pp 265 *et seq.*

[119] See Satow (6th edn 2009) para 8.18.

[120] Department of State Bulletin No 2047, February 1981, printed in 1981 AJIL 418 and 1981:20 ILM 223.

[121] *The Times*, 9 July 2003.

who permitted the throwing of rocks but not entry into the embassy compound—and for this damage the Chinese Government paid US$2.8 million.[122]

The duty under Article 22.2 is to take 'all appropriate steps'. The duty is not an absolute one, and what is appropriate depends on the degree of threat to a particular mission and on whether the receiving State has been made aware of any unusual threat.[123] In the case of *Ignatiev v United States*[124] proceedings were brought on behalf of a Bulgarian diplomat killed during an attempted armed robbery outside the Bulgarian Embassy in Washington, but the Circuit Court held that the duty on the United States to protect the premises of a diplomatic mission was discretionary in nature so that they could not be held liable for failing to carry it out in any specific way.

In general, however, state practice shows a very strong tendency for receiving States to pay compensation to sending States even where no breach of the duty to protect against damage to their mission premises is established or admitted. The UK Government has usually paid, on an *ex gratia* basis, full compensation for any damage to premises of foreign diplomatic missions. In 1973, for example, full compensation was paid to the Nigerian High Commission in London in respect of damage caused by an IRA bomb which exploded in a neighbouring street and was not specifically aimed at the High Commission. Claims are submitted on a reciprocal basis whenever damage occurs to a UK mission abroad, and in nearly every case these claims have been met without question. Mutual claims for damage to the Iranian Embassy in London—destroyed by fire as a result of the rescue operation described above—and to the UK Embassy in Iran were settled after prolonged negotiations by an Exchange of Notes in 1988.[125] In 1994 the UK Government in a Note to diplomatic missions clarified its policy regarding terrorist or other attacks, stating that: 'HMG does not necessarily consider itself under any legal obligation to pay compensation for damage resulting from an attack on diplomatic premises although it may do so on an ex gratia basis.' Missions were advised, unless they owned their own properties and chose to act as their own insurers, to take out comprehensive insurance against damage including terrorist attack.[126]

German and US practice is similar, but is clearly conditional on reciprocity.[127] Canadian practice is set out in advice by the Department of External Affairs as follows:

> As corollary to the special duty of protection is a general obligation to compensate for damages sustained by diplomatic premises by mobs or persons acting for political motives, even when receiving State has exercised all due diligence to prevent such occurrences... In Canada, the policy is to make such compensation when damages are not covered by insurance, when caused for political reasons, and if there is clear understanding that payment is made on the basis of reciprocity.[128]

[122] *Observer*, 9 May 1999; *The Times*, 11 May, 18 and 25 June, 1 September and 17 December 1999; 1999 RGDIP 947.

[123] For a survey of state practice in implementing the duty to protect, see Barker (2006) pp 87–91.

[124] 238 F 3rd 464 (DC Cir 2001), described in 2001 AJIL 873.

[125] Exchange of Notes between the Government of the United Kingdom and the Government of the Islamic Republic of Iran concerning the Settlement of Mutual Claims in respect of damage incurred to the Diplomatic Premises of the United Kingdom in Iran and the Islamic Republic of Iran in London, 6 July 1988, Cm 480.

[126] 1994 BYIL 617.

[127] Richtsteig (1994) p 49. Information on US practice supplied by State Department.

[128] 1968 Can YIL 257.

Following attacks on the embassies in Tripoli of States members of the UN Security Council which had voted in April 1992 to impose sanctions on Libya, in particular the embassies of Venezuela (then President of the Security Council) and Russia, Libya apologized and offered to pay compensation for the damage.[129]

The current level of threat to embassies in unstable countries—particularly to the embassies of the United States and the United Kingdom—has increasingly caused target States to resort to stronger measures to protect their own mission premises. Where receiving States are unwilling or simply unable to provide the appropriate degree of protection, a sending State may close its embassy and withdraw its diplomats without breaking diplomatic relations. Following the withdrawal of Soviet forces from Afghanistan in 1989, for example, the United Kingdom closed its Embassy in Kabul because of deteriorating security, and in 2004 closed its Embassy in Damascus after the bombing of the UK Consulate-General in Istanbul when the Syrian Government refused requests for an increased level of security. The United States withdrew a number of its overseas missions following the Al Quaeda attacks in 1998 on its Embassies in Kenya and Tanzania.[130] A second course of action for a sending State is to strengthen the physical structures of embassy buildings and to increase distance from the perimeter of the premises so as to protect them from lorry bombers—but the creation of bunker style embassies with no free access for the local people is an obvious impediment to the proper conduct of those diplomatic functions which require engagement with the population as well as being very costly. It was reported that in 2003 the United Kingdom spent £27 million on bombproof walls, security gates and other physical defences.[131] Barker suggests that US policies by creating diplomatic fortresses 'serve only to enhance the reputation of the United States as superior, aloof and interventionist'.[132] This criticism has been widely directed at the new US Embassy in Baghdad, which has been compared with a mediaeval crusader castle.[133] A third option is for the sending State to provide its own armed guards, and increasingly this function is being contracted out to private security firms.

Protection by forces or contractors of the sending State

Although the receiving State bears the primary responsibility for protection of foreign diplomatic missions, there is no legal impediment to alternative or additional protection being provided by the sending State, provided that those acting as protectors comply with the laws and regulations of the receiving State. The largest States—which are in many cases the most likely to be attacked—increasingly prefer in agreement with receiving States to rely for security in dangerous environments on their own military forces or on specialized civilian security contractors. The US has long relied on protection by US Marines of vulnerable embassies. In 1998, for example, an intruder into the residence of the US Ambassador to Albania who fired a weapon when challenged was shot by US armed guards and died of his injuries. US Secretary of State Madeleine Albright pointed

[129] *The Times*, 3 April 1992.

[130] *The Times*, 20 December 2001, 19 February 2004; Barker (2006) pp 13–16, 91–8. Annex 4 contains the Report of the Accountability Review Boards on the Bombings of the US Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on 7 August 1998.

[131] *The Times*, 16 January 2004, 27 February 2004, 30 June 2004.

[132] Barker (2006) p 148.

[133] *The Times*, 1 September 2007.

out that 'We have a legal right to defend ourselves'. US embassies around the world are protected by US marines who are of course required to conform to local laws and regulations in regard to the carrying and use of weapons in self-defence. In Iraq, following the withdrawal of US forces in 2011, remaining diplomats in the enormous compound were given heavily armoured vehicles, surveillance systems, and other military equipment by the US Army for their protection. The United Kingdom deployed armed guards to protect its embassy in the Democratic Republic of Congo and later entrusted the security of its diplomats in Iraq to a private security firm, Garda. Armorgroup, a British private security company, provided protection for both British and US Embassies in Afghanistan, Namibia, Jordan, Rwanda, Uganda, and Ecuador.[134]

More recently the UK has relied on G4S (originally Group 4 Security). G4S provides protection for the UK and US in Afghanistan and also provides protection for Japanese missions.[135] The UK Government has said that employees of private military and security companies may—if performing security functions for a diplomatic mission—properly be notified to the receiving State as members of its administrative and technical staff.[136]

While it is increasingly accepted practice that sending States may carry out or organize their own protection where the protection available from the receiving State authorities is inadequate to the degree of risk, they retain discretion as to whether and how they do so. In *Macharia v United States*[137] a claim was brought against the United States under the Foreign Tort Claims Act for judicial review of the security measures taken before the bombing of the US Embassy in Nairobi. The claim was dismissed by the District Court on the ground that the measures were within government discretion not susceptible to policy analysis by a US court. On appeal to the Circuit Court the dismissal was affirmed on the additional grounds that all the relevant acts took place outside the United States and that the claim fell within the 'political question' doctrine. The Supreme Court denied a request for certiorari.

Prevention of disturbance of the peace of the mission or impairment of its dignity: demonstrations

Politically motivated demonstrations in front of foreign embassies have become a highly favoured method of public protest at the policies of the sending State, and with the increasing emphasis in many States on freedom of speech and freedom of assembly they often give rise to difficult decisions as to how the balance between the constitutional rights of citizens of the receiving State and the duty to prevent disturbance of the peace of the mission or impairment of its dignity should be struck by the police or other authorities controlling the demonstration.

[134] *The Times*, 24 August 1998, 14 October 2000, 8 December 2006, 3 April 2007; Hansard HL Debs 2 February 2005 WS col 11; Barker (2006) Annex 4, esp para 7. In evidence to the House of Commons Foreign Affairs Committee, the Foreign Secretary stressed that the formal responsibility to protect diplomatic missions lay with the host country, in co-operation with the post concerned, FAC Second Report 2004, *Foreign Policy Aspects of the War against Terrorism*, HC 81 (2004), cited in 2004 BYIL 765.

[135] *The Times*, 25 March 2010 and 15 December 2011.

[136] Response of the Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on Human Rights, Session 2008–9, Cm 7723, 2009 BYIL 835–6.

[137] 238 F Supp 2nd 13 (DDC 2002); on appeal 334 F 3rd 61 (DC Cir 2003) No 02–5252. The case is described in 2004 AJIL 169.

In the United States a Joint Resolution of both Houses of Congress was approved in 1938, making it unlawful:

> to display any flag, banner or placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party or organization, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by and in accordance with, a permit issued by the superintendent of police of the said District; or to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

The Resolution was upheld as constitutional by the US Court of Appeals in 1939 in *Frend et al v United States.*[138] The court noted that the law of nations imposed on the United States the duty and responsibility to protect missions not only from intrusion but also from disturbance of their peace or dignity, and concluded that the Resolution imposed: 'reasonable and proper restrictions. In them there is no abridgment of the right of speech or of assembly or of any other constitutional right of the citizen.'

In 1981, the provisions of the 1938 Resolution were incorporated in a statute of the District of Columbia[139] and this was again challenged in the courts by individuals who sought to congregate and to display signs outside the embassies of the Soviet Union and of Nicaragua. The US Court of Appeals in *Finzer v Barry*[140] were required to re-examine the analysis in the *Frend* case and to determine whether it remained consistent with the constitutional standards which had since evolved, and whether it achieved a permissible balance between the national interests and international obligations of the United States and the constitutional guarantee of free speech. The majority judgment reviewed at length the history of the obligation to protect embassy premises and the special difficulty of doing this given that the police were not permitted to establish a presence inside these premises. The Court of Appeals held that the restriction on hostile signs (the display prohibition) was not in any real sense a restriction on political debate about foreign governments or their policies. 'It does not eliminate any point of view from our political discourse, but sets aside the space immediately surrounding foreign embassies as an area free from hostile protest. The unique restrictions imposed are justified by the unique interests that are at stake.' Wald CJ, dissenting, held, however, that the provision of the statute which prohibited only hostile banners and placards removed a large category of political speech from constitutional protection—an alternative which banned all demonstrations would equally protect embassy security but would be 'far less abhorrent to the first amendment'. The prohibition on congregation was construed so as to permit police dispersal only if the police reasonably believed there was a threat to the security or peace of the embassy,

[138] 100 F 2nd 691 (DC Ct App 1938); certiorari denied, 306 US 640 (1939); 1938–40 AD No 161. See Whiteman, *Digest of International Law* vol VII p 382, and Art 3 of Harvard Draft Convention, 26 AJIL (1932 Supp) 51. The Resolution was also upheld in *Jewish Defence League Inc v Washington and others* 60 ILR 384.

[139] DC Code § 22–1115 (1981).

[140] 798 F 2nd 1450; 121 ILR 499.

and on this narrow construction the Court of Appeals unanimously held it to be constitutional.

On application for certiorari to the Supreme Court by three different would-be demonstrators in the case of *Boos et al v Barry*,[141] the Supreme Court by a majority reversed the Court of Appeals on the display prohibition point. They held that the prohibition was a content-based restriction on political speech in a public forum which was not sufficiently narrowly tailored to serve a compelling state interest. They noted that US legislation which applied to embassy premises other than those within the District of Columbia was more carefully constructed so that it prohibited only acts or attempts to 'intimidate, coerce, threaten, or harass' members of foreign missions, so that a constitutionally acceptable alternative form of legislation was available. The Supreme Court unanimously upheld the prohibition on congregation in the District of Columbia statute. They commented in regard to the duty under Article 22 of the Vienna Convention 'to prevent any disturbance of the peace of the mission' that: 'Given the particular context for which the clause is crafted, it is apparent that the prohibited quantum of disturbance is determined by whether normal embassy activities have been or are about to be disrupted.'

Most other States, however, do not have laws of comparable precision regarding demonstrations outside mission premises, and the United States has had more occasion than most States to protest at breaches of the obligations owed in respect of its embassies in foreign States. The Foreign Assistance Act as amended in 1967 permits the President to consider terminating assistance to any country which fails to carry out its obligations to prevent damage or destruction by mob action of US property within that country.[142]

In Australia, a similar balancing of the duty to protect mission premises from 'disturbance of the peace of the mission or impairment of its dignity' and the fundamental rights of freedom of speech and of assembly was carried out in 1992 by the General Division of the Federal Court in *Minister for Foreign Affairs and Trade and others v Magno and another*.[143] Magno and other representatives of the East Timorese community had placed 124 white wooden crosses on a grass verge next to a footpath outside the Indonesian Embassy as a symbolic protest at the killing of a number of East Timorese people by Indonesian military forces. The Australian Diplomatic Privileges and Immunities Act 1967 gave power to make 'necessary or convenient' regulations to give effect to the Act and so to implement Australia's obligations under the Vienna Convention. Regulations were made under the Act to authorize removal of the crosses as an 'appropriate step' to prevent disturbance of the peace of the mission or impairment of its dignity and to prevent any attack on the dignity of a diplomatic agent. The issue before the court was the validity of these Regulations and in effect whether they were necessary or appropriate to the fulfilment of the obligations imposed by Article 22 of the Convention. The judge at first instance held that they went beyond the powers delegated by the 1967 Act. On appeal the Federal Court considered a very wide range of material from many jurisdictions, including the US cases described above, and by a majority they upheld the Regulations. French J noted that disturbance of the peace of a mission and impairment

[141] 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157 [No 86–803], decided 22 March 1988; 121 ILR 499 at 551. See also Lee (1991) pp 406–12.

[142] 81 Stat 459; 22 USC § 2370. See Whiteman, *Digest of International Law* vol VII p 388.

[143] (1992–3) 112 ALR 529; 101 ILR 202.

of its dignity overlap, but that impairment of dignity included activity not amounting to disturbance of peace:

> Offensive or insulting behaviour in the vicinity of and directed to the mission may fall into this category. The burning of the flag of the sending State or the mock execution of its leader in effigy if committed in the immediate vicinity of the mission could well be construed as attacks on its dignity. So too might the depositing of some offensive substances and perhaps also the dumping of farm commodities outside mission premises.

Beyond this the sending State must take the receiving State as it found it, including its traditions of free expression and international human rights commitments. 'Subject to those general considerations however, the notions of peace and dignity in this context involve evaluative judgments and are not amenable to clear rules of definition.' He concluded that the Regulations were valid, though that did not conclude the question whether removal of the crosses was a proper exercise of the powers conferred.

Einfield J, however, in a powerful dissent gave greater weight to the restrictive interpretation of 'impairment of dignity' applied in the United States and in the United Kingdom, and to Australia's obligations under the United Nations International Covenant on Civil and Political Rights. The Act did not permit the executive to determine by regulation how much of a fundamental human right should be allowed. He took the view that:

> Small planted crosses symbolising people killed without cause could not impair the dignity of a mission because they have nothing to do with its freedom to function, however aggravating it may have been in this case for the members of the mission and the government they represent to have the massacre so poignantly dramatised.

He concluded that the Regulations authorized 'such an interference with basic rights as to balance the scales too far against protesters' rights and in favour of the rights of those against whom such protests are directed'.

In The Netherlands there are no Penal Code provisions specific to foreign diplomatic missions, but the courts in considering the appropriate penalty for unlawful entry in the context of political demonstrations take into account the duty of protection of mission premises on the one hand and the motives of the accused in protesting on the other.[144]

In the United Kingdom there are no statutory provisions giving detailed effect to the duty to protect mission premises, and measures taken have normally been determined by the police in the light of specific threats or planned demonstrations and in consultation with the Home Office and the Foreign and Commonwealth Office. The shooting from the Libyan People's Bureau in 1984 which killed a woman police constable took place during a demonstration outside the premises by Libyan dissidents—a demonstration which Libyan diplomats had on the previous evening requested the Foreign and Commonwealth Office to prevent. The nature of legal powers and duties in respect of demonstrations outside mission premises was therefore examined carefully by the House of Commons Foreign Affairs Committee in their Report on the Abuse of Diplomatic Immunities and Privileges. They concluded that the duty to protect the peace of the mission:

> cannot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving State. Provided always that work at the mission can continue

[144] *AA v Public Prosecutor*, Court of Appeal of The Hague, 1980, 94 ILR 306; *SMHIN v Public Prosecutor*, Court of Appeal of The Hague, 1985, 94 ILR 349.

normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or the staff injured, the requirements of Article 22 are met.

They noted that in the case of *R v Roques*,[145] later in 1984, a magistrates' court had refused to uphold the right of the police to move demonstrators from the pavement immediately outside the South African Embassy, taking the view that the dignity of mission premises was impaired only if there was abusive or insulting behaviour or actual violence. The Foreign Affairs Committee maintained that to impose higher standards of protection than those set out above would impinge on British political freedoms.[146] Freedom of expression and freedom of peaceful assembly are guaranteed by Articles 10 and 11 of the European Convention on Human Rights and by Articles 19 and 21 of the United Nations International Covenant on Civil and Political Rights.

The United Kingdom, responding to this Report in their Review of the Vienna Convention, agreed 'that the essential requirements are that the work of the mission should not be disrupted, that mission staff are not put in fear, and that there is free access for both staff and visitors'. It was generally for the police to judge how to implement these requirements, they did have statutory or common law powers to control marches which might result in serious public disorder and to prevent obstruction of the highway, and they usually kept demonstrations on the opposite side of the road from a diplomatic mission.[147]

When the Chinese President, Jiang Zemin, came on a state visit to the United Kingdom in 1999, entitled under the UK State Immunity Act 1978 to the same protection of his dignity as the head of a diplomatic mission, the British police removed banners and flags from Free Tibet campaigners while permitting the display of Chinese national flags, and used police vans to mask the President's view of protesters during his visit to Buckingham Palace and to the Chinese Embassy. Proceedings for judicial review were brought in the High Court in the case of *R v Commissioner of Police for the Metropolis*[148] to challenge the lawfulness of the policing of the protests. These proceedings were settled on the basis of a consent order under which the court granted declarations that it was unlawful for officers to remove banners and flags from people solely on the basis that they were protesting against the Chinese regime and that it would be unlawful to position police vans in front of protesters if the reason for this was to suppress free speech.

One aspect of ensuring that the peace of the mission is not disturbed is the prevention of excessively noisy demonstrations, sometimes intended to harass the mission. For several years demonstrators kept vigil outside the South African Embassy in London, demanding that Nelson Mandela, who was then still held in detention by the South African Government, should be set free. The decision in *R v Roques*, described above, as well as the limits to the noise control powers of local authorities, made it difficult for the police to control the noise of the demonstrators, which at times prevented the members of the

[145] Acquittal by Chief Metropolitan Magistrate on charge of obstructing police in the lawful execution of their duty, 1 August 1984, unreported.

[146] First Report from the Foreign Affairs Committee, 1984–5, paras 45–52.

[147] Cmnd 9497, paras 39–40.

[148] CO/129/2000, unreported; *The Times*, 20 October 1999 (under the headline 'China's leader isolated from chill of dissent'), 15 January and 4 May 2000.

mission from working and led to complaints by the ambassador of breach of the requirements of Article 22 of the Convention. A much more obvious violation of the requirements took place during the US intervention in Panama in 1989 when the Legation of the Holy See was subjected to bombardment by loud rock music and overflying military aircraft of US invading forces. Their objective was to harass President Noriega into leaving his shelter in the mission premises and surrendering to trial in the United States—an objective which was ultimately achieved in spite of the protests by the nuncio at the deliberate disturbance of the peace of the mission.[149] In Australia in 2002, the Minister for Foreign Affairs under powers granted by the Diplomatic Privileges and Immunities Act 1967 signed certificates entitling police to prohibit demonstrations by Falun Gong on land opposite or near the Chinese Embassy which included instruments used for amplified noise. The Minister maintained that this noise, as well as the display of large staked banners, impaired the dignity of the diplomatic mission of China.[150]

In Germany the practice regarding demonstrations is based on the need to balance the constitutional right of assembly with the duty to protect mission premises. Members of the mission and visitors must have access to the premises without being harassed, and harassment by means of noise, loudspeakers, or megaphones is not permissible. A demonstration which continues 'round the clock' may not only impair the dignity of the mission but, even if it is peaceful, infringe the inviolability of diplomats guaranteed by Article 29.[151]

Listening devices

Complicity by the authorities of the receiving State in planting electronic eavesdropping devices in mission premises amounts to a violation of all three paragraphs of Article 22 of the Vienna Convention. The installation of listening devices infringes the duty to protect the premises 'against any intrusion or damage', and actual use of the devices in order to obtain information could be said to be a constructive 'entry' or 'search' by the agents of the receiving State. Since, however, the breach violates the mission's freedom of communication rather than the physical integrity of its premises, bugging is discussed more thoroughly in the context of Article 27 of the Convention.

Commencement and termination of inviolability of premises

A question which cannot be clearly resolved from the text of the Convention or from the *travaux préparatoires* is when the inviolability of mission premises begins and ends. In the Harvard Draft Convention entitlement to inviolability is contingent on a notification to the authorities of the receiving State that premises are occupied by a diplomatic mission or by a member of the mission.[152] In the Vienna Convention, however, although there are elaborate provisions for notification of persons entitled to privileges and immunities and for determining the time when entitlement begins and ends, there are no analogous provisions for premises.

[149] *The Times*, 28 December 1989.
[150] 23 AYIL 351 (Australian Practice in International Law, 2002).
[151] Richtsteig (1994) p 48.
[152] 26 AJIL (1932 Supp) p 50, Art 3.

Several members of the International Law Commission addressed the problem in 1957, but each put forward a different answer. Mr Ago said that it was practice to notify the receiving State that premises had been acquired for mission use, and that inviolability might date from receipt of such a notification. Sir Gerald Fitzmaurice suggested that inviolability of premises taken over for mission use 'began from the time they were put at the disposal of the mission'. Mr Bartos said that it was customary to claim inviolability for new buildings when they reached the stage of interior installation and decoration. He also observed that the question 'was a very thorny one, and in the absence of any established rule, it would be more prudent for the Commission to refrain from mentioning the matter'—and this suggestion at least was generally endorsed.[153]

There is some support for Mr Bartos' test in the cases. In *Petrococchino v Swedish State*[154] a French court held in the context of a tenancy dispute that: 'The acquisition of real property by a foreign State does not *ipso facto* invest that property with the privilege of exterritoriality: it is necessary that the property be completely appropriated to the service of the embassy.' In *Beckman v Chinese People's Republic*,[155] by contrast, the Swedish Supreme Court refused to exercise jurisdiction in a dispute as to the validity of a sale of real property to the Chinese People's Republic, holding that although a foreign State did not in general enjoy immunity in regard to actions concerning real property, since 'the property in this case is used by the Republic for its Embassy in this country', China could plead immunity.

In four related cases, *Tietz and others v People's Republic of Bulgaria*, *Weinmann v Republic of Latvia*, *Bennett and Ball v People's Republic of Hungary*, and *Cassirer and Geheeb v Japan*,[156] the Supreme Restitution Court for Berlin emphasized that a remote intention on the part of a State to use property owned by it for mission premises was not sufficient to create immunity from local jurisdiction. In each of the four cases property in West Berlin had been sold by Jewish emigrants to a foreign State which had used it as mission premises until 1945. In 1959 three of the States, Latvia, Bulgaria, and Hungary, maintained no diplomatic relations with the Federal Republic of Germany, while the fourth, Japan, maintained its embassy in Bonn. The court acknowledged that there might be special circumstances, such as war or breach of diplomatic relations, in which the immunity of the premises might be 'suspended'. But on the facts before them 'no diplomatic activity whatever, in the sense of the conduct of diplomatic relations between a sending sovereign and a receiving sovereign, exists in West Berlin' and the immunity in respect of the premises had come to an end. Immunity could not depend on intention to use the buildings for mission purposes if Berlin should again become capital of a united Germany, but 'only upon an actual and present use of the premises'.[157]

An agreement on the construction of embassies in Beijing and Washington concluded in 2003 between the United States and the People's Republic of China provides for the two embassies to be accorded inviolability as premises of the mission 'from the date of delivery of possession'.[158]

[153] *ILC Yearbook* 1957 vol I pp 52–3.
[154] 1929–30 AD No 198.
[155] 1957:24 ILR 221.
[156] 28 ILR 369, 385, 392, and 396.
[157] At pp 384 and 412. See also *Roumanian Legation (Greece) Case* 1949 AD No 101, where immunity was denied since diplomatic relations had been broken between Romania and Greece.
[158] See extracts at 2003 DUSPIL 256.

UK practice

The lack of precision in Article 22 over commencement and termination of the status of premises of the mission gave rise to problems of administration and of control in some capitals. In the United Kingdom, practice originally was to regard premises as 'premises of the mission' from the time they were at the disposal of the mission, provided that planning consent had been secured under local law and that it was the intention to use the buildings 'for the purposes of the mission' as soon as building and decorating had been completed. When buildings were no longer 'used for the purposes of the mission'—for example, if a mission was withdrawn—the Foreign and Commonwealth Office allowed a 'reasonable time' by analogy with Article 39 of the Convention before they could be entered. Loss of inviolability under Article 22 would not, of course, affect the duty on the receiving State to 'respect and protect' them under Article 45 of the Convention. When diplomatic relations were broken with Libya following the shooting in 1984 from the premises of the Libyan People's Bureau, the premises were treated as inviolable until seven days had elapsed from the date relations were broken. Although the premises were vacated two days before, police did not enter to search for evidence relating to the shooting until the full seven days had elapsed.

While neither customary international law nor the terms of the Convention prescribe any notification to the receiving State for premises to be used for the purposes of the mission, there is no reason why individual States should not impose through their national laws or administrative regulations a duty of notification or require their own consent before premises acquire the status of 'premises of the mission'. There have been a number of States which controlled the location of embassy premises, for example confining them to a diplomatic compound. Provided that the power of control is exercised in such a manner that sending States are able to acquire premises adequate and suitable to their needs, and that administrative assistance in accordance with Article 21 of the Convention is forthcoming, a system of control is not against the letter or spirit of the Convention. It is in the interests of both sending and receiving States that mission premises are placed in locations where they do not cause friction with local inhabitants and where the receiving State may discharge without undue difficulty its duty of protection. A system of control was established in the United States by the District of Columbia Code and in 1982 by the Foreign Missions Act, which was designed 'to promote the orderly conduct of international relations'.[159] A system of notification and agreement may also have the advantage of fixing precisely when the status of mission premises begins and ends.

The UK Government gave notice in its Review of the Vienna Convention that it proposed to seek legislative powers which would enable the Secretary of State for Foreign and Commonwealth Affairs:

(i) to require diplomatic missions to obtain his express consent before office premises acquired by them, or following a change of use, could be regarded as premises 'used for the purposes of the mission', and therefore entitled under the Diplomatic Privileges Act to inviolability and rating relief;

[159] Discussed above under Art 21.

(ii) to provide that such consent could be withdrawn in respect of existing premises in certain circumstances and that the premises would then cease after a specified period to be premises of the mission (with consequential loss of inviolability and rating relief).[160]

These proposals were implemented by section 1 of the Diplomatic and Consular Premises Act 1987,[161] already discussed under Articles 1(i), 21 and above. The section provides that consent may only be given or withdrawn if the Secretary of State 'is satisfied that to do so is permissible under international law'. It also requires States to give notice of an intention to cease using land as mission premises, and provides that in any proceedings a certificate issued by or under the authority of the Secretary of State should be conclusive as to whether land was at any time diplomatic premises.

The Act was drawn to the attention of diplomatic missions in London by a Circular Note[162] and its compatibility with the Vienna Convention has not been challenged by other governments. The powers also taken in the Act to control former diplomatic premises are described below, under Article 45.

[160] Cmnd 9497, para 39.
[161] C 46.
[162] Printed in 1987 BYIL 541.

EXEMPTION OF MISSION PREMISES FROM TAXATION

Article 23

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

Historical background

Prior to the Vienna Convention, state practice on the imposition of national and local taxes on premises of a diplomatic mission was variable, and where exemption from liability was granted it was based on courtesy, on general usage, or on reciprocity rather than on binding custom.

The subject is not mentioned in the early authorities, probably because the raising of revenue by means of taxation of real property was not at that time general. Nineteenth-century authors consistently stated that the ambassador's residence would in practice not be taxed, but that the practice was based not on diplomatic immunity but on courtesy.[1] Many States concluded bilateral agreements or arrangements providing exemption—a practice which would have been unnecessary if customary international law had required it. Exemption 'from all land taxes on the building of the mission, when it belongs to the respective Government' was also required under the 1928 Havana Convention on Diplomatic Officers.[2]

In many States national legislation provided for exemption, but in the majority of these the privilege was expressly made subject to reciprocity—a further indication that the privilege did not have a clear basis in customary international law.[3]

In the United Kingdom tax levied by central and by local authorities was treated separately. Under section 111 of the Income Tax Act 1952[4] tax on property occupied by a

[1] Martens-Geffcken (1866) pp 110–11; Pradier-Fodéré (1899) vol II pp 65–6; Genet (1931) vol I pp 426–7.

[2] 26 AJIL (1932 Supp) 175; UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 419.

[3] See UN Laws and Regulations. States requiring reciprocity included Argentina (p 3); Austria (p 17, see also *In Re Khan* 1931–2 AD No 182); Denmark (p 97); UAR (p 111); Finland (p 115); Hungary (p 163); Israel (pp 184–5); Korea (p 190); Luxembourg (p 192); Netherlands (p 204); Nicaragua (p 222); Norway (p 225); Poland (pp 254–5); Portugal (p 280); Romania (p 289); Sweden (p 297); Soviet Union (p 340); Yugoslavia (pp 409–10). States not expressly requiring reciprocity were Belgium (p 25); Colombia (p 66); Cuba (p 73); Peru (p 232); Vietnam (pp 404, 406–7). See also 26 AJIL (1932 Supp) pp 58–61.

[4] 15 and 16 Geo 6 and 1 Eliz 2 c 10. Earlier provision was in the Land Tax Acts 1692 and 1789, cited in Feller and Hudson (1933) vol I p 213 and in 26 AJIL (1932 Supp) 58–61. See also Lyons (1953) at pp 138–40.

foreign embassy was 'charged on and paid by the landlord or other person immediately entitled to the rent of the house or tenement'. If the foreign State or a diplomatic agent owned the mission premises he was in practice treated as exempt from taxes levied on owners and on profits of occupation. But if the landlord was not entitled to diplomatic immunity he could be charged.

Taxes levied by local authorities to meet expenses such as road maintenance and lighting, water supply, rubbish collection, and policing were known in the United Kingdom as rates. Local legislation provided that in respect of the land or house of an ambassador, rates should be imposed on the landlord or proprietor. The case of *Parkinson v Potter*[5] arose because a Portuguese diplomat, who on assignment of a lease had covenanted to pay the rates on his premises, declined to pay on the ground that he was exempt. The landlord was compelled to pay, and sued the original lessee, who argued that the landlord should not have had to pay. The court held that the diplomat was within the Act, the landlord had to pay, and the defendant was liable under his covenant. The decision was followed in *Macartney v Garbutt.*[6] Following these cases, and other demands in cases not covered by local legislation imposing liability on landlords, the diplomatic corps made collective representations to the Secretary of State, claiming that under international law mission premises and diplomatic residences should be exempt. The Foreign Office consulted their posts abroad, and on the basis of the responses replied that 'in several countries besides England, rates which are not paid by a Diplomatic Representative are recovered from his landlord, and that it is not therefore possible, under existing circumstances, to invoke any universal principle of reciprocity in favour of a change in the English law and practice'. Following consultation with the Law Officers, the United Kingdom maintained their view of international law, and declined to seek repeal of the Acts imposing liability on landlords. They did, however, propose by way of compromise arrangements under which the 'beneficial' element of the rates, covering such matters as drainage, street maintenance, and lighting should be borne by diplomatic missions, while on the basis of reciprocal agreements the Foreign Office would pay the 'non-beneficial' element covering such matters as poor relief, policing, baths, and libraries.[7]

This distinction between the general rate or local tax and that portion which represented 'payment for specific services rendered' had already appeared in the practice of other capitals.[8] Following the circular letter from the British Foreign Secretary in 1892,[9] agreements were concluded with most States represented in London whereby the non-beneficial element of local rates—amounting to about two-thirds of the total—was paid by the Foreign Office on condition of reciprocity for British missions in the relevant foreign capital.

During the twentieth century, general practice based on courtesy or on reciprocity began to harden into a customary rule requiring exemption from central and local taxes on

[5] [1885] 16 QBD 152.

[6] [1890] 24 QBD 368.

[7] VII BDIL 823; Lyons (1953) pp 140–7; Satow (4th edn 1957) p 232; Wheaton (1816) § 242; Ryde (1950) p 97; Konstam (1927) p 84; McNair (1956) vol I p 207. See also FO 83/1661 and Jones (1948) at pp 274–5.

[8] eg Paris: see draft of letter from Marquis of Salisbury, 1891, in McNair (1956) vol I p 209; Washington: 26 AJIL (1932 Supp) 61.

[9] Letter from Marquis of Salisbury, 19 July 1892, FO 1233 (18864).

mission property. The Supreme Court of Canada in 1943 in the *Rockcliffe Park Case*[10] by a majority of three to two held that premises occupied by foreign legations were exempt from rates levied for general purposes, though not from those 'which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed'. The majority held that imposition of liability would amount to a subtraction from the property of a foreign sovereign, inconsistent with the principle of *par in parem non habet imperium*. Their view rested, however, mainly on the proposition that the rates were not recoverable from the missions and that to assess taxes which could not be enforced would be a useless procedure. The minority in the Supreme Court distinguished between liability and enforcement against a foreign State, and would have applied the same legal principles as UK courts.

In the United States a circular instruction by the State Department in 1937 stated that:

> Property in the District of Columbia owned by foreign governments for Embassy and Legation purposes is exempt from general and special taxes or assessments. Property owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes but not from special assessments or improvements. The payment of water rent is required in all cases, as this is not regarded as a tax but the sale of a commodity.

The United States did not insist on reciprocity, but sometimes relied on the position in Washington in order to secure reciprocity abroad.[11] In 1969, in the case of *Republic of Argentina v City of New York*,[12] which involved an attempt by New York City to collect taxes in respect of consular premises at a time when the United States was not party to either of the Vienna Conventions, the United States submitted an *amicus curiae* brief to the court stating that: 'A controlling rule of customary international law exempts from taxation real property owned by a foreign government and used exclusively for governmental purposes.' This was accepted by the court.[13]

Negotiating history

There was no controversy within the International Law Commission over the proposal that the sending State and the head of the mission should be accorded exemption from all national and local dues and taxes in respect of mission premises, other than those which reflected services from which the mission derived benefit. In 1958 the Commission accepted the suggestion of Luxembourg that the term 'such as represent payment for specific services rendered' was more suitable to describe the beneficial element than the previous wording 'compensation for services actually rendered'. The change was intended to make it clear that rates could be levied in respect of fire services, for example, although it might be the case that in any particular year no services had been 'actually rendered' by the fire brigade to the particular mission.[14] Neither the Commission nor the Vienna

[10] *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, 1943 SCR 208, 1941–2 AD No 106. See also *ILC Yearbook* 1956 vol II p 169.

[11] Moore (1905) vol IV pp 669–73; Hackworth, *Digest of International Law* vol IV pp 576–81.

[12] Court of Appeals of New York, 1 July 1969, 25 NY 2d 252, 303 NYS 2d 644.

[13] 1978 DUSPIL 611.

[14] UN Docs A/CN 4/L 75 p 15; A/CN 4/114 p 26; A/CN 4/116 p 41; *ILC Yearbook* 1958 vol I p 135, vol II p 96.

Conference attempted to clarify this wording in terms of which elements of a local assessment would be covered. Mr Bartos, representing Yugoslavia at the Conference, did however, specify that the Commission had not intended 'dues . . . for specific services rendered' to cover such administrative charges as registration fees or transfer duties.[15] Article 34(f) of the Vienna Convention provides that a diplomatic agent is not exempt from 'registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23'. If the head of mission or another diplomatic agent holds the premises of the mission in his own name he will therefore be exempt from registration and transfer duties.

Paragraph 2 of Article 23 was added at the Vienna Conference by an amendment proposed by Mexico in order to put it beyond doubt that the exemption from rates, taxes, and transfer duties did not apply to persons who leased or sold embassy premises to the sending State.[16] This reflected general international practice and the intentions of the International Law Commission. Landlords may, of course, specify in a lease that rates or taxes which would normally fall on them should instead be defrayed by the mission. In this case, as the Commission stated in its Commentary on the 1958 draft articles, the liability 'becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable'.[17] If, however, the effect of an agreement between landlord and a State or diplomat renting mission premises is that under national law, liability for the rates or taxes would fall directly on the State or on the diplomat, the sending State may take advantage in those circumstances of its exemption under Article 23.

Subsequent practice

The United States in 1973, shortly after it had become a Contracting Party to the Vienna Convention, relied on Article 23 to resist payment by its embassy in Vienna of a new Austrian tax relating to rental income. Under the law the lessor was obliged to pay the tax, but was authorized to collect it from the lessee. The US Embassy lease required the lessor to accept full responsibility for payment of all taxes assessed against the leased property. The State Department took the position that the provision enabling the lessor to collect the tax did not impose liability on the lessee, and that under Article 23 the US Government was exempt.[18] In Washington, however, refund of real estate tax levied by the District of Columbia on embassy premises of Romania between 1967 and 1972 was refused because the taxes had been 'properly assessed and collected' in earlier years and the State Department had no power to make reimbursement after the expiry of the relevant fiscal year.[19] In general, however, foreign governments are now given exemption from real estate taxes on mission premises and the Office of Foreign Missions verifies claims to exemption and submits them directly to the appropriate taxing authority.[20]

[15] A/Conf. 14 p 147.
[16] UN Docs A/Conf. 20/C 1/L 131; A/Conf. 20/14 pp 146–7.
[17] *ILC Yearbook* 1958 vol II p 96.
[18] 1973 DUSPIL 151.
[19] Ibid p 152.
[20] Department of State Circular Note of 1 January 1993 to chiefs of mission.

In a similar sense was a memorandum in 1975 by the Legal Bureau of the Department of External Affairs in Canada:

> Article 23(2) removes the exemption from Missions for taxes which the landlord may be required to pay and which are passed on to the Diplomatic Mission by inclusion in a leasehold agreement as part of the rent payable. Taxes which are not in the first instance payable by lessors and not capable of being included in the leasehold agreement are not required to be paid by a Mission under Article 23(1).[21]

In New York there was prolonged dispute between the City authorities and foreign governments as to whether the foreign governments were exempt from taxes on property owned by them and used to house diplomatic staff of missions to the UN (entitled to the same level of privilege as diplomatic agents) and staff of their consulates in New York. Exemption was granted on those parts of the relevant buildings used for diplomatic offices. In 2007, the Supreme Court ruled in proceedings for recovery against the Government of India that India was not entitled to sovereign immunity.[22] The District Court then ruled that India was subject to the taxes under State and international law. India appealed, but before an appeal on the issue of liability could be determined, the State Department took action under the Foreign Missions Act to issue a Designation and Determination which granted as a benefit exemption from the taxes and preempted state and local laws. The State Department action was expressly based on reciprocal advantage to the US—which owns much more property overseas than is owned in the US by foreign governments. The Court of Appeals held that the State Department action was valid and justified, saying that the underlying issue of liability for tax under Article 23 of the Vienna Convention (and the corresponding provision in the Vienna Convention on Consular Relations) was unclear.[23]

During the construction in London of an entirely new embassy, it was argued by the US that exemption from VAT on construction materials and related services should be granted by the UK authorities. There appears to be no precedent for interpreting the words 'taxes in respect of the premises of the mission' to cover taxes on the materials or services required to construct a new building and—although taxes would not normally have been levied by the US in similar circumstances—it was apparently accepted by the US that they had no legal entitlement to relief.[24]

Taxes which 'represent payment for specific services rendered'

The interpretation of these words in the context of a local system of taxation may cause difficulty. Neither the previous international practice nor the negotiating history provide clear guidance, though they do make clear that it is not necessary for liability that the mission should actually have used or benefited directly from the services rendered. Lecaros explains that national interpretations of the exception vary and that it is necessary to take account of local customs.[25] Satow also says that:

[21] 1976 Can YIL 326.
[22] *Permanent Mission of India v City of New York*, 551 US 193 (2007).
[23] *City of New York v Permanent Mission of India*, 618 F 3d 172 (2d Cir 2010); 2011 AJIL 339.
[24] *The Times*, 16 August 2013.
[25] (1984) p 154.

It is for each State party to give a precise interpretation of this exception in terms of its own local taxation system, but the general effect is that the embassy, in addition to being obliged to pay for commodities or utilities actually supplied, where charges are levied for these, is expected to pay any tax, or element of a tax, which relates to a supply or a service from which the embassy benefits.[26]

The European Court of Justice, interpreting the Protocol on the Privileges and Immunities of the Communities in the case of *Van Leeuwen v Rotterdam*[27] said that: 'it is proper to distinguish between a tax intended to provide for the general expenses of public authorities and a due constituting a given service. The national law of various Member States recognize this distinction in different forms and under various names.'

The United Nations has argued that it is liable only for charges made at a fixed rate, according to the amount of supplies or services rendered, and for services which could be specifically identified and calculated—but under the General Convention on the Privileges and Immunities of the United Nations, the liability of the United Nations is limited to charges which are 'no more than charges for public utility services'. This wording gives a wider exemption than that given to diplomatic missions by Article 23 of the Vienna Convention.[28]

The United Kingdom, after ratification of the Vienna Convention, continued to apply the practice originally based on the reciprocal rating arrangements of 1892, including the division between beneficial and non-beneficial elements. The criterion applied was to grant exemption in respect of local expenditure on services from which the mission was 'deemed to derive no direct benefit'. Under the arrangements set out in the 1996 version of the Memorandum on Diplomatic Privileges and Immunities:[29] 'The non-beneficial portion includes such services as education, police, housing and welfare services while the beneficial portion covers street cleaning, lighting and maintenance, fire services, parks, public libraries and museums.' The beneficial portion in 1996 was 14 per cent, and this percentage was subject to review every five years. This break-down between 'beneficial' and 'non-beneficial' elements attempts to take account of the usual circumstances of diplomatic missions—for example, children of staff of a mission are not normally educated at schools maintained by local taxes. Police services were, however, placed in the 'non-beneficial' category not because the mission was deemed to derive no direct benefit from them but because of the duty imposed on the receiving State under Article 22 to protect mission premises.

Salmon argues, however, that the exception requiring payment by diplomatic missions of dues and taxes in respect of specific services rendered should cover only services which are particular rather than general, which are not required by a specific obligation on the receiving State (such as police protection), which are voluntarily requested, and which are charged for on a proportionate basis (so that the tax element is excluded).[30] Such a narrow construction of the exception would, however, reflect the wording used in the General Convention on the Privileges and Immunities of the United Nations, which was discussed above. The exception to the exemption in Article 23 of the Vienna Convention is not limited

[26] (5th edn 1979) para 14.24; (6th edn 2009) para 8.28-9.
[27] Case 32/67 [1968] ECR 43 at 48.
[28] Muller (1995) pp 240–4.
[29] Notes about the council tax sent to all diplomatic missions in London are reproduced in 1993 BYIL at 624 and 625.
[30] (1994) paras 361–5, especially 363. Salmon also sets out Belgian practice.

to 'charges for services actually requested and rendered', but covers '*dues and taxes... which represent* payment for specific services rendered' (emphasis added).

The position taken in the United States by the State Department is that 'charges for specific services rendered' are limited to charges which are related in value to the cost of a distinct commodity or service provided to and directly benefiting the mission.[31] This test is closer to that proposed by Salmon, but does not require that the service should have been voluntarily requested. It would exclude such items as fire services (which cannot in any event be provided to premises of a diplomatic mission without specific consent), parks, public libraries, and museums. It may be argued that these services are 'offered' to members of the mission rather than 'rendered' to the mission. In 1996, following a comprehensive review of their practice in applying Article 23 to non-domestic rates charged by local authorities, the UK Foreign and Commonwealth Office informed diplomatic missions 'that henceforth beneficial services will comprise only lighting, maintenance and cleaning of local highways and streets and the provision of fire services'. In consequence diplomatic missions would be liable to only 6 per cent instead of 14 per cent of normal rates.[32] The test applied was one of direct benefit to the mission from the service in question—parks, museums, and libraries being of benefit to individuals rather than to the mission. This narrower interpretation of the words 'such as represent payment for specific services rendered' brings UK practice very close to that applied by the United States.

The records of the Vienna Conference indicate an intention that sending States and diplomatic missions should be exempt from duties and charges levied on them in connection with acquisition, whether by way of freehold or leasehold, of mission premises. In the United Kingdom relief is given from stamp duty (by free stamping of the relevant documents). No exemption is given in respect of the counterparts of the documents concerned, and there is no exemption from Land Registry fees for services in registering title.[33] A similar exemption is granted under German practice.[34] In the United States exemption is given from recordation taxes on purchase of mission premises and also from transfer tax on sale of property.[35]

[31] State Department information.

[32] Note to all Diplomatic and Consular Missions in London of 16 September 1996 supplied by Protocol Department of the Foreign and Commonwealth Office.

[33] Memorandum on Diplomatic Privileges and Immunities para 28.

[34] Richtsteig (1994) p 51.

[35] State Department Circular Note to chiefs of mission, 1 January 1993.

INVIOLABILITY OF THE ARCHIVES

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

The inviolability of diplomatic archives on the premises of the mission followed from the inviolability of those premises, and those in normal transit were protected by the—more limited—inviolability of the diplomatic bag and courier. Only in the twentieth century have courts and governments addressed the question of the status of diplomatic documents not on the premises of the mission nor in the custody of a courier or member of a mission—and perhaps not easily identifiable as diplomatic archives. Only with Article 24 of the Vienna Convention has inviolability in all these circumstances been clearly established.

The first writer to mention inviolability of an ambassador's papers along with that of dispatches sent or received by him was Vattel. In *Le Droit des Gens* he pointed out that without such protection the ambassador would be unable to perform his duties in security. But where the ambassador conspired against the receiving State, Vattel acknowledged that since he himself might be arrested and interrogated, his papers also might be seized in order to expose the conspiracy.[1] State practice supported this approach—for example, when in 1718 Count Cellamare, Spanish Ambassador to France, was discovered by interception of his dispatches to be conspiring against the French Regent, the disregard for the inviolability of his archives and dispatches contrasted with the respect which was shown towards the person of the ambassador who was merely expelled.[2] In 1906, two years after France had broken diplomatic relations with the Holy See, the archives of the former nuncio were seized by the French authorities. This was, however, justified by the Minister of Foreign Affairs on the basis that the archives had not been placed under seal nor entrusted to a protecting power but were found in the apartment of a priest who had no official position and was himself under suspicion.[3] In 1918, following the looting of the British Embassy in Petrograd during the Russian revolution, the diplomatic archives were destroyed.[4]

In all these cases there were immediate protests from the sending States, but it is notable that they all resulted from extreme situations in which diplomatic relations were broken either before or immediately after. It was in fact normal practice on discontinuance of diplomatic relations for the archives either to be destroyed or entrusted to a protecting power on the basis that any protection to which they might be entitled would otherwise lapse along with the inviolability of the mission premises. There was also the risk, if a change of government took place in the sending State, of dispute between the outgoing and incoming heads of mission about the archives and documents. In 1830, for

[1] (1758) IV.IX para 123.
[2] Martens (1827) vol I p 149.
[3] 1907 RGDIP 175 and 1966 416–17; Sfez (1966).
[4] Ullman (1961) p 289; *The Times*, 24 October 1918.

example, the newly recognized representative of the King of Portugal in the United States brought proceedings against the chargé d'affaires who had represented the previous Government of Portugal for delivery of the archives and documents which the defendant was taking with him on leaving the United States. The court in *Torlade v Barrozo*[5] did not distinguish between the immunity from arrest and suit of the outgoing chargé d'affaires and the property in the archives and so the suit failed.

In 1928 Article 14 of the Havana Convention on Diplomatic Officers extended inviolability to the 'papers, archives and correspondence of the mission'.[6] The draft Convention drawn up in 1930 by the Harvard Research in Article 5 gave a somewhat more limited protection of archives 'from any violation' and required their confidential character to be safeguarded 'wherever such archives may be located within the territory of the receiving state, provided that notification of their location has been previously given to the receiving state'. The Commentary noted that:

> When in earlier centuries an important part of the business of a diplomat was acquisition of information, to which he was not properly entitled, by methods not admitted or proper if used by one other than a state agent, a receiving state might have been regarded as to some extent excused if it sought by dubious means to gain information from the correspondence of a foreign mission.

The Harvard Research Article was, however, drafted on the basis 'that the normal functioning of modern international intercourse requires a clearer acknowledgment of the confidential character of diplomatic correspondence'. Although it did not go so far as to establish a duty on the receiving State to prevent publication, it 'did however imply a duty to protect more than the mere property rights in and to the archives of a sending state'.[7]

Acceptance of this approach was demonstrated by the inclusion in national legislation of a number of States of specific provisions for the inviolability of diplomatic archives.[8]

In the case of *Rose v The King*[9] in 1946, the Quebec Court of King's Bench, Appeal Side, had to consider the admissibility in criminal proceedings for conspiracy and espionage against a member of the Canadian House of Commons of documents stolen from the Soviet Embassy. Gouzenko, a cipher clerk in the Embassy of the Soviet Union in Ottawa, on defecting to the West took with him and handed to the Canadian Government a large number of secret documents incriminating Canadian private citizens and public servants in espionage. The Soviet Government did not waive the immunity of members of its mission, but a number of prosecutions were brought against others implicated, and the admissibility of the documents taken by Gouzenko was crucial to conviction. Neither the Soviet nor the Canadian Government made any claim to the courts that the documents were inadmissible as diplomatic papers—this argument was put forward by the defence.

[5] 1 Miles 366 (Phila D Ct 1830); 9 AILC 181.

[6] 26 AJIL (1932 Supp) 176.

[7] 26 AJIL (1932 Supp) 61–2; Denza (2007) at pp 164–6.

[8] eg Australia: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 9; Burma: ibid p 52; Canada: ibid p 57; New Zealand: ibid p 218; UK: Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, 15 & 16 Geo 6 & 1 Eliz 2, c 18, s 1.

[9] [1947] 3 DLR 618; 1946 AD No 76. See background and comment by Maxwell Cohen in 'Espionage and Immunity: Some Recent Problems and Developments', 1948 BYIL 404. The decision is strongly criticized by Salmon (1994) para 318.

On appeal by Rose against conviction, Bissonnette J gave careful consideration against the background of customary international law to the status of the stolen documents. He held that: 'International law creates a presumption of law that documents coming from an Embassy have a diplomatic character and that every Court of Justice must refuse to acknowledge jurisdiction or competence in regard to them.' But this presumption was subject to the overriding right of the State to assure its own security. Competence to repress the abuses of a diplomatic agent rested exclusively on the executive, and if the executive turned over documents to a court for prosecution, the courts could not regard them as entitled to immunity, since otherwise 'the conflict of powers between the executive and the judiciary would lead to an absurdity and juridical anarchy'. Although diplomatic immunity must be accorded to diplomatic agents who claimed it, 'to impose, through a judicial decision, immunity upon a State which does not claim any, would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance'. Gagne J supported these arguments and maintained further that the documents, though physically originating within the Embassy of the Soviet Union, were documents of an espionage Bureau not under the control of the ambassador and therefore not embassy documents.

Negotiating history

The International Law Commission and the Vienna Conference extended the protection to be accorded to diplomatic archives in some respects beyond what had been established under the previous international law. In the first place, the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others.[10] Secondly, the Vienna Conference added the words 'at any time' in order to make clear that inviolability continued without interruption on the breaking of diplomatic relations or in the event of armed conflict.[11] Article 45 requires the receiving State to 'respect and protect' these archives, and entitles the sending State to entrust their custody to a third State, the protecting power. It should, however, be noted that whereas 'premises of the mission' by virtue of Article 1(i) of the Convention lose their status as such once they are no longer 'used for the purposes of the mission', diplomatic archives and documents do not lose their status and retain their inviolability under Article 24 on an indefinite basis.

The third way in which the customary international law rule was extended by Article 24 was that the International Law Commission and the Conference, by adding the words 'wherever they may be', made it clear beyond argument that archives not on the premises of the mission and not in the custody of a member of the mission are entitled to inviolability.[12] The Conference expressly rejected that part of the amendment of France and Italy which would have required archives and documents outside mission premises to

[10] *ILC Yearbook* 1957 vol II p 137, Commentary on draft Art 18.

[11] UN Docs A/Conf. 20/C 1/L 149 (amendment of France and Italy); A/Conf. 20/14 p 149 (representative of France).

[12] *ILC Yearbook* 1958 vol II p 96, Commentary on draft Art 22; UN Docs A/Conf. 20/C 1/L 149 (amendment of France and Italy); L 126 (Bulgaria); A/Conf. 20/14 pp 148–50.

be identified by visible official signs. A US amendment which would have defined 'archives and documents' to mean 'the official records and reference collections belonging to or in the possession of the mission' was withdrawn.[13] The position of archives is thus different from other property of the mission which under Article 22(3) is not generally given inviolability unless it is on the premises of the mission. If archives fall into the hands of the receiving State after being lost or stolen they must therefore be returned forthwith and may not be used in legal proceedings or for any other purpose of the receiving State.

Subsequent practice

States Parties have generally given full effect to the wide protection provided under Article 24 of the Convention. In 1965, when the United States was not yet a Party, the State Department in response to an attempt to secure access to personnel records of the Cambodian Embassy, whose diplomatic staff had all been withdrawn, said that: 'Although the Embassy is closed, it remains inviolable, and any records which may be stored therein are not subject to subpoena.'[14]

In 1987 the UK Court of Appeal in *Fayed v Al-Tajir*[15] referred to the *Rose* judgment as well as to Article 24 in holding that a document already disclosed voluntarily to the court during discovery should nevertheless be treated as absolutely privileged. The plaintiff claimed that the document in question libelled him and the defendant, who had been and was later reappointed as Ambassador of the United Arab Emirates, accepted responsibility for it, and waived his own diplomatic immunity while arguing that the document itself was entitled to privilege. The Court of Appeal held that although the resulting situation was extraordinary, 'there is no inconsistency in principle between a waiver of the diplomatic immunity of a defendant and the assertion of a claim for immunity of a diplomatic or embassy document whose contents are sought to be introduced into the proceedings against him'.[16]

The same approach to the inviolability of diplomatic archives was taken by the US State Department in the context of a case where they were not prepared to support a claim to state immunity—*Renchard v Humphreys & Harding Inc.*[17] In a letter to the court, the State Department said that in declining to recognize and allow sovereign immunity in a suit for damage to neighbouring property caused by excavations and construction on the Embassy of Brazil, they did not intend to imply that Article 24 could not be used to resist discovery of relevant documents:

> Thus, while it is the position of the Department of State that the Government of Brazil does not enjoy immunity from suit in the courts of the United States in the subject litigation, involving the construction of the chancery building in Washington, it is also the position of the Department of

[13] A/Conf. 20/C 1/L 153; A/Conf. 20/14 p 149. See also report of US Delegation on this point, in Whiteman, *Digest of International Law* vol VII p 391.

[14] Whiteman, *Digest of International Law* vol VII p 392.

[15] [1988] 1 QB 712; [1987] 2 All ER 396; [1987] 3 WLR 102; 86 ILR 131.

[16] Per Kerr LJ.

[17] Civil Action No 2128–72 US District Court, District of Columbia, 381 F Supp 382 (DDC 1974). See 1975 AJIL 182 and 889.

State that the documents and archives of the Embassy are inviolable under the Vienna Convention as against any order of a United States court.

The same distinction was upheld in the case of *Mission of Saudi Arabia to the United Nations v Kirkwood Ltd*[18] in which a US court confirmed that the Saudi Mission did not lose the separate inviolability of its archives (conferred under the Host State Agreement between the United States and the United Nations) by instituting legal proceedings.

The International Court of Justice in the *Hostages Case*[19] stated in their judgment that: 'Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.' The ICJ emphasized the separate nature of the breach of the inviolability of diplomatic archives in stating that: 'This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof.'

The separate character of the inviolability of diplomatic archives was also underlined by the Eritrea Ethiopia Claims Commission in their Partial Award of 19 December 2005. Ethiopia claimed that Eritrean customs officials at Asmara airport intercepted and retained a diplomatic bag containing blank passports, invoices, and receipts. The Commission found that the package in question was not appropriately labelled and so did not constitute a diplomatic bag, but that the nature of the official Ethiopian correspondence inside was apparent, so that Eritrea by retaining it violated Article 24 of the Convention.[20]

What are the 'archives and documents of the mission'?

The terms 'archives and documents' were not defined in the Convention. Their inviolability is not conditional on their being identifiable, and there is no obligation to identify them when they are outside mission premises (in contrast, for example, to the diplomatic bag). It is clear that the negotiators intended a wide definition to be given to the term, and the words 'and documents' were added to the text in order to cover, for example, negotiating documents and memoranda in draft—which are strictly not archives in the ordinary sense of the word.[21] The Vienna Convention on Consular Relations provided in Article 1(1)(k) that '"consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping'. In practice this extensive definition has been applied by analogy to the Vienna Diplomatic Convention, on the basis that given the wider immunities generally given to diplomatic missions, it would be absurd for a narrower construction of the term 'archives' to be applied to diplomatic archives than to consular archives. Given that the

[18] Index No 112122/01, summarized in 2003 DUSPIL 573.

[19] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3, at paras 24 and 77.

[20] Eritrea Ethiopia Claims Commission, Partial Award on Ethiopia's Claim, The Hague, 19 December 2005. See also ICJ Judgment of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* para 343 dealing with Uganda's counterclaim.

[21] *ILC Yearbook* 1958 vol I pp 135–6 (Mr Liang, Mr Zourek).

underlying purpose is the protection of the confidentiality of information stored, it is clearly right that the words 'archives and documents' should be regarded as covering modern methods of storage such as computers and computer disks. Modern international agreements giving broadly a diplomatic level of inviolability and immunity to international organizations have also adopted a more detailed description of what storage methods are to be covered. The Headquarters Agreement between the Government of the United Kingdom and the International Maritime Organization regarding the Headquarters of the Organization, for example, extends inviolability to 'all archives, correspondence, documents, manuscripts, photographs, films and recordings belonging to or held by the Organization and to all information contained therein'.[22] There is, however, the danger that in attempting to list modern methods of information storage, any detailed definition may fail to keep pace with the increasing proliferation of techniques. It is probably better simply to rely on the clear intention of Article 24 to cover all physical items storing information.

The UK House of Lords addressed the meaning of the expression 'archives and documents of the mission' in the case of *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd and others (International Tin Council Intervening)*.[23] The case was one of those which arose following the collapse of the International Tin Council in 1985, leaving huge liabilities on its trading and loan contracts. It was intended to place in evidence documents originating (through means which were never clearly determined) from the Tin Council, which was entitled under UK legislation giving effect to its Headquarters Agreement to 'the like inviolability of official archives as was accorded in respect of those of a diplomatic mission'. The International Tin Council intervened in the case claiming that these documents were inadmissible. Lord Bridge, giving the leading judgment of the House of Lords, said that 'it would seem to me perfectly natural to interpret the phrase "the archives and documents of the mission" in Article 24 of the Vienna Convention as referring to the archives and documents belonging to or held by the mission'. One particular difficulty arising in that case—the status of documents communicated by the Tin Council to one of its member governments or a representative of a government—was not relevant to the case of archives or documents of a diplomatic mission. The House of Lords, however, also held that letters or documents communicated to a third party by an officer or employee of the Tin Council with actual or ostensible authority no longer belonged to the Council and thus no longer enjoyed inviolability as part of its archives. This finding is equally relevant to the case of archives and documents of a diplomatic mission.

The House of Lords in the same judgment rejected the argument that the inviolability of archives gave only protection from executive or judicial action of the receiving State, so that a document which was stolen or otherwise obtained by improper means from a diplomatic mission was not necessarily inadmissible in evidence. Of this submission Lord Bridge said:

> The underlying purpose of the inviolability is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the

[22] UKTS No. 18 (1969). Art 3(3). See also Lee (1991) pp 427–8, and Satow (5th edn 1979) para 14.26.

[23] [1988] 1 All ER 116; [1988] 1 WLR 16; 77 ILR 145. The judgments at first instance and in the Court of Appeal, which are also of interest on the question of 'archives and documents' are in 77 ILR 107 and 124.

judicial authorities of the host State should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.[24]

It should be noted that since 'the mission' does not have legal personality, archives belong strictly to the sending State. If a change of government takes place in the sending State, the archives retain their inviolability, but the recognition by the receiving State of a new government of the sending State will normally have the effect of transferring title to the archives and documents to the new government. The new government, or its newly appointed representative, would, however, be entitled to enforce its title in the courts of the receiving State only if they were prepared to accept that they would not be immune in respect of any directly connected counterclaim.

The status of archives and documents held by professional consultants to a diplomatic mission was considered in 2002 by the US House of Representatives Committee on Government Reform and by the State Department. For the purposes of an investigation into abductions of children of dual US and Saudi Arabian nationality in which the Embassy of Saudi Arabia was alleged to be complicit, the House Committee issued subpoenas seeking relevant documents to three US firms which were lobbyists or public relations advisers to the Embassy. The documents in question were records relating to professional services performed for the Embassy, but it was not claimed that they were in the ownership or possession of the Embassy. The lobbyists and the Saudi Arabian Embassy refused to comply with the subpoenas on the ground that the documents requested were 'archives and documents of the mission', but the Committee was not persuaded. Their stance was backed in an opinion and by oral testimony submitted to the Committee by the present author. The basis of these submissions was that the statement by Lord Bridge in the English House of Lords case of *Shearson Lehman Brothers Inc and another v Maclaine Watson & Co Ltd and another*, described above, although not binding, would be a persuasive authority in US courts on the interpretation of Article 24 of the Vienna Convention, and that Lord Bridge had held that a document communicated to a third party with actual authority, express or implied, or with ostensible authority, was no longer entitled to inviolability. It would follow that correspondence to or documents supplied to a third party not being a member of the diplomatic mission or in any other capacity an employee of the sending State would normally become the property of the recipient and so would no longer form part of the archives and documents of the mission.

The Committee on Government Reform also invited the US State Department to appear before them or to indicate their views, and on the date of the oral hearing, the State Department responded in writing. They pointed out that this was the first time that a legislature had attempted to compel production of records from contractors for an embassy in that country, and that they did not have firm views on the correct interpretation of the Vienna Convention in that context. They pointed out that the State

[24] Contrast the position taken by the House of Lords in the later case of *R v Khan (Sultan)* [1996] 3 WLR 162, where evidence obtained through an electronic listening device attached by the police to a private house without the knowledge of the owners or occupiers was held admissible in the absence of unfairness. Although the European Court of Human Rights later held in *Khan v United Kingdom*, Application No. 35394/97, ECHR 2000 V, 12.5.00, that the United Kingdom was in breach of Art 8 (right to respect for private life) and Art 13 (duty to provide an effective remedy) of the European Convention on Human Rights, that court did not accept that the unlawfully obtained evidence should necessarily have been excluded.

Department contracted overseas with local nationals to fill some embassy positions and that in a number of instances the Department had asserted that information in the possession of such local nationals was 'archival' under the Vienna Convention and thus inviolable. They also used outside US contractors for embassy construction in sensitive posts and would want to argue that information provided to such contractors was protected. The letter pointed out that the analysis of Lord Bridge in the *Shearson Lehman* case referred to above had noted the absence in that case of 'any relationship of lender and borrower, bailor and bailee or principal and agent'. While it is true that it is unusual for a national legislature to use compulsory means to secure attendance of witnesses or production of documents, the question of the limits of inviolability of mission archives are of application to the executive and judicial as well as the legislative branch of a State. The subpoenas issued were, however, never tested in a US court since shortly after the oral hearings described the Committee on Government Reform was reconstituted. The State Department made clear that their written statement reflected only their own views and not those of other interested agencies or Departments. The exchanges in the context of the enquiry into the possible involvement of Saudi Arabia in child abduction cases therefore illustrate the issues and the practical difficulties which are likely to arise elsewhere, but do not resolve them. Where it is desired to protect sensitive documents to be supplied to persons who are not members of the diplomatic mission, such as building contractors, it would be safer to make special arrangements to ring-fence them in order to guarantee their continued inviolability. This could be done either by ensuring that the documents did not physically leave the mission premises or that if they do they are clearly marked as property of the State or Government entitled to inviolability for its diplomatic archives.[25] Perhaps in response to these events, the Agreement concluded between the United States and the People's Republic of China in 2003 for the construction of embassies in Beijing and Washington makes specific provision for papers on the construction and design of the premises to be treated as archives of the mission.[26]

The *Bancoult* Case

The extent of protection to be accorded to archives and documents of a diplomatic mission was re-examined by the English Divisional Court and then by the Court of Appeal in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)*.[27] The case was a further stage in the long-running litigation which followed the removal and subsequent exclusion by the UK of the population of the Chagos Islands in its dependency, the British Indian Ocean Territory. The challenge in this case was not to the expulsion as such but to the decision by the UK Foreign Secretary to create a large marine protected area in the territory in which fishing would be forbidden. One of the grounds for challenge was that the decision was based at least in part on an improper motive on the part of the Secretary of State of seeking to make the eventual re-settlement of the Chagos Islands impossible. To support their claim, the Chagos Islanders relied on a

[25] Information about the enquiry, correspondence and hearings was available from the Committee website www.house.gov/reform. The State Department response to the Committee is printed in 2002 DUSPIL 567.

[26] Extracts from the Agreement of 17 November 2003 are in 2003 DUSPIL 256.

[27] Divisional Court Judgment [2013] EWHC 1502 (Admin); Court of Appeal Judgment [2014] EWCA Civ 708; Times Law Reports, 10 June 2014.

document published by WikiLeaks and by the newspapers the *Daily Telegraph* and the *Guardian* which claimed to be a copy of a record of a meeting in the US Embassy in London sent by cable to Washington and to the US Embassy in Mauritius. It was suggested, but not proved, that it was one of many documents alleged to have been illicitly obtained by Private Bradley Manning from a US facility in Iraq, and it was clear that it had not been published by or with the authority of the US Government. In this US account, two UK diplomatic service officers were recorded as having made statements which appeared to support the claim of improper motive. The accuracy of the account was disputed by the UK officers, but the UK could offer no alternative record of the critical meeting.

The Divisional Court held that the document was inadmissible because in the absence of consent by the US Government it remained an archive and a communication of the US mission, notwithstanding the fact that it had been leaked by a third party and given widespread publicity. The Court relied on the speech by Lord Bridge in the *Shearson Lehman* (ITC) case described above in which he said:

> The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host State should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.

The Divisional Court accepted that the cable, created, transmitted, received and stored electronically, remained a document for the purposes of Article 24 and remained 'official correspondence' for the purposes of Article 27.2 of the Vienna Convention. Its inviolability was not lost merely because it was sent to and received by the US Government or because it was held in a place geographically remote from the US mission in London. The Court said:

> We are required to apply a broad and sensible construction to Articles 24 and 27.2. Taken together, they provide for comprehensive rules for the enduring protection of all forms of diplomatic communication.[28]

On the basis of other evidence of advice and communications within the FCO, however, the Divisional Court rejected the claim that the Secretary of State had been influenced by an improper motive.

Before the Court of Appeal it was argued for the appellants, first, that the words 'wherever they may be' was limited territorially to places within the receiving State and, secondly, that the term 'inviolability' did not automatically imply inadmissibility in judicial proceedings but was limited to excluding interference or compulsion on the part of the receiving State. The Court of Appeal saw 'considerable force' in the argument that the UK could not violate the diplomatic archives or documents of the US mission if they are not in its territory or otherwise under its jurisdiction and that it was irrelevant that they originated in the US mission in the UK. In the light of its decision on the issue of admissibility, however, it did not express a concluded view about it.

On the question of whether inviolability implied inadmissibility of an archive or document, the Court of Appeal concluded that it was not bound by the statement by

[28] Paras 40–45.

Lord Bridge in the *Shearson Lehman* case where he rejected the proposition that the only protection afforded by inviolability was against executive or judicial action by the host State and asserted that if a stolen document was put in evidence, it would be contrary to the duty to protect the privacy of diplomatic communications to permit the violator or anyone receiving the document from the violator to make use of it in judicial proceedings. Because the rejection of the claim to admissibility in *Shearson Lehman* turned on disclosure with the express or implied authority of the ITC, the Court of Appeal in *Bancoult* held that Lord Bridge's assertion was not part of the ratio and that the present case was distinguishable on the facts in that the person seeking to adduce the document in evidence was not complicit in its disclosure.

The Court quoted the definition of inviolability offered by Professor Clive Parry:

> Immunity from all interference, whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interferences or from mere insult, on the part of the receiving state.

It then relied with approval on the statement by Dr Francis Mann where he said:

> 'Inviolability' let it be stated once more, simply means freedom from official interferences. Official correspondence of the mission over which the receiving state has had no control can, as has been submitted above, be freely used in judicial proceedings.

The Court considered in detail various cases cited (including *Rose v The King*)[29] and concluded that they did not clearly resolve the admissibility issue.

The conclusion of the Court of Appeal was that

> Inviolability involves the placing of a protective ring around the ambassador, the embassy and its archives and documents which neither the receiving state nor the courts of the receiving state may lawfully penetrate. If, however, a relevant document has found its way into the hands of a third party, even in consequence of a breach of inviolability, it is prima facie admissible in evidence. The concept of inviolability has no relevance where no attempt is being made to exercise *compulsion* against the embassy. Inviolability, like other diplomatic immunities, is a defence against an attempt to exercise state power and nothing more.[30]

The Court further held that the view that inviolability of archives and communications implied inadmissibility was inconsistent with the central object and purpose of the immunities in the Convention which was 'to ensure the efficient performance of the functions of the diplomatic mission'. Where a document had already been disclosed the damage had already been done and it made no sense for a party who had no responsibility for the disclosure to be precluded from using it in legal proceedings. It was also relevant that the US Government had not objected to the use of the cable in the proceedings.

Comment on the *Bancoult* Case

Since the Court of Appeal, along with the Divisional Court, found on the basis of other evidence that the Secretary of State was not influenced by an improper motive, there was no incentive for either side to appeal on the question of the admissibility of the leaked

[29] [1947] 3 DLR 618. The case is discussed above at p 157.
[30] Para 58.

cable. The reasoning favoured, or relied on by the Court of Appeal does, however, have important implications for the general protection available to archives, documents and communications of a diplomatic mission.

The Vienna Conventions on Diplomatic and Consular Relations were drawn up at a time when electronic communications between a State and its diplomatic and consular missions abroad were not as general as they have since become. They were, however, developing fast, and it was clear that the negotiators of both Conventions sought to ensure that protection of the confidentiality of records communications would not depend on the use of methods already in existence. Since a diplomatic mission has no legal personality, its archives and documents belong at all times to the sending State, as was pointed out above. The seamless protection of confidentiality of archives and documents is also emphasized by the fact that in transmission they are also protected as official correspondence of the mission under Article 27.2 of the Convention. Article 40.3 requires third States to accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. It is this triple protection of the confidentiality of archives, documents, correspondence, and communications which ensures that diplomatic missions and their staff provide to all sending States a clear advantage over press reporting.

Under modern practice a record or memorandum generated within a diplomatic mission will usually be transmitted electronically to the government of the sending State and often to other missions of that State. The proposition that once this has occurred, the document 'becomes the property of the sending State' and that on leaving the territorial jurisdiction its status lapses so that that Articles 24 and 27 are no longer engaged and the Convention no longer applies would annihilate entirely the protection intended to be given by those Articles.

It is true that the receiving State is not responsible for protecting copies of a document in other jurisdictions. But this does not mean that a copy which is physically present (whether or not it has been electronically transmitted out of the jurisdiction) has ceased to be an archive or document of the mission. This was clearly explained by Professor (later Judge) Higgins in the passage cited to the Court of Appeal where she said:

> It is true that an English court is not likely to be in a position to enforce the inviolability of a document from the authorities of another country where that particular document happens to be located. But it is entirely another thing to say that, because a document happens to be outside the jurisdiction, an English court is thereby entitled to treat it, in matters that do fall within its own competence, as non-archival and thus without benefit of such inviolability as it is in a position to bestow.[31]

It is unfortunate that the Court of Appeal saw 'considerable force' in the approach which would truncate the inviolability of diplomatic archives and documents as soon as they are transmitted in electronic form to the government of the sending State and thus in some sense leave the territory of the receiving State. The Court, however, did not express a concluded view on the argument. It therefore remains possible to maintain that the words 'wherever they may be' in Article 24 must be construed to include cyberspace as well as computer storage facilities outside the receiving State if the protection of confidentiality

[31] *Problems and Process: International Law and How We Use It* (1994), cited in para 27 of the Court of Appeal Judgment.

required by Article 24 is to be effective under modern methods of recording and transmitting information. It seems clear that this is required in order to give proper effect to Article 24 as was intended by the original Parties.

As to the proposition that the term 'inviolability' implies only protection from interference by the authorities of the receiving State, so that a document in the hands of a third party, even in consequence of a breach of inviolability, is *prima facie* admissible in evidence, the Court of Appeal correctly pointed out that most of the cases cited did not directly address this point. The Court, however, relied heavily on the statement by Dr Mann that inviolability 'simply means freedom from official interference. Official correspondence of the mission over the removal of which the receiving state has had no control can, as has been submitted above, be freely used in judicial proceedings.' Dr Mann, however, while citing with approval the definition of inviolability suggested by Professor Clive Parry, in his own definition totally ignores the element of a 'special duty of protection, whether from such interferences or from mere insult, on the part of the receiving state'. Inviolability—whether of diplomatic premises, diplomatic agents, or of archives, documents, and communications—clearly also comprises this duty of protection from intrusion, detention, injury, insult, or breach of confidentiality by third parties. It is under this head that the general obligation of courts to regard as *prima facie* inadmissible documents not disclosed by or on behalf of the sending State must be examined. The conclusion of the Court of Appeal[32] that 'The concept of inviolability has no relevance where no attempt is being made to exercise *compulsion* against the embassy. Inviolability, like other diplomatic immunities is a defence against an attempt to exercise state power and nothing more' ignores entirely the protective aspect of inviolability and is potentially greatly damaging to the application of the concept in many contexts throughout the Convention.

It is also at odds with those earlier cases where the document was not obtained by coercion of any sort on the part of the receiving State. The Court quoted Bissonnette J in the *Rose* case emphasizing the absence of protest in that case either by the sending State (the Soviet Union) or the receiving State (Canada), but it did not quote his starting point which was that

> International law creates a presumption that documents coming from an Embassy have a diplomatic character and that every Court of Justice must refuse to acknowledge jurisdiction or competence in regard to them.

Nor did the Court of Appeal take into account that the International Law Commission deliberately chose to confer 'inviolability' on diplomatic archives to convey both that the receiving State must abstain from any interference through its own authorities and that it owed a duty of protection of the archives in respect of unauthorized interference by others.[33] It did not discuss the case of *Fayed v Al-Tajir*[34] where the relevant document had not been obtained by the authorities of the receiving State but disclosed voluntarily during discovery, but was nevertheless held to be absolutely privileged. It did cite the conclusion of Lord Bridge in *Shearson Lehman* who expressly dismissed the argument that

[32] Para 58 of the Judgment.
[33] ILC Yearbook 1957 vol II p 137, Commentary on draft Art 18.
[34] [1988] 1 QB 712, [1987] 2 All ER 396, 86 ILR 131, described above.

inviolability connoted only protection from interference by the receiving State, but chose to differ from his view on the ground that the finding was not part of the ratio in that case.

The Court of Appeal, however, in allowing admissibility of the leaked cable placed reliance on two other factors where its views are more persuasive. The first was that the damage to the confidentiality of the documents had already been done by their disclosure by a third party for which the party which wished to adduce the evidence had no responsibility. It may be argued that it should not be relevant whether the party seeking to admit the evidence bears no responsibility for the initial disclosure, since the inviolability given to archives is entirely for the protection of the confidentiality of mission records. There is, however, more force in the argument that there is no longer any confidentiality to protect, although it will not always be the case that admission as evidence in court of a leaked document, even where widely circulated, causes no further damage to the sending State. In an era where leaking is increasingly common and is in some circles applauded as contributing to freedom of information, governments may well take the view that admitting a document as evidence in court compounds the original breach of trust and acts as an encouragement to other potential leakers.

The Court also placed importance on the fact that the US Government had not objected to the use of the cable in the proceedings. If this failure to intervene or to assert inadmissibility was deliberate, it would bring the case squarely within the ratio of the *Shearson Lehman* case—the document ceased to be archival because its confidentiality was in effect waived by disclosure with the express or implied authority of the US Government whose archive it was. The case was of course unusual in that it was not the sending State which had the primary substantive interest in withholding the document from the court but the receiving State, the UK.

The Court allowed the appeal on admissibility 'on the narrow basis that admitting the cable in evidence in the instant case did not violate the archive and documents of the US mission since it had already been disclosed to the world by a third party'.[35]

Confining the ratio of the decision on admissibility to these grounds would be much less damaging to the protection given by Article 24 of the Convention than the much wider proposition that the term inviolability does not cover inadmissibility unless some organ of the sending State was responsible for the initial violation. The wider proposition would substantially reduce the protection available under Article 24.[36]

[35] Para 65.

[36] For analysis of the issues and modern practice, see Duquet and Wouters (2015b).

FACILITIES FOR THE MISSION

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

It was the modern practice in virtually all States that the government of a receiving State would if requested provide administrative assistance to a diplomatic mission on such matters as securing suitable accommodation and parking facilities and would refrain from imposing obstacles to its legitimate activities. This was, however, regarded as a matter of comity or of effective diplomacy rather than a specific rule of customary international law. The question of premises and accommodation is now dealt with by Article 21 of the Convention.

Article 25 originated as the introduction to a redraft by the Special Rapporteur of the Article on communications, which the International Law Commission believed would be more appropriate as a separate provision.[1] In commenting on the 1957 draft articles of the Commission, the US Government observed that some indication should be given as to the scope and meaning of the words 'full facilities'. In response the Special Rapporteur listed examples of assistance which a receiving State might be expected to give—arranging for permits or licences for building work or for installation of telephones if new premises were being built for a mission, assisting the mission in obtaining access to sources of information or in organizing study trips. He emphasized that the list was subject to the reasonableness of the request, and the International Law Commission in its Commentary on the 1958 draft articles also said: 'It is assumed that requests for assistance will be kept within reasonable limits.'[2] The article was adopted without comment by the Vienna Conference.

Subsequent practice

A clear analysis of the obligation under Article 25 was given by the German Federal Administrative Court in 1971 in the *Parking Privileges for Diplomats Case.*[3] Proceedings were brought against a local road traffic authority challenging the legal basis for a parking prohibition sign outside a diplomatic mission. The prohibition could not be justified under domestic traffic control legislation and the issue for the court was therefore whether Article 25 of the Convention or customary international law imposed an obligation to give special parking privileges on the public highway to diplomatic missions and their staff. The Federal Administrative Court held that they did not. Of Article 25 the court said:

This provision enshrines the fundamental and old-established basic norm for diplomatic missions of *ne impediatur legatio.* It is not, however, a 'blanket' norm requiring the receiving State to take all

[1] *ILC Yearbook* 1957 vol I pp 74–5.

[2] UN Docs A/CN 4/114 p 62 (comment on Art 19); A/CN 4/116 p 43; *ILC Yearbook* 1958 vol II p 96 (Commentary on draft Art 23).

[3] 70 ILR 396.

those measures which it considers to be opportune, but merely requires that State to grant to diplomatic missions all facilities that are possible and permissible within the framework of its legal system. If Article 25 were given the meaning assigned to it by the defendant and the representative of the public interest, it could lead to a far-reaching suspension of the municipal legal system for the benefit of diplomatic missions.

The Federal Administrative Court went on to consider, in the light of a letter from the Foreign Ministry and evidence of practice in a number of other capitals, whether independently of Article 25 there might be a rule of customary international law requiring provision of parking places for diplomatic missions on the public highway. That court was not entitled to make a final determination that such a rule existed or to decide whether it directly created rights and duties for the individual, since the Basic Law of the Federal Republic required a decision from the Federal Constitutional Court in the event of doubt. The Federal Administrative Court held, however, that there was 'no serious doubt' that provision of parking facilities for diplomatic missions was a matter of courtesy only and was not required by customary international law.

The Legal Counsel to the United Nations, on the other hand, expressed the opinion that Article 25 did impose an obligation on the host State to attempt to resolve problems for diplomatic and UN missions arising from the Parking Programme administered by the authorities in New York. Non-renewal of the diplomatic number plates of persistent parking offenders (leaving each mission with at least one vehicle with diplomatic number plates) was, however, a permissible measure.[4]

In the case of *Alcom v Republic of Colombia*,[5] already discussed in the context of Article 22, the House of Lords drew some support from Article 25 in deciding that international law required immunity from execution to be accorded to the current account of a diplomatic mission used to defray running expenses of the mission. Having cited Article 25, Lord Diplock commented: 'Transposed into its negative form: neither the executive nor the legal branch of government in the receiving State, and enforcement of judgments of courts of law is a combined operation of both these branches, must act in such manner as to obstruct the mission in carrying out its functions.' Article 25 was not, however, among those scheduled to the UK Diplomatic Privileges Act, on the basis that it required no specific derogation from the ordinary law of the United Kingdom, and so it was not on its own sufficient to compel the House of Lords in the *Alcom* case to the conclusion that the State Immunity Act 1978 must be construed in such a way as to except embassy bank accounts from its provisions on execution of judgments. When a similar issue arose in the United States in 1987 in the case of *Liberian Eastern Timber Corporation (LETCO) v Liberia*, the District Court, District of Columbia, placed greater reliance on Article 25, saying that:

If the 'full facilities' to which the United States agreed to 'accord' diplomatic immunity did not include bank accounts off the premises of the mission, the Liberian Embassy either would have to take grossly inconvenient measures, such as issuing only checks drawn on a Liberian bank, or would have to run the risk that judgment creditors of Liberia would cause the accounts the embassy holds at banks located in the United States to be seized for an indefinite period of time, severely hampering the performance of the Embassy's diplomatic functions.[6]

[4] 2003 AJIL 190.
[5] [1984] AC 580; [1984] 2 All ER 6; [1984] 2 WLR 750; 74 ILR 170.
[6] 89 ILR 360 at 363.

In 2010, JP Morgan Chase, which provided banking services to many diplomatic missions in Washington and New York, advised many of those clients that it would cease to provide these services in March 2011, and the Bank of America and other major banks also terminated a number of diplomatic accounts. It was believed that this reflected the commercial risks associated with US laws on money laundering and terrorism. The US Department of the Treasury offered assistance to missions, but emphasized that the banks were not government directed, and that the termination of accounts was a commercial decision for the banks.[7]

Article 25 therefore is usually invoked in order to lend additional weight to a diplomatic claim or protest based on a more specific provision. It does not entitle a mission to any specific privilege not otherwise granted by the Convention, by international law or by the national law of the receiving State. It confers no automatic exemption from local laws on planning control or licensing—and this is reinforced by the duty imposed by Article 41 of the Convention on all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State. Nor does Article 25 entitle the mission to provision of any services free of charge. If, for example, the mission fails to pay bills for water or for telephone services, provision of these services may be withheld on the same basis as is permitted in regard to other customers. In some capitals there has been reluctance to cut a diplomatic mission's last telephone line so that it cannot receive incoming calls—but such courtesy is not required by Article 25.

The United States have not regarded Article 25 as precluding them from making a determination that persistent violations of traffic laws and regulations by a member of a mission may 'indicate a flagrant disregard for the laws of the United States' and that the culprit should no longer be entitled to the privilege of driving an automobile within that country. In the most recent Diplomatic Note circulated on 24 February 2004 to heads of mission, the Secretary of State said:

> The Chiefs of Mission are reminded that the Department's traffic violations policy is based on the principle that persons enjoying privileges and immunities in the United States are nevertheless obliged to respect United States laws and regulations. The policy further rests on the principle that the operation of a motor vehicle in the United States is not a right, but a privilege that may be withdrawn in cases of abuse.

Tickets issued for violations of parking or driving laws are recorded by the Diplomatic Motor Vehicle Office under an elaborate points system which may in the most serious cases lead to suspension of the driver's licence. Where there is a suspension, the embassy is asked to guarantee that the alleged offender will not drive for the duration of the suspension. Members of mission and family members are expected to secure necessary waivers and to contest citations which they believe were issued unjustly. In the case of serious violations such as reckless driving and driving under the influence of alcohol or drugs, the State Department will formally request waiver of immunity. If a waiver is declined, it is State Department policy to require the alleged offender to be withdrawn from the United States.[8]

[7] 2011 AJIL 342–4.

[8] State Department Circular Notes to chiefs of mission at Washington of 2 July 1984 and 17 December 1984, described in 1985 AJIL 1048, and of 22 December 1993; *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States* 6.4; Diplomatic Note No 04–38 of 24 February 2004.

Belgium and The Netherlands have followed the example of the US—but to the limited extent of withholding diplomatic licence plates from persistently offending missions rather than the more draconian step of suspending driving licences.[9]

Article 25 is therefore of little use to a sending State if the receiving State is determined to be obstructive or unfriendly, and where relations between the two States are good the existence of this obligation is hardly necessary. As can be seen from the measures taken by the United States in particular, it does not present an obstacle to requiring members of diplomatic mission to enjoy their facilities in conformity with local laws and regulations.

[9] Duquet and Wouters (2015a) p 25.

FREEDOM OF MOVEMENT

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Freedom to travel throughout the territory of the receiving State is an essential facility to enable diplomatic agents to exercise two of their most important functions—protection of the nationals of the sending State and reporting to their government on conditions and developments in the receiving State. It has not, however, been a privilege readily accorded by closed societies. In the eleventh century, when systematic diplomacy was carried out only by Byzantium, envoys received there were met at the frontier, escorted to the capital by a route chosen to impress them with Byzantine military might and on arrival immured in a special fortress where their entertainment was confined to watching endless military reviews.[1] In the sixteenth century, the State of Muscovy followed this style of receiving diplomats—envoys were lodged under armed guard outside Moscow, their food and other necessities were supplied in order to prevent contact with the outside world, and they were supervised when travelling through the Tsar's dominions.[2] China from the period of the Manchu dynasty required all aliens to obtain permits in order to travel within the country, and no exceptions were made for diplomats.[3]

Among those European States where the laws and practices of modern diplomacy were developed, however, freedom of movement for diplomats was generally accepted. This may have resulted from the fact that few restrictions of any sort were placed on the movement of aliens until the twentieth century and that States did not in general have sufficient police resources to supervise any alternative. The question of any entitlement of an envoy under customary international law to freedom of movement was not really put to the test.

After the Second World War the Soviet Union limited travel by members of diplomatic missions in Moscow to fifty kilometres from the capital. Permission had to be sought for specified journeys beyond these limits. This was usually granted, perhaps after bureaucratic delays, and the traveller was then subjected to police surveillance. Other East European States, Hungary, Romania, and Bulgaria, followed suit. The United Kingdom, the United States, Canada, Belgium, France, The Netherlands, Greece, and Italy retaliated by imposing precisely reciprocal restrictions on members of the missions of the States concerned.[4] Wilson describes numerous cases of detention of diplomats in Communist States during the early years of the Cold War on grounds of transgressing in forbidden

[1] Hill (1905) vol I p 39; Nicolson (1954) p 25; Nys (1884) p 31; Young (1964) at p 144.
[2] Grzybowski (1981) at p 47.
[3] Lee (1991) p 429.
[4] Perrenoud (1953); Cahier (1962) p 149; Lyons (1954) at p 331.

zones, which he saw as 'a modern version of the Byzantine school of diplomacy'. As he observed:

> Communist officials do not consider it in their national interest to permit unlimited prowling through their territory by diplomats and staff members, perhaps justifiably so in many cases.[5]

The legality of these various restrictions and counter-restrictions was examined in 1953 by Perrenoud, who concluded that the original unilateral restrictions probably violated customary international law in that they prevented a diplomat from exercising all but one of his classical functions—he could not represent the sending State in the prohibited areas, he could not observe and report satisfactorily on large areas of the receiving State which might be of considerable economic and political importance, nor could he effectively extend protection to nationals of the sending State who might require assistance. The counter-restrictions on the other hand could be justified as reprisals if the original restrictions were in violation of international law, or as retorsion if they were not.

The proposal to include among the draft articles a special provision according freedom of movement to members of the mission originated with Sir Gerald Fitzmaurice. He maintained that thirty years previously such a provision would not have been needed, since traditionally members of missions had enjoyed freedom of movement within the receiving State, subject to minor exceptions for zones prohibited on strategic grounds. The proposal was strongly opposed by Mr Tunkin of the Soviet Union, who declared that most countries in accordance with their legal rights laid down regulations respecting movement of members of diplomatic missions in the light of security considerations, and stressed the importance of the Commission producing a text capable of acceptance and application by States. The great majority of the Commission accepted that specific provision was desirable, that exception should be made in regard to zones of military significance, but that the right to except such zones must not be abused in such a way as to nullify the purpose of the Article. The Article approved by the Commission was identical to the text of Article 26 of the Convention, and the Commentary included the important sentence: 'The establishment of prohibited zones must not, on the other hand, be so extensive as to render freedom of movement and travel illusory.'[6]

Subsequently, some States doubted whether the International Law Commission's formulation was adequate to make illegal the practices begun by East European countries. The Netherlands in its comments on the draft articles of 1957 and 1958[7] and the Philippines at the Vienna Conference[8] sought unsuccessfully to incorporate into the text of the article the sentence quoted above from the Commission's Commentary. The Soviet Union found the Commission's text to be an acceptable compromise—suggesting by implication that it did not believe it would thereby be required to alter its existing practices. The Conference, like the Commission, was unwilling to stir up dissension by disturbing the text. The Philippines withdrew its amendment on the understanding, also expressed in clear terms by the UK representative, that any restrictions imposed on freedom of movement should not be so extensive as to render freedom of movement

[5] Wilson (1967) pp 64–72. See also comment in Goldsmith and Posner (2005) at p 58, that 'the communist states suffered more than noncommunist states from enforcement of the traditional customary law of diplomatic immunity, because in a closed society ordinary observation is more damaging than in an open society'.

[6] *ILC Yearbook* 1957 vol I pp 85–6; vol II p 137 (Art 20).

[7] UN Docs A/CN 114 Add. 1 p 15 (comment on Art 20); A/4164 p 18 (comment on Art 24).

[8] UN Docs A/Conf. 20/C1/L 141; A/Conf. 20/14 pp 150–2.

illusory. The UK representative also stressed that a State which abused the permitted exception in this article would also violate Article 25 by denying a basic facility for the fulfilment of the functions of the mission.[9]

Subsequent practice left some doubt as to the legal position. The Soviet Union and other Communist States ratified the Convention without any reservation to Article 26, but continued their practice of barring large areas of their territory to members of diplomatic missions who had not obtained special permission. Other States Parties did not protest that this conduct was in violation of the Convention, but maintained their own reciprocal restrictions on the basis that they were justified under Article 47. Article 47 does not permit reprisals—actual derogation from the terms of the Convention in response to a derogation by another Contracting Party—but does permit a receiving State to discriminate by applying a provision restrictively where there is a 'restrictive application of that provision to its mission in the sending State'. Failure to protest thus suggests that extensive control of access by diplomats to areas of national territory outside the capital has been accepted not as a violation of Article 26 but as a 'restrictive application' for which the appropriate countermeasure is a reciprocal form of control of movement.[10]

The position in regard to Article 34 of the Vienna Convention on Consular Relations is very similar—apparent guarantees of unrestricted freedom of movement for consuls and the staff of consular posts have not been effectively implemented. In a Note from the US Department of State to the Soviet Embassy which is quoted by Lee,[11] the US Government 'wishes to emphasize again that its firm preference is to abolish all restrictions on free travel', but the substance of the Note is concerned with the detail of reciprocal restrictions and not with any charge of violation of either the Diplomatic or the Consular Convention. The United States, according to a summary of travel restrictions set out by Lee,[12] maintained in the late 1980s restrictions on the Embassies of Afghanistan, Bulgaria, China, Czechoslovakia, German Democratic Republic, Poland, and the Soviet Union. By 1997 only four missions were required to notify proposed travel arrangements and diplomats from the Cuban Interests Section and the Iraqi Interests Section of the respective protecting powers were required to await permission before travelling.[13]

The United Kingdom at this period also imposed reciprocal restrictions on diplomats of the Soviet Union, China, Vietnam, and Mongolia, but not on diplomats of all States which restricted the movement of UK representatives. Diplomats from restricted States were required under the travel notification scheme to give at least two working days' notice of their intention to travel beyond a thirty-five mile radius of the centre of London. As a mirror of the restrictions imposed by the Soviet Union, the Soviet Ambassador, his family, personal interpreter, and personal driver were permitted to travel within the United Kingdom without prior notification.[14] Article 26 is not among those set out in Schedule 1 to the Diplomatic Privileges Act 1964, on the basis that no derogation from

[9] For discussion in the 6th Committee of the GA and at the Conference, see Bruns (2014) pp 25, 45, and 121.

[10] See Lecaros (1984) p 151; Salmon (1994) para 469.

[11] (1991) pp 430–1.

[12] Ibid pp 432–4.

[13] State Department information. For the current position on consular freedom of movement, see Lee and Quigley (2008) pp 394–7.

[14] Hansard HC Debs vol 906 WA col 133.

UK law is required to confer freedom of movement throughout the territory with the exception of the few places to which access is generally forbidden under the Official Secrets Acts 1911–89.[15] Restrictions were supervised by the police, but had no basis in domestic law, and the only sanction available for any unauthorized journey would be a declaration of *persona non grata*.

Germany applied similar restrictions on freedom of movement on a basis of reciprocity, and also took the position that notification of travel could be requested to ensure that adequate security protection was accorded to members of diplomatic missions. It was, however, essential that such a procedure should not be regarded as seeking permission for a journey.[16] Belgium restricted only diplomats of the Soviet Union and Romania and later only those of the Soviet Union.[17] The Netherlands limited freedom of movement of Soviet diplomats, but in a reply to a written question in Parliament, the Minister for Foreign Affairs said that: 'There is in fact a marked imbalance, and were we to apply the principle of strict reciprocity, it would call for a considerable tightening of the present regulations for Soviet officials in The Netherlands.' The reply, while making it clear that a reciprocal lifting would be welcome, did not suggest that the Soviet restrictions were contrary to Article 26 of the Convention.[18]

With the end of the Cold War and practical implementation of commitments first assumed in 1975 under the Helsinki Accords, these restrictions gradually withered away. In 1992, for example, the Governments of the Ukraine and the United Kingdom announced that they would:

> accord to all members of the diplomatic missions of one side unrestricted freedom to travel throughout the territory of the other side: prior authorisation or notification of travel will not be required, and limitations and prohibitions on access will apply only to specific installations or military bases as well as to other areas closed to the public.

The Ukraine also recorded its willingness to accord on a reciprocal basis the same rights to members of the diplomatic missions of the other Member States of the European Union.[19] Specific restrictions on diplomatic movement are no longer applied by the United Kingdom, although their withdrawal appears to have been gradual and unannounced.[20]

In other capitals, including Washington, it seems that any restrictions applied are extremely limited, and the missions affected are normally not publicly disclosed. Since as explained above they have no formal basis either in Article 26 of the Convention or in domestic laws, this reticence makes it easy both to apply and also to withdraw them. In 2014, however, the US State Department stated publicly that it had imposed a twenty-five-mile travel restriction on the movement of the Syrian Permanent Representative to the UN and the staff of the delegation.[21]

Syria itself in July 2011, early in the armed insurrection, banned foreign diplomats from travel outside Damascus without authorization, and required even authorized travel

[15] 1911 c 28, 1920 c 75, 1939 c 121, 1989 c 6.
[16] Richtsteig (1994) pp 54–5.
[17] Salmon (1994) para 462.
[18] 1980 NYIL 219.
[19] Joint Press Release of 15 September 1992, printed in 1992 BYIL 685.
[20] Information from Protocol Department, Foreign and Commonwealth Office.
[21] State Department Note of 7 March 2014.

to be by air, so restricting opportunities for observing conditions outside the capital and speaking with Syrian people. Permission was refused for the UK Defence Attaché to travel in order to lead a Remembrance Day Service in Aleppo in November 2011 and although the UK Ambassador was in the event permitted to go in his place, the UK Government protested at the breach of the right to freedom of movement.[22]

[22] *The Times*, November 2011.

FREEDOM OF COMMUNICATION

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However the mission may install and use a wireless transmitter only with the consent of the receiving State.

...

Free and secret communication between a diplomatic mission and its sending government is from the point of view of its effective operation probably the most important of all the privileges and immunities accorded under international diplomatic law. Without such a right of free communication the mission cannot effectively carry out two of its most important functions—negotiating with the government of the receiving State and reporting to the government of the sending State on conditions and developments in the receiving State. If the confidentiality of the communications of the mission could not be relied on, they would have little advantage over press reporting.[1]

The inviolability of the couriers and dispatches of a diplomatic envoy was established in theory by the sixteenth century. But whereas in regard to the personal inviolability of ambassadors the practice of States was more protective than the opinions of the writers, the reverse was true in regard to communications. The temptation for States to intercept the communications between other States and their diplomatic missions has always been strong, and the possibility of doing this while escaping detection has increased with the greater sophistication of modern methods of detection. Vattel argued that the principle of inviolability of communications admitted of exception where the ambassador, by conspiring against the receiving State, had himself broken international law.[2] The difficulty in this approach was, however, that the breach usually became clear only as a result of the unlawful interception. In practice, governments whose interception was detected blamed a junior official wherever possible and otherwise apologized.[3] Adair recounts that during the English Civil War frequent interceptions of diplomatic dispatches were authorized by Parliament. The Portuguese envoy, knowing that his correspondence had been tampered with, sought his revenge by sending a packet containing an old newssheet, a figure of a man hanged, and several pairs of spectacles to assist the English parliamentary

[1] In 1920, before the United Kingdom had recognized the Government of the Soviet Union, the Russian delegation which came to the United Kingdom to negotiate a trade agreement requested and were accorded only the following privileges: '1. The right to enter and leave England freely; 2. The right of postal, telegraphic and wireless communication, if necessary in cypher, with Moscow, Copenhagen and Soviet representatives in other places; 3. The right to send couriers to and from Russia, Copenhagen and wherever else the Soviet representative may be; 4. The right to send des-patch bags under seal.' Law Officers' Reports 1920 No 9 (N 3274).

[2] (1758) IV.IX para 123. See also Martens-Geffcken (1866) p 80.

[3] Adair (1929) pp 170–6; Genet (1931) vol I p 509; Martens (1827) vol I p 329.

commissioners to decipher this valuable information. Parliament responded to the joke by ordering his immediate deportation.[4]

In modern practice it was rare even during wartime for States maintaining diplomatic relations to block or overtly to claim the right to censor diplomatic communications. During the siege of Paris by the Germans in 1870 Bismarck permitted envoys in Paris to send couriers to their sending States only if their dispatches were open—a decision which met with protest from the States concerned. The United Kingdom during the First World War and for a brief period from April 1944 before the Allied invasion prohibited missions in London from dispatching telegrams in cipher, though not from sending diplomatic bags.[5] Israel restricted secret diplomatic communications during the hostilities of 1948 to 1949.[6] South Vietnam for a few days in 1963 refused to permit transmission of diplomatic messages in code and asked that they be submitted *en clair* to the national censor—a request which met with strong protest from all missions in Saigon.[7]

Twentieth-century codifications, such as the 1927 project of the International Commission of American Jurists[8] and the 1928 Havana Convention on Diplomatic Agents,[9] provided for the inviolability of diplomatic correspondence and the right of free communication with the sending government. Article 14 of the 1932 Harvard Draft Convention gave extensive rights of communication by all available means covering not only communications with the sending government, but also with other diplomatic missions in the same State, with international organizations, and with nationals of the sending State within the territory of the receiving State. This last privilege in particular was not then based on established practice.[10]

Negotiating history

The general principle of free communication by a diplomatic mission for all official purposes was accepted with virtually no controversy by the International Law Commission and the Vienna Conference. The negotiating history makes clear that the right of free communication is unrestricted as to the recipients of any communications from a mission and extends not only to exchanges with the sending government but also, as in the Harvard Draft Convention, to communication with international organizations, with missions and consulates of other States, and with nationals of the sending State wherever present.[11] The right to use 'all appropriate means, including diplomatic couriers and messages in code or cipher' is on the other hand restricted by the terms of the second sentence of Article 27.1 to communication with the sending government and its missions and consulates wherever situated. The use of diplomatic couriers other than to carry

[4] (1929) p 175; Satow (5th edn 1979) para 14.28.

[5] SR & O 1944 No 347 (vol II p 344); Lyons (1954) pp 334–7. Other examples of exceptional wartime restrictions on diplomatic communications are given in Lee (1991) pp 440–2.

[6] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 180.

[7] 1964 RGDIP 219.

[8] Arts 19 and 20, 1927:26 AJIL (1932 Supp) 173.

[9] Ibid p 176, Arts 14 and 15.

[10] 26 AJIL (1932 Supp) 79–85; Denza, 'Diplomatic Privileges and Immunities' in Grant and Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein, 2007) at pp 166–7.

[11] *ILC Yearbook* 1957 vol I pp 75–6, vol II pp 137–8. See on this point Seyersted (1970) at pp 207–12.

communications between different agencies of the same government could hardly be regarded as 'appropriate'. Written messages from the mission would, however, be entitled to inviolability either as archives or as correspondence of the mission while in transit to the intended recipient, so that the receiving State would in any event not be entitled to inspect them in order to verify whether or not they were in code or cipher. It is clear that the words 'all appropriate means' were intended to and have been applied so as to include methods of communication such as fax and electronic mail which were not in use when the Vienna Convention was drawn up but which have since become standard.

The particular question of wireless transmitters, however, caused a great deal of controversy at the Vienna Conference. It became apparent during the debates in the International Law Commission that different States had adopted different approaches to the question of transmitters. On the one hand Sir Gerald Fitzmaurice argued that:

> 'Diplomatic wireless', as it was now called, was now quasi-universal and had virtually superseded other means of transmitting messages. If the Commission wished to codify established practice, there was a good case for openly admitting the practice of using private transmitters and regulating the procedure for their use. He was by no means sure that the operation of wireless transmitters was always conditional on the consent of the receiving State. The principle of the inviolability of missions made it very difficult for receiving States to prevent the use of transmitters.

The majority of members of the Commission on the other hand did not agree and voted to include in the Commentary to the draft article the statement that the mission wishing to make use of a private transmitter: 'must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. If the regulations applicable to all users of such communications are observed, such permission should not be refused.'[12]

The UK Government took strong exception to this passage. They had not previously required either specific permission or licences for the operation of diplomatic wireless by foreign missions in the United Kingdom and they maintained that their practice reflected the unqualified right of free communication set out in the text of the Commission's draft article. The provisions in the Telecommunications Conventions were not to be interpreted as requiring a sending State to seek the permission of the receiving State before establishing, receiving, or transmitting apparatus in its own mission.[13]

At the Vienna Conference the UK position was supported by most of the more highly developed States who already made extensive use of diplomatic wireless. The UK representative stressed that foreign missions in London and UK missions abroad accepted a moral obligation to co-operate with the local authorities in order to avoid any possibility of harmful interference, and said that no such difficulty had in practice occurred. Representatives of other States, however, expressed anxiety that States would be unable to exercise their supervisory functions under the International Telecommunication Convention if missions on their territory could use wireless without control by the receiving State. Although it was pointed out that diplomatic wireless transmitters were quite unsuitable for broadcasting to listeners in the receiving State, the fear remained that transmitters might be used for propaganda or for intervention in that State's internal affairs. A more fundamental reason for opposition to the principle of unrestricted

[12] *ILC Yearbook* 1957 vol I pp 76–7, vol II p 138.
[13] UN Doc A/4164 p 32.

diplomatic wireless was that such a provision would benefit only the richer States and that there would be no real reciprocity. As the representative of Iran explained:

> It was easy for highly industrialized States to instal radio transmitters as and when they pleased, and consequently they naturally upheld the principle of the free use of transmitters; but less favoured States were in a very different position. At the Conference on the Law of the Sea, the great Powers had defended Grotius' principle of the freedom of the seas, while the smaller States had argued for an extension of territorial waters. The attitude of the great Powers was perfectly understandable, for they had large fleets for which the freedom of the seas had obvious advantages.[14]

In the light of this discussion, Argentina, India, Indonesia, and the United Arab Republic proposed to add to the text: 'However, the mission may instal and use a wireless transmitter only with the consent of the receiving State and after making proper arrangements for its use in accordance with the laws of the receiving State and international regulations.' In spite of the opposition of developed States this amendment was adopted by the Committee of the Whole. A UK compromise which would have limited use of wireless to communications between the sending State and its missions or consulates, required notification of installation, and provided that the application of international telecommunications regulations would not be prejudiced, was not voted on.[15]

Before the plenary session of the Conference, however, there was a move towards compromise. All the major States had opposed the text adopted by the Committee of the Whole and in view of the uncertainty of customary law on the matter it was obviously important to secure agreement on a text likely to be accepted by those States. The text put forward as a fourteen Power amendment, which became the text of the final sentence of Article 27.1, required the consent of the receiving State for installation and use of a transmitter, but could be construed so that tacit consent was sufficient—where, for example, the sending State already operated diplomatic wireless with the knowledge of the receiving State. The amendment also omitted those additional words which would have spelt out subjection of the mission in this regard to local laws and procedures, possibly including a duty to submit to inspection.[16]

Subsequent practice

Missions which are given permission to install and operate a transmitter are nevertheless not entitled to disregard local laws and regulations. Paragraphs 1 and 3 of Article 41 of the Vienna Convention impose a duty to respect those laws, and permission may be made conditional on compliance, although this cannot be enforced by inspection of transmitters on mission premises or by legal proceedings against mission staff entitled to immunity. Some of the practical problems emerge from guidance given in 1978 by the US Department of State in the context of approval of a request by Senegal to install and operate a radio transmitter/receiver. These problems include interference with other US users, interference with other embassy radio facilities and visual obstruction by antennae. The

[14] UN Doc A/Conf. 20/14 pp 154–64.

[15] UN Docs A/Conf. 20/C 1/L 264 and L 291; A/Conf./20/14 p 180.

[16] UN Docs A/Conf. 20/L 15 and Add 1; A/Conf. 20/14 p 17; Kerley (1962) pp 111–16. Bruns (2014) pp 61, 138–42, 174–5.

State Department suggested various measures of co-operation to minimize these difficulties.[17]

The UK Government continued its previous practice of not requiring missions to seek express permission or even to notify its authorities on installing a transmitter. Article 27, as pointed out above, does not preclude the receiving State from giving implied or general consent to the operation of diplomatic wireless transmitters in its territory. The United Kingdom also took the position, consistently with its practice of not requiring consent, that the sending State was responsible for applying the provisions of the International Telecommunication Conventions. The successive Conventions make clear that States Parties must apply the Convention and Regulations to 'all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries'.[18] There is in these Conventions specific exemption for States Parties in respect of the military radio installations of their army, naval, and air forces, but there is no specific exemption for diplomatic installations.

The United States, on the other hand, does require express authorization for diplomatic missions to operate transmitters. In a Memorandum of Understanding signed in March 1991 between the United States and Albania, the two Governments in the context of provision of necessary assistance for the performance of the functions of diplomatic missions give 'consent to the use of wireless transmitters including the use of satellite links, by the respective Embassies for purposes of official communication'.[19] The United States also took the position that it was required by paragraph 2 of the provisions in the ITU Conventions to 'take the necessary steps to impose the observance of the provisions' of the Convention on missions as 'private operating agencies authorized by them to establish and operate telecommunications'. The United States has consistently registered with the ITU the frequencies agreed with diplomatic missions in Washington. This position was difficult to reconcile with the definition of 'private operating agency' in Annex 2 to the 1985 Nairobi International Telecommunication Convention (and earlier Conventions) which expressly excluded 'a governmental establishment or agency'. The 1992 Geneva ITU Constitution and Convention, however, no longer distinguish between private and government agencies, and the definition of 'Recognized Operating Agency' in the Annex to the ITU Constitution includes:

> Any operating agency, as defined above, which operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 6 of this Constitution are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunications service in its territory.

[17] 1978 DUSPIL 558. For Belgian reaction to a large antenna on the roof of the Benin Embassy see Salmon (1994) para 349.

[18] Article 22 of the 1965 Montreux International Telecommunication Convention, UKTS No. 41 (1967), replaced in substance by Art 44 of the 1973 Torremolinos Telecommunication Convention TIAS 8572, then by Art 44 of the 1982 Nairobi International Telecommunication Convention, UKTS No. 33 (1985) (published in Wallenstein, *International Telecommunication Agreements* (1977)), and most recently by Arts 6 and 48 of the Geneva Constitution of the International Telecommunication Union, UKTS No. 24 (1996).

[19] Text of Memorandum of Understanding of 15 March 1991 supplied by State Department. Authorization is under the *Manual of Regulations and Procedures for Federal Radio Frequency Management* (National Telecommunications and Information Administration).

Article 6 of the 1992 Constitution, taken with this definition, therefore appears to leave it open either to the sending or the receiving State to be responsible for the enforcement of the provisions of the ITU Convention—particularly those on harmful interference—in respect of diplomatic wireless installations.

Telephone services

Article 27.1 does not entitle the sending State or its mission staff to supply of telephone or other communication services without payment. The words 'free communication' imply absence of prohibition or restriction and not exemption from appropriate charges. Article 34(e) makes quite clear that the exemption of a diplomatic agent from taxation does not extend to 'charges levied for specific services rendered'. As stated above in the context of Article 25 of the Convention, if a mission fails to pay charges levied for the installation or use of a telephone line, the services may be discontinued by the relevant authorities on the same basis as is done for private customers. It would, however, be usual for the Ministry of Foreign Affairs of the receiving State to make efforts as a matter of courtesy to ensure that interruption of telephone communications did not occur except as a last resort. The Ministry of Foreign Affairs in Germany, even in such extreme circumstances, permit a diplomatic mission to continue to receive incoming calls even where the facility of making outward calls has been suspended in response to substantial unpaid telephone bills.[20]

Listening devices

The development of sophisticated eavesdropping devices whereby wireless, telephone, and spoken communications of an embassy may be intercepted by other States with the necessary technical equipment has to some extent brought the international practice on secrecy of diplomatic communications back to where it was in the seventeenth century. The writers state clearly that the installation and use of hidden microphones on mission premises violates both Article 22 and Article 27 of the Vienna Convention. Seyersted, for example, in setting out the duties of the receiving State as regards protecting communications and respecting their secrecy says:

> The receiving State must not attempt to become acquainted with the contents of the communications—and it must take all reasonable precautions to prevent others from doing so. Thus the receiving State does not have the right to censor ordinary mail, or to open the diplomatic bag, or to listen in to telephones or private conversations, or to copy or decipher telegrams. If it employs these practices in respect of its own citizens, it must make an exception for diplomatic communications.[21]

There have, however, in recent years been several publications and reports which have made allegations of extensive interception by intelligence officers of diplomatic communications without the knowledge or consent of the diplomats whose communications were monitored.

The most notorious account was the book *Spycatcher* by a former British intelligence officer Peter Wright who, after retiring to Australia where he was outside the jurisdiction

[20] Richtsteig (1994) p 58.
[21] (1970) at pp 209, 219.

of British courts, published memoirs describing his activities in the security service, and in particular extensive bugging by him of diplomatic missions in London. The British Government sought for a considerable time to obtain first temporary and later permanent injunctions against newspapers, the *Guardian* and the *Observer*, preventing them from publishing in the United Kingdom information or extracts from Wright's memoirs. It was common ground between the parties that the bugging of embassy premises if it had occurred was unlawful conduct on the part of the security services, in breach of the Vienna Convention, and the newspapers argued that the public interest in the exposure of such conduct outweighed the public interest in enforcing the confidentiality which Wright owed to the Government which had employed him.[22] No special provision regarding diplomatic missions is made in the UK Interception of Communications Act 1985[23] and the position in domestic law rests on the incorporation of Article 27.1 of the Vienna Convention into UK law through the Diplomatic Privileges Act 1964. But little effort was made by counsel for the UK Government during these lengthy proceedings to suggest that Wright's allegation was a total fabrication.

In 1986 the United States justified bombing raids on Tripoli and Benghazi as self-defence in response to involvement by Libya in an explosion in a discothèque in Berlin which killed a US serviceman. The evidence for Libyan involvement was an intercepted message from the Libyan diplomatic mission in West Berlin to the Government of Libya in Tripoli. It does not appear that at the time there was challenge to the legality of the interception or the use made of the evidence thus obtained. Only in 1997 was it announced by the German police authorities that criminal charges had been brought in respect of the Berlin attack.[24] Also in the context of suspected terrorist activity, it was stated in April 1997 that all fax, telephone, and telex communications from the Iranian Embassy in Bonn were being tapped.[25]

During the Cold War there were numerous occasions where listening devices were discovered to be implanted in mission buildings, particularly where these had been recently constructed with the assistance of local labour. In 1973, for example, France discovered that its new chancery building in Warsaw had been comprehensively equipped with a network of forty-two microphones.[26] In 1985 the half-completed new embassy of the United States in the Soviet Union was discovered to be riddled with listening devices presumably planted on behalf of the Soviet authorities. For several years the building remained unused while the US Congress deliberated whether to destroy it, to complete it, or to superimpose a secure three-storey 'top hat'. In 1991 the new head of the KGB, in the context of warmer relations between Russia and the United States, presented the US Ambassador in Moscow with the documents describing how the bugging of the embassy was planned and carried out—a gesture which was, however, insufficient to remove all

[22] *Attorney-General v Guardian Newspapers Ltd and others* [1987] 3 All ER 316 at 337 (Sir John Donaldson MR in the Court of Appeal); *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 141 (Scott J at first instance), 189–90 (Sir John Donaldson MR in the Court of Appeal: 'It would be a sad day for democracy and the rule of law if the service were ever to be considered above or exempt from the law of the land. And it is not... But there is a need for some discretion and common sense.')

[23] C 56.

[24] *The Times*, 8 February 1997 and 19 November 1997.

[25] *Frankfürter Allgemeine Zeitung*, relayed in *The Times*, 12 April 1997.

[26] 1975 RGDIP 217. The account also mentions similar discoveries in the US and UK Embassies in Warsaw.

doubts as to the future use of the building. Cold War habits, however, died hard, and in 1999 the United States discovered that a listening device had been installed in a Conference Room within the State Department and was being monitored from outside the building by an attaché from the Russian Embassy, whose diplomatic appointment was brought to a swift ending.[27] At the same time, as was revealed in 2001 in the context of an espionage trial, the FBI constructed a tunnel complex underneath the Embassy of the Soviet Union in Washington in order to eavesdrop on conversations within the mission and even ran guided tours for senior FBI officials to display its capacities.[28] The United States also complained to the Soviet Union that illness among US diplomatic staff was being caused by microwave emissions used to trigger listening devices.[29] In the light of these experiences, the UK Foreign Office arranged for the more sensitive parts of the proposed British Embassy in Moscow to be constructed from prefabricated sections imported in sealed containers, assuming that other parts would be compromised by the use of Russian construction workers.

Sweden also complained in 1988 that—for the second time in ten years—it had discovered secret microphones implanted into its embassy in Moscow.[30] In 1989 the Soviet Union complained at the discovery of listening devices installed in the Soviet Trade Mission and in diplomatic residences in London. The British Foreign Secretary denied any involvement, suggesting that in the light of recent expulsions of Soviet diplomats the incident should be regarded as 'a rather amateurish effort at news management'. Press comment was sceptical of this denial, implying that security service bugging by all States with the technical capacity to do it, though never admitted, was a matter of routine.[31]

In 1998 it was disclosed in a leaked report from the Italian secret service that the KGB in the early 1980s had placed a listening device in the residence in the Vatican of the chief envoy to Eastern Europe of Pope John Paul II—the espionage being due to the fear in the Kremlin that the 'Polish Pope' would seek to use his influence to subvert Communism in Poland and then in other parts of the then Soviet bloc.[32]

Murty in *The International Law of Diplomacy* writes that:

> The electronic equipment is operated in the premises of embassies, and the issue is how far does the inviolability of the premises of diplomatic missions require the tolerance of the use of such equipment. A high degree of tolerance is necessary to preserve the institution of the diplomatic mission itself, and with justification both the United States and Soviet Union tolerate it, but perhaps use protective technological devices to safeguard their vital secrets. If electronic surveillance seriously threatens the security of the receiving State, it is likely to demand the closure of the mission; the sending State will decide to close the mission if the surveillance of the receiving government seriously undermines the utility of the mission.[33]

Murty also suggests that transmission of microwaves cannot be objected to unless they cause physical harm to those living or working on the premises. Although complicity by a receiving State in the installation of listening devices in the mission premises of a sending

[27] 2000 AJIL 534.
[28] *The Times*, 16 December 1991; 25 October 1996; 5 and 12 March 2001.
[29] 1984 RGDIP 464.
[30] 1989 RGDIP 148. Other earlier examples are listed in Salmon (1994) para 304.
[31] *Observer*, 4 June 1989; *The Times*, 5 June 1989.
[32] *The Times*, 9 April 1998.
[33] (1989) p 506.

State violates all aspects of their inviolability (as stated above in the commentary on Article 22), the more fundamental breach relates to the right to protection by the receiving State of mission communications, and there do not appear to be any instances where the response to detected surveillance has been the closure of a diplomatic mission. The usual response has rather been for the facts to be denied by the State accused of surveillance and for the other to resort to more effective practical and technical methods of protecting the secrecy of its own communications. As Seyersted observed in 1970: 'When microphones have been found in embassies, protests have of course been made, but the receiving State has never, so far as one knows, admitted that it has installed them.'[34]

While the above examples of surveillance took place against enemies in the Cold War or in the context of counter-terrorism, there are more recent well documented cases of interception of the diplomatic communications of allies. In 2004 it was admitted by the Turkish security services that they had bugged the telephone of the British Ambassador in Ankara. The admission was made in a letter to a Turkish State Security Court which was trying a Turkish journalist who had published in a book a transcript of a conversation between the ambassador and a senior official of the Commission of the European Union, and the letter to the court was then leaked by a court official. In November 2003 it was claimed by the *Sunday Times* that the British security services had installed covert surveillance devices in the embassy of an ally while the building was being refurbished. Shortly afterwards, officials from the Ministry of Foreign Affairs of Pakistan declared that Pakistan had been the country targeted, and said that:

> Pakistan is insisting on a categorical assurance from the highest level of the British Government that it did not authorize any activity in the Pakistan High Commission in London which is inconsistent with the Vienna Convention.

There is no indication that any such 'categorical assurance' was given, but in April 2004 it was reported that Sir Nigel Sheinwald, foreign policy adviser to the British Prime Minister, had telephoned and written to the Foreign Minister of Pakistan:

> underlining the importance of maintaining good relations between the two countries, while neither confirming nor denying that an authorized bugging operation had taken place.[35]

In 2013, Ecuador discovered a listening device hidden in the desk of its Ambassador in London, and described the discovery as 'another instance of a loss of ethics at the international level in relations between governments'.[36] Germany complained of spying on its diplomatic communications by both the UK and the US on the basis of information leaked by the whistleblower Edward Snowden, pointing out that the interception was 'contrary to international law'.[37] Brazil—which had complained of US surveillance of its President's telephone and e-mail messages—was obliged to admit in the light of further Snowden disclosures that its own intelligence agency had spied on US diplomats.[38]

The most highly publicized and controversial surveillance operation took place in 2003 against the delegations in New York of members of the Security Council during the diplomatic efforts to obtain a further Council resolution explicitly authorizing the use of

[34] (1970) p 220.
[35] *The Times*, 3 November 2003 and 13 April 2004, www.timesonline.co.uk, 5 November 2003.
[36] *The Times*, 4 July 2013.
[37] *The Times*, 31 October and 6 November 2013.
[38] *The Times*, 6 November 2013.

force against Iraq. The communications of delegations to the United Nations as well as those of the United Nations itself enjoy under the General Convention on the Privileges and Immunities of the United Nations and the Headquarters Agreement with the United States the same protection as is accorded under the Vienna Convention on Diplomatic Relations to diplomatic missions. A memorandum written in January 2003 by an official at the US National Security Agency disclosing an order to agents to step up surveillance on home and office telephones and e-mails of the delegations whose votes would be crucial—Angola, Cameroon, Chile, Bulgaria, Guinea, and Pakistan—was leaked to and published after some careful checking of its authenticity by the *Observer*.[39] Soon afterwards Katharine Gun, a translator at the UK Government Communications Headquarters (GCHQ), which intercepts and analyses signals for intelligence purposes, was arrested, and she was later charged with breach of the Official Secrets Act. Katharine Gun put forward a defence of 'necessity' and more specifically argued that:

> Any disclosures that may have been made were justified on the following grounds: because they exposed serious illegality and wrongdoing on the part of the US government who attempted to subvert our own security services and to prevent widescale death and casualties among ordinary Iraqi people and UK forces in the course of an illegal war.

When her trial began in February 2004 there was confirmation in New York from the delegations of Mexico and Chile that they believed their phones had been bugged, and in London the Foreign Secretary, Jack Straw, was pressed by Members of Parliament from all political parties to clarify the position.[40]

On 25 February 2004, the prosecution indicated that they would offer no evidence against Katharine Gun and the case against her was discontinued. It was widely claimed that the UK Government was unwilling to allow more publicity for her embarrassing allegations both on the interception of diplomatic communications and on the legal advice given by the Attorney-General in 2003 on the legal justification for the use of force. The Director of Public Prosecutions stated that the prosecution would be unable to disprove the defence of 'necessity'. Clare Short, a former UK Cabinet Minister, confirmed in response to questions asked on BBC Radio 4 that the United Kingdom had in the context of the efforts to secure a further Security Council resolution been involved in bugging the offices of the UN Secretary General, Kofi Annan. The Prime Minister condemned Clare Short's admission as 'totally irresponsible', said that the security services had complied with domestic and international law but refused to confirm that the premises and communications of the UN Secretary-General as well as of UN representatives in New York were protected by international convention from espionage.[41]

Despite Article 27.1, and its extension to cover diplomatic communications of many other international organizations, the practice of many States who possess the technical capability for interception has reverted to that of the seventeenth century. There is, however, no indication whatsoever from public diplomatic exchanges of any attempt to justify any forms of surveillance of diplomatic communications on any legal basis, whether by reference to relations with the State or international organizations whose

[39] *Observer*, 2 March 2003.

[40] *Observer*, 15 February 2004; *Guardian*, 26 and 27 February 2004; *The Times*, 27 February 2004; *Observer*, 29 February 2004.

[41] *Guardian*, 26 and 27 February 2004; *The Times*, 27 February 2004; *Observer*, 29 February 2004; *Observer*, 3 March 2013.

communications are intercepted or by reference to the purpose of the particular interception. States complain of breach of international law when their own communications are compromised while simultaneously stating that it is unpatriotic or naïve for questions to be raised about their own conduct. The evidence is increasing, and it suggests that more States now have the capacity and the inclination to carry out sophisticated surveillance and that interception is increasingly carried out against friendly as well as hostile States.[42] There is, however, no *opinio iuris* suggesting that the law prohibiting violation of the right to free and secret diplomatic communication as set out in Article 27 has changed. The exceptional disregard for this particular rule of international law may be explained by the lack of reciprocity, given that the majority of States do not have the capacity for surveillance, together with the possibility for the technologically advanced intelligence services to carry out their interception by methods which are increasingly difficult for the target missions to detect.

[42] See eg a document leaked from the UK Foreign and Commonwealth Office and described in *The Times*, 24 March 2004.

INVIOLABILITY OF OFFICIAL CORRESPONDENCE

Article 27

...

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

...

There was no clearly established rule of customary international law according inviolability to correspondence to or from a diplomatic mission which was sent through the public postal facilities. Letters to a mission would become archives or documents of the mission on delivery, but not before. Letters from a mission were not in practice sent through the ordinary post if they were of any importance or delicacy. It can be assumed that the authorities on occasion tampered with such letters, but such interference would usually be hard to detect and there do not appear to be instances where protest was made by a diplomatic mission.

The text of the first sentence of Article 27.2 was proposed in the International Law Commission by Mr Alfaro, who explained that: 'The phrase "official correspondence of the mission" meant correspondence from the mission, that sent to the mission from its chancellery or other authorities of the sending State, and correspondence between the mission and consulates situated in the receiving State.' The Rapporteur, however, accepted Mr Alfaro's proposal 'on the understanding that "official correspondence" applied only to mail emanating from the mission'.[1] At the Vienna Conference the representative of Australia reintroduced as his own delegation's amendment the definition of official correspondence now contained in the second sentence of Article 27.2.[2] This addition does not help to clarify the question of whether only correspondence coming from the mission or also correspondence to it from the authorities of the sending State is to be given inviolability.

It is probable—although the point does not appear to have been settled—that 'correspondence' includes e-mails and their attachments which have become the most usual method of correspondence and can be regarded as essential for the performance of mission functions in the modern world. On this assumption there would be some degree of overlap between the protection accorded by paragraphs 1 and 2 of Article 27 as well as overlap between Articles 24 and 27.2.

The inviolability of official correspondence of a mission has two aspects—it makes it unlawful for the correspondence to be opened by the authorities of the receiving State and it precludes the correspondence being used as evidence in the courts of the receiving State. As regards use of correspondence as evidence, Article 27.2 may be regarded as duplicating the protection under Article 24 of the Convention which gives inviolability to the archives and documents of the mission 'wherever they may be'. Correspondence from the sending

[1] *ILC Yearbook* 1958 vol I p 143.
[2] UN Docs A/Conf. 20/C 1/L 154 (para 2) and A/Conf./20/14 p 179.

government to its mission would also at least arguably be entitled to protection as archives of a foreign sovereign State.

The primary importance of Article 27.2 lies in the protection which it gives from interference by the authorities of the receiving State. In this context the second sentence is unhelpful, since it is not possible for these authorities to know whether correspondence relates to the mission and its functions without opening it and reading it—and with this the real damage has occurred. There is no obligation, as there is with the diplomatic bag, for mission correspondence to bear 'visible external marks' of identification. Correspondence to a mission at least indicates its destination, but it may not be clear whether it originates from the sending government and would thus be entitled to inviolability as archives of a foreign sovereign State. If the mission wishes to ensure that its outward correspondence is recognized as entitled to inviolability it should ensure that it is clearly marked on the outside.

In the nature of things there are likely to be few disputes over Article 27.2. A receiving State which wishes to intercept and read correspondence to or from a diplomatic mission will do so by methods which cannot be detected, including methods which do not involve opening it. Any complaints of wrongdoing will be rejected or blamed on mistake by a lowly official. Missions will continue to send confidential communications by cipher telegram or by sealed diplomatic bag, and will place little reliance on the uncertain protection given by Article 27.2 to correspondence passing through the public post.

THE DIPLOMATIC BAG

Article 27...

...

3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use....

...

Prior to the Vienna Conference it was certainly accepted international practice, and probably international law, that in exceptional cases where the receiving State had grounds for suspecting abuse of the diplomatic bag it might challenge it. The sending State might then be given a choice between returning the suspect bag to its place of origin and allowing it to be opened for inspection by the authorities of the receiving State in the presence of a member of its own mission.

Given the vulnerability of communications sent by wireless, by telephone, or by correspondence through public facilities—described in the commentary on Article 27.1 and 27.2 and apparently increasing as technology advances and leaking meets with public sympathy—States attach prime importance to the security of the diplomatic bag for reliable transmission of confidential material. But there is a continuing need to balance the need for confidentiality of diplomatic communications with the need for safeguards against possible abuse. Paragraphs 3 and 4 of Article 27 tilted the balance in favour of greater protection for the bag. The reservations made to these paragraphs of Article 27 and subsequent evidence of abuse as well as public reaction to it show how difficult it is to achieve an acceptable balance.

Negotiating history

A draft provision reflecting the position under customary law, permitting 'challenge and return' of a suspect diplomatic bag, was included in the draft articles prepared for the International Law Commission, but withdrawn in the revised text submitted to them in favour of provision that the bag 'shall be exempt from inspection'.[1] There was prolonged controversy in the Commission. Some, including Sir Gerald Fitzmaurice, stressed the dangers of traffic in diamonds, currency, drugs, and even radioactive materials and urged that where there were very serious grounds for suspicion there should be exceptional provision for controlled inspection 'on the highest authority and after communication with the mission concerned'. Others including Mr Tunkin from the Soviet Union and Mr Padilla Nervo favoured unconditional immunity for the bag. In their view:

That did not mean, however, that the sending State did not owe a duty to use the pouch exclusively for the transmission of diplomatic correspondence. But—and that was the main point—even the

[1] UN Doc A/CN 4/91, Art 16 para 2; *ILC Yearbook* 1957 vol I p 74.

non-observance of that duty did not create a right to inspect the diplomatic pouch; any such situation would have to be remedied by other means.

Eventually a delicate compromise was reached under which the text of the draft article would state that 'The diplomatic bag may not be opened or detained.' The Commentary would contain a qualifying passage eventually formulated in these terms:

> The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry of Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 3 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the over-riding importance which it attaches to the observance of the inviolability of the diplomatic bag.[2]

In 1958 the Rapporteur proposed to the Commission a formulation which amalgamated the provisions now contained in paragraphs 3 and 4 of Article 27. The object was to place the provision which could be said to constitute the definition of the diplomatic bag before the provision prohibiting opening or detention. The rearrangement was not, however, acceptable to the Commission, who considered that it might give rise to the argument that the protection of the bag from opening or detention was conditional on its complying with the requirements limiting its contents. This would be a dangerous argument, since the contents of the bag could only be established to the satisfaction of the receiving State by inspection. The Commission therefore retained the 1957 text on the basis that it was not open to such a construction, and that the protection given to a properly identified diplomatic bag was unconditional. It is also notable that although the text does not expressly confer full inviolability on the bag, providing only that it might not be opened or detained, several delegates referred to the draft article as providing inviolability, and the Commentary contains the sentence: 'Paragraph 3 . . . states that the diplomatic bag is inviolable.'[3]

Numerous amendments were submitted to the Vienna Conference with the aim of limiting the unconditional protection to be given to the diplomatic bag. France proposed permitting inspection in the presence of a member of the mission of the sending State, the United States proposed permitting inspection only if the sending State chose to submit to inspection rather than send the bag back (the 'challenge and return' option), while the United Arab Republic and Ghana proposed allowing the receiving State to reject a suspect bag. A late amendment by France and Switzerland would have reformulated the two paragraphs so as to set out the permissible contents of the bag *before* providing that it might not be opened or detained (the arrangement previously rejected by the Commission). All of these amendments were withdrawn or were rejected by the Conference.[4] Article 27 paragraphs 3 and 4 therefore on their face prohibit the opening or detention of a diplomatic bag under any circumstances.

[2] *ILC Yearbook* 1957 vol I pp 77–82; vol II p 138 (para (3) of Commentary on Art 21). For old examples of abuse of the diplomatic bag see Clark (1973); *The Times*, 6 December 1996 (transfer by Nazi Government in 1945 of looted gold and securities to Argentina by Swiss diplomatic bag).

[3] *ILC Yearbook* 1958 vol I pp 138–9; 1958 vol II pp 96–7. See Barker (1996) p 89.

[4] UN Docs A/Conf. 20/C 1/L 125, L 154, L 151 (Rev. 2), L 294, L 286; A/Conf. 20/14 pp 180–1; Kerley (1962) pp 116–18; Bruns (2014) pp 142–3.

Reservations and objections

The controversy over the protection to be extended to suspect bags did not end with the adoption of Article 27. A number of Arab States on ratifying or acceding to the Convention entered reservations seeking to limit the inviolability given to the diplomatic bag. Kuwait in 1969, Libya in 1977, Saudi Arabia in 1981, and the Yemen Arab Republic in 1986[5] reserved the right, if they had serious reason to suspect the existence of items in a bag not authorized under the terms of Article 27.4, to request that the bag be opened in the presence of the representative of the diplomatic mission concerned and to require the bag to be returned to its place of origin if this request was refused. Qatar, acceding in 1986, reserved the right to open a diplomatic bag in two situations. The first was:

> abuse, observed *in flagrante delicto*, of the diplomatic bag for unlawful purposes incompatible with the aims of the relevant rule of immunity, by putting therein items other than the diplomatic documents and articles for official use mentioned in para. 4 of the said Article, in violation of the obligations prescribed by the Government and by international law and custom.

In this case the Foreign Ministry and the mission would be notified, the bag would be opened only with the approval of the Foreign Ministry and 'the contraband articles will be seized in the presence of a representative of the Ministry and the Mission'. The second case was the existence of 'strong indications or suspicions that the said violations have been perpetrated'. In this case Qatar reserved the right to act as in the reservation by Kuwait and others described above. The most radical reservation was in 1971 by Bahrain which simply reserved 'its right to open the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law'.[6]

These reservations provoked a large number of objections from other States Parties. The Bahrain reservation met with a formal objection from nearly all European States—Western and Communist bloc alike. Several States said that they did not regard it as valid, and Germany stated that it was incompatible with the object and purpose of the Convention.[7] The Netherlands in rejecting it said that on a basis of reciprocity they would be prepared to operate the 'challenge and return' system contained in the Kuwait reservation. It may be suggested that as between Bahrain and other States which have formally objected to its reservation, the same position applies, since the outcome of not applying the text of Article 27 paragraph 3 is that customary international law continues to apply—and customary international law in fact authorized the possibility of 'challenge and return'. A few States (including The Netherlands) treated the Qatar reservation on the same basis as that by Bahrain, although it is doubtful whether this is correct. 'The abuse, observed *in flagrante delicto*', of the diplomatic bag is a special case which will be discussed more fully below. The similar reservations by Kuwait and others attracted far fewer objections. Since the effect of objecting to these reservations would probably, as suggested

[5] Since the People's Democratic Republic of Yemen had acceded to the Convention in 1976 without any reservation, the reservation by the Yemen Arab Republic may be regarded as having lost any legal force under the terms of the 1990 formation of the single State of Yemen and the letter sent to the UN Secretary-General about treaties previously concluded by either of the two States which merged: see Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1995, ST/LEG/SER E/14, ch I, n 32.

[6] For full texts of reservations and objections to them see Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1996, ST/LEG-/SER E/15. Now available online from UN Treaty Collection Database.

[7] See comment by Bowett (1976) at p 81.

above, be no different from accepting it and applying it on a basis of reciprocity, it seems that many States who considered the matter concluded either that the reservation could be accepted or that there was no purpose in objecting to it.

It should be noted that a State which has not objected to any of the above reservations may invoke them on a basis of reciprocity against the reserving States. This possibility assumed considerable importance to the United Kingdom when, following their breaking of diplomatic relations with Libya after the 1984 shooting from the People's Bureau in London, preparations were made—which included taking empty bags into the mission premises—for the evacuation of the persons who had remained under siege in the premises. Ministers were advised that, as explained by the Legal Adviser to the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee:

> The fact of the matter is that the Law of Treaties Convention, which in this respect reflects customary international law, provides that where a State has established a reservation against another party, and that was the case with Libya as against the United Kingdom since we did not object, that reservation qualifies the obligation to which it is addressed for both of them. So, without more ado, we would have had the ability to respond.

The Committee concluded that the decision not to challenge the Libyan bags was a matter of political judgment, and they did not dissent from that judgment.[8] It emerged also from evidence given to the Committee that the Libyans had never invoked their reservation in order to request a search of a UK bag.[9] Nor is there any indication from other sources that any of the States who have made these reservations have actually relied on them in order to challenge any suspect bag.

Practice: what is a diplomatic bag?

Although most usually a diplomatic bag resembles a sack, there is no requirement in Article 27 limiting the size or weight of 'the packages constituting the diplomatic bag'. Nor can any limits on size or weight be deduced from international practice. Some States have concluded bilateral agreements about carriage of unaccompanied bags which do impose size limits—but it seems that these agreed limits are directed rather to reciprocal franking privileges than to the deterrence of possible abuse.[10] Since items which may quite properly be contained in a diplomatic bag include photocopying machines, cipher equipment, computers, and building materials for construction of new embassy premises (in order to reduce the likelihood of these premises containing listening devices) a diplomatic bag may be very large indeed without being open to challenge. Although there have been occasions when a transport container has been accepted by customs authorities as constituting a diplomatic bag, the more usual practice is that a lorry or aircraft does not itself qualify as a 'package'. In 1985, for example, authorities of the Federal Republic of Germany declined to accept that a truck with a total load of 9,000 kilograms could be regarded as a single diplomatic bag of the Soviet Union. They required the Soviet Embassy to open the truck and to submit a list with the number of packages.

[8] Evidence Q 21, Report paras 98–101.

[9] Q 15.

[10] See eg limits imposed in agreements between Spain and other States, described in *ILC Yearbook* 1982 vol II Pt 1 p 239, and in agreements of Mexico, *ILC Yearbook* 1984 vol II Pt 1 pp 64–7.

Although the Soviet Union complained that this constituted a breach of the Vienna Convention, they ultimately complied, and the list was compared with the number of packages, without any of the packages being opened.[11]

The question of the limits on what may constitute a diplomatic bag—as well as its identification which is discussed below—received close attention in the context of the 1985 Report of the House of Commons Foreign Affairs Committee on the Abuse of Diplomatic Immunities and Privileges.[12] While the Committee's inquiry was already under way following the April 1984 shooting from the Libyan People's Bureau, Umaru Dikko, a former minister in Nigeria, was kidnapped on the streets of London. A watch was placed on airports, and suspicions were aroused on the arrival of two large crates, containing air holes, at Stansted airport with the intention of loading them on to a Nigeria Airways aircraft. On the receipt of advice from the Foreign and Commonwealth Office that the crates were not diplomatic bags (the grounds for this are discussed below), they were opened by customs authorities in the presence of members of the Nigerian High Commission and found to contain Mr Dikko, who was unconscious and accompanied by a doctor, as well as two other men. There were also strong suspicions that weapons in the Libyan People's Bureau had been brought into the United Kingdom in Libyan diplomatic bags, and it was assumed that weapons used in the shooting and the killing of a policewoman were taken out of the country when the Bureau was evacuated following the breaking of diplomatic relations between Libya and the United Kingdom.[13]

The Committee recommended that records should be kept of the size and weight of diplomatic bags entering the country in the care of a diplomatic courier or airline pilot. The UK Government in their Review and Reply[14] rejected this recommendation, pointing out that it would not be effective in detecting illicit items such as firearms or drugs, and that there were 'good operational reasons for heavy items such as transmitting equipment to be sent at irregular intervals thus creating an irregular pattern of size and weight of bags'. They would be ready to record weight and size of individual bags only if there were specific grounds for such supervision. In 1988, the UK Government in comments to the International Law Commission expressed support for formulating new provision which would impose a requirement for the courier to carry documents which would more precisely describe the size and weight of the packages constituting the bag, but there was little support for such a provision.[15] The UK's reluctance to endorse weight limits on diplomatic bags was shown to be well founded in the context of re-opening their Embassy in Tehran in 2015. They had destroyed sensitive equipment during the invasion of their Embassy in 2011 by an Iranian mob, and when they tried to replace it were thwarted by an Iranian rule restricting diplomatic bags to 15 kilograms.[16]

What Article 27.4 actually requires is that the packages constituting the diplomatic bag 'must bear visible external marks of their character'. While it is clear that a package does not lose its character as a diplomatic bag by reason of suspicions that it may contain items

[11] Notes of the Soviet Union of 11 October 1984 and of the Federal Republic of Germany of 11 March 1985 to the UN Secretary-General were circulated as LA/COD/4. See also 1985 RGDIP 179; Salmon (1994) para 354.

[12] At paras 106–13 and 127. See also Akinsanya (1985).

[13] See paras 96–101 of the Report.

[14] Cmnd 9497, paras 54–6.

[15] *ILC Yearbook* 1988 vol II Pt 1 p 154, Pt 2 p 79 (para 331).

[16] *The Times*, 21 August 2015.

other than 'diplomatic documents or articles intended for official use' (since this can in general only be established by breach of the prohibition on opening) a package which does not bear visible external marks of its character is not entitled to the status of a diplomatic bag. The crates used in the attempted abduction of Umaru Dikko had labels indicating their origin (the Nigerian High Commission in London) and destination (the Nigerian Ministry of Foreign Affairs in Lagos) but did not bear any official seals. As the Secretary of State later stated in evidence to the House of Commons Foreign Affairs Committee:[17] 'Under general international practice there are two visible external marks: firstly a seal in lead or wax marked with the official stamp by the competent authority of the sending State or the diplomatic mission, and secondly a tag or stick-on label identifying the contents.' It was on the ground that the crates, not bearing seals, did not constitute diplomatic bags but merely mission property or baggage that the Foreign and Commonwealth Office advised Customs and Excise Officers that the Vienna Convention placed no obstacle to their entitlement to search the crates on suspicion that they contained a human being. The Nigerian High Commission at no stage claimed that the crates constituted diplomatic bags or questioned the decision that they could be searched.

In its Review of the Vienna Convention, the UK Government said that diplomatic missions in London as well as HM Customs and Excise had been given revised clarification of the rules on the identification and the handling of foreign diplomatic bags. 'These rules, which reflect international law and practice, are being rigorously applied in the UK and ensure that we are able to check the official origin and endorsement of all items purporting to be diplomatic bags.'[18] A Note of 24 October 1984 to diplomatic missions in London said:

> Consistently with general international practice the marks required are:
>
> (1) a seal in wax, metal or plastic affixed by the competent authority of the sending State or of the sending diplomatic mission; and
> (2) a tag or stick-on label, addressed to the head of mission, to the head of a consular post, or to the Minister of Foreign Affairs, and carrying the official stamp of the sending State or of the sending diplomatic mission.[19]

In 2004 it was proposed that the task of assembling unaccompanied UK diplomatic bags should be privatized, although final sealing would still be carried out by government officials. But these plans were abandoned in the face of strong opposition from Parliament.[20]

A 1962 internal regulation of the Republic of Korea, in describing measures to be taken in making up a diplomatic bag, says: 'For the maintenance of security all the documents to be sent by the bag shall be put in envelopes and sealed up. The bag containing such documents shall be packed and locked according to the procedures and be sealed up by lead ball with the seal of the Ministry of Foreign Affairs.'[21] Soviet Union rules stated that: 'Each parcel of the diplomatic bag must be sealed with wax or lead seals by the sender and

[17] Report, p 50 of Evidence.
[18] Para 49.
[19] These requirements were confirmed by Note No A622/02 of 31 October 2002 to diplomatic missions in London.
[20] *The Times*, 29 December 2004 and 24 January 2005.
[21] *ILC Yearbook* 1982 vol II Pt 1 p 238. See also requirements in Spain on form of bags, ibid p 239.

must bear a gummed label with the words *expedition officielle.*' These rules also required customs officers to inspect bags externally and specified that: 'Parcels not meeting the requirement of these Rules shall not be regarded as forming part of the diplomatic bag.'[22] Current US rules prescribe that a diplomatic bag must:

1) Have visible external markings which identify it by clearly stating 'Diplomatic Pouch' on the outside of the container.
2) Bear the official seal of the sending entity, i.e., government or international organization. Outbound pouches may bear the seal of the embassy, consulate, or sending office.
3) Be addressed to an office of the government or international organization whose seal the pouch bears.

For unaccompanied pouches there is a further requirement for a detachable certificate on the outside of the pouch, describing the pouch, its weight, and certifying that it contains only official documents or articles for official use.[23]

Failure by a sending State to comply with the requirement that the diplomatic bag 'may contain only diplomatic documents or articles intended for official use' will not disqualify a package from having the status of a diplomatic bag. In its 1989 Report, the International Law Commission in its Commentary on Article 3 (which contains definitions for its draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier), said that:

> The real essential character of the diplomatic bag is the bearing of visible external marks of its character, because even if its contents are found to be objects other than packages containing official correspondence, documents or articles intended exclusively for official use, it is still a diplomatic bag deserving protection as such.[24]

Practice: permitted contents of the diplomatic bag

Since the suspicion of unauthorized contents does not justify the opening of the bag there is no international practice clarifying in objective terms what may be sent. It is standard practice for States to use their diplomatic bags to transmit a wide range of items for the official use of the mission or the sending State. Apart from the large items of equipment mentioned above, coins, currency notes, medals, films, books, food and drink, and clothing may all be articles intended for official use and may be sent through the diplomatic bag provided that there is no violation of the laws and regulations of the receiving State. In 1997 it was disclosed that throughout the Second World War, Sir Winston Churchill's supply of Cuban cigars from a well-wisher in New York was

[22] Ibid pp 242–3. See also requirements set out in Circular Note from Federal Secretariat for Foreign Affairs of Yugoslavia to diplomatic missions, ibid p 245, and practice of Iran in *ILC Yearbook* 1984 vol II Pt 1 p 64.

[23] Department of State, *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States* para 5.2.1.7. The current rules are in Diplomatic Note 03–54 of 28 August 2003, superseding earlier Notes and available at www.state.gov/ofm/31311.htm. A further Note 04–181 of 23 July 2004 further clarifies the question of identification of bags—in particular that the seal 'may be a lead seal that is attached to a tie that closes the bag, or a seal printed on the fabric of the diplomatic bag, or an ink seal impressed on the detachable tag.'

[24] *ILC Yearbook* 1989 vol II Pt 2 pp 15–17. Members of the Commission were somewhat unclear whether the visible external marks were essential to give a bag its diplomatic status, see ibid vol I pp 243–5, but the formula in the Report is quite clear that the marks form part of the definition.

maintained through the diplomatic bag from Washington.[25] In 1947, US and UK diplomats in Poland colluded in assisting the Polish Deputy Prime Minister, Stanislaw Mikolajczyk, who feared imminent arrest to escape from Poland on a British ship. The fugitive was disguised in the hat and overcoat of the US Ambassador, and following his successful escape, the hat and overcoat were returned to the Ambassador through the British diplomatic bag.[26]

Following the break in diplomatic relations between the United Kingdom and Libya as a result of the shooting from the Libyan People's Bureau and the permitted departure of Libyan diplomatic bags which almost certainly contained the murder weapon, *The Times* commented that:

> They have been used to take alcohol to 'dry' countries, contraceptives to the Irish Republic, a naval officer's collars from Moscow to London for starching and espionage equipment almost everywhere.[27]

What limits should be placed on the words 'articles for official use' is in practice a matter for the internal regulations of each diplomatic service. There may be room for some appreciation as to whether personal correspondence to or from members of a diplomatic mission or medical supplies or luxury items for personal use not available in the receiving State may properly be sent through the diplomatic bag. The Republic of Korea in its internal regulation of 1982 concerning the treatment of official documents defined the term 'official use' as meaning:

(a) Official documents and materials necessary for the management of the mission abroad and for their diplomatic negotiations;
(b) Letters and other materials required for the maintenance of security;
(c) Semi-official correspondence and communications; and
(d) Other matters recognized as important by the Minister of Foreign Affairs and the heads of the missions.

Medical supplies and necessities for the use of staff 'in special areas where living conditions are notably uncomfortable' might be included subject to approval by the Ministry of Foreign Affairs.[28] Colombian rules stated that: 'As an exceptional measure and in very special circumstances, the head of mission may give prior express authorization for the dispatch of officials' personal correspondence', and envelopes thus authorized must comply with weight limits and other formal requirements.[29] The 1982 law concerning the Mexican Foreign Service provided that illicit use, or use for personal gain by members of the Foreign Service of bags, stamps, or means of communication were grounds for suspension without pay.[30] The Conseil d'Etat of France in an opinion given in 1986 stated that items intended for persons or bodies outside diplomatic missions could not consistently with international commitments be transmitted by diplomatic bag except in exceptional circumstances such as catastrophes or regional conflicts which interrupted communications.[31]

[25] *The Times*, 26 May 1997.
[26] *The Times*, 24 May 2013.
[27] *The Times*, 24 April 1984.
[28] Part of this Regulation is printed in *ILC Yearbook* 1982 vol II Pt 1 pp 237–8.
[29] *ILC Yearbook* 1984 vol II Pt 1 p 62.
[30] Ibid p 67.
[31] 1987 AFDI 1006.

Members of the mission are subject to the duty under Article 41.1 of the Convention to respect the laws and regulations of the receiving State and are therefore not entitled to use the bag for the carriage of items such as weapons, alcohol, or drugs if these are not permissible imports under the law of the receiving State. Thus, the UK Government in its Review of the Vienna Convention said:

> In the Government's view it is unacceptable that bags should be used to transmit items prohibited in UK law whether or not it is claimed that they may be 'for official use'. We do not accept for instance that weapons may be imported by bag since the use of firearms for personal protection of diplomats is not permitted in the UK.

As the Report noted however, other States saw no objection in principle to the carriage of arms for personal defence.[32]

In 1973 the Government of Nigeria stated in Notes to heads of diplomatic missions in Lagos that in order to combat trafficking in Nigerian currency, for a period of six weeks all packages entering Nigeria, including diplomatic bags, would be searched. Other governments immediately protested that such action would violate Article 27 of the Vienna Convention on Diplomatic Relations. There is no indication that the threat to search diplomatic bags was in fact carried out.[33]

There was widespread international concern when in 2000 Zimbabwe opened a consignment of British diplomatic bags, under supervision of armed police and against strong protest. The British High Commissioner, Peter Longworth, was recalled to London for consultations and in a Press Statement charging Zimbabwe with 'grave and unprecedented breach of the Vienna Convention' explained:

> The detained and opened diplomatic bags were accompanied by a fully authorized and documented casual courier. The waybill carried and presented to the Zimbabwean authorities correctly listed every one of the diplomatic bags he was accompanying; all of which were correctly identified as such, bearing both a seal and a label.
>
> The bags contained articles for the official use of the British High Commission in accordance with Article 27.4, namely protective screening equipment for our communication set-up at the High Commission, as well as tools for its installation. The equipment to be installed was routine equipment used in our missions all around the world, and did not contravene any Zimbabwe rules or regulations as shown by their subsequent release by the Zimbabwean authorities.

A European Union Delegation delivered a formal protest to the Zimbabwean Foreign Ministry, but the Minister while making no serious attempt at legal justification said: 'We don't have any regrets.'[34]

In 2003 a diplomatic bag en route from the Foreign Ministry to the High Commission of Sierra Leone in London was opened with the permission of the President of Sierra Leone by UN officers and found to contain £1 million worth of cocaine. Two Foreign

[32] Cmnd 9497, paras 43, 46. The UK position was confirmed in Note to A622/02 of 31 October 2002 to diplomatic missions in London which stated: 'It is particularly stressed in this context that the regulations governing the import and possession of firearms in the UK are among those [laws and regulations] which must be observed, regardless of any claim that any firearms may be intended for official use.'

[33] US protest is in 1973 AJIL 536. Protest by Sweden (omitting name of the offending State) is in *ILC Yearbook* 1983 vol II Pt 1 p 61.

[34] *The Times*, 10 and 11 March 2000; Press Statement by the High Commissioner, 16 March 2000; 2000 BYIL 586.

Ministry officials were arrested in Sierra Leone.[35] In 2013, the UK complained formally to Spain that one of its diplomatic bags had been opened at the border crossing with Gibraltar. The Spanish authorities claimed that the bag was not marked as a diplomatic bag—an allegation which was dismissed by the UK.[36]

Practice: the scanning of diplomatic bags

As already noted, Article 27.3 does not confer full 'inviolability' on the diplomatic bag, but instead provides that it 'shall not be opened or detained'. There is no indication that the representatives at the Vienna Conference considered the possibility of tests on the bag which without opening or detaining it might reveal or confirm suspicions that it contained certain illicit items—for example, nuclear material, drugs, some explosives, and weapons could all be detected by methods including dogs and X-ray equipment. Should any of these be detected, the diplomatic bag would remain entitled to protection from the authorities of the receiving State, but it would be expected that even where the Convention applied without any reservation being relevant to the case, the receiving State would draw the matter to the attention of the authorities of the sending State, would invite its co-operation, and in the meantime would ensure that the bag did not leave its jurisdiction. An air carrier in particular—even if it was under the control of the receiving State—would not be required to provide facilities for the carriage of a bag apparently containing weapons or explosives.

With the widespread introduction in the 1970s of scanning of baggage by national security authorities or by airlines, the question of whether the Vienna Convention permitted the scanning of diplomatic bags became highly relevant. Some governments, and some writers,[37] took the view that as a matter of construction of Article 27, scanning did not involve opening or detaining the bag and was not prohibited in law. In evidence to the House of Commons Foreign Affairs Committee in 1984 the UK Government stated their view that it was lawful to carry out electronic scanning of bags, and the Committee recommended 'that on specific occasions they should be prepared to do so if in their judgment the need arises'.[38] The Government in their 1985 Review of the Vienna Convention noted the alternative view that 'any method for finding out the contents of the bag is tantamount to opening it, which is illegal'. They pointed out that scanning would be of limited value against a determined sending State—'It might reveal a problem but it could not solve it.' It would make UK bags vulnerable to 'generalised and indiscriminate challenge' and for security reasons—notably the possibility of sensitive equipment being compromised—they could not allow their bags to be scanned. They would, however, 'be ready to scan any bag on specific occasions where the grounds for suspicion are sufficiently strong'.[39]

The general practice among States had been that diplomatic bags were not subjected to scanning, and some States took the position that Article 27.3 prohibited electronic or

[35] *Sunday Times*, 26 October 2003.

[36] *The Times*, 27 November 2013; *Telegraph*, 27 November 2013; statement to Parliament in 2013 BYIL 731–3.

[37] Including this writer, in the 1st edn of *Diplomatic Law* and in Satow (5th edn 1979) para 14.30.

[38] Evidence Q 17, Q 31, Report paras 29–33.

[39] Cmnd 9497 paras 50–3.

X-ray screening. New Zealand, for example, in comments to the International Law Commission in 1988 stated that in their view electronic screening was not permitted under the Convention. 'This position of the New Zealand Government is based on its acknowledgment of the fact that electronic screening could, in certain circumstances, result in a violation of the confidentiality of the documents contained in a diplomatic bag.'[40] The US State Department also pointed out that 'any provision which would allow scanning of the bag risks compromising the confidentiality of sensitive communications equipment'.[41] In the mid-1980s, however, a few governments—including that of Kuwait which had been the first to enter a reservation to Article 27—introduced systematic scanning of bags. Austria made clear in circulars from the Federal Ministry of Foreign Affairs to diplomatic missions that it considered electronic screening of diplomatic bags compatible with Article 27.3 provided that it was carried out on a non-discriminatory basis and that there was no obligation to submit—though in the event of refusal transport might be denied by an airline.[42] In 1986 the Government of Italy announced its intention to subject diplomatic bags to X-ray devices at airports and frontiers, without clarifying what action was to be taken if suspect objects were revealed.[43] Western governments generally, like the United Kingdom, did not permit their own bags to be subjected to scanning because of the possibility of compromising their security, instructed their couriers that in case of challenge a bag should be returned to its place of origin, and reacted to any systematic scanning by any State by suspending their diplomatic bag services to that State.

Commenting in 1988 on the International Law Commission's draft articles on the status of the diplomatic courier and diplomatic bag, the UK Government were more cautious in admitting the right to scan diplomatic bags. They stressed that:

> the scanning must not be of a kind which would reveal the contents of the communications which are being transmitted in the bag; the right to require the bag to be scanned must be exercised only where there is good reason to suspect that the bag is being used for an improper purpose; there should be no general and routine practice of scanning bags and each case should be treated on its individual merits; a representative of the sending State should have the opportunity to be present while the scanning is taking place; and if the sending State objects to the proposed scanning it should have the option of having the bag returned, unexamined, to its originator.[44]

If this long list of qualifications was intended to circumscribe a legal entitlement to scan, the entitlement would be left with scarcely any substance.

The key to the legal position may lie in the first qualification—that the scanning must not be of a kind which would reveal the contents of the communications which are being transmitted in the bag. The view that scanning was permissible was based on the

[40] *ILC Yearbook* 1988 vol II Pt 1 p 147. See also comments by Australia, ibid at p 131; Soviet Union, ibid at p 152; France, ibid at p 142: 'since the outcome could only be the opening or return of the bag, measures which would seem to contravene Article 27. Furthermore, account must be taken of the implications of such inspection, sooner or later, for the confidentiality of the content of the bag.' On France, see also 1984 AFDI 1032. For Belgian practice, which also does not permit scanning, see Salmon (1994) para 355.

[41] *Study and Report Concerning the Status of Individuals with Diplomatic Immunity in the US*, prepared in pursuance of Foreign Relations Act, presented to Congress 18 March 1988, at p 55.

[42] Circulars printed in *ILC Yearbook* 1982 vol II Pt 1 p 233.

[43] Council of Europe Information Bulletin on Legal Activities, 26 January 1988 p 58; *ILC Yearbook* 1988 vol II Pt 1 p 146.

[44] *ILC Yearbook* 1988 vol II Pt 1 p 157; 1987 BYIL 566, 570–1.

assumption that it was not capable of compromising the freedom and confidentiality of communications. This is at the heart of the status of the bag. Modern X-ray technology is capable of damaging certain contents of bags, in particular films, and of eliciting information which may not only compromise equipment but may even decipher the contents of documents. As explained to the International Law Commission by its Special Rapporteur, Mr Yankov, 'there was no guarantee that sophisticated radiological or electronic examinations would not be used to discover, not only the physical contents of diplomatic bags, but also specific items that were material and pertinent to the secrecy of communications, such as coding and decoding instructions or handbooks'.[45] Its use is therefore not compatible with the basic purpose of Article 27. In effect it is a constructive 'opening' of the bag and, more importantly, it amounts to a failure to 'permit and protect free communication' which is the fundamental obligation of the receiving State under Article 27. This objection does not apply to carrying out tests for illegal drugs or radioactive material—both known to have been carried on occasion in diplomatic bags—or for explosives. It is not arguable that these substances could be properly intended for the official use of the mission. Moreover, as Mr Yankov observed to the International Law Commission: 'Sniffer dogs were unlikely to be so well educated that they could read the contents of a diplomatic bag.'[46] To draw a distinction between external tests such as X-ray screening which are capable of intruding on the confidentiality of communications and other tests which do not have this capability would appear to be consistent with the views expressed to the International Law Commission by most governments. Detection of drugs or other illicit substances would not in itself justify opening or detaining a bag, but it would have a considerable deterrent effect since the information would certainly be brought to the attention of the sending State and might well lead to imposition of other sanctions permitted under the Convention. If the item or substance detected threatened the safety of an aircraft or of human life, the situation which is discussed immediately below would arise.[47]

There is no breach of Article 27.3 if airline authorities require some form of scanning of a diplomatic bag as a condition of carriage. Neither the airline nor the receiving State is required to provide 'full facilities' for the carriage of a diplomatic bag which may pose a threat to aircraft safety. The sending State is, of course, entitled to send the bag without any form of opening or detention by alternative means of transport. In support of this position, the Government of Switzerland commented to the International Law Commission that 'it would be illusory to believe that, today, the captain of an aircraft would be willing to transport a package without subjecting it to some form of control'.[48]

Practice: manifest abuse or threat to human life

Except where either the sending or the receiving State has made a reservation to Article 27 of the Convention, even very strong indications of abuse of the diplomatic bag do not legally justify opening or detaining it. The Convention remedies would in such a case normally be limited to a declaration of *persona non grata* or, in a case of extreme or

[45] *ILC Yearbook* 1988 vol I p 232.
[46] Ibid.
[47] For a clear account of the arguments see Nelson (1988–89) and Nawaz (1994).
[48] *ILC Yearbook* 1988 vol II Pt 1 p 162.

systematic abuse, breach of diplomatic relations. In a few very rare cases, abuse has become manifest without actual opening of the bag by the authorities of the sending State. In 1980, for example, a crate which constituted a diplomatic bag addressed to the Moroccan Embassy in London fell from a fork-lift truck at Harwich Docks in Essex and broke open to reveal a consignment of cannabis resin to the value of £635,000. A Pakistan national employed as personal secretary to the Moroccan Ambassador in Pakistan—and not entitled to diplomatic immunity in the United Kingdom—pleaded guilty to the charge of attempting illegal import of the drug.[49] In 1964 Italian customs authorities realized that a large diplomatic bag addressed to the Ministry of Foreign Affairs in Cairo was emitting moans. The bag was opened and found to contain a drugged Israeli who had been kidnapped with the intention that he should be tried in Egypt for espionage. Some members of the Egyptian mission were declared *persona non grata* as a result of the incident.[50] Italy had not yet ratified the Vienna Convention and so the action—which was clearly justified under customary international law—did not require to be considered under Article 27.

As in the cases of premises of the mission discussed above under Article 22, there remains the possibility in extreme cases of personal danger for the receiving State to invoke self-defence or the need to protect human life. In 1917, for example, a German courier, Baron von Rautenfels, was arrested in Oslo with the consent of the Norwegian Ministry of Justice. The German Legation protested and declined an invitation to attend the opening of the diplomatic bag—which as expected was found to contain bombs intended for ships leaving Norwegian ports.[51]

In the case of the attempted kidnapping of Umaru Dikko in 1964, it was explained above that the actual decision to proceed on the basis of suspicions (knowledge of his abduction, air holes in the suspect crates, and a smell of chloroform coming from one of them) to immediate opening of the crate which contained him was taken on the basis that the crates lacked official seals and thus did not constitute diplomatic bags. But the House of Commons Foreign Affairs Committee in the context of their ongoing inquiry into the abuse of diplomatic immunities and privileges naturally explored with the Secretary of State for Foreign and Commonwealth Affairs what would have happened if the crates had indeed been identified as diplomatic bags. He replied that he had sought in evidence to emphasize that 'the advice that would have been given had the crate constituted a diplomatic bag, took fully into account the overriding duty to preserve and protect human life'. The Committee welcomed 'this acceptance that the inviolability of the bag cannot take precedence over human life'.[52] Responding in their Review of the Vienna Convention on Diplomatic Relations, the Government said:

> Whatever measures it may prove possible to achieve internationally to curb abuse of the bag, the Government remain ready to deal promptly and firmly with any exceptional cases. For instance, where the evidence is good that the contents of a bag might endanger national security or the personal safety of the public or of individuals, the Government will not hesitate to take the necessary

[49] *The Times*, 16 October 1980.

[50] *The Times*, 18 November 1964, 23 November 1964, 27 November 1964; Satow (5th edn 1979) para 14.30; Lee (1991) p 445.

[51] Seyersted (1970) pp 220–2.

[52] Report of the Foreign Affairs Committee, 1984–5, on *The Abuse of Diplomatic Immunities and Privileges*, paras 111, 113, Evidence p 50.

action on the basis of the overriding right of self-defence or the duty to protect human life. This latter consideration applied in the case of the attempted abduction of Mr Umaru Dikko and would have done so even if the crate in which he was found had in fact constituted a diplomatic bag.[53]

Work of the International Law Commission on the diplomatic bag

In 1979 the General Assembly of the United Nations, on the recommendation of the Sixth Committee, recommended that the International Law Commission should continue work begun in 1977 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic couriers with a view to the possible elaboration of an appropriate legal instrument. Even then there were doubts as to the utility of such an exercise. The United Kingdom in a Note to the Secretary-General pointed out that of nineteen different issues on the status of the courier and the unaccompanied bag, many were already covered by the Vienna Convention on Diplomatic Relations and they did not believe there was a practical need for a Protocol to the Convention. 'It is the view of the Government of the United Kingdom that any problems there may be regarding protection of the bag unaccompanied by diplomatic courier can be solved by a more faithful compliance by all States with those legal provisions that already exist rather than by further regulation.'[54] Most States, however, favoured elaboration of the rules in order to enhance protection of the courier and bag and perhaps to formulate rules which might apply generally to bags whose status was originally determined either by the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the New York Convention on Special Missions, or the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Mr Yankov from Bulgaria was appointed as Special Rapporteur and in 1980 he submitted a preliminary report to the International Law Commission. He suggested in this report that the increasing number of violations of diplomatic law warranted: 'a comprehensive and coherent regulation of the status of all types of official couriers and official bags. In this way, all means of communication for official purposes through official couriers and official bags would enjoy the same degree of international legal protection.'[55] The Commission discussed Mr Yankov's report and agreed that they should proceed to consider draft articles which he should submit.[56] Over the next few years Mr Yankov proposed forty-three draft Articles which were discussed in successive meetings of the International Law Commission. In 1986 the Commission completed first reading of a somewhat shorter set of draft Articles.[57]

The second reading of the draft articles took place in 1988 and 1989.[58] Fundamental doubts continued to be expressed about the direction and purpose of the work.

[53] Cmnd 9497, para 48.

[54] Note of 7 June 1979 in 1979 BYIL 334.

[55] *ILC Yearbook* 1980 vol II Pt 1 pp 231–45 at p 245.

[56] *ILC Yearbook* 1980 vol II Pt 2 pp 162–5.

[57] *ILC Yearbooks* 1981 vol I pp 273–8, 296; vol II Pt 1 pp 151–93, Pt 2 pp 159–62; 1982 vol I pp 293–5, vol II Pt 1 pp 231–73, Pt 2 pp 112–20; 1983 vol I pp 108–13, 152–71, 292–5, 301–9, 322–4; vol II Pt 1 pp 57–135, Pt 2 pp 44–61; 1984 vol I pp 59–92, 107–10, 162–98, 282–302, 345–9; vol II Pt 1 pp 59–88, Pt 2 pp 18–57; 1985 vol I pp 163–227, 349–51; vol II Pt 1 pp 49–62, Pt 2 pp 28–50; 1986 vol I pp 38–56, 242–7; vol II Pt 1 pp 39–52, Pt 2 pp 23–34. For an account of the ILC's draft Articles at the conclusion of their First Reading see McCaffrey (1987) at pp 676–80.

[58] *ILC Yearbook* 1988 vol I pp 168–79, 229–59; vol II Pt 1 pp 125–96, Pt 2 pp 74–97.

Mr McCaffrey from the United States pointed out to the Commission that many States had never become parties to two of the four Conventions which had formed the basis for the Commission's work, which was 'like sitting on a chair with only two legs'. The provisions of these Conventions on critical points varied widely. 'Where States had consciously and deliberately developed such different rules to cover different situations, it was hard to see how the objective of unifying existing rules . . . could be attained.'[59] Australia in its comments submitted to the Commission prior to its 1988 session said that there was no need for a new convention, no clear identification of aspects of state practice requiring revision, and that a new convention or protocol would only create difficulties and confusion for couriers, customs, and immigration officials. There was widespread support among Western governments for these views.[60]

In 1989 the United States submitted comments to the Commission which elaborated their view that 'there is no need for draft articles on this topic at this time and that approval of the draft articles would be counter-productive'. They stressed the value of the existing regime for the diplomatic bag as vital to the operation of all diplomatic missions and to the efficient conduct of foreign relations and as striking the right balance between sending and receiving States. 'That regime, which reflects centuries of practice, has been adapted where necessary by the international community and particular States as circumstances have required. Attempting in these articles to deal with the special features of different adaptations of that regime in other contexts complicates the law in this area, diminishes the flexibility inherent in separate but parallel approaches to the regime of the bag in different contexts and is therefore unnecessary and undesirable.' Although serious problems had arisen they had been relatively few, and would be better addressed by the States concerned within the present general framework. The United States suggested that the Commission should recommend that the General Assembly should, at most, take note of the draft as a possible set of guidelines and should not convene an international conference with a view to a convention on the basis of the draft.[61]

By this time, however, the draft articles had acquired a life of their own in the International Law Commission and in the deliberations of the Commission in 1989 there appeared to be very few members who took full account of the very radical reservations expressed by a significant number of serious-minded States as to the usefulness or potential acceptability of the entire exercise.[62] The 1989 Report of the Commission, which concluded their work on the subject, showed little real response on the central question of whether the draft articles were viable. The proposed regime was formidably complex, as was its relationship to other conventions and agreements, with the possibility of further supplementary bilateral agreements 'provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles'. There were two optional protocols extending the articles to bags of special missions and the bags of international organizations of a

[59] *ILC Yearbook* 1988 vol I p 178. See also comments by Belgium, ibid vol II Pt 1 pp 133–4.

[60] *ILC Yearbook* 1988 vol II Pt 1 p 131. See also comments by Canada, ibid p 138; by France, ibid p 140; by Federal Republic of Germany, ibid p 144; by Greece, ibid p 145; by The Netherlands, ibid p 146. For reasons for the widespread reserve as to the desirability of further work, see Tomuschat (2006) at p 86.

[61] *ILC Yearbook* 1989 vol II Pt 1 pp 76–9.

[62] *ILC Yearbook* 1989 vol I pp 242–81. Mr Eriksson at p 280 was the most radical in seeking to remove provisions which seemed either unnecessary or unduly burdensome.

universal character—but again subject to qualifications and possibilities of bilateral variation. It seemed likely that were these provisions to enter into force, all couriers and customs officers would require qualifications in international law.

The Commission recommended that the Articles should take the form of 'a convention constituting a distinct legal instrument and keeping an appropriate legal relationship with the codification conventions' which, in their view, 'would complete the work on progressive development and codification of diplomatic and consular law'.[63] Since 1989, however, there has been no agreement in the Sixth Committee of the United Nations General Assembly for the convening of any international conference to consider the draft articles.

A detailed description of the work of the International Law Commission on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is beyond the scope of this Commentary.[64] There seems to be no prospect of international negotiation, far less international agreement, on a protocol which might amend or supplement the Vienna Convention on Diplomatic Relations or the other multilateral agreements which govern the status of other kinds of official bag. The central problem which seems to have prevented the very considerable labours by the International Law Commission and its Special Rapporteur from bearing fruit was the existence of two potentially conflicting objectives—elaboration of a uniform regime to cover different kinds of bag and the desire to limit abuse of diplomatic bags—and the absence of general agreement in the Commission and among Member States as to which of these objectives was more important. Although the idea of a uniform regime appeared superficially attractive and easier to administer, it did not take account of the fact that the difference in treatment given to diplomatic bags and to consular bags under the respective Conventions of 1961 and 1963 was not an anomaly but reflected the difference in the likely sensitivity of diplomatic and consular communications. It was not acceptable to those States which were during the 1980s deeply concerned at possible abuse of diplomatic immunity to standardize treatment of all official bags on the basis of the higher degree of protection from search and detention given to diplomatic bags. On the other hand, it was not acceptable to smaller States without adequate resources to send extensive communications by coded wireless transmission or systematically to provide couriers for their bags that standardization of treatment should take place on the basis of the 'challenge and return' provision contained in Article 35 of the Vienna Convention on Consular Relations. The Communist States were also at that time uniformly in favour of provisions which would standardize treatment on the higher level of inviolability, and they were virtually alone in favouring adoption of new rules in the form of a convention. In consequence, what emerged was far short of a uniform regime and in many respects it failed to reflect either what State practice actually was or what a majority of States really wanted.

Although the Articles themselves remain in limbo, the extensive records of debate in the International Law Commission and the comments submitted by governments do shed light on particular controversies as to the meaning of Article 27 of the Vienna Convention on Diplomatic Relations—the definition of a diplomatic bag, the permissible contents, size and weight limits, and the admissibility of X-ray screening and other tests not

[63] *ILC Yearbook* 1989 vol II Pt 2 p 13.

[64] For short accounts of this work see Sinclair (1987) pp 99–102 and 157–64; McCaffrey (1987) at pp 676–80; Barker (1996) ch 7 pp 162–88.

involving opening or detention of the bag. Many of these shafts of light are reflected in the commentary above. The final Commission version of the key provision on the treatment of the bag was:

Article 28. Protection of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other devices.
2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of Article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.[65]

The Commentary of the International Law Commission emphasized that:

The immunity of the bag from search has been considered the reflection of the basic principle of the inviolability of diplomatic and consular correspondence and of the archives and documents of the mission or consular office, generally recognized by customary international law and reflected in the codification conventions.

The Commission also made clear that the prohibition on examination through electronic or other technical devices had been thought necessary 'as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed States'. External examination to verify from visible external marks the character of a bag was acceptable, and: 'The paragraph does not rule out non-intrusive means of examination, such as sniffer dogs, in the case of suspicion that the bag is being used for the transport of narcotic drugs.' Although these extracts relate to projected new international law, there are strong arguments from current state practice and the views expressed by governments to the International Law Commission for regarding them as an accurate account of the meaning of Article 27.3 of the Vienna Convention on Diplomatic Relations.

[65] *ILC Yearbook* 1989 vol II Pt 2 pp 42–3.

DIPLOMATIC COURIERS

Article 27

...

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Under the Convention, the status of the diplomatic bag and the protection to be accorded to it by the receiving State under Article 27 or by the transit State under Article 40 do not depend on whether or not it is accompanied by a courier. As a matter of common sense, however, those States which attach high importance to the security of some at least of their diplomatic communications and official equipment and can afford it, employ professional couriers. In the United Kingdom couriers form a special and highly regarded Queen's Messenger Service. An unaccompanied bag is more secure than official correspondence sent through public postal facilities, because of the official seals which identify it and prevent its being opened without detection. There is, however, no way in which the sending State can ensure that it is not detained or subjected to X-ray screening or to other tests which may compromise its security. The function of the diplomatic courier is to ensure by personal supervision of the bags which he accompanies that the rules of international law are observed in practice.

Negotiating history

The three concluding paragraphs of Article 27 greatly expanded and clarified the customary law regarding diplomatic couriers. The customary law might have been summed up in the single sentence which constituted the original draft submitted to the International Law Commission: 'The messenger carrying the dispatches shall be protected by the receiving State.'[1] State practice varied on such matters as whether the courier was immune from the jurisdiction of the courts, whether his personal baggage might be inspected, and on his position after he had delivered the diplomatic bag. In the case of

[1] UN Doc A/CN 4/91, Art 16 para 3.

Juan Ysmael & Co v S.S. Tasikmalaja,[2] for example, the acting Attorney-General advised the Hong Kong Supreme Court that diplomatic couriers could not be compelled to give evidence about matters within the scope of their official duties, but the court made clear that had the courier not already left Hong Kong, a warrant would have issued to compel him to attend for cross-examination on an affidavit he had filed in the action. The practice of sending ad hoc couriers (usually members of the diplomatic or consular service travelling for some other reason on official business) had become widespread, but the status of these ad hoc couriers was not clear. Nor was the position of commercial pilots entrusted with the carriage of diplomatic bags, who might or might not be issued with identification as diplomatic couriers.

The International Law Commission in 1957 distinguished clearly between the three types of messenger—the professional courier, the ad hoc courier carrying accreditation, and the commercial airline pilot carrying diplomatic bags. The draft article adopted made provision similar to that now in Article 27.5 for 'the diplomatic courier'. The Commentary made clear that the captain of a commercial aircraft not furnished with a document testifying to his status as a courier was not regarded as a diplomatic courier. Emphasis had been laid in discussion on the need for him to be subject to local jurisdiction in respect of his functions in regard to the aircraft. No distinction was drawn between professional and ad hoc couriers.[3] A number of States were unhappy with these provisions and made various suggestions for their improvement.[4] The Commission were, however, divided on the matter in 1958 and found that the views of governments diverged. Text and Commentary were therefore left largely unchanged.[5]

The Vienna Conference devoted little attention to the question of couriers, which was completely overshadowed by the questions of wireless transmitters and the status of the diplomatic bag. Three amendments, however, replaced the Commission's text by the much more detailed provisions of paragraphs 5, 6, and 7 of Article 27. An amendment introduced by France[6] took into the text the requirement (which the Commission had indicated in their Commentary as practice) that the courier must be furnished with a document indicating his status. For professional couriers this is normally a courier's passport. The amendment also required the courier to carry a document indicating the number of packages constituting the diplomatic bag. This safeguard is additional to the requirement in Article 27.4 that the packages constituting the diplomatic bag must bear visible external marks of their character. It should avoid disputes as to whether particular items form part of the courier's personal baggage, which is given no exemption from inspection or from confiscation. The third change in the amendment was the introduction of the words 'in the performance of his functions' which underlines the fact that the inviolability given to the courier is closely linked to the protection of the diplomatic bag which he carries. Under paragraph 5 (in contrast to paragraph 6) the professional courier does not lose his inviolability on delivery of the bags. Normally, of course, he departs almost immediately bearing diplomatic bags from the mission to the sending government

[2] 19 ILR (1952) 400.
[3] *ILC Yearbook* 1957 vol I pp 83–5; vol II p 138 (para (4) of Commentary on Art 21).
[4] UN Doc A/CN 4/116 pp 48–50.
[5] *ILC Yearbook* 1958 vol I pp 139–42; vol II p 97.
[6] UN Docs A/Conf. 20/C 1/L 125 para 2 and L 286 para 2 (France and Switzerland); A/Conf. 20/14 p 154.

or for delivery elsewhere. Were he to remain in the receiving or transit State for a substantial period of leave, his inviolability would lapse, but would be revived by entrusting him with another diplomatic bag. Couriers are normally inseparable from the bags which they accompany—in the United Kingdom there is special authority permitting accompanied diplomatic bags to be carried in the passenger compartment of the aircraft on a passenger seat or on the floor without being checked in for carriage in the hold or stowed in a compartment.[7]

Chile, which had earlier argued without success that inviolability should be extended to commercial pilots while they were in charge of the bag, introduced the new provision which became Article 27.6 and which made clear provision for ad hoc couriers, limited to the period during which they are in charge of the bag.[8] Ad hoc couriers are in general used more by smaller States lacking the resources to employ professional couriers, but larger States may also use them to accompany some urgent delivery of documents where the normal courier service would arrive too late. It is common practice for ad hoc couriers to be members of the diplomatic service of the sending State, so that even when they lose their inviolability as couriers they may well continue to be entitled to immunity in some different capacity. Finland, for example, which no longer uses professional couriers, set out its practice on ad hoc couriers in the following comments to the International Law Commission:

> Such couriers may be officials in the foreign service or adult members of their families, or even other Finnish citizens of high reputation, and in the first place, persons eligible to carry a diplomatic passport or a passport of official service. The *ad hoc* courier will be provided not only with the certificate mentioned above but also with a courier passport which will indicate his/her diplomatic status and which the courier has to hand over to the receiver. When land or sea transportation is used (for heavy consignments), captains of Finnish ships or Finnish truck drivers may act as couriers.[9]

Switzerland introduced the amendment which added provision, following the Commission's Commentary, on the position of the captain of a commercial aircraft in charge of a bag.[10] The privilege accorded under Article 27.7 is that of direct access to the aircraft, and it is accorded to the mission, which 'may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft'. No special status or immunities are accorded to the commercial pilot himself. Article 27.7 does not expressly cover the captain of a ship who may also, though less frequently, be entrusted with the carriage of diplomatic bags. This omission is rectified for consular bags in Article 35 of the Vienna Convention on Consular Relations. There is, however, unlikely to be any difficulty for a diplomatic mission in seeking—even in the absence of express provision in Article 27.7—to secure direct access to a ship's captain in order to collect a diplomatic bag.

[7] UK Civil Aviation Authority, Air Navigation Order 2005, 31 October 2005.

[8] UN Docs A/CN 4/L 72 p 15 (statement to Sixth Committee); A/CN 4/116 p 50; A/Conf. 20/C 1/L 133; A/Conf. 20/14 p 157.

[9] *ILC Yearbook* 1982 vol II Pt 1 p 236.

[10] UN Doc A/Conf. 20/C 1/L 158 and L 286; A/Conf. 20/14 p 157.

Work of the International Law Commission on diplomatic couriers

While the work of the International Law Commission on diplomatic bags, even though very unlikely to result in new treaty law, may be justified in terms of the light shed on the meaning of Article 27 of the Vienna Convention on Diplomatic Relations and on contemporary state practice, the same cannot be said of the Commission's work on the diplomatic courier. There is virtually no evidence from reported incidents, from cases, or from comments of governments to the International Law Commission to suggest that paragraphs 5, 6, and 7 of Article 27 of the Convention were causing any difficulties. They respond well both to modern practice and to the need to grant immunities only 'to ensure the efficient performance of the functions of diplomatic missions as representing States'. The draft articles adopted by the Commission[11] would have added numerous legal provisions which were either unnecessary (appointment of couriers, declaration of couriers *persona non grata*, freedom of movement, tax exemption) or were unacceptable as a matter of principle to many Western governments (immunity from jurisdiction, inviolability of lodgings). The grant of more extensive immunities to couriers was not compatible with any kind of response to abuse of immunities and, as was pointed out above, many governments clearly signalled that this would not be an acceptable approach.

The doubts of many States were well expressed by Austria when it said in its comments to the International Law Commission in 1988:[12]

> The diplomatic courier is being elevated, in many respects, to the level of a 'temporary diplomat' for which Austria sees no compelling reason. It would seem that the focus of attention should rather be directed to the bag, for the courier is only a means used by Governments for the delivery of the bag. Any status accorded to the courier should be exclusively defined according to functional necessities. A State may, at any time, designate a member of a diplomatic mission as a courier should the need be felt that such courier should enjoy full diplomatic protection. The guiding principle should be the extent to which the protection accorded to the courier who is not a member of the diplomatic staff of a mission is necessary for the performance of his function—which is the delivery of the bag. Consideration must be given to the delicate balance between the sending State's interest in maintaining free communication with and between its missions and the receiving State's legitimate interest in preserving its integrity and security.

The International Law Commission, however, failed to address this concern, although it was widely shared and repeatedly expressed. In the light of the subsequent failure of the Sixth Committee of the General Assembly to agree even to convene a diplomatic conference to enable governments to consider the draft articles of the Commission it is very probable that the status of diplomatic couriers will for the foreseeable future continue to be regulated by the concluding paragraphs of Article 27.

[11] *ILC Yearbook* 1989 vol II Pt 2 p 13. The work by the International Law Commission is discussed more fully above in the context of the diplomatic bag.

[12] *ILC Yearbook* 1988 vol II Pt 1 p 132.

EXEMPTION OF OFFICIAL FEES FROM TAXATION

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 28, which was based on a proposal by The Netherlands, states a rule so universally accepted and practised that debate on it in the International Law Commission was limited to whether it was necessary to include it in the draft as a separate article or whether a reference in the commentary might suffice.[1] It was adopted by the Vienna Conference unanimously and without amendment.[2]

For the most part, fees and charges levied by a diplomatic mission are likely to relate to functions which might be regarded as consular in nature—for example, passport and visa fees and charges for authenticating or legalizing documents. Possible restrictions and rules applicable where a diplomatic mission performs consular functions are discussed above in the context of Article 3 of the Convention.

[1] UN Docs A/CN 4/114/Add. 1 p 16; A/CN 4/116 p 51; *ILC Yearbook* 1958 vol I p 143.
[2] UN Doc A/Conf. 20/14 p 152.

PERSONAL INVIOLABILITY

Article 29

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

Historical background

Inviolability of the person of a diplomatic agent is certainly the oldest established rule of diplomatic law. Wherever among the separate States of an international community ambassadors were sent and received, custom or religion invariably accorded a special protection to their persons. Among the city States of ancient Greece, among the peoples of the Mediterranean before the establishment of the Roman Empire, among the States of India, the person of the herald in time of war and of the diplomatic envoy in time of peace were universally held sacrosanct.[1]

When diplomatic missions began to be exchanged among the Italian city States, ambassadors were granted safe conducts for missions which at first were normally temporary, or were treated as inviolable. During the sixteenth century the guarantee of special protection to an envoy became more difficult as their numbers increased and they were exchanged between sovereigns of different faiths—Catholic, Protestant, and Muslim—in an age of religious intolerance and of legal penalties for the practice of an alien faith. Inviolability was, however, accepted in practice as essential if diplomatic relations were to develop at all. By the end of the sixteenth century, when the earliest treatises on diplomatic law were published by Ayrault and by Gentilis, the inviolability of the ambassador was firmly established as a rule of customary international law.[2]

It happened too frequently at this period that an envoy became involved in conspiracy against the sovereign of the receiving State. In this event the practice of States was that the envoy was expelled and could not be tried or punished.[3] The writers argued that the receiving State retained a right of self-defence—and Grotius maintained that the ambassador could even be killed in self-defence.[4] While this must be correct as a matter of principle—and the overriding nature of the right of a State to self-defence has been stressed above in the context of Articles 22 and 27 and will be considered below—it is significant that throughout a period when abuse of diplomatic immunity was as serious a

[1] Tenékidès (1956); Audinet (1914) at p 57; Coleman Phillipson (1911) vol I ch XIII; Hill (1905) vol I p 8; Pomponius (533) *Digest* L.vii De Legationibus fr.17; Chatterjee (1958) p 66; Viswanatha (1925) ch IV.

[2] Ayrault (1576); Gentilis (1585); Adair (1929); Young (1964) pp 141–7; Przetacznik (1978) p 348.

[3] eg John Lesley, Bishop of Ross, representative of the captive Mary Queen of Scots to Queen Elizabeth of England, was expelled after a short period of imprisonment despite the advice of civilian lawyers that he had forfeited his diplomatic immunity—see Adair (1929) p 48; McNair (1956) vol I p 186. The Spanish Ambassador to Queen Elizabeth, Mendoza, was expelled in 1584 on suspicion of conspiracy against the Queen. The French Ambassador d'Aubéspine in 1587 fell under similar suspicion but continued to act as Ambassador when a request for his recall was ignored: Bynkershoek (1721) ch XVIII.

[4] (1625) II.XVIII.iv.6 and 7.

problem as it became in the twentieth century there appears to be no instance where a receiving sovereign relied on self-defence to take measures stronger than expulsion against a diplomat discovered to be actively conspiring against him.

Negotiating history

In the Commentary on its draft article, the International Law Commission stated that: 'Being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion. This principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.'[5] The principle of personal inviolability was so long established in customary international law that there was in the International Law Commission no other discussion of its scope or formulation.

At the Vienna Conference there was again little discussion of the draft article. China proposed to incorporate into the text the passage from the International Law Commission's Commentary set out in the previous paragraph. This proposal was rejected without discussion—no doubt because it was thought to be unnecessary and liable to give rise to uncertainty as to whether the principle of self-defence applied in the case of other articles of the Convention. The outcome was thus similar to that of the various attempts to introduce specific exceptions to the inviolability of mission premises under Article 22.

A more illuminating exchange took place in response to the proposal by Belgium to require the receiving State to take not 'all reasonable steps'—as in the International Law Commission's draft—but simply 'all steps' to prevent any attack on the person, freedom, or dignity of the diplomatic agent. This was at first accepted by the Conference, but the UK representative, with support from Ireland and Nigeria, explained that he had voted against it 'because the removal of the word "reasonable" would give the article unlimited scope, and impose an impossible task on receiving States'. The Belgian representative said that he would be content with 'all appropriate steps', and this formula—which is identical to that imposed on the receiving State in respect of premises of the mission under Article 22—was then adopted by the Conference.[6]

Subsequent practice: protection against attack

Article 29 of the Convention, like Article 22, first confers 'inviolability' and then defines in greater detail what is meant. As in the case of premises of a diplomatic mission there are two aspects of inviolability—first the duty on the receiving State to abstain from exercising sovereign rights and in particular law enforcement rights, and secondly the positive duty to treat the diplomatic agent with due respect and to protect him from physical interference by others with his person, freedom, or dignity. Prior to the Vienna Convention the attention of writers tended to focus on the first of these two aspects, and the second was almost taken for granted. In the nineteenth century it was even suggested that

[5] *ILC Yearbook* 1957 vol I pp 209–10; vol II p 138; 1958 vol II p 97. For older authorities supporting the existence of a right of self-defence in exceptional circumstances see Salmon (1994) 394.

[6] UN Docs A/Conf. 20/C 1/L 214; A/Conf. 20/14 p 160.

with increased public order and acceptance of the duty to protect all aliens, diplomatic inviolability would become unnecessary and lapse.[7]

Soon after 1961 the position altered dramatically. Kidnapping, murder, and violent assaults against diplomatic agents as well as against mission premises became frequent. In some instances diplomats were selected for attack because of their status as representatives of the policies of particular sending States, in others because of the publicity value of flouting the long-established rule of inviolability or because the duty of protection imposed on the receiving State meant that its government would be regarded as being under pressure to comply with any extortionate demand in order to secure the safety and freedom of a hostage. In some attacks it might be unclear whether the motive was to highlight divisions in the sending or in the receiving State—as was apparent following the bombing in 2000 of the car of the Ambassador of the Philippines to Indonesia which seriously injured the ambassador and killed two other people. The Government of Indonesia expressed conflicting views as to whether the intention was to highlight the separatist struggle in the Philippines or to destabilize the President of Indonesia by showing that he was incapable of maintaining security.[8] In July 2005 Al Qaeda abducted and later claimed to have killed the prospective Ambassador of Egypt to Iraq, Ihab al-Sherif, and attempted to abduct diplomats of Pakistan and Bahrain, apparently with the aim of deterring Arab Governments from strengthening diplomatic relations with the democratically elected Government in Baghdad.[9]

The extent of the duty to protect diplomatic agents came into question at an early stage as a result of the growth in the practice of taking diplomats as hostages in order to extort political or financial gain from the receiving State. It was clear from the International Law Commission's Commentary[10] that the receiving State might be obliged, in case of threat to the safety of a diplomat, to provide an armed guard to protect him. Experience showed, however, that special armed escorts were of limited value as protection against determined terrorists. If a diplomat was taken hostage, did the duty to 'take all appropriate steps' require the receiving State to pay the ransom demanded for his release or to violate its own laws by bargaining with terrorists for the release of prisoners? In 1970 the West German Ambassador to Guatemala, Count von Spreti, was kidnapped, and the hostage takers demanded the release of prisoners as well as a ransom for his release. The Government of Guatemala took the position that Article 29 did not require them to violate their own Constitution or endanger national security by capitulating in this way. But the ambassador was murdered, and the Government of the Federal Republic of Germany—which had sent a special envoy to press for acceptance of the terrorists' demands—protested that Guatemala 'was expected to do everything to obtain the release' and had violated its obligations under the Vienna Convention. Germany virtually broke diplomatic relations with Guatemala.[11]

On other occasions of kidnapping, by contrast, receiving States had secured the release of diplomatic hostages by capitulating to demands to release political prisoners. In 1969

[7] Martens-Geffcken (1866) p x.

[8] *The Times*, 2 August 2000. See also Barker (2006) esp pp 3–16, 67–70.

[9] *The Times*, 8 and 28 July 2005; US State Department Press Release 8 July 2005.

[10] *ILC Yearbook* 1958 vol II p 97.

[11] *The Times*, 7 April 1970; Baumann (1973) p 101; Sztucki (1970); Salmon (1994) para 390; Satow (6th edn 2009) at para 17.28.

the US Ambassador to Brazil was released by the Movimento Revolucionario do Ottobre 8 in exchange for the release of fifteen prisoners and publication of their political manifesto. In 1970 it required the release of forty prisoners to secure the safety of the West German Ambassador to Brazil and a few months later, when the Swiss Ambassador to Brazil was kidnapped, inflation had raised the price of his release to seventy prisoners. In 1970 there were seventeen separate diplomatic kidnappings and it became apparent to those Western governments whose diplomats were the most favoured targets that a policy of capitulating to unlawful demands was not an inherent requirement of Article 29 of the Vienna Convention and could not be sustained.[12] The United Kingdom set an example of discouraging bargaining with diplomatic hostage takers. The release of a UK honorary consul in Argentina kidnapped in 1971 followed the distribution by his employers—and not by the UK Government—of goods to the value of £75,000 to the poor. In the same year the UK Government stood firm when their Ambassador to Uruguay was kidnapped by guerrillas and held captive for eight months.[13] A collective stand by Western governments in refusing to accept or to press for acceptance of the demands of diplomatic hostage takers may well have had some effect, for the incidence of kidnappings—though not of other forms of terrorist violence against diplomats—declined sharply after 1971.[14]

UN Convention on Crimes against Diplomatic Agents

The need for a collective response by governments was also met to some extent by the request from the United Nations General Assembly in December 1971 to the International Law Commission to prepare draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. There was a swift response from the International Law Commission, draft articles were drawn up in the light of comments from governments and submitted to the General Assembly.[15] Some governments were in fact sceptical of the need for any additional international agreement in the light of the rules in the Vienna Convention,[16] but the majority accepted the political case for a new Convention. A regional precedent had already been created by the Organization of American States who in February 1971 had adopted a Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance.[17] In December 1973 the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was drawn up by the Sixth Committee of the General Assembly, approved by the General Assembly, and

[12] Moss (1971) p 206; *Terrorist Incidents involving Diplomats: A Statistical Overview of International Terrorist Incidents involving Diplomatic Personnel and Facilities from January 1968 through April 1983* (State Department, 1983); Kaufman Hevener (1986) pp 67–71.

[13] Sir Geoffrey Jackson in *People's Prison* (1973) published an account of his captivity. See also Satow (5th edn 1979) ch 24 'Kidnapping of Diplomats'.

[14] Satow (6th edn 2009) ch 17.

[15] UN Docs A/CN 4/253 and Adds 1, 2, and 3; ILC Report 1972 vol II p 225; Rosakis (1974).

[16] Brazil, France, Australia: UN Doc A/CN 4/253 and Adds 2 and 3. Morocco, Cuba, and China expressed doubts in the Sixth Committee. See UN Doc A/pv.2202.

[17] TIAS 8413, Inter-American Treaties and Conventions, Treaty Series No 9, rev 1985. The Convention is printed in Kaufman Hevener (1986).

opened for signature.[18] By August 2015 there were 178 Contracting Parties to the Convention.

The key provisions of the Convention require that persons alleged to have committed any one of specified offences of violence against a diplomatic agent or other person entitled to similar protection should either be extradited or have their case submitted to the competent authorities for the purpose of prosecution. The offences—including threats, attempts, and participation as an accomplice—are to be made crimes under the internal law of each State Party and jurisdiction over them is required to be taken on a very wide basis. There are in addition provisions for co-operation among States Parties to prevent preparation of these crimes anywhere and for exchange of information to prevent the crimes or secure punishment of offenders. The Convention was applied by the Australian Federal Court in 1979 in the case of *Duff v R*[19] in order to convict the defendant on charges of attacking the military adviser to the Indian High Commission in Canberra and his wife—both internationally protected persons.

Article 2 of the Convention also requires that the specified crimes are to be 'punishable by appropriate penalties which take into account their grave nature'. It does not require that the penalty should be greater on account of the fact that the victim was an internationally protected person. In this it follows Article 29 of the Vienna Convention. National legal provisions which created a special offence of injury either to the person or dignity of a diplomat were in fact common, but by no means universal before the Vienna Convention.[20] The US Protection of Diplomats Act 1972 was adopted as a federal statute because Congress found that 'harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States adversely affect the foreign relations of the United States'. The federal jurisdiction was to be concurrent with that of the individual States.[21] In 2011, however, Manssor Arbabsian, a US naturalized Iranian, was charged in a New York Federal Court in connection with a failed plot to murder the Ambassador of Saudi Arabia to the US. The charges were not brought under the 1972 Act, but included conspiracy to murder a foreign official, conspiracy to commit an act of terrorism transcending national boundaries, and other general criminal offences. The UN General Assembly passed a resolution deploring the assassination plot and calling on Iran to co-operate in attempts to bring those involved to

[18] Text in 1974:13 ILM 41. See Wood (1974); Green in 1973–4 Virginia Journal of International Law 703; Przetacznik (1974); Foakes (2014) 75–6. See also General Assembly Res 38/136 of 2 February 1984 on consideration of effective measures to enhance the protection, security, and safety of diplomatic and consular missions and representatives. The Resolution requests all States to report to the Secretary-General serious violations of the security and safety of diplomats.

[19] [1979] 28 ALR 663; 73 ILR 678. See also *Von Dardel v USSR* 77 ILR 258, in which the US District Court relied in part on the Convention to establish jurisdiction and to find on the merits against the Soviet Union in a claim for the unlawful seizure, detention, and possible death of Raoul Wallenberg, a Swedish diplomat in Hungary during the Second World War.

[20] eg Belgium: Salmon (1994) para 391; Cuba: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 71; Ecuador: ibid p 107; Egypt: ibid p 109; Israel: ibid p 180; Korea: ibid p 189; The Netherlands: ibid p 201; Norway: ibid p 225; The Philippines: ibid p 236; Poland: ibid p 245; Yugoslavia: ibid p 407; United States: ibid p 386 and see also *Frend et al v United States*, AD 1938–40 No 161 and US Protection of Diplomats Act (1972), Public Law 92–539; 18 USCA § 1116, printed in 1973 AJIL 622.

[21] US Code Congressional and Administrative News, 92nd Congress—Second Session 1972 vol 3 Legislative History.

justice. In 2013 Arbabsian, having pleaded guilty, was sentenced to twenty-five years in prison.[22]

In 1978 when the Supreme Court of Cyprus reduced to three years the sentences imposed on those convicted on charges arising out of a violent demonstration and attack on the US Embassy in Nicosia which led to the ambassador and another member of the mission being killed by gunfire, the US Government publicly expressed strong disappointment at the outcome of proceedings resulting from the murder of their ambassador. Some months later it was announced that the Attorney-General for Cyprus had instructed the police to reopen the investigation.[23]

In the United Kingdom by contrast, as in most other States, there was no special offence and no special provision or penalty. Although section 4 of the Diplomatic Privileges Act 1708 made it an offence to issue a writ or process against an ambassador or any member of his staff, the provision was enacted in order to appease the Tsar of Russia for breach of the inviolability of his ambassador and there is no record that proceedings under it were ever brought.[24]

Beyond this, what are the 'appropriate steps' to be taken to safeguard diplomatic agents must be determined in the light of the relevant circumstances and particular threats or dangers by sending and receiving States in consultation. The French Minister for Foreign Affairs has made clear that the factors taken into account in determining how his Government's responsibility is to be discharged include the position of the diplomats, the risks which they run, threats made against them, and political circumstances in France and in the sending State.[25] In Colombia, for example, regarded as a highly dangerous posting by diplomats, the Government provide armed guards for all ambassadors and first secretaries as well as special security advice. Even these measures did not prevent a wave of kidnappings of diplomats and consuls in 1988.[26] But the way in which the duty of protection is carried out is not susceptible to review by a court in the receiving State, as was made clear by a US Federal Court in *Ignatiev v United States*,[27] described above in the context of Article 22.

A sending State with the necessary resources may offer to provide additional protection for its vulnerable diplomats and may do this if the receiving State agrees. The US expects to provide security for its diplomats as well as its premises in dangerous capitals. When in September 2012 the US Ambassador to Libya was killed as a result of an attack on his mission in Benghazi, there was no serious criticism of the Transitional Government of Libya—which condemned and apologized for the attack and provided co-operation in its investigation—but there was sustained criticism of the failure by the US Government to provide the additional security which had been requested by the Ambassador.[28] But it must be recalled that the primary responsibility to protect and to secure the enforcement

[22] Department of Justice Press Release 11 October 2011, 2012 AJIL 146, GA Res 66/12, 18 November 2011; *New York Times*, *Washington Post*, 30 May 2013.

[23] 1978 DUSPIL 565.

[24] Lyons (1954) pp 299–305; Hurst (1926) at pp 128–30; Hardy (1968) p 52; Satow (5th edn 1979) paras 15.2–5.

[25] 1982 AFDI 1099. See also Satow (5th edn 1979) para 15.5. For an appraisal of protection provided in a case where the Turkish Ambassador was murdered in Paris see 1988 AFDI 888.

[26] *The Times*, 5 May 1988.

[27] 238 F 32rd 464 (DC Cir 2001); 2001 AJIL 873.

[28] *The Times*, 13 September 2012; *Observer*, 23 September 2012.

of law is that of the receiving State and that any agents of the sending State protecting their own officials are bound to comply with local laws and regulations on such matters as the carriage and use of weapons. The UK Government, which discharges its duties under the Vienna Convention through a specially constituted and trained Diplomatic Protection Group of police, have repeatedly warned diplomatic missions that any breach of their domestic laws on import, acquisition, and possession of firearms will normally lead to a request for recall of the offender.[29] A similar view of breaches of local firearms laws has been taken by the United States.[30]

With the exception of the detention of the hostages in Iran in 1979, deliberate violations of the personal inviolability of diplomats are extremely rare. But in Zimbabwe in June 2008, during a period of political tension preceding a run-off vote between President Mugabe and his opponent Morgan Tsvangirai, a convoy of US and UK diplomats travelling to observe conditions and investigate allegations of harassment of opposition supporters was attacked by Presidential militiamen and police and detained for several hours. Their car tyres were slashed, their mobile phones seized, they were accused of 'trying to effect régime change in Zimbabwe' and threatened with violence, and a driver who was a member of the US mission was beaten up. Strong protests were delivered to the Ambassadors of Zimbabwe in Washington and London, and the US called for Security Council consultation.[31] In 2013, during a period of tense relations between The Netherlands and Russia, a Dutch diplomat was attacked and bound to a chair in his flat in Moscow while the premises were ransacked. The police took an hour to respond to his alarm call and although the authorities expressed regret, there were allegations that the incident was politically motivated.[32]

Attack on the dignity of a diplomat

The emphasis in recent times on protection of the person of diplomats from physical attack has not been matched by special measures to protect their dignity. The extent of the duty on the receiving State under Article 29 to protect dignity was, however, carefully considered by the UK Court of Appeal in the case of *Mariam Aziz v Aziz and others, Sultan of Brunei intervening.*[33] Proceedings were brought by the former wife of the Sultan of Brunei against a fortune teller for recovery of property given under a false understanding. The Sultan of Brunei, who was entitled as a foreign Head of State under section 20 of the UK State Immunity Act 1978 to the same inviolability as is given to a head of mission and thus to 'appropriate steps to prevent any attack on his dignity', intervened seeking further redaction of the judgments given by the court to remove any material which would lead to his being identified. Collins LJ found that state practice made clear that when complaints were made about offence given to a Head of State by private parties, the receiving State regularly referred the complainant to remedies which were available in its courts but subject to constitutional guarantees of free speech. There was no authority from custom or precedent for the proposition that respect for dignity required

[29] Review of the Vienna Convention, Cmnd 9497, para 70.
[30] See incidents described in Lee (1991) pp 473–5.
[31] *The Times* and *Guardian*, 6 June 2008, *Telegraph*, 5 June 2008, 2009 DUSPIL 495.
[32] *The Times*, 18 October 2013, *Washington Post*, 16 October 2013.
[33] Judgment of 11 July 2007 [2007] EWCA Civ 712; 136 ILR 587; *Foakes* (2014) 68–9.

confidentiality of court proceedings. The material before the court relating to diplomatic inviolability was concerned with the duty of the receiving State to protect embassy premises while permitting its citizens to demonstrate outside them. It showed that there was a duty to prevent offensive or insulting conduct but that neither Article 22 nor Article 29 could be invoked in order to suppress free expression. He concluded that:

> I am far from convinced by the material before us that there is a rule of customary international law which imposes an obligation on a State to take appropriate steps to prevent conduct by individuals which is simply offensive or insulting to a foreign head of state abroad.

He found that there had been no attack on the dignity of the Sultan, that steps had been taken to protect his interests, and that no greater protection from disclosure of the judgments was required in his case than was given to ordinary members of the public who were third parties to litigation. This judgment was directed to the position of a foreign Head of State, but would apply equally—or even more so—to an ambassador or other member of a diplomatic mission entitled to inviolability. It is entirely consistent with the modern tendency to confine all privileges and immunities to what is required to ensure efficient performance of international relations and to circumscribe them with particular care where they may be in conflict with the fundamental rights of others.

A similarly restrictive interpretation of the entitlement to protection from attack against dignity under Article 29 of the Vienna Convention was given by the International Court of Justice in the *Case Concerning Certain Question of Mutual Assistance in Criminal Matters (Djibouti v France)*, where the Court held that an invitation by an investigating judge to testify in writing, not accompanied by any threat in case of failure to comply, could not be regarded as failing to respect the immunities of the Head of State of Djibouti—entitled to the level of inviolability accorded to an ambassador—or as being in any way an attack on his honour or dignity.[34]

Subsequent practice: liability to arrest or detention

While diplomats have become vulnerable to attack from third parties, there have in modern times been very few cases where they have been arrested or detained by the authorities of the receiving State. In the case of *Von Dardel v USSR*[35] in 1985 the next of kin of Raoul Wallenberg, a diplomat in the Swedish Legation in Hungary during the Second World War much occupied in saving Hungarian Jews from deportation to death camps, successfully established jurisdiction of a US District Court and a judgment on the merits against the Soviet Union. Jurisdiction was accepted by the US Court on the basis that Wallenberg had been arrested by Soviet occupation forces during their conquest of Hungary in 1945 and had been held as a prisoner in the Soviet Union at least until 1947, when the Soviet Union alleged that he had died of natural causes. The court held that this infringement of Wallenberg's inviolability was a 'clear violation' of a universally recognized principle of international law. The Soviet Union when it formally admitted responsibility in 1957 admitted that the action of the occupying forces was unlawful, but claimed that the person responsible had been tried and punished. Wallenberg was not alone in his actions—in the context of an exhibition and gathering of descendants at the

[34] (2008) ICJ Rep 177, at para 178; Foakes (2014) pp 64–6, 79–80.
[35] 77 ILR 258.

United Nations headquarters in New York in 2000 it was claimed that eighty-four diplomats from twenty-four States had issued protective letters or arranged safe houses in order to save Jews from Nazi death camps. It was not, however, clear to what extent the occupying authorities were aware of these efforts by diplomats to circumvent local laws.[36]

One even more extraordinary breach of the personal inviolability of diplomatic agents—and probably the only significant breach by a Contracting Party of Article 29 of the Vienna Convention—was the detention for over a year of the diplomatic and consular staff in the US Embassy in Tehran. The inaction of the Government of Iran in face of the imprisonment of diplomats and other embassy staff by militant students demanding that the former Shah should be extradited by the United States was characterized by the International Court of Justice (ICJ) in the *Hostages Case* as a 'clear and serious violation' of Article 29 as well as of other provisions of the Vienna Convention. The subsequent approval of the situation by the Ayatollah Khomeini and other organs of the State, as the ICJ said, transformed the detention of the hostages into acts for which Iran was internationally responsible, and gave rise to 'repeated and multiple breaches of the applicable provisions of the Conventions'. There was also a continuing breach of Article 29 in respect of the effective detention of the US Chargé d'Affaires and two other members of the mission in the Ministry of Foreign Affairs.[37] As suggested above, however, in the context of Article 22, the violation was so manifestly indefensible and so clearly condemned by the ICJ and by the international community that it cast no doubt on the legal position established in the Convention.[38] Bassiouni analysed the historical and contemporary practice under Islamic Law relating to the protection of diplomats, and concluded that the conduct of Iran was 'in clear violation of Islamic law as established in the Koran, practised by the Prophet, followed by the successive *Khalifas*, agreed upon in the writings of the most distinguished and recognized scholars throughout Islam's history, and practised by contemporary Muslim States'.[39]

A much less serious but nevertheless clear breach of Article 29 occurred in Tehran in 1987 following the arrest of an Iranian vice-consul in Manchester by British police on charges of shoplifting. The vice-consul was entitled only to immunity for his official acts. In an act of apparent retaliation a diplomatic agent in the British Interests Section in Tehran was arrested and detained for twenty-four hours by Revolutionary Guards. There were strong protests by the UK Government, and the incident led to the closure of the Iranian Consulate in Manchester and to further downgrading of relations between the two States.[40]

In the case of *Democratic Republic of the Congo v Uganda*[41] the ICJ declared admissible in 2005 the counterclaim of Uganda that Congolese soldiers had threatened and maltreated members of the Uganda diplomatic mission in Kinshasa in violation of Article 29 of the Vienna Convention. The ICJ held that the alleged violation related to rights owed

[36] *The Times*, 5 April 2000; Eliasson Commission Report, 2003 (Sweden); Article on Wallenberg in Jewish Virtual Library.

[37] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at paras 67, 74, and 76–8; Satow (6th edn 2009) para 9.4. See also under Art 22 above.

[38] Lecaros (1984) at p 134 says that the detention 'aroused the repulsion of the entire world'.

[39] Bassiouni (1980) at p 619.

[40] *The Times*, 30 May 1987, 1 June 1987, 5 June 1987.

[41] *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ Rep, Judgment of 19 December 2005.

directly to Uganda and so there was no need for local remedies to be exhausted by the diplomats who were victims. The Eritrea Ethiopia Claims Commission also in 2005 upheld the claim of Ethiopia that Eritrean guards arrested and detained the Chargé d'Affaires of Ethiopia for under an hour, so infringing his inviolability under Article 29. Ethiopia was itself in breach of Article 29 by subjecting Eritrean diplomats required to leave to search of their persons and luggage.[42]

The inviolability of a diplomatic agent does not preclude his being expected to submit to search either manually or by X-ray device as a condition of carriage by air. The position is the same as with diplomatic bags under Article 27 of the Convention in that the diplomatic agent cannot be obliged to submit to search or screening, but if he refuses the airline cannot be required to transport him on its aircraft. In 1982 the UK Secretary of State informed all diplomatic missions in London that: 'Airlines are fully entitled to refuse to carry any passenger who is unwilling to be searched.' This Note also explained that certain distinguished visitors from overseas would not in practice be searched and asked heads of mission to encourage compliance by diplomatic staff in the interests of general safety.[43] There have, however, been repeated complaints by India over searches by US security officials of Indian diplomats, including the Indian Ambassador, before boarding flights leaving the US.[44]

Exceptional protective measures

A diplomatic agent cannot be required to submit to compulsory search by police or other law enforcement authorities and cannot be required to submit to a breath test or other medical examination. The UK Government told Parliament in 2004 that where incoming diplomats had been subjected to medical checks, this was due to administrative error for which apologies had been offered.[45] It follows that even if a waiver of inviolability could be sought and obtained from the head of the relevant diplomatic mission it would in general not be practical to obtain in time the necessary evidence to prosecute for drink-driving offences, and UK policy is therefore not to request waivers in such cases.[46] The practice in the United States is, however, for police to ask drivers entitled to inviolability to submit to a breath test for their own safety. The State Department explained to diplomatic missions in Washington that: 'The object of the test is not punitive, but preventative, and serves to protect both the driver and the possible victims of drunken driving.'[47] Canadian practice is also to:

> request the driver to submit voluntarily to road-side screening, and subsequently on reasonable suspicion of impaired driving, to a breathalyser test. On evidence of insobriety, police forces may escort the offender to the local police station where a member of the mission or the offender's family will be contacted to take him/her home in the interest of public safety and that of the offender.[48]

[42] Diplomatic Claim, Eritrea's Claim 20 (*Eritrea v Ethiopia*) Partial Award of the Claims Commission, The Hague, 19 December 2005; 135 ILR 519; RIAA Vol XXVI 381.

[43] Note of 24 November 1982 printed in 1983 BYIL 439. On Canadian airline search of diplomats for weapons, see 1971 Can YIL 279.

[44] *The Times*, 14 November 2011.

[45] Hansard HC Debs 10 Mar 2004 vol 418 W col 1533; 2004 BYIL 765.

[46] 1986 BYIL 550.

[47] Circular Note of 3 July 1985, quoted in Brown (1988) at p 82.

[48] Department of External Affairs Circular Note of 22 April 1986, quoted in Brown (1988) at p 84.

As in the case of other immunities granted under provisions of the Convention such as Articles 22 and 27, a very limited exception to the prohibition on arrest or detention may be implied on a basis of self-defence or of an overriding duty to protect human life. The exception has been generally admitted by writers, and was confirmed in the Commentary of the International Law Commission which was set out above. The ICJ in the *Hostages Case* also stated that observance of the principle of inviolability did not mean 'that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime'.[49]

The exception is applied most usually when a diplomat seen to be drunk in charge of a motor vehicle is restrained from further driving and arrangements made for his safe transport by alternative means. This is standard police practice in London and Washington. In the context of the closure and evacuation of the Libyan People's Bureau following the breaking of diplomatic relations by the United Kingdom in April 1986, those leaving the building passed through metal detection equipment and were searched. Although this procedure was agreed in advance with the representative of Libya and could thus have been presented simply as a voluntary waiver, the Foreign and Commonwealth Office also justified the action as a measure of self-defence in domestic and international law.[50] Another example occurred in Sweden in 1988 when the Yugoslav Ambassador to Sweden, seen lying under a blanket in a sandpit and brandishing a fully loaded pistol, was disarmed by police who confiscated the pistol.[51] In Canada the Legal Bureau of the Department of External Affairs has made clear that temporary detention of a diplomat is permissible where it is necessary to prevent the commission of a serious offence and stated that:

> if the police should arrest a diplomat for the purpose of disarming him, the Department [of External Affairs] would have a defensible position in international law. It is recognized that even though the person of a diplomat is inviolable, such inviolability is not so absolute as to prevent the receiving State taking measures of self-protection or measures to protect the diplomat against himself.[52]

By contrast, German police who in 2004 pursued the Bulgarian Ambassador on suspicion of dangerous driving, claiming that his car was veering across the road, released him after his diplomatic identity was established.[53] It is clear that the risk to the public must be of an extreme and continuing character in order to justify any restraint on an inviolable diplomat.

Service of process

It should be noted that personal inviolability precludes personal service of legal process on a diplomat or other entitled member of a diplomatic mission. Although service of process does not involve arrest or detention and does not in any real sense involve attack on the person, freedom, or dignity of the diplomat, it is a manifestation of the enforcement

[49] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at para 86. See also 1983 Can YIL 309.

[50] Foreign Affairs Committee, *Report on the Abuse of Diplomatic Immunities and Privileges* (1985) para 102, App 10 and Q 48.

[51] *The Times*, 17 May 1988. See also Richtsteig (1994) p 65.

[52] 1983 Can YIL 309, 310.

[53] *The Times*, 1 October 2004.

jurisdiction of the receiving State and therefore a contravention of personal inviolability just as service of process even by post on inviolable premises (as was pointed out in the context of Article 22 above) is a breach of their inviolability. Thus, a criminal court in Ireland held in 2000 that the service of proceedings on the British Ambassador to Ireland contravened his personal inviolability as well as the inviolability of the British Embassy in Dublin and was ineffective.[54] The English Court of Appeal in *Reyes v Al-Malki*[55] confirmed that Article 29 prohibited personal service of process on a diplomatic agent. The prohibition applies equally when service is attempted on a diplomat or a person entitled to diplomatic inviolability as agent for his government, for a separate political entity of his government or for a political party. US courts therefore held that the visiting President of China, Jiang Zemin, could not be served with process as agent of the Falun Gong Control Office, nor could President Mugabe of Zimbabwe be served as agent of the political party ZANU.[56]

[54] *Adams v DPP, Judge for District No 16, Her Majesty's Secretary of State for Home Affairs* [2001] 2 ILRM 401, [2000] IEHC 45; *Hellenic Lines Limited v Moore*, 120 US App DC 288, 345 F 2d 978 (DC Cir 1965).

[55] [2015] EWCA Civ 32, at para 84.

[56] *Wei Ye v Jiang Zemin*, 383 F 2nd 620 (7th Cir 2004); 2004 DUSPIL 547; *Tachiona v Mugabe*, 386 F 3rd 205; 2004 DUSPIL 553. In the case of *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues*, 133 ILR 389 (discussed below under Art 31.1(a)), the High Court in South Africa noted that process had been correctly served on the Ambassador of Angola by transmission through the Department of Foreign Affairs to the Ministry of Foreign Affairs of Angola. See also 2003 AJIL 182 on the impropriety of requiring a State Department security officer to serve process on a visiting dignitary he was protecting.

INVIOLABILITY OF RESIDENCE AND PROPERTY

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

The rule that the private residence and property of a diplomatic agent were inviolable was long established in customary international law. Article 30 has clarified a number of the uncertain points, and has extended the scope of this inviolability—perhaps beyond what is easily justifiable on grounds of functional necessity.

Private residences

Originally no distinction was made between the premises of the mission and the residence of the ambassador. Even when the growth in the size of missions sometimes led to physical separation between the office building—often known as the chancery—and the private residence of the ambassador, the term 'l'hôtel de l'ambassadeur' continued to be applied indiscriminately to both, and the same inviolability was accorded to both as a matter of customary law.[1] This usage has been reflected in the Vienna Convention in that the definition of 'premises of the mission' in Article 1(i) includes the residence of the head of the mission. Inviolability was also accepted generally as applying to the separate residence of a subordinate diplomatic agent—who in the sixteenth and seventeenth centuries would almost always have lived with the ambassador as a member of his suite.[2] Many States made specific rules in national legislation to confer inviolability on the residence of a diplomatic agent, and express provision was included in the Havana Convention regarding Diplomatic Officers.[3]

As to the nature of the property which might constitute a 'private residence', the International Law Commission made clear that it denoted a residence distinct from the premises of the mission (as defined in Article 1(i)). This could be a room in a hotel, an apartment, or a house. The term also included a residence owned or leased by the sending State and made available for diplomatic occupation, even though this was in one sense not 'private'. The Commission said in its Commentary that: 'Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private

[1] Grotius (1625) II.XVIII.IX; Vattel (1758) IV.I. para 117 De l'Hôtel de l'Ambassadeur; Lyons (1953).

[2] Adair (1929) p 215 mentions an early case in 1641 where the English Parliament accepted the inviolability of the separate lodgings of a secretary to the French Embassy.

[3] eg Australia: UN Laws and Regulations p 9; Byelorussia: ibid p 55; Canada: ibid p 57; Colombia: ibid p 64; Hungary: ibid p 162; New Zealand: ibid p 218; Poland: ibid pp 242–3; Soviet Union: ibid pp 337, 340; United Kingdom: ibid p 348—Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 s 1(1)(a); Venezuela: ibid p 403; Art 14 of the Havana Convention: ibid p 421.

residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.'[4]

While this approach would accord inviolability to a second residence, such as a holiday cottage or a hotel room away from the capital, if the diplomat was actually living in it, it might also suggest that the principal private residence lost its inviolability if the diplomat was temporarily absent. This problem arose in the United Kingdom in the case of *Agbor v Metropolitan Police Commissioner*.[5] A Nigerian diplomat moved out of his flat and a Biafran family took advantage of his absence to move in. The Nigerian High Commission claimed that the diplomat had moved out temporarily while the premises were redecorated and that the flat remained inviolable as the 'residence of a diplomatic agent'. They requested police assistance to evict the intruders and after a delay of some weeks for consultation between Foreign and Commonwealth Office and Home Office eviction was carried out. On challenge to the legality of the eviction, which had been carried out on the instructions of the executive without any court order, the Court of Appeal found that the diplomatic agent had left permanently, so that the flat was no longer 'the residence of a diplomatic agent' and the action was not justified. The court therefore did not have to determine whether inviolability would have continued if the absence had been only temporary. It would, however, seem to be reasonable that the inviolability of a principal residence should subsist during a temporary absence—particularly if the diplomat's property remains in the premises. A temporary residence by contrast would be entitled to inviolability only while the diplomat was actually resident there. If the temporary residence was the 'property' of the diplomatic agent it would, however, also be entitled to the somewhat more limited degree of inviolability given under Article 30.2.

Lord Denning MR in giving judgment in the *Agbor* case also expressed doubt as to whether the Diplomatic Privileges Act 1964 gave the executive any right to evict a person in possession who claimed as of right to be in occupation of diplomatic premises. 'It enables the police to defend the premises against intruders. But not to turn out people who are in possession and claim as of right to be there.' As explained above in the context of Article 22, it was believed to be unsatisfactory that the executive should be unable to act without first seeking a court order to recover possession of mission premises or a diplomatic residence, and section 9 of the Criminal Law Act 1977[6] made it a criminal offence knowingly to trespass on 'any premises which are the private residence of a diplomatic agent' and gave the police powers to arrest offenders.

A further question which could arise is whether a private residence should be regarded as inviolable for a 'reasonable period' after the diplomat has ceased to live there. In the context of Article 22 above it has been suggested that a 'reasonable period' should be given by the receiving State after premises cease to be 'used for the purposes of the mission'. This does not, however, appear to be necessary or appropriate under Article 30. If a diplomat has moved out permanently from his principal residence—which will usually be when he is no longer living there and his property has been moved out—there seems no reason for inviolability to subsist any longer.

In the *Dorf Case*[7] in 1973 the Norwegian Supreme Court considered the lawfulness of an arrest of a suspect not entitled to immunity in the private residence of a member of the

[4] *ILC Yearbook* 1958 vol I p 144; vol II p 98.
[5] [1969] 2 All ER 707; [1969] 1 WLR 703; 1970 BYIL 215.
[6] C 45.
[7] 71 ILR 552.

diplomatic staff of the Embassy of Israel in Oslo. On a first hearing the case was remitted to the Magistrates' Court for further review of whether the inviolability of the premises should have led to the release of Dorf, and whether misuse by the diplomat of his inviolability was relevant. On a second hearing the Supreme Court held that 'the Vienna Convention contains no rule from which it follows that it is prohibited to take into custody a person without personal immunity who has been apprehended upon such premises'. The court did not deal with the relevance of police knowledge or of misuse of the diplomatic inviolability of the diplomat's residence. They added that they were also 'inclined to favour the view that an apprehension under those circumstances cannot be regarded as contrary to international law', and they quoted Article 41.3 of the Convention in support of this view. While the result could perhaps have been defended—in view of the apparent lack of protest on the part of Israel—on the basis that the infringement of inviolability was a matter between sending and receiving States, the view that arrest of a person not entitled to inviolability may be carried out on inviolable premises is extremely difficult to reconcile with the meaning of the inviolability conferred under the Convention.

The Family Division of the English High Court considered in the case of *Re B (Care Proceedings: Diplomatic Immunity)*[8] whether it was proper for the court to continue an interim care order in respect of a child of a member of the administrative and technical staff of a diplomatic mission, given that the father and his private residence were inviolable so that the order might not be capable of enforcement. The original order had been made when scars and bruising of the child detected at her school were found by consultant paediatricians examining her under child protection arrangements to have resulted from serious non-accidental injuries. The President, Dame Elizabeth Butler-Sloss, held that any difficulty in ultimate enforcement was not relevant when determining whether the court had jurisdiction to make or continue such an order. Although it was not clear whether in an emergency situation steps could be taken to protect the child if she was beaten at home, this was not such an emergency case. Dame Elizabeth said:

> In my judgment, Art. 30 of the Vienna Convention relates to the premises of a diplomatic agent and not to the consequences of acts done by individuals in the premises. I see no reason to seek to strain the wording of Art. 30.1 beyond its obvious meaning.

There is no requirement under Article 10 of the Convention that the addresses of the private residences of members of the mission should be notified to the receiving State, though it is normal practice for such notifications to be given as a matter of common sense. Although some States impose requirements as to the location of mission premises—a matter discussed under Articles 21 and 22 above—restrictions on location or choice of residential accommodation are not usual. Private diplomatic residences are in general less obvious targets than embassies for demonstrators or terrorists. The same considerations of principle as apply to Article 22—for example, as to what are 'appropriate steps' to be taken by the receiving State to protect premises from intrusion or damage and the legal position in the event of requests for asylum—apply *mutatis mutandis* to Article 30.

[8] [2002] EWHC 1751 (Fam); [2003] 1 FLR 241; [2003] 2 WLR 168.

Papers and correspondence

The papers and correspondence of a diplomatic agent were not accorded inviolability as such under customary international law. There is no mention of such a category in the legislative provisions of individual States which confer inviolability. Official papers of a diplomat would be entitled to inviolability as 'archives and documents of the mission'. His personal papers would of course be 'property of a diplomatic agent' and protected on that basis but not (as will shortly be explained) entitled to complete inviolability. Correspondence physically situated in the diplomatic bag, in the mission premises, or in his private residence would be protected by reason of these wider entitlements to inviolability.

Article 30 of the Convention, however, goes beyond the previous customary law and gives inviolability to papers and correspondence of a diplomatic agent which may be private in character and which may be sent through the public postal service without identifying marks. This raises for the receiving State which is under a duty to abstain from any interference with such correspondence problems of identification which are similar to those discussed in the context of Article 27.2 of the Convention. The justification for inviolability of papers and correspondence is that it removes from the receiving State the temptation to search papers which may be partly official and partly private on the pretext that the search was directed to the discovery of private or personal papers or correspondence of a diplomatic agent. It must, however, be pointed out that there seem to be no cases where reliance has openly been placed on this aspect of Article 30 or where there has been complaint at any breach—no doubt because a State which wishes to intercept and read personal papers or correspondence of a diplomat which are not physically in his custody, in mission premises, or in a diplomatic bag will do so by methods which cannot be detected. Diplomats who may have to send compromising material relating to their functions will make use of cipher telegram or sealed diplomatic bag and will in general use discretion in what they commit on a personal basis to public postal facilities.

At the Vienna Conference the US delegate moved an amendment which would have limited the inviolability of a diplomat's papers and correspondence by reference to the exceptions to diplomatic immunity set out in paragraph 1 of Article 31.[9] The inviolability of his property is, of course, subject to such a limitation. The Conference, however, rejected extending this limitation to papers and correspondence. The effect is that even where a diplomat does not have immunity from jurisdiction of the courts—for example, in regard to a commercial activity which he has been exercising in the receiving State outside his official functions—it will not be possible to compel production of relevant papers in his possession which may be crucial to the success of the case. In debate the Soviet delegate argued that if the diplomat wished to win his case it would be in his interest to produce relevant papers. But there may also be occasions where it will be in the interest of the diplomat to withhold damaging evidence in his possession, and a court may be hindered from doing justice in a case properly before it. Given that the documents in issue are necessarily private in character, not mission archives, it is difficult to defend this inviolability either on grounds of logic or as necessary to enable the diplomat to perform his functions.

[9] UN Docs A/Conf. 20/C 1/L 259; A/Conf. 20/14 p 165.

Correspondence of a diplomatic agent may not be intercepted, searched, or subjected to X-ray screening. This could cause difficulty in the event that correspondence to a diplomatic agent was suspected of containing a harmful device. In September 1972, for example, a number of letter bombs were dispatched to members of diplomatic missions of Israel, and one killed a diplomat in the Israeli Embassy in London.[10] In practice systematic surveillance of incoming correspondence is very likely to be carried out at the request or with the consent of a mission which has received threats or warnings. If consent could not be secured, the duty to protect the person of a member of the mission by screening and perhaps opening mail which might present a physical threat would undoubtedly take precedence over the possibly conflicting duty to respect the inviolable character of such mail.

Property

The inviolability of the property of a diplomatic agent was generally regarded prior to the Vienna Convention as a limited one, though writers differed as to the basis of limitation. Some took the view that only property in the diplomat's residence was entitled—thus making the protection somewhat superfluous.[11] Others suggested that inviolability extended to property which the diplomat needed to live and work in the receiving State. In *Novello v Toogood*,[12] for example, the English court used the words: 'whatever is necessary to the convenience of an ambassador as connected with his rank his duties and religion'. Hurst more realistically argued that since only the diplomat could say what was essential to enable him to perform his functions, complete inviolability should be accorded to all his property in the receiving State.[13] In 1999 two dogs used by the Russian Ambassador to guard his country residence gave rise to public controversy when neighbouring farmers accused them of savaging their sheep and called for their immediate destruction. The charges against the dogs were never proved and it appears that the dispute was amicably resolved.[14]

The uncertainty in the previous customary international law was reflected in debate in the International Law Commission, where several members suggested different methods of limiting inviolability of a diplomat's property.[15] Some took the view that only personal property was covered—but this was disputed and Article 30 refers to 'property' without limitation. The Commission eventually followed the Hurst approach and decided to give inviolability to all property, though the Commentary said that 'inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account and goods which are intended for his personal use or essential to his livelihood'. In 1958 the Commission limited the inviolability of a diplomat's property (other than his residence, papers, and correspondence) so as to permit execution if a judgment against him is given under one of the exceptions to immunity

[10] *The Times*, 20 September 1972.
[11] eg Satow (4th edn 1957) p 386.
[12] [1823] 1 B & C 554.
[13] (1926) p 162.
[14] *The Times*, 30 November 1999.
[15] Mr El-Erian, Mr Yokota, Mr Pal, Mr Bartos, Mr Tunkin, and the Special Rapporteur Mr Sandstrom all had different ideas: *ILC Yearbook* 1957 vol I pp 90–1.

from jurisdiction set out in Article 31.[16] If this exception applies there is no requirement that the property should be connected with the subject matter of the action brought against the diplomat.

There is in fact a further exception to the inviolability of the property of a diplomat to which no cross-reference is made in Article 30. Under Article 36.2 the personal baggage of a diplomatic agent, which may be presumed to be his property, may in exceptional circumstances and under specified procedures be inspected.

Neither the International Law Commission debates nor the Conference records clarify the question of the degree or nature of legal interest which a diplomat must have for goods to be regarded as his property. This point was in issue in the UK case of *The Amazone*[17] where the wife of a Belgian diplomat issued process claiming possession of a yacht. Her husband moved for the writ to be set aside on the ground that he was entitled to diplomatic immunity and that he owned and was in possession of the yacht. For the wife it was argued that the defendant had to satisfy the court that the goods were his before immunity could be claimed, but the English Court of Appeal rejected this submission. It would seem that possession by a diplomatic agent will be sufficient to attract inviolability—at least where this is apparently lawful. A diplomat, or a member of the family of a diplomat, caught in the act of shoplifting could hardly expect to depart with the stolen goods even if on establishing his entitlement to immunity he himself was released without charge.[18] On the other hand, if there is a dispute over goods which are not in the possession of the diplomat—for example, if his car were retained by a garage owner in exercise of a lien pending payment of money owed for its repair—the other party can wait for the diplomat to bring proceedings for recovery. Such a course of action would under Article 31.3 preclude the diplomat from invoking immunity from jurisdiction in respect of the related counterclaim.

Exchange control

A diplomat's bank account, it is clear, is a form of 'property'. The inviolability of his account does not, however, imply that he is in any way exempt from the exchange control legislation of the receiving State. Exchange control legislation is not a form of execution or a penalty, and under the general principle set out in Article 41 of the Convention the diplomat is obliged to respect the requirements of the receiving State. A substantive exemption from exchange control requirements is common in international agreements conferring privileges and immunities on persons connected with international organizations, and the United Kingdom in commenting on the International Law Commission's draft suggested that there should be a similar exemption for diplomatic agents. This was, however, not acceptable to most members of the Commission.[19]

In practice, however, special or favourable treatment for diplomatic missions and for their members—other than permanent residents of the receiving State—is common. The

[16] *ILC Yearbook* 1957 vol II p 138; 1958 vol II p 98.

[17] [1939] P 322; (on appeal) [1940] P 40; AD 1938–40 p 414.

[18] For a case where a Soviet diplomat was interrupted by a 'citizen's arrest' while stealing a kaleidoscope from a toy shop in London, see *The Times*, 29 April 1971 and 1972 RGDIP 536.

[19] UN Doc A/CN 4/116 p 53; *ILC Yearbook* 1958 vol I pp 145–6. On the position of international organizations, see Muller (1995) pp 256–60.

accounts may, for example, be regarded as belonging to non-residents, so simplifying transfers to and from the sending State. As more States have moved towards permitting greater freedom for movements of capital and current payments, any difficulties for diplomatic missions have diminished. A sending State which encountered real difficulties in making transfers necessary for the exercise of its functions could complain of breach of Article 25 which requires the receiving State to 'accord full facilities for the performance of the functions of the mission'.

Removal of motor vehicles

Consideration has already been given in the context of Article 22 paragraph 3 to the immunity given from 'search, requisition, attachment or execution' to the means of transport of the mission and to whether this provision permits clamping or towing away of mission cars illegally parked. Article 30 in paragraph 1 provides that the private residence of a diplomatic agent 'shall enjoy the same inviolability and protection as the premises of the mission' and in paragraph 2 that his property 'shall likewise enjoy inviolability'. Taken as a whole this implies that, *mutatis mutandis*, identical protection from measures of legal compulsion is extended both to mission property and to the property of a diplomatic agent. The degree of inviolability given to the means of transport of the mission is not complete and the terms in which immunity is conferred have been regarded in subsequent state practice as not precluding towing away—at least where this is carried out not primarily to penalize the driver but to keep the highway clear. The same is true of the means of transport of a diplomatic agent.[20]

Practice in a number of capitals regarding the towing away of diplomatic vehicles has been described under Article 22.3, and it seems that in all capitals which permit this in exceptional circumstances, no distinction is made between the means of transport of the mission and the private vehicle of a diplomatic agent (or other person entitled to the inviolability of property conferred by Article 30). It is common practice for the vehicles entitled to exemption from clamping and to somewhat privileged treatment in respect of towing away to be identified by number plates familiar to police or other traffic control authorities.[21] The Guidance to Law Enforcement Officers issued in 1988 by the US Department of State describes the system of distinctive vehicle licence plates, accompanying vehicle registration cards, and drivers' permits issued by the Department to persons entitled to privileges and immunities in the United States. The Guidance warns that neither the distinctive licence plates, the registration cards, nor the drivers' licences should be relied on as conclusive indications of the status or immunity of the operator or bearer.[22]

[20] See extracts from Opinion of the Legal Counsel to the United Nations, which accepted that towing away of diplomatic cars in New York posing a risk to safety was not a measure of enforcement, 2003 AJIL 190.

[21] For practice in the United Kingdom and in 'the majority of countries', see Hansard HL Debs 18 March 1985 cols 329–32; 1984 BYIL 470 and 474; 1985 BYIL 435. For German practice see Richtsteig (1994) p 68.

[22] Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel 1988:27 ILM 1617 at 1628–9; Office of Foreign Missions publication *Diplomatic License Plates.*

IMMUNITY FROM JURISDICTION

Article 31

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

...

Historical background

The immunity of an envoy from the criminal jurisdiction of the receiving State was in the earlier literature regarded as indistinguishable from his personal inviolability. At the period when inviolability was first clearly established as a rule of customary international law it would have been unusual for criminal proceedings to take place without prior arrest and detention of the accused. Immunity from civil and administrative jurisdiction, which is less obviously coercive in character, was the next to become established of the basic rules of diplomatic law.

As already mentioned in the context of Article 29, it was during the sixteenth century common practice for ambassadors as well as secret agents to be used as *agents provocateurs*. Several notorious cases occurred where the ambassador of one monarch was found participating in treasonable conspiracies against the sovereign to whose court he was accredited. The earliest writers on diplomatic law doubted whether an ambassador should retain his immunity from criminal jurisdiction under such circumstances. Gentilis, the first Professor of Civil Law at Oxford University, and other distinguished civilians advised Queen Elizabeth I of England that John Lesley, Bishop of Ross, the representative of the captive Mary Queen of Scots, had forfeited his immunity by conspiring against the sovereign to whom he was accredited and could be tried. But Queen Elizabeth did not respond to this advice. After a short period of imprisonment the Bishop of Ross was expelled. Two other foreign ambassadors to the Queen later suspected of similar activities—the Spanish Ambassador Mendoza and the French Ambassador d'Aubéspine—were likewise never brought to trial. Mendoza was expelled and d'Aubéspine continued to act as ambassador after a request for his recall was ignored.[1]

[1] Bynkershoek (1721) ch XVIII; Adair (1929) pp 48, 49; Satow (4th edn 1957) p 294; McNair (1956) vol I p 186; Hill (1905) vol 2 p 515.

The writers were initially not convinced by these precedents. Gentilis in his *De Legationibus*[2] argued that although an ambassador remained immune from charges of conspiracy, if a crime has actually been committed he could be tried by the receiving State. Hotman in *L'Ambassadeur* wrote that if an appeal for clemency was made to the sending sovereign and failed, the ambassador could be tried both for political and for ordinary crimes. In practice, however, no ambassador in the seventeenth century or subsequently was brought to trial. Grotius followed the actual practice in stating that the exercise of criminal jurisdiction against a diplomat was not permitted—the receiving State retained a right of self-defence against a diplomat who used force, but this was not to be equated with criminal jurisdiction.[3] A hundred years later Bynkershoek wrote in *De Foro Legatorum* that there were so many cases of envoys who had misbehaved in various ways without being punished 'that we struggle under the weight of numbers'. Sometimes the offences were hushed up, sometimes the envoys were sent back for punishment by the sending sovereign, but most usually they were simply told to get out.[4] From that time the rule of immunity from criminal jurisdiction continued virtually unchallenged until its incorporation into the Vienna Convention.

The immunity of the ambassador from civil jurisdiction was established later and with greater difficulty. The earliest writers on diplomatic law, Hotman, Gentilis, and Grotius, prescribed only that the ambassador's residence (then synonymous with mission premises) might not be entered nor his movable property seized by way of execution. During the sixteenth and seventeenth centuries envoys were expected for reasons of prestige to live in a grand and expensive style and they were not then given by the sending State pay or allowances to provide for this. Consequently unless they had unlimited private means they were very likely to run into debt in the receiving State, to engage in trade there, or even to turn their customs privileges to improper profit. Embarrassing incidents began to occur in a number of States which—because of increasing separation of the courts from the executive—receiving governments no longer had the power to prevent. Some rulers at this period took the position that immunity from civil jurisdiction related only to acts performed in the exercise of the envoy's functions. The Netherlands in 1679, Denmark, and England found it necessary to enact national legislation to provide for the inviolability and immunity of ambassadors in their territory.[5]

The Diplomatic Privileges Act 1708[6] was passed in order to appease the Tsar of Russia whose ambassador had been dragged from his coach and detained for several hours in custody at the instance of his irate creditors. The creditors were brought to trial before the Queen's Bench, but the judges were not prepared to say that the acts complained of constituted any offence under English law. The Act of Anne accordingly not only made null and void any civil process against an ambassador or his servants but also made any

[2] (1585) Book II chs XIII, XVII, XVIII, XIX, XXI.

[3] (1625) II.XVIII.iv. 5, 6, and 7.

[4] (1721) ch XVIII. 'Novi aevi exempla de legatis qui varie deliquerant, non punitis, tot ubique in Annalibus occurrunt, ut ipsa copia laboremus.'

[5] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') pp 201 (The Netherlands), 224 (Denmark—under Norway); Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933) vol I p 409. For other cases see Salmon (1994) paras 406–8.

[6] 7 Anne c 12; UN Laws and Regulations p 347; Martens (1827) vol I p 73; McNair (1956) vol I p 189; Adair (1929) p 87.

breach of the rule a criminal offence. A copy of the new Act, with explanation and apologies, was duly tendered to 'his Czarish Majesty Emperor of Great Russia'. The Act went beyond the customary law in creating a criminal offence—though in practice prosecutions never took place—and in giving immunity to all servants and in respect of all kinds of process. On the other hand it made no mention of the inviolability of mission premises or of the immunity of an ambassador from criminal jurisdiction—perhaps because institution of criminal proceedings was at that time always under the control of the Crown.[7] Although the Diplomatic Privileges Act was even at the time of its enactment not an accurate or comprehensive statement of customary international law it was often described as declaratory of the law of nations, and cases involving diplomats were decided by English courts for 250 years in accordance with its terms. Reliance on the statute by these courts precluded reference to the limitations on immunity from jurisdiction which began to be applied in the practice of other States.

By the time that Bynkershoek wrote *De Foro Legatorum* in 1721 the general immunity of a diplomatic agent from civil jurisdiction was a well established rule. Subsequent debate among writers, in national courts and during the preparation of Article 31.1 of the Vienna Convention, concerned only the special exceptions to the rule and the extent to which subordinate staff of a diplomatic mission and the families of members of the mission were entitled to immunity to the same extent as diplomats themselves. Italian courts in the early years of the twentieth century applied in some cases a wide exception relating to private acts of a diplomat, but this trend was finally reversed by the Court of Cassation in 1940.[8] In 1969 the Supreme Court of Chile held that: 'The fact that the Republic of China has not yet ratified the Vienna Convention does not prevent the application of Article 31 in our country because it is a principle of international law, common and customary, that this provision has crystallized, being only an expression of it.'[9]

Modern practice: scope of immunity from jurisdiction

The International Court of Justice in the *Hostages Case* laid emphasis on the importance of immunity from criminal jurisdiction. Noting that Iranian judicial authorities and the Ministry of Foreign Affairs had threatened to have some of the US hostages submitted for trial before a court or other body, they said:

> These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1 of the 1961 Vienna Convention.[10]

[7] See Blackstone (1756) *Commentaries* vol I ch 7 p 254; *Gallatin's Coachman Case:* McNair (1956) vol I p 193.

[8] See *Comina v Kite* AD 1919–22 No 202; *Lurie v Steinmann* AD 1927–8 No 246 ('It is quite obvious that when questions of privileges and immunity of diplomatic agents arise... such immunity can only refer to the persons of the diplomatic agents with regard to their private affairs.'); *Balloni v Ambassador of Chile to the Holy See* AD 1933–4 No 164 ('But immunity cannot be extended to acts done by diplomatic agents and persons of their suite outside the sphere of their functions'); *De Meeus v Forzano* AD 1938–40 No 164 (Court of Cassation).

[9] *MH v Embassy of the Republic of China*, 3 September 1969, 70 ILR 394.

[10] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at para 79.

Immunity from civil and administrative jurisdiction covers not only direct claims against a diplomatic agent or his property but also family matters such as divorce or other matrimonial proceedings, proceedings to protect a member of the family of a diplomat by a care order or make him or her a ward of court[11] and—unless they are within the specific exceptions set out in Article 31.1—such matters as bankruptcy, company law, or administration of estates.

A question which arises from time to time and is not answered with absolute clarity by the Convention is whether Article 31.1 of the Convention precludes the receiving State from holding an inquest following the death of a diplomat. The practice which had earlier developed in the United Kingdom was that an inquest was not held under these circumstances. In 1913 the Foreign Office Legal Adviser was reluctant to say that as a matter of international law: 'the death of a diplomat is in no circumstances a subject for inquisition by the coroner. In the case of the body of a diplomat being found in circumstances which indicate foul play it is obviously in the interests of justice that an inquiry should be held and evidence taken on oath.'[12] Under Article 31.1 of the Convention, the holding of an inquest may be regarded as an exercise of civil or administrative jurisdiction over the person of the deceased diplomat. Although his functions have come to an end with his death, his immunities under Article 39.2 of the Convention subsist for a 'reasonable period'. It is usual for a diplomatic mission to prefer that no inquest should take place, and it appears to be general practice that inquests or public inquiries into the death of diplomats do not take place unless the mission consents. Following the sudden death in 2009 of the Ambassador of the Czech Republic to the UK, at the request of the Governments of the Czech Republic and the UK and the family of the Ambassador, the coroner agreed not to proceed with an inquest.[13] An enquiry may of course be held following the repatriation of the body of a diplomat to the sending State.

Modern practice: diplomatic immunity and State immunity

The justifications for diplomatic immunity and for state immunity are different, as are now to an increasing extent the detailed rules and the exceptions in the two areas. For this reason (as is apparent from many parts of this Commentary) it is increasingly common for a plaintiff to sue both the ambassador or another member of a diplomatic mission and the relevant sending State. Provided that the defendant is correctly impleaded, given the facts and the nature of the law, there is no reason why this should not be done. Where, for example, a contract is concluded by 'the Embassy of X' which has no legal personality, it may be unclear whether the proper defendant to an action to enforce the contract is 'the State of X' or 'the Ambassador of X', and it may be necessary to bring proceedings against

[11] eg *De Andrade v De Andrade* 118 ILR 299 (1984); *P v P (Diplomatic Immunity: Jurisdiction)* [1998] 1 FLR 1026, 114 ILR 485; *In re B (A Child)(Care Proceedings: Diplomatic Immunity)* [2002] EWHC 1751 (Fam); [2003] 2 WLR 168;145 ILR 516.

[12] VII BDIL 809. Satow (5th edn 1979) para 15.17 gives the example of a suicide in the British Embassy at Madrid in 1921, where evidence taken in the embassy from the ambassador and some mission staff was drawn up in a *proces-verbal*. See also Lyons, 'Diplomatic Immunity: Some Minor Points', 1958 BYIL 373; Salmon (1994) para 402.

[13] *Hampstead and Highgate Express*, 26 February 2009; Satow (6th edn 2009) at para 9.23.

both in order to clarify the issue.[14] In the case of *HM The Queen in Right of Canada v Edelson and Others*,[15] the Supreme Court of Israel in 2008 correctly held that a lease for the residence of the Ambassador of Canada had been concluded by Canada, so that jurisdiction should be determined under the rules of State and not diplomatic immunity. In the case of *Bah v Libyan Embassy*,[16] on the other hand, where a dismissed employee of the embassy claimed for severance pay and unlawfully withheld wages, the Industrial Court in Botswana failed to distinguish clearly between State and diplomatic immunity, but in effect decided correctly on the basis of rules of State immunity that the claim could proceed.

There are often reasons in local law why premises or property must be held in the name of the ambassador even if the true beneficial owner is the sending State, and again it is in no way improper to sue both. Conduct by a diplomat on official instructions will normally be attributable to the sending State, but it may well be highly desirable to join the diplomat when bringing civil proceedings. This is particularly so when the diplomat is no longer in his post so that his continuing immunity from jurisdiction is limited to acts performed in the exercise of his functions.[17]

Modern practice: effect of immunity on insurance

In the United Kingdom it was established by the case of *Dickinson v Del Solar*[18] that an insurer cannot take advantage of the entitlement of a diplomatic client to immunity either on the ground that a waiver of diplomatic immunity amounted to a breach of a condition in the insurance contract or on the ground that the diplomat was under no legal liability giving rise to an obligation to indemnify him. Lord Hewart CJ stressed that: 'Diplomatic privilege does not import immunity from legal liability but only exemption from local jurisdiction.' In order to avoid any similar argument from insurers, however, the Foreign Office sought and obtained from all authorized motor insurers doing business in the United Kingdom an assurance that they would not attempt to rely on the privileged position of their diplomatic clients. In 1958 diplomatic missions in London were reminded of their legal obligation to take out motor insurance before driving and were informed that all authorized insurers (listed in an Annex) had given the above assurance. Revised and extended circulars were sent to insurers in 1972 and in 1976 in the light of additional requirements imposed by the Road Traffic Act 1972. These also told diplomats that on request any authorized insurers would endorse a diplomat's policy as follows:

[14] See eg, *Kramer Italo Ltd v Government of Belgium, Embassy of Belgium, Nigeria* 103 ILR 299. The suit was correctly dismissed on grounds of state immunity as well as the diplomatic immunity of the mission staff, but the court expressed concern (at 310) that it would 'destroy the basis of diplomatic immunity... if a foreign sovereign is made answerable in court for the action of his envoy who enjoyed diplomatic immunity'. It is submitted that this concern was not justified.

[15] 131 ILR 279.

[16] 142 ILR 167.

[17] For a more complex case, where although neither the ambassador nor the sending State were directly sued, the defendant persuaded the Supreme Court of New South Wales that the Ambassador of Saudi Arabia was a 'necessary and proper party' to the proceedings and that the plaintiff sought to implead the sending State through him, see *Australian Federation of Islamic Councils Inc v Westpac Banking Corp* (1988) 17 NSWLR 623, 104 ILR 405.

[18] [1930] 1 KB 376, AD 1929–30 No 190.

Notwithstanding that the insured is or may be entitled under the Diplomatic Privileges Act 1964 to refuse to submit to the jurisdiction of the Courts in connection with any claim against him, it is hereby declared and agreed that the Insurer will not call upon the Insured to so refuse.

It was made clear that the provision would not fetter the discretion of a head of mission to maintain or to waive the immunity of a member of the mission in any specific case. On the whole these arrangements have meant that claims in respect of accidents involving diplomats can be settled by or between insurance companies. The Foreign and Commonwealth Office Minister responding in Parliament in 1985 to a question on compensation to individuals for losses which they cannot recover because the defendants have diplomatic immunity, said:

Arrangements already exist with authorised motor insurers to ensure that claims against diplomats in respect of traffic accidents are settled in the usual way. These cause few problems in practice.[19]

Where, however, a diplomat denies liability and refuses either to seek a waiver of his immunity from his sending State or to allow his insurer to settle or compromise a claim against him, a plaintiff will still have difficulty in obtaining redress. Other possible remedies where immunity bars a claim are discussed more generally below in the context of Article 31.4.

In the United States, the Diplomatic Relations Act 1978[20] in section 6 required diplomatic missions, their members, and families to have and maintain liability insurance against risks arising from their operation of motor vehicles, vessels, and aircraft. Section 7 of the Act permits civil suits directly against insurers. The Department of State published regulations made under the Act specifying the insurance cover required from diplomatic missions and persons entitled to diplomatic immunity and the evidence of insurance which must be produced before the Department will endorse applications for diplomatic automobile licence plates or exemptions from registration fees.[21] The insurance must cover third party liability for bodily injury including death, property damage, and other cover required by the jurisdiction where the vehicle, vessel, or aircraft is principally garaged, berthed, or kept. The regulations prohibit policy terms under which an insurer might shelter behind the immunity of the insured or plead that he is an indispensable party to any legal proceedings, and the insured is 'expected to respond to reasonable requests from the insurer for co-operation'. These statutory requirements were later extended and compliance by diplomats more effectively ensured by the Foreign Missions Amendments Act 1983.[22]

Canadian practice, as set out by the Department of External Affairs in 1966, is to ensure by administrative measures that diplomats comply with local requirements on motor insurance and that insurers cannot under any circumstances use immunity 'as a factor in the settlement of claims for damages or in answer to a legal action arising out of an accident'. If an insurer attempts to make use of the client's immunity, the Department press for a waiver to facilitate normal settlement of a claim.[23]

[19] Hansard HL Debs 24 June 1985 col 543, cited in 1985 BYIL 455.

[20] Public Law 95–393; 22 USC 254a *et seq*, 28 USC s 1364.

[21] 1979:18 ILM 871.

[22] Title VI of Department of State Authorization Act, Fiscal Years 1984 and 1985, Public Law 98–164, approved 22 November 1983, 97 Stat 1017, 1042. The detailed requirements are set out in 1981–8 DUSPIL 1036.

[23] 1966 Can YIL 257.

Belgian courts have also held in 1970 in the case of *Bonne and Company X v Company Y*[24] that under the Belgian Law on Compulsory Motor Vehicle Insurance a plaintiff could bring a direct action for indemnity for damage and other loss following an accident alleged to have been caused by the driver of a vehicle belonging to the Embassy of Madagascar. There was no breach of diplomatic immunity in such proceedings because even though they involved a finding of negligence against the driver, this finding did not involve any constraint against the person or property of a foreign diplomatic agent. By agreeing to provide insurance cover for embassy staff the insurers had by implication waived the right to take advantage of their entitlement to immunity. This case, however, also illustrates the potential difficulty where a diplomat is unwilling to allow a finding or an assumption of responsibility for an accident.

A less satisfactory outcome occurred in Ghana in 1976 in the case of *Armon and another v Katz*[25] where the plaintiff instead of bringing proceedings against the insurers of a car belonging to the First Secretary of the Israeli Embassy sued the diplomat and his son (who was driving at the time of the accident). The plaintiff argued that the insuring of the vehicle amounted to a waiver of diplomatic immunity. In the alternative she argued that the insurance was a 'commercial activity outside his functions' so that by virtue of Article 31.1(c) the diplomat was not entitled to immunity. Unsurprisingly the court rejected both these arguments. The defendants continued to rely on diplomatic immunity and they made no attempt to bring in the insurers under third party procedure, so that the plaintiff was apparently left without a remedy even though the diplomat was insured.

Motoring offences and claims

In practice most of the difficulties suffered as a result of diplomatic immunity by the general public in the receiving State arise from driving and parking by members of diplomatic missions. The largest category of serious offences involving diplomats, according to records published by the Foreign and Commonwealth Office in their 1985 Review of the Vienna Convention,[26] was driving under the influence of drink or drugs—though the Review stressed that the numbers were comparatively small in percentage terms. Eleven years later, the position of driving under the influence of drink in the league table of serious offences by diplomats remained unchanged.[27] For diplomats, of course, driving under the influence of drink may be regarded as an occupational hazard. Parking offences constituted, in many crowded capitals, overwhelmingly the most extensive example of abuse of diplomatic immunity—and the measures which have been taken in response have already been described in the context of Article 9. The largest number of civil claims against diplomats arise from motor traffic offences. Insistence on diplomats carrying third party insurance has greatly reduced the number of cases where individuals are barred by diplomatic immunity from securing redress—but the problems cannot be entirely eliminated while there is no compulsory adjudication of disputed questions of fact or of liability. The US scheme for the withholding of driving privileges from persistent violators

[24] 69 ILR 280, 1973:2 RBDI 679. French law also permits direct action against an insurer: see Salmon (1994) para 414.

[25] 60 ILR 374.

[26] Cmnd 9497, paras 60–2.

[27] *The Times*, 29 July 1997; see also Hansard HC Debs 29 June 2000 W col 580, cited in 2000 BYIL 588.

of traffic rules was described above in the context of Article 25. Alternative methods of redress where potential claims are barred by diplomatic immunity are considered more generally in the context of Article 31.4 below.

It is interesting to note that at the Vienna Conference a proposal was made by The Netherlands that the courts of the receiving State should have jurisdiction over claims for damages arising from motor traffic accidents unless a direct right of action lay under the law of that State against an insurance company.[28] Such an exception to immunity was clearly not based on previous customary law, and many delegations argued that it was undesirable in principle. The UK representative, for example, pointed out that whereas the other exceptions to immunity concerned activities which even if not in themselves undesirable were clearly apart from the ordinary performance of diplomatic functions, driving would normally be a part of life and work in the receiving State. The Netherlands amendment was rejected by the Conference, but the fact that The Netherlands did not ratify the Vienna Convention until 1984 was in large part due to the strength of feeling in that country on the question of motor accident claims.

It is conceivable that if the Conference had taken place a few years later The Netherlands' amendment would have met with a warmer welcome from delegates. The negotiators of the Vienna Convention on Consular Relations took care to make it clear, in Article 43(2)(b), that consuls could be sued in respect of motor traffic accidents, and several more recent agreements relating to privileges and immunities of international organizations have included exceptions to immunity in respect of motoring offences and claims for damages arising from motor accidents.[29] In practice, however, those States most concerned to contain abuse of diplomatic immunity have been able to ensure mainly through insurance schemes such as those described above that aggrieved plaintiffs are seldom deprived of a remedy by immunity from civil jurisdiction in regard to motor accidents.

Exception for private immovable property

The exception from diplomatic immunity relating to real property situated within the territory of the receiving State was accepted by writers as early as Grotius,[30] but in the twentieth century it has been subjected to some criticism. In many jurisdictions, including the United Kingdom, there is no evidence that it was ever applied by the courts. Examination of the legislative and judicial material shows that there was even in those States which applied the exception diversity in the views taken of its rationale and scope. This in part explains why Article 31.1(a) of the Vienna Convention contains several ambiguities which even on examination of the *travaux préparatoires* are difficult to resolve.

Bynkershoek stated that it was everywhere accepted that proceedings *in rem* could be brought against ambassadors in respect of immovable property in the receiving State. He justified the exception first by reference to the overriding necessity that immovable property should be administered by the courts of the territory where it was situated and

[28] UN Docs A/Conf. 20/C 1/L 186/Rev. 1; A/Conf. 20/14 pp 166–72.

[29] eg Protocols on Privileges and Immunities of the European Space Research Organisation and the European Launcher Development Organisation: UKTS No. 39 (1968) and No. 28 (1967).

[30] (1625) II.XVIII.IX.

secondly on the basis that immunity for an envoy's property should be limited to what was essential to him for the fulfilment of his mission.[31]

Vattel also gives a double justification for this exception in his classic statement:

> Tous les fonds de terre, tous les biens immeubles relèvent de la jurisdiction du pays... quel qu'en soit le propriétaire. Pourrait-on les en soustraire par cela seul que le maitre sera envoyé en qualité d'ambassadeur; ils ne sont pas attachés a sa personne, de manière qu'ils puissent être reputés hors du territoire avec elle.... Au reste, on comprendra aisément que si l'ambassadeur loge dans une maison qui lui appartient en propre, cette maison est exceptée de la règle, comme servant actuellement a son usage.[32]

The exception appeared in a wide form in both the 1895 and the 1929 versions of the Règlement sur les immunités diplomatiques formulated by the Institute of International Law, which stated: 'L'immunité de jurisdiction ne peut etre invoquée... en matière d'actions réelles, y compris les actions possessoires, se rapportant a une chose, meuble ou immeuble, qui se trouve sur le territoire.'[33] It was also in the texts of the 1925 Project of the American Institute of International Law and the 1927 Project of the International Commission of American Jurists.[34] Although it did not feature in the 1928 Havana Convention on Diplomatic Officers—which omitted all exceptions to diplomatic immunity—it was instead incorporated in the Code of Private International law (the Bustamante Code) signed also at Havana on the same date.[35] This suggests that the rationale was the strong jurisdictional link between immovable property and the courts of the territory where it lies.

Not all civil law States applied the exception—for example, French courts never did so.[36] Nor did English courts, constrained as they were by the terms of the Diplomatic Privileges Act 1708 which did not mention it. French and English writers criticized the elevation of the exception to the status of a rule of international law. Sir Cecil Hurst concluded that although the courts of the receiving State were the most suitable to determine cases of this nature, to permit an exception so as to give them jurisdiction would be contrary to the basic principle of diplomatic immunity.[37]

'real action'

There was no discussion at the Vienna Conference of the meaning of the expression 'real action', but the sense emerges from study of national legislation and cases. The essence is that the relief sought in the action is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession. A real action is equivalent to an action *in rem*, in the sense which this action has in jurisdictions which (unlike England) permit actions *in rem* in respect of immovable property where title or possession is in

[31] (1721) ch XVI; Adair (1929) pp 73–4.

[32] (1758) IV.VIII para 115; cp Pradier-Fodéré (1899) vol II pp 127–9, 149–52; Phillimore (1879) p 221; Satow (4th edn 1957) p 336.

[33] 26 AJIL (1932 Supp) 164 (Art 16), 187 (Art 12).

[34] 26 AJIL (1932 Supp) 170, 174 (Art 27).

[35] Ibid 175; UN Laws and Regulations pp 419, 425 (Arts 334, 337); CLV LNTS 261.

[36] 1884 Journal de Droit International Privé 57; ibid 1917 at 588.

[37] Genet (1931) vol I pp 582–5; Hurst (1926) pp 180–4; Lyons (1953) at pp 137–8.

issue. It does not include actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property.

Colombian legislation, for example, refers to 'actions in rem, including possessory actions, which relate to movable or immovable property situated within the territory'.[38] Under the law in Czechoslovakia the exception referred to 'cases involving immovable property owned by them and situated in the Czechoslovak Republic, or their rights in such immovable property belonging to other persons, with the exception of right to the payment of rent, arising from the lease of such immovable property'.[39] Legislation in some States, however, such as India, Austria, and Switzerland, set out a wider exception which was not confined to real actions but included any action 'relating' to private immovable property.[40]

The Supreme Court of Czechoslovakia in the *Deposit (Land in Czechoslovakia) Case*[41] in 1936 held that an action to recover money paid as deposit for the purchase of an estate, which a diplomat was defending as successor to the property, was not covered by the exception, so that the defendant could rely on his immunity. By contrast, in the case of *Agostini v De Antueno*,[42] where proceedings were brought in New York to recover possession of premises leased to a person entitled to the immunities of a diplomatic agent, the court assumed jurisdiction, saying:

> The instant matter is a special proceeding to recover the possession of real property, and the legislature of the State of New York has seen fit to invest this court with the unique power, authority and jurisdiction in this type of special proceeding... The jurisdiction of this court is basically *in rem* and not *in personam*.

In other cases before national courts the exception is described as relating to actions *in rem*, but without this concept being further analysed.[43]

A District Court of The Netherlands in 1980 considered the purpose and scope of Article 31.1(a) in the *Deputy Registrar Case*.[44] In proceedings against the Deputy Registrar of the International Court of Justice in The Hague, who was entitled by an agreement between the Court and The Netherlands to full diplomatic immunity, the District Court took the Vienna Convention—even though at that time The Netherlands had not yet ratified it—as the appropriate standard. The Netherlands court held that Article 31.1(a) of the Vienna Convention, which was declaratory of customary international law, was intended to ensure that rights *in rem* to immovable property should be enforced in the State where the property was situated. It therefore followed that an application to a court for an eviction order, the purpose of which was to regain full control over a property that had been let to a diplomat in the receiving State, fell within the ambit of Article 31.1(a).

In the case of *Hildebrand v Champagne*[45] in 1984 the Court of Cassation of Belgium considered whether the exception for real actions relating to private immovable property applied to a claim for rental charges and costs alleged to be owing under a lease of a private

[38] UN Laws and Regulations p 65.
[39] Ibid p 82.
[40] Ibid pp 167, 15, 308.
[41] AD 1938–40 No 167.
[42] 1950 ILR No 91 esp at 298.
[43] eg *Afghan Minister (Consular Activities) Case* AD 1931–2 No 179; Embassy cases before Supreme Restitution Court for Berlin 28 ILR 369 *et seq.*
[44] 94 ILR 308.
[45] 82 ILR 121.

apartment. The lower court assumed jurisdiction on the ground that diplomatic immunity applied only to acts performed in the exercise of diplomatic functions and that Article 31.1(a) was a particular example of this. The Court of Cassation allowed the appeal, however, on the basis that the summons did not concern a real action, and stated that the judgment of the lower court violated Article 31 of the Convention.

The expression 'real action relating to private immovable property situated in the territory of the receiving State' is particularly likely to cause difficulty in Anglo-American jurisdictions. The old distinction in English law (now abolished) between 'real' and 'personal' actions did not correspond to what is meant in Article 31.1(a). The distinction between actions *in rem* and actions *in personam* cannot be applied precisely either since actions *in rem* are generally brought in order to establish title to a vessel. The common law distinction between realty and personalty is also unhelpful in that leasehold property is personalty, but an action against a diplomat for possession of property which he holds under lease may be a 'real action' under Article 31.1(a). An attempt was made during the passage of the UK Diplomatic Privileges Bill in 1964 to define the term. The proposed definition moved by amendment was 'an action relating to land or to any right or title to land', and land was to be defined by reference to the Law of Property Act 1925.[46] It was explained by the Minister that this would result in widening the exceptions to immunity set out in Article 31, and the amendment was withdrawn. In 1983, in the case of *Intpro Properties Ltd v Sauvel and others*,[47] which is discussed more fully below, the English Court of Appeal correctly concluded 'that in so far as real property in England is concerned such an action is one in which the ownership or possession, as distinct from mere use, of such property is in issue'.

In 1984 the Family Court in Australia in *De Andrade v De Andrade*[48] considered whether an application by a wife in the context of divorce proceedings for a declaration that her husband held a home in Queensland purchased in his name and let to tenants on trust for the parties as tenants in common in equal shares might be a 'real action relating to private immovable property'. The judge held however that the wife had apparently made no financial contribution to the acquisition of this property and that the real purpose of her claim was 'to achieve an alteration of property interests and obtain some of the property now in the legal ownership of the husband'. The application was essentially connected with the marriage and was not a 'real action' within the meaning of Article 31.1(a).

The Italian Court of Cassation in 1987 in the case of *Largueche v Tancredi Feni*[49] also said that a real action relating to immovable property could only refer to cases concerning the ownership or possession of property. But in an action seeking vacation of property leased by a diplomat they held that because under Italian law the rights in question 'are of a personal nature and do not involve a real action', they had no jurisdiction. The court did not apparently consider any cases from other jurisdictions where the words 'real action'

[46] Hansard HC Debs vol 699 cols 864–73, 891–8.

[47] [1983] QB 1019, [1983] 2 All ER 495, [1983] 2 WLR 908. See also Richtsteig (1994) pp 70–1.

[48] 118 ILR 299. In *Laverty v Laverty* 1995 Can YIL 427 an Ontario court held that an action by the wife of a diplomat was not against the land but against her husband who held an interest in it, and so it was not a 'real action'.

[49] 101 ILR 377.

have been construed. The same approach had been taken by the Examining Magistrate of Rome in the earlier case of *Aziz v Caruzzi.*[50]

Is a diplomat's principal private residence within the exception?

A point of some difficulty is whether the words in Article 31.1(a) 'unless he holds it on behalf of the receiving State for the purposes of the mission' apply to the principal private residence of a diplomatic agent. No clear consensus on this practical point emerges from the previous customary law. If the rationale of the exception regarding private immovable property was that immunity should extend only to property necessary to enable a diplomat to carry out his functions in tranquillity, the conclusion would follow that all diplomatic staff as well as the ambassador should be immune from actions claiming title or possession of their principal private residence. For example, the Regulations of the Philippines follow this approach in providing: 'If an officer holds, in a private country, real or personal property in a personal as distinguished from an official capacity, such property may be subject to the local laws'.[51] The alternative approach was that the reason for the exception was the pre-eminence of the *lex rei sitae* and the difficulty of using any other forum than the courts of the receiving State to determine disputes over title or possession. On this basis the exception should apply to any immovable property belonging to a diplomat. Legislative provisions in several States followed this approach and applied the exception to all immovable property including residences.[52]

None of the cases before the Vienna Convention draw a clear distinction between a principal private residence and other kinds of private immovable property in the receiving State. In *Montwid-Biallozor v Ivaldi*[53] in 1925 a Polish court held 'that municipal courts have jurisdiction in regard to the private immovable property of a public minister, except in regard to such immovable property as is devoted to the official use of the embassy or legation'. The diplomat was held to be immune on the basis that the action, which related to a lease of a furnished flat, was one *in personam,* and the court did not address the question whether his residence was in fact 'devoted to the official use of the embassy or legation'. In the *Afghan Minister (Consular Activities) Case*[54] in 1932 a German court said 'that the immunity of an extraterritorial person from the jurisdiction of the receiving State was without effect in an action *in rem* concerning real property, owned by such person and situated in the territory of the receiving State' and made no qualification for residences. In 1950 a New York court in the case of *Agostini v De Antueno,*[55] in which action for recovery of premises in Manhattan was brought against a UN official entitled by statute to the immunities of a diplomatic agent, held that it had jurisdiction. The court said: 'There appears to be no doubt that real property held by diplomatic officers in a foreign State, and not pertaining to their diplomatic status, is subject to local laws.'

[50] 101 ILR 358.

[51] UN Laws and Regulations p 237 note 5.

[52] UN Laws and Regulations p 15 (Austria); ibid p 65 (Colombia); ibid p 82 (Czechoslovakia); ibid pp 166–7 (India); ibid p 243 (Poland); ibid p 308 (Switzerland).

[53] AD 1925–6 Nos 245, 246.

[54] AD 1931–2 No 179.

[55] 1950 ILR No 91. cp *Matter of Foreclosure of Tax Liens by City of New Rochelle v Republic of Ghana*, 255 NYS 2nd 178, 1965 AJIL 642.

It could be argued that premises used by a diplomat as his residence pertained to his diplomatic status, but the court did not take this point.

The exception to immunity where a claim is for title or possession of immovable property was thoroughly considered by the Supreme Restitution Court for Berlin in 1959 in four related cases, *Tietz and others v People's Republic of Bulgaria*, *Weinmann v Republic of Latvia*, *Bennett and Ball v People's Republic of Hungary*, and *Cassirer and Geheeb v Japan*.[56] The court proceeded from the principle that:

> there is not in existence (and certainly not in Germany) any generally accepted rule of international law which prevents a court, sitting in a particular country, either from hearing or from passing upon the merits of a claim which, if sustained, may adversely affect the legal ownership of and title to real property located within the same country, even where a foreign sovereign is, or allegedly is, the adverse owner of the real property, and even when the foreign sovereign asserts that the real property in his possession is immune either from any such inquiry or from the consequences of an adverse judgment.[57]

Examining whether mission premises might form a special case, the court found that the decisive question was the use of the premises 'for the conduct of diplomatic affairs between sovereigns', but they did not consider how wide that description might go, since they were concerned with premises whose use for mission purposes had long been discontinued. In the later case of *Jurisdiction over Yugoslav Military Mission (Germany) Case*[58] the German Federal Constitutional Court, in an action for rectification of the land register in regard to land used for the Military Mission of Yugoslavia, also took the view that the exercise of its jurisdiction was permissible provided that there would be no interference with the performance of diplomatic functions.

From the records of the International Law Commission and the Vienna Conference it is clear that the diplomatic agent holding premises of the mission in his own name is entitled to immunity from local jurisdiction in regard to these premises. The Rapporteur's original draft of the provision did not contain the qualifying words 'unless he holds it on behalf of the sending State for the purposes of the mission'. In the International Law Commission in 1957 Mr Tunkin proposed to add the words 'and representing a source of income'. He said that the amendment was 'designed to cover cases where immovable property used for the purposes of a mission was held in the name of the head of a mission, because local law did not permit it to be acquired by a foreign State'. Other members were sympathetic to the objective but not to the form of words, while the Rapporteur opposed the amendment on the ground that 'the rule that the private immovable property of diplomatic agents was subject to local jurisdiction admitted of no exception'. Sir Gerald Fitzmaurice proposed the form of words 'unless he holds it on behalf of the sending State for the purposes of the mission', making clear that the purpose of the addition was to cover cases where mission premises as a matter of form and in accordance with local law were held in the name of the head of mission.[59]

The subsequent history of the exceptions in regard to private immovable property in Article 31.1(a) and in Article 34(b)—where identical wording is used—is set out in

[56] 280 ILR 369, 385, 392, and 396.

[57] Ibid at 378.

[58] 15 Entscheidungen des Bundesverfassungsgrerichts 25; 1963:16 Neue Juristische Wochenschrift 435; 1965 AJIL 653; 38 ILR 162 (1962 decision) and 65 ILR 108 (1969 decision).

[59] UN Doc A/CN 4/91 Art 20.1(a); *ILC Yearbook* 1957 vol I pp 94–5.

greater detail below in the context of Article 34. No firm conclusion can be drawn as to whether the International Law Commission or the Vienna Conference intended the term 'private immovable property' to include the principal private residence of a diplomatic agent. But whereas general principles and subsequent state practice support the grant of tax exemption on such a residence, this is not so in the case of immunity from jurisdiction. Article 31.3 as well as Article 30 clearly protects the residences of diplomatic agents from any measure of execution. It would therefore seem to be the better view, and one more consistent with previous practice, that the courts of the receiving State are entitled to exercise jurisdiction over real actions against diplomatic agents affecting such residences, and thus to determine disputes affecting immovable property within their territory. This position derives support from the decision of The Netherlands District Court of The Hague in the *Deputy Registrar Case*[60] described above. The court there held that immunity could not be claimed by the Deputy Registrar even though the property in question was used as his residence. They said that:

> The only function which the dwelling serves with regard to his work at the Registry of the International Court is to provide him and his wife with somewhere to live which is relatively close to his work; this is not altered by the fact that the International Court regards this as useful, or by the fact that P's aforesaid library is housed in the building.

In reaching their conclusion the District Court relied also on Article 16(1)(a) of the European Community Convention on Jurisdiction and the Enforcement of Judgments ('Brussels Convention'), which excludes any possibility of proceedings in the sending State of a diplomatic agent in relation to rights *in rem* to his immovable property situated in the receiving State.

It should be noted that although the diplomatic agent is clearly immune from local jurisdiction in respect of the premises of the mission if he holds them in his own name, the same is not necessarily true of the sending State if the premises are in the name of that State. This problem is discussed in the context of Article 22 above.

In the case of *Arab Republic of Syria v Arab Republic of Egypt*[61] in 1982 the Supreme Court of Brazil missed an opportunity to determine the scope of the words 'unless he holds it on behalf of the sending State for the purposes of the mission'. The case arose in consequence of a dispute between Syria and Brazil over premises in Rio de Janeiro which originally formed the Embassy of Syria, and which on the merger of Egypt and Syria to form the United Arab Republic became the Embassy of the UAR. On the dissolution of the UAR in 1961 the Embassy was in charge of an Egyptian diplomat who refused to return the premises to Syria when it sought to reclaim them on the basis of being the original owner registered in the Land Registry. Instead the premises were used for the purposes of the reestablished Egyptian Embassy and later as Egyptian consular premises. In proceedings brought by the Syrian Ambassador against the Egyptian Ambassador and Consul for possession of the premises, Syria argued that the case was a real action relating to immovable property situated in the territory of the receiving State and held unlawfully by the defendants, so that Article 31.1(a) of the Vienna Convention on Diplomatic Relations precluded immunity from jurisdiction. The Egyptian Ambassador did not enter an appearance but maintained through the diplomatic channel that the dispute was

[60] 94 ILR 308.
[61] 91 ILR 288.

between two sovereign States and that Egypt was entitled to immunity from the jurisdiction of Brazilian courts. In submissions made on behalf of the Government of Brazil by the Deputy Attorney-General it was argued that the real defendant was the State of Egypt. This was accepted by the Supreme Court who then held by a majority that they had no jurisdiction—but on grounds of sovereign rather than diplomatic immunity, so that they made no decision on the Article 31.1(a) argument.

The English Court of Appeal considered the scope of Article 31.1(a) in 1983 in the case of *Intpro Properties Ltd v Sauvel and others.*[62] The proceedings arose from lease of a house to the French Government for occupation by a diplomatic agent and his family. Dry rot developed and the landlord sought access for contractors to carry out remedial work, but this was denied. Proceedings were begun against the diplomat and his wife, and the French Government were later joined as defendants to an action for breach of covenants to repair and to grant access. The claim was pursued later only against the French Government and turned mainly on construction of the State Immunity Act 1978, which provided an exception to the immunity of a State as respects obligations arising out of its interest in, possession, or use of immovable property. There was, however, a saving under section 16 of the 1978 Act for any immunity conferred by the Diplomatic Privileges Act 1964 (which gives effect in the United Kingdom to the Vienna Convention) and also for 'proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission'. The Court of Appeal held that the fact that the premises were used as a private residence by a diplomatic agent, and for carrying out social obligations, was not sufficient to meet the test of their being 'used for the purposes of a diplomatic mission'. In coming to this view they drew support from Articles 1 and 31.1(a) of the Vienna Convention on Diplomatic Relations. They also noted that it would not have been possible for the plaintiff to obtain an injunction or an order for specific performance of the relevant covenants, since the premises were used as the residence of a diplomat, and they concluded that: 'Consequently this inviolability should not be allowed to operate as a bar to proceedings otherwise permitted by the statute when the relief sought is merely damages for breach of covenant.'

A somewhat similar case was decided in 1999 by the South African High Court, *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues.*[63] The Court held that a property purchased in Johannesburg by the Ambassador of Angola as a residence was purchased as a private investment and was not occupied for the purposes of the mission (which was situated along with the Ambassador's principal residence in Pretoria), so that an eviction order could be granted on the ground that the obligations under the purchase agreement had not been fulfilled.

The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property[64] provides in Article 13 an exception to state immunity for proceedings which relate to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest, or its possession or use of, immovable property situated in the State of the forum;

[62] [1983] QB 1019, [1983] 2 All ER 495, [1983] 2 WLR 908.
[63] 133 ILR 389.
[64] Adopted by General Assembly Res A/RES/59/38 of 16 December 2004.

Although this provision is, under Article 3, without prejudice to privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of its diplomatic missions, there is no special saving as regards jurisdiction (as opposed to execution) in respect of property used or intended for use in the performance of the functions of the diplomatic mission of that State. This tends to confirm the emerging view that the forum State may exercise jurisdiction—over diplomatic agents as well as over sending States—to determine questions of title to or possession of land situated within that State.

Exception for private involvement in succession

The exception set out in Article 31.1(b)—'an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State'—was not clearly established in customary international law before the Vienna Convention. There is no mention of such an exception in the words of the earlier writers on diplomatic law, and no case where a diplomat was in the absence of any waiver made subject to local jurisdiction in relation to private matters of succession. In the *Deposit (Land in Czechoslovakia) Case*[65] in 1936 the plaintiff had given a sum of money as deposit for the purchase of an estate. On the death of the intending vendor the estate passed to a diplomat in Prague and the sale did not materialize. In an action for recovery of the deposit the Supreme Court said, upholding the diplomat's immunity: 'The fact that he is sued as the legal successor of a Czechoslovak subject from whom he inherited real property in Czechoslovak territory, is irrelevant for the decision of the question whether the Czechoslovak courts have jurisdiction under Article 9 of the Code.' In 1955 the Administrative Court of Austria in the case of *Re Nidjam, deceased*[66] held that a diplomat who was part heir to the estate of a person who died domiciled in Austria was under a legal obligation to supply for estate duty purposes information regarding the value of the estate left in The Netherlands. They said that by virtue of his diplomatic status he was exempt from a duty to supply information only to the extent that he was not subject to Austrian law, and that within limits set out he was subject to Austrian revenue law. This case provides very limited authority for the existence of a general exception in regard to succession matters.

The 1925 Project of the American Institute of International Law and the 1927 Project of the International Commission of American Jurists[67] list among exceptions to immunity 'actions connected with his capacity as heir or legatee of an estate settled on the territory of the country to which the diplomatic agent is accredited'. From this source it was adopted into the draft articles submitted by the Rapporteur to the International Law Commission.[68] Although criticized on the ground that it had not appeared in more authoritative previous codifications of diplomatic Law and was not declaratory of existing customary law,[69] it survived to become part of the text of Article 31 because it was

[65] 1938–40 AD No 167.
[66] 1955 ILR 530.
[67] 26 AJIL (1932 Supp) 170 (Art 27) and 174 (Art 27).
[68] UN Doc A/CN 4/91 p 4 (Art 20) and p 18.
[69] *ILC Yearbook* 1957 vol I pp 96–7; UN Doc A/CN 4/116 pp 55–6 (observations of Government of United States on draft Arts).

justified on grounds of principle. Actions relating to succession to an estate are likely to require all interested parties to be joined in order to be dealt with properly, and in a case where several persons were involved there would be no alternative forum, since it would be unlikely that the courts of the diplomat's sending State could assume jurisdiction.

Exceptions (a) and (b) in Article 31.1 thus have in common that they seek to prevent a situation wherein a plaintiff is deprived by diplomatic immunity of any possible forum. These are not the only examples of this kind. For example, if criminal proceedings against a diplomat are barred by his immunity it will only rarely be possible or practicable to institute proceedings in the sending State (although other remedies are considered below). Proceedings to make the child of a diplomat a ward of court, or to divorce a diplomat may not be capable of being heard in any other jurisdiction. If permission for an inquest on the body of a diplomat is not given, it is unlikely that any alternative inquiry elsewhere could satisfy the interest of the receiving State in ascertaining the cause of a death occurring on its territory. But in all these cases proceedings could not take place without impeding the diplomat in the exercise of his functions or impairing the dignity of the mission. Succession proceedings by contrast are very unlikely to have such an effect, and so the interest of the receiving State in asserting jurisdiction over all persons concerned with a succession is accepted as paramount.

The words 'as a private person and not on behalf of the sending State' were added at the Vienna Conference as a result of an amendment proposed by Spain.[70] Their purpose is to make clear that immunity applies in the relatively frequent case where a person dies leaving money to another State—usually his home State—or to a person or charitable body in that State, and a diplomat acting in an official capacity receives the money for transmission to his sending State. A diplomat may also become involved in his official capacity in a succession if the deceased left no heirs either by will or intestacy, and the sending State therefore claims the estate as *bona vacantia*.

Exception for private, professional, or commercial activity

The earliest discussion of the problem of the merchant ambassador was by Bynkershoek. He criticized the recent practice of certain Dutch courts and argued that although the ambassador who traded retained his immunity from suit, any real or personal property which he held entirely in his private or commercial character might be distrained.[71] Vattel followed Bynkershoek in maintaining that the ambassador was not liable to personal suit by reason of engaging in trade, but that it was permissible to distrain property held by him by virtue of any commercial functions.[72] While the exception remained in the narrow terms formulated by Bynkershoek and Vattel it could apply only in those States whose legal systems had a form of process which could be begun by distraint of goods without personal suit. Under English law, for example, this was in general not possible, and it was

[70] UN Docs A/Conf. 20/C 1/L 221 para 1; A/Conf. 20/14 p 167.

[71] (1721) ch XIV 'De Legato Mercatore'.

[72] (1758) IV.VIII para 114: 'Et bien que, pour ces procès, on ne peut s'addresser directement à la personne du ministre à cause de son indépendance, on l'oblige indirectement à répondre, par la saisie des effets qui appartiennent a son commerce.'

therefore held in the case of *Magdalena Steam Navigation Company v Martin*[73] that the exception had no place in English law.

It was sometimes suggested that section 5 of the Diplomatic Privileges Act 1708[74] reflected an exception for subordinate diplomatic and other staff of a mission who engaged in commerce. Section 5 was as follows: 'Provided and be it declared that no merchant or other trader whatsoever within the description of any of the statutes against bankrupts who hath or shall put himself into the service of any such ambassador or public minister shall have or take any manner of benefit by this Act'. It is, however, probable that this was intended to prevent a merchant or trader from taking dishonest advantage of the Act by entering into the service of an ambassador rather than to remove immunity from bona fide servants who engaged in trading activities.[75] Two English cases made clear that the ambassador himself did not lose his entitlement to immunity by engaging in commercial activities. In *Taylor v Best*[76] in 1854 Jarvis CJ, in spite of strong argument based on the writings of Vattel, held:

> that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne c. XII s. 5, in the case of an ambassador's servant. If an ambassador or minister, during his residence in this country, violates the character in which he is accredited to our court by engaging in commercial transaction, that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character.

In *The Magdalena Steam Navigation Company v Martin*[77] in 1859 Lord Campbell CJ while acknowledging that the position was different in countries 'where there may be a citation by seizure of goods', said of English law that: 'It certainly has not hitherto been expressly decided that a public minister duly accorded to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well established principles and we give judgment for the defendant.'

Later academic writers during the nineteenth century stated the exception from immunity in wider terms than those given by Bynkershoek and Vattel. Pradier-Fodéré maintained that a diplomatic agent who engaged in commercial activities incompatible with his character ought to be liable to suit in respect of those activities, though not to detention.[78] The draft Code drawn up by the Institute of International Law in both 1895 and 1929 versions provided that immunity from jurisdiction could not be invoked by a diplomat in relation to a professional activity outside his official functions.[79] This appears to be the first mention of professional rather than commercial functions. The Harvard Draft Convention in Article 24 stated:

> A receiving State may refuse to accord the privileges and immunities provided for in this Convention to a member of a mission or to a member of his family who engages in a business or who

[73] 2 El & El 94 at 116, 121 ER 36 at 44; Satow (4th edn 1957) p 185.
[74] 7 Anne c 12.
[75] See Mervyn Jones (1940); Holland (1951).
[76] 14 CB 487 at 519; 139 ER 201 at 214; Satow (4th edn 1957) pp 184–5.
[77] 2 El & El 94 at 116; 121 ER 36.
[78] (1899) vol II pp 129–31.
[79] 1895–6 *Institut de Droit International Annuaire* p 240; 1929 vol II p 207; 26 AJIL (1932 Supp) 162 (Art 16 at 164), 186 (Art 13 at 187).

practises a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession.

The Commentary, however, questioned whether this was a true reflection of international practice.[80] Other authorities including Genet[81] and Hurst[82] also denied that the exception was established in international law. In the *Case of Tchitchérine*[83] proceedings were brought against a counsellor to the Russian Embassy in Paris who provided funds to establish a newspaper and contracted to supply it with material relating to Russia and Poland. At first instance immunity was denied on the ground that this was a commercial transaction into which the diplomat had entered in his private capacity. The Court of Appeal reversed this decision, though it is not clear whether this was on the ground that the exception was not established in international law or on the ground that the transaction in issue did not fall within the scope of the exception.

Several States, however, provided expressly in their national legislation for an exception to immunity in the case of private commercial activities. The law of India, for instance, provided for an exception where the diplomat 'by himself or another, trades within the local limits of the jurisdiction of the court'. The law of Norway stated that 'if he engages in trade or business, he shall be subject in respect thereto to the Constitution and the laws of the country'. Swiss law related the exception to 'a lucrative activity outside his official functions'. The law of South Africa referred to 'any transaction entered into by him in his private and personal capacity for the purposes of trade or in the exercise of any profession or calling'.[84]

The exception was added to the text of the draft articles of the International Law Commission in 1957 as a result of an amendment proposed by Mr Verdross.[85] It was opposed there by Mr François, and the United States in their comments on the 1957 draft articles maintained that it was not part of existing international law.[86]

At the Vienna Conference discussion of the purpose of the exception took place in the context of discussion of the new provision introduced at the Conference which became Article 42 of the Convention: 'A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.' Delegates to the Conference saw Article 31.1(c) and Article 42 as being very closely linked. Colombia in fact proposed deletion of Article 31.1(c) on the ground that it could be construed as implying authority for the diplomat to engage in professional or commercial functions. It withdrew this proposal, however, when it was pointed out that Article 31.1(c) would apply also to members of the family of a diplomatic agent and to administrative, technical, and service staff who were not within the scope of the prohibition in Article 42 and who might without any impropriety engage in professional or commercial activities separate from their diplomatic mission duties. It was also pointed out by delegates to the Conference that certain professional activities might be practised by the diplomatic agent himself without any infringement of Article 42—for example, literary, artistic, or

[80] 26 AJIL (1932 Supp) 121.
[81] (1931) vol I pp 579–82.
[82] (1926) pp 184–9.
[83] Genet (1931) vol I p 580; Satow (4th edn 1958) p 185.
[84] UN Laws and Regulations pp 65, 112, 167, 224, 243, 308, 330.
[85] *ILC Yearbook* 1957 vol I pp 97–8.
[86] UN Docs A/CN 4/L 75 p 22; A/CN 4/116 p 56.

academic work which even if paid was not undertaken primarily 'for personal profit'. The UK delegate suggested that 'there was no reason to prevent an embassy chaplain from ministering to the spiritual needs or attending to the physical health of persons outside the diplomatic mission'.[87]

Article 31.1(c) is also essential in two other kinds of situation. The first is where the sending and receiving States agree to overlook, in the case of a particular diplomat, the prohibition set out in Article 42. This does occasionally happen where an individual is unwilling to give up his business or professional activities but is accepted as being unusually well qualified to hold a particular diplomatic post. For example, when Mr William Wilson was nominated by President Reagan as US Ambassador to the Holy See in 1984, it was explained to the Senate Foreign Affairs Committee that exceptionally he had been permitted to retain the positions he held in two US commercial companies.[88] The second situation is where the diplomatic agent engages in professional or commercial activities in defiance of Article 42, or without being aware of its constraints. In this case Article 31.1(c) is a more effective protection for claimants or creditors in the receiving State than the possibility of declaring the diplomat *persona non grata*.

Meaning of 'any professional or commercial activity'

It was made clear during the drafting of Article 31.1(c) that the exclusion did not apply to a single act of commerce but to a continuous activity.[89] Ordinary contracts incidental to life in the receiving State, such as purchase of goods, medical, legal or educational services, or agreements to rent accommodation do not constitute 'commercial activities'. Thus in the case of *Tabion v Mufti*[90] in 1996 the US Court of Appeals held that a contract between a Philippine national and a diplomat for performance of domestic services was not within the scope of the exception. The court took account of a statement of interest filed by the State Department in the matter, in which the Department concluded that 'commercial activity' in Article 31.1(c) 'focuses on the pursuit of trade or business activity; it does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State'. The court held that: 'Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.'

The reasoning in *Tabion v Mufti* was followed by the English High Court in *Wokuri v Kassam*.[91] This case arose from a claim by a chef and housekeeper to the Deputy High Commissioner at the Uganda High Commission in London, Ms Kassam, that she had not been provided with a copy of her contract of employment and had not been paid her full salary. The High Court did not accept that Ms Kassam had not been entitled to immunity by virtue of Article 31.1(c). But when the case was heard in 2012, Ms Kassam had left the UK on transfer to the Uganda Embassy in Rome, so that her continuing immunity

[87] UN Docs A/Conf. 20/C 1/L 173; A/Conf. 20/14 pp 165–6, 212–13.
[88] *International Herald Tribune*, 13 July 1984; 1985 RGDIP 141.
[89] A/CN 4/116 p 56: comment by Rapporteur to ILC.
[90] US Court of Appeals, 4th Cir 73 F 3d 535; 1996 US App LEXIS 495; 107 ILR 452. See also *Logan v Dupuis*, 900 F Supp 26, DDC 1997.
[91] [2012] EWHC 105; 152 ILR 557. See also US Statement of Interest in 2009 DUSPIL 378.

depended on the terms of Article 39.2 of the Vienna Convention. The case is discussed further below under Article 39.2.

The English Court of Appeal in the case of *Reyes v Al-Malki*[92] also found the reasoning in *Tabion v Mufti* persuasive and supported by commentators, and declined to disregard it on the ground that the US court had given 'substantial deference' to a State Department statement of interest on the interpretation of 'commercial activity'. Lord Dyson, Master of the Rolls, in giving the lead judgment, pointed out that the ordinary meaning of the words was consistent with the scheme of the Vienna Convention as a whole and the principle underlying diplomatic immunity: 'If a diplomatic agent does what he is sent to the receiving State to do, then the activities which are incidental to his life as a diplomatic agent in the receiving State are covered by the immunity.' There was a clear link with Article 34(d) excluding from tax exemption taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State and also with Article 42 prohibiting diplomats from practising for personal profit professional or commercial activity in the receiving State. It was clear from the *travaux préparatoires* of the Vienna Convention that the participants did not consider that contracts of employment for the provision of domestic services at a mission were included within the term 'professional and commercial activities'. Such an employment contract was incidental to the daily life of a diplomatic agent and enabled him to perform his functions.

It was also argued on behalf of the plaintiff in *Reyes v Al-Malki* that because the UK Government accepted that the plaintiffs had been the victims of trafficking as defined by international agreements,[93] this transformed their engagement into a commercial activity so as to be caught by the exception to immunity in Article 31.1(c). The Court held that the fact that a diplomat derived economic benefit from employing an employee below the market rate did not imply that he was engaged in a commercial activity, or an activity outside his official functions. The international agreements did not address the question of diplomatic immunity which was the subject matter of the 1961 Vienna Convention.

Article 4 of the European Convention on Human Rights and Fundamental Freedoms required Parties to penalize and prosecute acts maintaining a person in a situation of forced or compulsory labour, but this was not a superior rule of international law which entailed an exception to the principle of diplomatic immunity. In the case of *Jones v Saudi Arabia*[94] the House of Lords had held that even a claim of torture which was accepted as *ius cogens* did not take precedence over a rule of State immunity, and there was no material distinction in this context between diplomatic and State immunity. Article 6 of the European Convention on Human Rights which required Parties to grant access to a court must be construed in accordance with the decision of the European Court of Human Rights in *Fogarty v UK*[95] where it was held that the right was not absolute and could be limited by proportionate restrictions reflecting generally accepted rules of international law on State immunity. This reasoning applied also to the rules on

[92] [2015] EWCA Civ 32.

[93] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000, UNTS vol 2237 p 319 ('the Palermo Protocol'); Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS N 197.

[94] [2007] 1 AC 270.

[95] [2002] 34 EHRR 12.

diplomatic immunity. On the true interpretation of Article 31.1(c) diplomatic immunity was not excluded in relation to claims for compensation by domestic workers who had been trafficked.

Paid employment outside the mission or provision of professional services for remuneration by a member of the mission or a member of his family is, on the other hand, within the exception. The spouse of a member of the mission who works as a doctor, teacher, or administrator in the receiving State may therefore be sued in respect of these activities. The clear exception from immunity for such activities has in many States overcome an important obstacle to permitting spouses and other members of the families of diplomats from independent work in the receiving State. Between some States there are specific agreements underlining the absence of immunity, or a specific assurance may be a condition of granting permission to a spouse to take up employment—but between Parties to the Vienna Convention such a precaution is not in fact legally necessary.[96]

More difficult is the question of the diplomat's personal assets if these are invested in the receiving State. Cahier[97] takes the view that administration by the diplomat of his personal assets would not come within the exception to immunity. The Family Court of Australia held in *De Andrade v De Andrade* in 1984 that neither the purchase of a house as an investment nor the collection of rent from tenants was a 'commercial activity'.[98] But investment—whether direct or portfolio—is normally a continuous activity carried out for profit. While the courts might accept that a single personal loan was not covered by the exception, they would be less likely to take the same view of investment in shares or in business enterprises within the receiving State. National courts would be particularly anxious not to permit diplomatic immunity to be raised as an obstacle to bankruptcy or winding-up proceedings where the interests of a number of people would be involved. US regulations do not permit US diplomats overseas to invest in local companies,[99] and such restrictions may well be more general—which would explain the absence of authority on this point.

Meaning of 'outside his official functions'

In the case of *Portugal v Goncalves*[100] the plaintiff Mr Goncalves obtained a default judgment for payment for a translation provided at the request of the Director of the Commercial Office of Portugal, part of Portugal's diplomatic mission to Belgium. Before the Civil Court of Brussels he argued that the commissioning of a translation was not among the functions of a diplomatic mission as set out in Article 3 of the Convention, and that Article 31.1(c) therefore applied. Although the suit was against the Portuguese State, the court addressed the question of immunity on the basis of the Vienna Convention, and they held that: 'Article 3 sets out the general framework for diplomatic functions and must be interpreted as also covering all other incidental actions which are indispensable for the performance of those general functions listed in the Article.' The plaintiff had not

[96] These agreements, of which the United States has concluded many, are discussed in the context of Art 37.1. For agreement concluded in 1982 between Chile and the United States, see Lecaros (1984) p 141.

[97] (1962) p 260.

[98] 118 ILR 299 at 306, described by Brown (1988) at 76.

[99] State Department information.

[100] 82 ILR 115.

established that commissioning a translation was outside Article 3, and Article 31.1(c) therefore had no application. A similarly broad approach to diplomatic functions was taken by the English High Court in the case of *Propend Finance Property v Sing and the Commissioner of the Australian Federal Police*[101] in holding that a member of the diplomatic staff of the Australian High Commission in London carrying out police liaison activities (which formed part of his official duties) was not acting outside his official diplomatic functions. The judge held that 'the tasks which he carried out on behalf of the Australian Federal Police were a very function of his particular diplomatic role'.

While the courts in the above two cases were clearly correct in concluding that Article 31.1(c) had no application, it may be open to question whether they were correct in accepting that the expression 'outside his official functions' in Article 31.1(c) should be interpreted by reference to Article 3 of the Vienna Convention. As already explained in the context of Article 3, there may sometimes be difficulties in determining the limits of diplomatic functions and the boundaries between diplomatic and commercial and diplomatic and consular functions. It is suggested that these issues should be determined by consultation between sending and receiving States. A diplomat who is instructed to undertake an activity, such as export promotion or assistance to businessmen, which could be argued to be commercial, or an activity, such as service of legal documents, which might be regarded as consular rather than diplomatic, is acting within *his* official functions and should be entitled without question to personal diplomatic immunity. If the receiving State takes the general view that certain of these activities are not properly diplomatic, or are consular rather than diplomatic, this may require resolution, and might be relevant to the question of whether premises are entitled to the status of 'premises of the mission' as defined in Article 1(i). This should not, however, expose a diplomat carrying out instructions—unless these clearly exceeded the bounds of proper activity—to the risk of personal civil suit. Where litigation has been undertaken, however, it may not be practicable for the question to be resolved by the sending and receiving States and the court may have to form its own view.[102]

The words 'relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions' should properly be read as a whole. This approach was correctly taken by the US Court of Appeals in *Tabion v Mufti*, described above, when they pointed out that to give a broader meaning to 'commercial activity' would ignore the relevance of the remainder of the phrase—'outside his official functions'. Also important to determining the scope of the exception are the words 'in the receiving State'. An attempt in the case of *Skidmore Energy, Inc et al v KPMG et al*[103] to bring proceedings in Texas against the Ambassador of Saudi Arabia to the United States in respect of investments by the ambassador in a company incorporated in Liechtenstein which carried out activities in Morocco was dismissed by the court for lack of jurisdiction.

[101] Judgment of Laws, Judgment of 14 March 1996, unreported. Although the case went to the Court of Appeal, the finding on this point was not appealed.

[102] Construction of the similar expression 'in the exercise of his functions as a member of the mission' in Art 39.2 may raise even more difficult problems, particularly in the context of criminal proceedings: see below.

[103] US District Court Northern District of Texas Dallas Division, Civil Action No 3: 03-CV-2138-B, Memorandum Order of 3 December 2004.

Procedure when immunity is raised

Article 31 lays down no procedural provisions as to when or how diplomatic immunity should be pleaded or established in national courts. These matters are left to the law of each State Party. The majority of cases where proceedings against a person entitled to diplomatic immunity are contemplated never come to trial because the plaintiff or his advisers learn of the defendant's status and find that his government are unwilling to waive his immunity. Informal guidance may be sought from the Ministry of Foreign Affairs in order to check a claim that the defendant is entitled to diplomatic immunity. Article 10 of the Convention requires the Ministry of Foreign Affairs of the receiving State to be notified of appointments of all persons entitled to privileges and immunities by virtue of their connection with a diplomatic mission and of their departure or the termination of their appointment or employment. The Ministry is therefore uniquely well placed to state the relevant facts. If difficult questions of law arise, however, these are likely to be determined by the courts, although under many legal systems there are arrangements under which the executive may offer guidance to the courts on the relevant international law.

In the United Kingdom informal advice may be sought from the Foreign and Commonwealth Office. If legal proceedings are contemplated, an approach may be made by the solicitors for both parties acting jointly. If only one solicitor requests information, the reply will be copied as a matter of course to the other party or his advisers. Any formal request for a waiver of immunity by the sending State will be dealt with at ministerial level. If legal proceedings are begun the defendant may ignore them in reliance on his immunity—though there is then some risk that the court may proceed without being aware of his diplomatic status. In the alternative the defendant may enter a conditional appearance under protest, pleading diplomatic immunity. The court will then request from the Foreign and Commonwealth Office a certificate under section 4 of the Diplomatic Privileges Act 1964.[104] This provides that:

> If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.

An example of an affirmative certificate under section 4 was that issued in the case of *Empson v Smith*[105] which stated:

> By the direction of Her Majesty's Principal Secretary of State for Commonwealth Relations it is hereby certified under section 4 of the Diplomatic Privileges Act 1964 that Mr C. B. Smith was on [October 1] a member of the administrative and technical staff of the diplomatic mission of Canada in the United Kingdom, that he has since that date continued to be a member of the said administrative and technical staff and he is now such a member.

An example of a negative certificate was that provided in the case of *R v Governor of Pentonville Prison, ex parte Teja*,[106] stating:

> Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me in accordance with the provisions of section 4 of the Diplomatic Privileges

[104] C 81.
[105] [1966] 1 QB 426 at 434, [1965] 2 All ER 881, 41 ILR 407.
[106] [1971] 2 QB 274, [1971] 2 All ER 11, [1971] 2 WLR 816.

Act 1964, I, Alexander Lees Mayall, Head of Protocol and Conference Department of the Foreign and Commonwealth Office, hereby certify that Dr. Jayanti Dharma Teja has not been accredited to the Court of St. James as a diplomatic agent of the Costa Rican Government.

Certificates under the Diplomatic Privileges Act are rigorously confined to questions of fact within the special knowledge of the Foreign and Commonwealth Office, such as notifications of appointments of members of diplomatic missions. Questions of law such as whether the defendant is permanently resident in the United Kingdom are left to the courts, though in appropriate cases facts relevant to these questions might be covered in a certificate. If the diplomatic status of the defendant comes to the attention of the court without having been expressly pleaded, the appropriate course is for the proceedings to be adjourned while a certificate is sought from the Foreign and Commonwealth Office.

Material relating to the establishment of diplomatic status in a number of jurisdictions, particularly in the United States, set out in Whiteman,[107] shows that notification to the relevant Ministry of Foreign Affairs, and the furnishing of a statement to the courts by that Ministry, are general preconditions to establishment of a claim to diplomatic immunity from jurisdiction. In the United States section 5 of the Diplomatic Relations Act 1978[108] now provides that:

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 3(b) or 4 of this Act, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

Motion would be by the defendant or his government, while suggestion or certification would come from the US Government. Unlike executive certificates in the United Kingdom, certifications in the United States may cover applicable law as well as relevant facts. In 1985 the State Department in a Circular Note to chiefs of mission in Washington explained that while the Department would continue to provide certifications where appropriate on the request of the embassy concerned, they would not do so where the request came from a court or an attorney representing a party in legal proceedings without first advising the embassy and providing it with an opportunity to consider whether it wished to waive immunity.[109]

The US Court of Appeals held in the case of *Abdulaziz v Metropolitan Dade County and Others*[110] in 1984 that once the State Department had certified that an individual in the United States was entitled to diplomatic status, the court was bound to accept that determination, and the certificate was not reviewable by the court.

In *US v Noriega and Others*[111] in 1990 a US District Court held that General Noriega, charged with narcotics offences following his surrender to US forces during their invasion of Panama, was not entitled to diplomatic immunity either on the basis of holding a Panamanian diplomatic passport or on the basis of US diplomatic visas. A diplomatic passport might secure certain courtesies in international travel but was 'without

[107] 7 Digest of International Law 108–26. See also Lecaros (1984) p 141.
[108] PL 95–393, cited in 1978 DUSPIL 585.
[109] Text of Note of 20 December 1985 provided by State Department.
[110] 11th Cir, 18 September 1984, 741 F 2d 1328 (1984), 99 ILR 113.
[111] US District Court, Southern District of Florida, 8 June 1990, 99 ILR 143 at 165–7.

significance in international law'. Similarly the issue by the United States of a diplomatic visa was 'an administrative action in connection with United States immigration law and is quite independent of the process of diplomatic accreditation'. The court also had a Declaration by an Under Secretary of State within the State Department that: 'The President of the United States does not recognize General Manuel Antonio Noriega as either the head of government or head of state of the Republic of Panama.'[112] The court in its decision had regard to the Circular Note sent by the State Department in 1985 to all diplomatic missions and which was annexed to the US Government's Motion in Opposition to Defendant Noriega's Motion to Dismiss the Indictment. In *R v Lambeth Justices, ex parte Yusufu*[113] in 1985 a similar argument of entitlement to diplomatic status on the basis of a diplomatic passport and a diplomatic entry visa was raised by one of the kidnappers of the Nigerian ex-Minister Mr Dikko, and was rejected by the English Divisional Court on the basis that there had been no notification of Mr Yusufu as a diplomatic agent to the Foreign and Commonwealth Office in London.

Legal effect of establishment or lifting of immunity

The Convention does not itself spell out the legal consequences of diplomatic immunity from jurisdiction, but it is generally accepted that it is procedural in character and does not affect any underlying 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 the conduct or events giving rise to a claim or charge took place or at the time when proceedings were begun. It follows that if the defendant becomes entitled to immunity he may raise it as a bar to proceedings relating to prior events or to proceedings already instituted against him, and the courts must discontinue any such proceedings if they accept his entitlement. Conversely if the defendant loses any entitlement—whether through termination of his appointment, through waiver by the sending State, by operation of law, or through any other change of circumstances—the court may proceed even though he was entitled to immunity when the events took place or when process was originally begun.[114] The distinction between immunity from jurisdiction and impunity was emphasized by the International Court of Justice in 2002 in the *Arrest Warrant Case* where they said:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[115]

In English law the position was made somewhat more difficult by the terms of the Diplomatic Privileges Act 1708,[116] which required civil suits against ambassadors or their servants to be 'deemed and adjudged to be utterly null and void, to all intents,

[112] Text of Declaration provided by State Department.
[113] [1985] Crim LR 510, [1985] Times Law Reports 114.
[114] See Salmon (1994) para 400.
[115] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ Reports 1.
[116] 7 Anne c 12.

constructions, and purposes whatsoever'. In *Empson v Smith*,[117] however, proceedings claiming damages for breach of a tenancy agreement against a member of the administrative and technical staff of the Canadian High Commission were begun shortly before the entry into force of the Diplomatic Privileges Act. The Act, which gave effect in the United Kingdom to the Vienna Convention, limited the entitlement to immunity of the defendant in respect of civil proceedings relating to acts performed outside the course of his duties. The court held unanimously that the defendant could not have the action dismissed without determination on the facts of whether the acts done in relation to the tenancy were outside the course of his duty. Diplock LJ said:

> It is elementary law that diplomatic immunity is not immunity from legal liability but immunity from suit... Statutes relating to diplomatic immunity from civil suit are procedural statutes. The Diplomatic Privileges Act 1964 is in my view clearly applicable to suits brought after the date on which that statute came into force in respect of acts done before that date.

He held that notwithstanding the Diplomatic Privileges Act 1708 the proceedings were not 'null and void' in the legal sense but could, like a phoenix, be brought to life by removal of the procedural bar through waiver or any other cause.[118] This case was followed in 1979 in the case of *Shaw v Shaw*.[119] In that case divorce proceedings instituted against a serving US diplomat were allowed by the English High Court to continue on the basis that by the time the matter came to court the husband, who had left his post at the embassy and returned to the United States, was no longer entitled to diplomatic immunity.

In the case of *Gustavo JL and Another*[120] the Supreme Court of Spain also emphasized the procedural nature of diplomatic immunity in rejecting the argument that a diplomat at the Embassy of Colombia could not be tried for drug trafficking offences even after dismissal from his post and waiver of his immunity because this would violate the provision of Spanish law which prohibited retroactive application of criminal laws. The Supreme Court held that the effect of the waiver by the sending State was 'to remove the procedural impediment which immunity represented and thereby, as stated above, to enable the judicial authorities of the receiving State to prosecute a [former] diplomatic agent for acts which, at the date of their alleged commission, constituted crimes according to the domestic legislation of the receiving State'. A similar view was taken in 1988 by a US District Court in the case of *US v Guinand*,[121] in which a member of the administrative staff of the Peruvian Embassy was charged, following his dismissal from the embassy, with distribution of cocaine at a time when he was entitled to diplomatic immunity. The court gave great weight to a Declaration of the State Department Legal Adviser as to the US Government's interpretation of the Vienna Convention and to the fact that this position had been communicated to all diplomatic missions in the United States in 1987.[122] They also noted precedents in the same sense from other jurisdictions, including *Empson v Smith* which is described above.

[117] [1966] 1 QB 426, [1965] 2 All ER 881, 41 ILR 407.
[118] At 438–9.
[119] [1979] 3 All ER 1, 78 ILR 483.
[120] 86 ILR 517.
[121] 99 ILR 117.
[122] In US Department of State Publication 9633, *Guidance for Law Enforcement Officers: Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel.*

It would appear to follow from those cases that if without the court being aware of the status of the defendant a verdict is given in the case of criminal proceedings or a judgment in the case of civil proceedings, these may be regarded as valid under national law. 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.

EXEMPTION FROM GIVING EVIDENCE

Article 31

...

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

...

Although it must for many centuries have been the practice among States that a diplomatic agent could not on account of his inviolability be compelled to give evidence in criminal or civil proceedings, the matter does not seem to have been discussed specifically by writers on diplomatic law until the nineteenth century.[1] The earliest celebrated incident where the giving of evidence by a diplomat was in question occurred in 1856 in Washington where a homicide occurred in the presence of the Dutch Minister. When the Minister declined to testify before a court the US Government raised the matter with the Government of The Netherlands, observing that 'it was not doubted that both by the usage of nations and by the laws of the United States, M. Dubois has the legal right to decline to give his testimony', but that he could do so without submitting to the jurisdiction and that it was desirable in the interests of justice that he should do so. The Netherlands Government declined to allow their Minister to appear in court, but suggested that he might give evidence under oath at the US Department of State. This offer was refused on the ground that it would not permit cross-examination of the witness, and the US Government asked for the recall of the Minister.[2]

In 1864 the English Law Officers on being consulted about a *subpoena ad testificandum* which it had been intended to transmit through the Foreign Office to the French Ambassador, advised:

> That, according to the settled principles of international law, an Ambassador is not amenable to the jurisdiction of the Courts of the nation to which he is accredited, either for the purpose of being summoned to give testimony or for any other purpose; ... It would, of course, be competent to any Government to which an Ambassador was accredited in any case in which there might be reason for believing that the interests of justice would be promoted by his voluntary appearance as a witness before the Tribunals to make any representation which they might think proper, with a view to induce him to consent to waive his undoubted privilege, and to give evidence, of course without any subpoena. But the case must be of a very exceptional character in which such an application could be discreetly made on the one side, or acceded to without loss of dignity on the other.[3]

The Resolution of the Institute of International Law in both its 1895 and its 1929 versions contained the following provision:

> Article 17. Persons enjoying legal immunity may refuse to appear as witnesses before a territorial court, on condition that, if they are so requested through diplomatic channels, they shall give their testimony, in the diplomatic residence, to a magistrate of the country sent to them for the purpose.[4]

[1] Martens-Geffcken (1866) p 98; Pradier-Fodéré (1899) pp 184–6.
[2] Moore (1905) vol IV para 662.
[3] McNair (1956) vol I p 202.
[4] 26 AJIL (1932 Supp) 164, 187.

This provision did not reflect general international law. Many States made provision in their law or by administrative means to enable diplomats to give evidence in some special way which might be more convenient to them, more consistent with their special status, or which would avoid exposing them to cross-examination on their evidence. For example, they might be permitted to submit a written statement to the court, to answer in writing a list of questions prepared by the court, or to give evidence in the premises of their own mission.[5] But there is no indication that the immunity of the diplomat from compulsion in regard to giving evidence was ever made conditional on his agreeing to make use of such special facilities, and there were many legal systems such as those of England and the United States where evidence given under such conditions was inadmissible.

Under customary international law a diplomat was immune from compulsion in regard to appearing or giving evidence as a witness but was probably not exempt from the legal obligation to do so if requested in proper terms. The International Law Commission in 1958 debated fiercely over whether their draft articles should contain merely an immunity—as provided in the Rapporteur's original draft: 'A diplomatic agent cannot be compelled to appear as a witness before a court'—or should confer exemption from the duty to give evidence. They chose the second alternative and adopted wording proposed by Sir Gerald Fitzmaurice which ultimately became the text of Article 31.2. Several Members of the Commission considered that this correctly restated the customary law. The general view was that since emphasis was laid in the draft articles as a whole on the distinction between procedural immunity and substantive exemption and on the duty of persons entitled to privileges and immunities to comply with their legal obligations, it was preferable to specify that in the matter of giving evidence the diplomat was under no obligation. Otherwise it could be argued that failure to give evidence on request was a breach of a legal duty and justified declaring the diplomat *persona non grata* as had been done in the early case of the Dutch Minister in Washington.[6]

The exemption from the duty to give evidence is not limited by the exceptions to immunity from jurisdiction set out in Article 31.1(a), (b), and (c). The International Law Commission considered adding such limitations but decided that they would be undesirable in principle. It was emphasized that a diplomatic agent involved for whatever reason as plaintiff or as defendant in legal proceedings would always have a strong incentive to give evidence in order to win his case, but that the decision whether to permit him to do so should remain with the sending State.[7] Administrative and technical staff are also under no obligation to give evidence should civil proceedings be instituted against them in respect of private acts.

Although the diplomatic agent is under Article 31.2 exempt from the duty to give evidence, it is clear from previous practice and implied in the debates in the International Law Commission and at the Vienna Conference that he may give evidence if permitted by his sending State. In practice this is usually described as a 'waiver' and the provisions of Article 32.1 and 32.2 are applied by analogy. The sending State may delegate its power in

[5] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') pp 13–16 (Austria); ibid p 65 (Colombia); ibid p 106 (Ecuador); ibid p 145 (Guatemala); ibid p 152 (Honduras); ibid p 222 (Nicaragua); ibid p 337 (Soviet Union).

[6] UN Doc A/CN 4/91 Art 20; *ILC Yearbook* 1958 vol I pp 147–52.

[7] UN Doc A/CN 4/116 p 57 (observations of Belgium and The Netherlands); *ILC Yearbook* 1958 vol I pp 147–52, vol II p 98 (para 10 of Commentary on Art 29).

this regard—for example, by permitting diplomatic agents to testify on matters unconnected with their official duties without specific authority in each case. Diplomats of the United Kingdom and United States are, however, required to refer back for instructions in any case where they are asked to give evidence before local courts.[8]

UK diplomats abroad are normally authorized to give evidence in any case which is unrelated to their official functions and provided that it is made clear that their evidence is not given under compulsion. An example of a waiver permitting a UK diplomat to give evidence in a road traffic case before a magistrates' court in Canberra is given by Brown.[9] In 2002 the UK Government authorized their Ambassador, Sir Ivor Roberts, to give evidence in the Special Criminal Court against the head of the Real IRA and accepted that he was cross-examined.[10] Where the matter does relate to official functions but it is thought desirable that in the interests of justice the diplomat's evidence should be made available to the court, enquiries are sometimes made as to whether local law would permit this evidence to be given in the form of a written statement or answers to questions from the court. There is no hard and fast guidance on the conditions under which authority to testify might be granted by the UK Government.

The difficulties which may arise in consequence of a limited concession are well illustrated by the case of *Public Prosecutor v Orhan Ormez*[11] decided by the Supreme Court of Malaysia in 1987. In an application by Turkey for extradition of a Turkish national who had been convicted in Ankara of murder, the First Secretary in the Turkish Embassy was authorized on the basis of a diplomatic note to give evidence 'solely for the authentication of legal documents'. The court adjourned to enable him to identify the translation of a document sent by the Turkish Government, and the embassy by a second note informed the court that the diplomat would not attend court any more. The High Court then—on the basis that there had been a waiver—issued a subpoena to compel him to attend and ordered that if he failed to attend a warrant of arrest should be served on him. The Supreme Court, however, set aside the order on the basis that there had been no waiver of immunity—the note 'was merely to express the diplomatic agent's *willingness* to give evidence voluntarily although he is not by virtue of Article 31(2) of the Convention legally *obliged* to give evidence as a witness'. His act of giving evidence did not constitute a submission to the jurisdiction, render him obliged to give evidence, or make him a compellable witness.

Both the International Law Commission and the Vienna Conference expressed concern at the possibility of serious injustice resulting from the diplomat's exemption from the duty to testify. In the Commission there was a suggestion that diplomats would be under a moral obligation to give evidence, but it was emphasized in response that the decision would always be one for the sending State, and the Commission avoided wording

[8] The Instructions to US Diplomatic Officers (1897) in § 48 provided that the immunity from compulsion to testify was: 'regarded as appertaining to his office, not to his person, and is one of which he cannot divest himself except by the consent of his Government. Therefore, even if a diplomatic representative of the United States be called upon to give evidence under circumstances which do not concern the business of his mission, and which are of a nature to counsel him to respond in the interests of justice, he should not do so without the consent of the President, which in any such case would probably be granted.' Moore (1905) vol IV p 642. For practice on granting permission for US consuls to testify see Lee (1991) pp 528–30.

[9] (1988) at p 79.

[10] Satow (6th edn 2009) at para 9.23.

[11] 87 ILR 212.

which seemed to suggest moral commitment to assist the court. At the Vienna Conference the Soviet Union proposed additional provision specifying that a diplomat authorized to give evidence need not attend for that purpose any court or other authority of the receiving State. The amendment met with no support, on the basis that nothing in the Convention prevented special facilities being arranged in cases where the resulting evidence would be admissible in national legal proceedings.[12] The Vienna Convention on Consular Relations, however, makes provision in Article 44(2) to assist consular officers—who are given only limited exemption from the duty to testify. The provision states that: 'The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.'[13] The Soviet Union in fact made special provision on the lines of its own amendment which had been rejected by the Vienna Diplomatic Conference when in 1966 a Decree was adopted to give effect to the two Vienna Conventions in respect of diplomatic and consular missions in the Soviet Union. Belgian law also admits the possibility of taking evidence in writing or in embassy premises where the sending State is unwilling to permit a diplomat to attend court to give evidence.[14]

English law provides no special procedures and if a diplomat is authorized to testify he must do so in court and under oath or affirmation and be cross-examined to the same extent as other witnesses.[15] Although some legislation has extended the circumstances in which written evidence may be admitted in civil cases there are no special provisions for persons exempt from the duty to testify. If a diplomat is authorized to testify, the Foreign and Commonwealth Office may in appropriate cases try to facilitate his appearance—for example, by asking if the case could be heard on a date which would not interfere with his diplomatic work.

[12] UN Docs A/Conf. 20/C 1/L 176; A/Conf. 20/14 pp 167 and 171. Mr Tunkin made a similar suggestion in the Commission: *ILC Yearbook* 1957 vol I p 104.

[13] Lee and Quigley (3rd edn 2008) at pp 487–9, where it is suggested that the position regarding the consular obligation to give evidence is a compromise between the requirement to respect the laws and regulations of the receiving State and the exemption from personal services and contributions.

[14] Salmon (1994) para 418.

[15] See McNair (1956) vol I p 201.

IMMUNITY FROM EXECUTION

Article 31

...

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

...

The immunity from execution of a diplomatic agent was a rule long established in customary international law. It derived from the diplomat's inviolability of person, residence, and property as well as from his immunity from civil jurisdiction. Insofar as it was ever treated in practice or by the writers as a matter separate from immunity from civil jurisdiction, this was usually in the context of the rule (now set out in Article 32.4) that waiver of immunity from jurisdiction does not imply waiver of immunity in respect of execution.

What was not clear in customary international law was the extent to which an automatic exception to immunity from jurisdiction (such as that in respect of private immovable property) necessarily implied an exception to immunity from execution if judgment were given against a diplomat. The Rapporteur to the International Law Commission originally provided that a diplomatic agent should, without any exception, be immune from measures of execution. But the Commission in 1957, after a short discussion substituted the provision which now forms Article 31.3.[1] This provision, while safeguarding the inviolability of the diplomat's person and residence, carries the exception to immunity set out in Article 31.1 to a logical conclusion by permitting judgments given in these cases to be executed. If, for example, the diplomat loses a case relating to title or possession of immovable property the judgment may be enforced, provided that the property in question is not at the relevant time the private residence of the diplomat. Neither he nor any member of his family may be evicted. If he loses a case relating to a professional or commercial activity, execution would in practice probably be levied first on goods in the receiving State relating to that activity. But in fact the Convention permits execution under these circumstances against any of his property provided that it is not on his person, in his residence, or on the premises of the mission or any other inviolable premises. In practice, therefore, the possibilities of execution of a judgment against a diplomat are limited.

It is, however, most improbable that a diplomat against whom a judgment was given by a court in the receiving State would not voluntarily comply with its terms. If non-compliance with a final judgment of a national court were drawn to the attention of the Ministry of Foreign Affairs of the receiving State, a more serious view would be taken

[1] *ILC Yearbook* 1957 vol I pp 104–5; vol II p 139.

of such an obvious failure to comply with the law than of a refusal by the sending State to waive immunity from jurisdiction. The matter would be drawn to the attention of the government of the diplomat's sending State and unless some satisfactory explanation were given it is likely that withdrawal of the offending diplomat would be requested.

A diplomat's residence may be vulnerable to execution if it is part of a larger block owned by the sending State and a judgment of a national court declares that the block as a whole is not exempt from execution under national or international rules on state immunity. In the case of *Russian Federation v Sedelmayer*,[2] the Supreme Court of Sweden held that although four of the apartments in the building against which Sedelmayer sought to enforce an arbitral award against Russia were the residences of diplomats so that their physical integrity was protected by the Vienna Convention, this was not sufficient to make distraint of the property as a whole unlawful. The property as a whole 'was not to a substantial part used for the official purposes of the Russian Federation' and was therefore not immune from enforcement.

[2] Supreme Court Judgment of 1 July 2011, No O 179-10; Note by P Wrange, 2012 AJIL 347; Fox and Webb (2013) pp 516–17, 530.

JURISDICTION OF THE SENDING STATE AND OTHER REMEDIES

Article 31

...

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

Article 31.4 does no more than restate a rule which has never at any time been challenged. But during the preparation of the Convention there were several efforts to make the jurisdiction of the sending State more effective. The original proposal for this paragraph made by the Rapporteur to the International Law Commission was:

A diplomatic agent shall be justiciable 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.

It was, however, pointed out by several members of the Commission both in 1957 and 1958 that the second sentence of this proposal was not in accordance with international law or with many national legal systems. Many States had no jurisdiction to try crimes committed abroad by their diplomatic agents, and there would be many civil cases where, even if the diplomat could properly be served with process while he remained at his post, the courts of the sending State would have no jurisdiction to hear the action. It was unlikely that States would be prepared to assume the obligation of providing a competent forum in every case where someone wished to sue one of their diplomats or there was evidence that he had committed a criminal offence. The International Law Commission accordingly dropped the controversial part of the Rapporteur's proposal, and attempts to introduce similar proposals at the Vienna Conference were wholly unsuccessful.[1]

Civil proceedings against a diplomat before the courts of the sending State do not usually provide a satisfactory remedy for a claimant in the receiving State. The first difficulty is that of serving process on the diplomat. While he remains at his post this cannot be done by the authorities of the receiving State because of his inviolability (as explained above under Article 29), and other methods of service such as letter or advertisement may not be adequate under the law of the sending State. Even after his appointment ends, it often happens that he does not return to the sending State but proceeds directly to take up another appointment in a third State where he is again inviolable and cannot easily be served. The second difficulty is that of expense—the plaintiff will have to bear the heavy costs of taking legal advice and instituting legal proceedings in a foreign country, perhaps including the expenses for witnesses willing (for they could not be compelled) to travel from the receiving to the sending State. In the

[1] *ILC Yearbook* 1957 vol I p 105; 1958 vol I pp 153–4. cp 1929 Resolution of Institute of International Law, 26 AJIL (1932 Supp) 187 (Art 9). UN Docs A/Conf. 20/C 1/L 229 (Venezuela); L 186 (Netherlands); L 221 (Spain); A/Conf. 20/14 pp 166–7 and 171.

English case of *Re P (Minors)*[2] it was argued on behalf of the wife of a US diplomat seeking leave through family proceedings to remove the children of the marriage to Germany that the English court should assume jurisdiction notwithstanding the immunity of the respondent husband because of the international commitments of the United Kingdom to uphold the rights and welfare of children and the difficulty for the wife (who was German) in securing funds to initiate proceedings in the United States. Although the court upheld the respondent's immunity, the judge did observe that the US Government which had declined to waive immunity ought to assist the wife in securing access to an appropriate US court. The third difficulty is that a court in the sending State may lack jurisdiction over the subject matter of the claim and even if it does have jurisdiction is probably not an appropriate forum to determine an action arising out of events which occurred in the receiving State. It may well be less sympathetic to the plaintiff than a court in his own country would be. For all these reasons, civil action in the courts of the sending State generally offers a theoretical rather than a realistic remedy to a plaintiff. For some kinds of case, however, for example divorce or family proceedings, it may be suitable and more appropriate than proceedings in the receiving State.

Some of the above difficulties apply in the case of possible criminal proceedings. The diplomat cannot be extradited so as to be physically present to stand trial in the sending State, witnesses in the receiving State could not be compelled to travel in order to testify, and the courts of the sending State might at least in regard to some kinds of offence take a more lenient view. For example, in 1978 at the conclusion of a taking of hostages in the Embassy of Iraq in Paris, at the moment when the hostage-taker had surrendered, was handcuffed and entering a French police car, several Iraqi diplomats opened fire from the embassy with the apparent intention of killing the hostage-taker but instead killing two other people one of whom was a French policeman, and wounding others. The French Government expelled three diplomats two days later and demanded that they should be brought to trial in Iraq. The Iraq Government indicated that criminal proceedings would be instituted only if there were a formal request from the French Government, and the then Vice-President of the Iraq Revolutionary Council, Saddam Hussein, commented that the problem was 'of secondary importance'. Although compensation was paid by Iraq to the family of the murdered policeman, there is no evidence that criminal proceedings were ever brought against the diplomats.[3] This may, however, be contrasted with the case of a French diplomat who in the course of a violent quarrel in the French Embassy in Angola had caused the death of a colleague in the mission. He was met by French police on his arrival in Paris and criminal proceedings were taken against him.[4] US courts also took criminal proceedings in 1973 in regard to the homicide of another member of the mission by the US chargé d'affaires in Equatorial Guinea.[5] UK diplomats may in many circumstances be prosecuted in the United Kingdom for alleged offences taking place overseas, under section 31 of the Criminal Justice Act 1948.[6]

In general, if the authorities of the sending State are ready to see criminal proceedings take place in regard to particular allegations, they are more likely to waive diplomatic

[2] Judgment of Stuart-White J of 7 August 1997 in Chambers, 114 ILR 479.
[3] 1979 RGDIP 518; 1978 AFDI 1147.
[4] 1984 RGDIP 674.
[5] *US v Erdos*, US Court of Appeals, 4th Cir 474 F 2d 157; 1973 AJIL 785.
[6] See 2004 BYIL 768.

immunity and in serious cases to dismiss the diplomat on the basis of the evidence against him—so opening the way to proceedings in the receiving State. This was the course adopted, for example, by the Irish Government in 1987, when a member of the administrative and technical staff of the Irish Embassy in London was found to be selling false Irish passports. Waiver in general and this case in particular are discussed in the context of Article 32 below.

Action through the Ministry of Foreign Affairs

For the frustrated claimant there are other ways of bringing pressure to bear on a diplomat whom he believes to be sheltering unjustly behind diplomatic immunity. If the matter arises from a road traffic accident the arrangements described above in the context of Article 31.1 should ensure that the diplomat is insured and that the insurer will settle any claim without diplomatic immunity complicating the issue. On other matters the claimant may write directly to the head of the diplomatic mission, setting out his case. In the last twenty years it has also become common, at least in certain countries, for claimants to try to persuade the local press to take up their grievances. Although during the 1980s, when abuse of diplomatic immunities was a matter of considerable public interest, this tactic was sometimes used to advantage, it carries some risk if there is a possibility of waiver of immunity leading to later legal proceedings. The course most likely to be fruitful is to approach the Ministry of Foreign Affairs of the receiving State in the hope that they will apply political pressure through the diplomatic mission for a waiver of diplomatic immunity to be granted, or—where there is evidence of abuse—declare the diplomat *persona non grata.*

The practice of the Foreign Office in London was set out in 1952 in a Report on Diplomatic Immunity presented to Parliament by the Secretary of State for Foreign Affairs, in these terms:[7]

> 3. The practice of the Foreign Office is based on the principle that diplomatic immunity is accorded not for the benefit of the individual in question, but for the benefit of the State in whose service he is, in order that he may fulfil his diplomatic duties with the necessary independence. A person who possesses diplomatic immunity only possesses immunity from legal process and is still subject to the operation of the law of the land, criminal or civil. Diplomatic immunity should not permit any individual who is involved in a civil dispute with another member of the community to be in an advantageous position in that dispute so that he can avoid either discharging obligations which he has contracted or making reparation for torts which he has committed. Further, the person possessing diplomatic immunity should not be able to use his immunity from suit to impose on the other party to the dispute the view of himself or his advisers as to his liability. Consequently, when a dispute arises between a person living in this country and a person possessing diplomatic immunity and the dispute cannot be settled directly between the parties, it is commonly reported to the Foreign Office and the Foreign Office then approaches the diplomatic mission concerned with the request that the Head of the Mission will either waive the immunity of the member of his staff so that the dispute can be decided in the ordinary way in the courts or that the matter should be decided by a private arbitration conducted under conditions which are fair to both sides. Such requests are commonly acceded to, and the cases where this approach has not brought about a proper settlement of the matter have generally been cases where, owing to delay, the foreign

[7] Cmd 8460.

diplomat in question has already left the country before the matter can be dealt with, a delay which is generally due to a failure of the party who thinks he is injured to approach the Foreign Office promptly. If a case arose where the foreign mission concerned was neither willing to waive immunity nor to persuade the foreign diplomat to accept a reasonable arbitration and the foreign diplomat remained in this country, the Foreign Office would in the circumstances feel obliged, unless there are exceptional features in the case, to inform the foreign mission concerned that this individual could no longer be accepted as a person holding a diplomatic appointment in this country.

If a person possessing diplomatic immunity is alleged to have committed a criminal offence and there is a *prima facie* case which, in the ordinary way, would lead to the institution of a prosecution, the Foreign Office approaches the foreign mission concerned and, unless the offence is such that it is considered that an admonition by the Head of the Mission is sufficient, the Foreign Office requests a waiver of immunity in order that the case may be tried, on the footing that, if the immunity is not waived, it may be impossible for the Foreign Secretary to continue to accept the individual concerned as a person possessing diplomatic status in this country.

As regards cases where immunity under the Vienna Convention is a bar to civil proceedings, the Foreign and Commonwealth Office would not now proceed immediately on receipt of representations to request a waiver of diplomatic immunity. Protocol and Conference Department would rather first establish by examination of the evidence submitted to them and the relevant law that a *prima facie* case exists and that the claim is not inflated. Only if satisfied on these points would they draw the matter to the attention of the head of mission. In their Review of the Vienna Convention[8] in 1985 the UK Government stated:

A serious view is also taken of any reliance on diplomatic immunity from civil jurisdiction to evade a legal obligation, or to impose on another party the person's own view as to liability. Many difficulties over civil claims, however, arise because of a dispute as to liability or a failure to secure remission of necessary funds from overseas. Again each case has to be treated individually, but the FCO remain ready to make representations calling for a waiver of immunity or for private arbitration where immunity from civil jurisdiction has prevented settlement of an apparently valid claim and where a direct approach to the Head of Mission has yielded no result.

An example of successful application of pressure by the Foreign and Commonwealth Office so as to ensure that diplomatic immunity was not used as a shelter from civil obligations occurred in 1985. The landlord of a flat occupied by a Syrian diplomat obtained an order for its vacation in the course of a complex dispute over rent. The diplomat did not leave and the order could not be enforced because the flat was his residence. The Foreign and Commonwealth Office warned the ambassador that they would request the removal of the diplomat from the United Kingdom if he did not vacate the flat within a fortnight—which he duly did.[9]

A similar practice is applied in other capitals,[10] and reflects a Resolution on the consideration of civil claims which was adopted by the Vienna Conference. In this Resolution the United Nations Conference on Diplomatic Intercourse and Immunities:

[8] Cmnd 9497, para 72.

[9] Hansard HC Debs 12 June 1985 WA cols 488–9; 17 June 1985 WA col 36; 1985 BYIL 454; 1985 RGDIP 1029.

[10] Some examples are given in Salmon (1994) para 456.

Recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.[11]

It has sometimes been suggested that a fund should be made available for the satisfaction of claimants who are barred by diplomatic immunity from pursuing civil remedies. This has generally been ruled out on the basis that in most of the cases where the procedures set out above do not satisfy the claimant, this is not because diplomatic immunity is being flagrantly abused but because either the facts or the defendant's liability are disputed. A system leading to payments to claimants without objective verification of their claims where they are disputed would inevitably lead to abuse of a different kind. There would, moreover, remain the vital question of whether the fund should be provided by the receiving State or the sending State—neither of which are normally responsible for any loss or damage resulting from a diplomat's action or inaction.

In the United States, proposals for establishment of a federal fund to compensate victims of diplomats who rely on immunity were made during the passage of the Diplomatic Relations Act in 1978. The State Department, however, rejected the idea on the ground that 'it would encourage diplomats and their governments not to assume their responsibilities in the expected manner'.[12] The UK Foreign and Commonwealth Office Minister in 1985 also rejected a suggestion made in Parliament for establishment of a compensation fund, saying: 'the Government's view is that compensation out of public funds for the wrongful acts of diplomats would be inappropriate. The loss that is suffered does not flow directly from the Government's obligation under international law, and even if it did that would be no reason to provide compensation out of public funds.'[13]

One writer in 1986 suggested a general system of compulsory insurance as a prerequisite for missions maintaining diplomatic relations with the United States.[14] While similar arrangements regarding motor vehicle claims—discussed above in the context of Article 31.1—have worked reasonably well in several jurisdictions, there would remain the problem of disputed liability in more sensitive areas, and the suggestion has not met with any government support. Barker, in *The Abuse of Diplomatic Privileges and Immunities*, put forward the possibility of amendment to the Vienna Convention so as to provide a direct action against the sending State in respect of unofficial as well as official acts of members of its diplomatic mission and their families. He admitted, however, that States were not willing to undertake restrictive amendment of the Vienna Convention and that the prospects of the suggestion being taken up in any other context—such as that of the International Law Commission's work on state immunity—were very remote.[15]

The possible sanction of withholding the 'driving privilege' from diplomats who persistently violate traffic regulations and ignore penalty notices, as applied in the United States, is discussed above in the context of Article 25. Another scheme to apply pressure was devised by the US Congress in 2004 when they approved statutory provision

[11] UN Docs A/Conf. 20/L 4/Rev. 1 (draft proposed by Israel); A/Conf. 20/14 pp 50–1; A/Conf. 20/10/Add. 1.

[12] Judiciary Committee Hearings on Diplomatic Immunity, 95th Congress, 2nd Session, 129 (1978) at 5, discussed by Farhangi (1985–6).

[13] Hansard HL Debs 24 June 1985 col 543; 1985 BYIL 455.

[14] Farhangi (1985–6).

[15] (1996) ch 8 esp pp 211–18.

requiring the United States to withhold from foreign assistance funds 110 per cent of unpaid fully adjudicated parking fines and penalties owed to the authorities in Washington and New York.[16]

Action against the sending State

There are, of course, some cases where the sending State rather than the diplomat—or in addition to the diplomat—can be shown to be legally liable and the more restrictive rules of state immunity now widely applied may well mean that the sending State can be sued in some cases where the diplomat would be entitled to immunity. In an increasing number of civil cases the sending State is sued in addition to a member of its diplomatic mission, or the court itself becomes aware during the proceedings that the sending State rather than the diplomat is the proper defendant to the proceedings.

This approach can, however, provide a remedy only where the act which forms the basis for the claim can be attributed to the sending State. The sending State is likely to be held responsible where the relevant act was performed by one of its diplomats acting in the exercise of his functions. It may also be held responsible—depending on the law of the receiving State—for acts of junior mission staff performed in the course of their duties. Suit against the sending State is very unlikely to be successful where the member of the mission concerned was not acting in the exercise of his functions or even in the course of his duties, or where the individual concerned is a member of the family of a diplomat. It was tried in the United States in 1983 in the case of *Skeen v Federative Republic of Brazil*.[17] The grandson of Brazil's Ambassador to the United States had shot the plaintiff outside a nightclub in Washington, and immediately afterwards the assailant left the United States. The plaintiff sued the ambassador, his grandson, and Brazil. The suit against Brazil was based on an exception to state immunity under the Foreign Sovereign Immunities Act[18] which applies where 'money damages are sought against a foreign State for personal injury occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment'. The judge held that a family member was not an employee or agent of the sending State and was granted immunity not in recognition of any official status but as a courtesy to the diplomat. Even if the claim that the grandson was an employee were accepted, the assault had been of a purely personal nature, in no way furthering Brazil's interests or foreseeable as a natural result of his employment. The court also rejected the argument that the ambassador had a special duty to control his grandson's conduct, by virtue of Article 41.1 of the Vienna Convention. Any failure of control would be relevant to diplomatic action by the State Department, seeking compensation or declaring an individual *persona non grata*. The State Department in fact mediated a settlement of the claim against Brazil which was acceptable to the plaintiff.

The same course was adopted by the personal representatives of a young girl killed in a multiple car crash caused by a diplomat from Georgia. His immunity from criminal proceedings was waived and he was convicted and dismissed from his post. The personal

[16] Foreign Operations, Export Financing and Related Programs Appropriations Act 2004, s 544, Public Law 108–199; Diplomatic Note No 04–127 of 29 June 2004.

[17] 566 F Supp 1414 (DDC 1983); discussed in Barker (1996) at pp 204–14.

[18] 28 USC 1605 (a)(5).

representatives of the victim brought civil proceedings against a number of defendants including the State of Georgia and the former diplomat. Although the diplomat was dismissed from the proceedings (for reasons discussed below under Article 32) an out-of-court settlement of the civil claim was negotiated on behalf of most of the other defendants, including the State of Georgia.[19]

As regards cases where diplomatic immunity prevents criminal proceedings, the position in the United Kingdom remains broadly as set out in the 1952 Report quoted above. In 1997 the Foreign and Commonwealth Office in publishing statistics of serious offences alleged to have been committed by diplomats in the United Kingdom or by members of their families for the first time named the individual States. The new policy reflected greater openness on the part of the Government as well as a desire to show that the rate of offending among diplomats was lower than among the population generally.[20] This policy was reviewed following the entry into force of the Freedom of Information Act on 1 January 2005, and the decision was taken to present annual information to Parliament. Names of individuals are not disclosed and information is withheld if the number of diplomats in a mission is so small that there is a risk of identifying an individual.[21]

Requests for waiver of diplomatic immunity are discussed more fully in the context of Article 32 below and declarations of *persona non grata* are discussed above in the context of Article 9.

[19] See 1999 AJIL 485; 1991–9 DUSPIL 1292.

[20] *The Times*, 29 July 1997; 13 July 2002; Hansard HC Debs 29 June 2000 W col 580.

[21] Circular Notes to Diplomatic Missions in London No A113/06 of 6 March 2006, No A307/06 of 5 July 2006 and No A270/07 of 21 June 2007.

WAIVER OF IMMUNITY

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Authority to waive immunity

Much of the confusion which surrounded previous decisions of national courts in regard to waiver resulted from failure to distinguish between two separate questions. The first question is whether the decision of substance whether or not to waive any diplomatic immunity is in law one for the sending State or one for the head of the mission or the individual member of the mission whose immunity is in issue. The second question is the procedural one of what evidence a court in the receiving State is entitled to require as proof that immunity has been waived by the sending State. Is that court entitled to require a statement from the head of the mission that immunity has been waived, and if it receives such a statement is it entitled to go beyond it and make inquiry of the government of the sending State? Or may it assume that all things done at least by the head of mission or even by any diplomatic agent are done with the apparent authority of the sending State? On this latter assumption, the national court might conclude that whenever a diplomatic agent without protest enters an appearance to a civil action or pleads in response to a criminal charge, any immunity has been validly waived and that it is a matter between the diplomatic agent and his government if he has failed to consult as he should.

Article 32.1 answers the first of these two questions clearly—diplomatic immunity belongs not to the individual but to the sending State and may be waived only by the sending State. This rule reflects the customary international law as stated by writers from Vattel[1] onwards, and in numerous decisions of national courts.[2] Thus in the English case of *R v Kent*,[3] where a cipher clerk in the London Embassy of the United States had been dismissed and his diplomatic immunity waived by the US Government to enable him to

[1] (1758) IV. VII. para 111.

[2] eg *Cottenet et Cie. c Dame Rafalovitch*, 1909 Journal de Droit International Privé 151; *In Re the Republic of Bolivia Exploration Syndicate* [1914] 1 Ch 139; *Acuña de Arce v Solórzano y Menocal* 1956 ILR 422; *Bolusco v Wolter* 1957:24 ILR 525; *Waddington* incident, described in Satow (5th edn 1979) para 15.20 and in Salmon (1994) para 428.

[3] [1941] 1 KB 454, 1941–2 AD No 110. See also *Zoernsch v Waldock* [1964] 2 All ER 256.

be tried for theft of embassy documents and for espionage, the court said 'that the privilege claimed by the appellant is a privilege which is derived from, and in law is the privilege of the ambassador and ultimately of the State which sends the ambassador'. The rule in Article 32.1 also reflects the functional approach of the Vienna Convention as set out in its Preamble: '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'.

The Court of Appeal of Paris in 1978 applied the terms of Article 32.1 in the case of *Nzie v Vessah*,[4] saying that it followed from its terms 'that the waiver made by a diplomatic agent who is sued before a court must always be expressly authorized by the Government'. A letter written by a diplomat in the Cameroon Embassy in Paris, some months before his wife instituted divorce proceedings against him, saying that he agreed to divorce her in Paris was not a waiver by Cameroon and did not show 'the unequivocal and clear intention necessary to constitute a waiver of immunity from jurisdiction'. The Supreme Court of Spain in *Gustavo JL and Another*[5] in 1987 stressed that:

> The power to waive must be exercised by the sending State itself through its sovereign organs and not by the official or agent himself. This is the logical conclusion to be reached on the basis of the provisions of the Vienna Convention and for two other reasons. Firstly, the Head of the State in question is in a position to decide whether or not to waive the privilege of immunity after taking account of the nature of the alleged offence and all the circumstances of the case. Secondly such a procedure avoids excess and abuses of diplomatic assignments. Taking advantage of the protection afforded by immunity could otherwise lead to undeserved impunity in the receiving State.

A decision by Colombia to waive the immunity of a Colombian diplomat accused of drug trafficking offences was not a violation of the constitutional prohibition in Spain on the retroactive application of criminal law.

In the context of Article 32 'the sending State' means the Government recognized by the receiving State at the time when any waiver is given or withheld. The US Court of Appeals even held in 1987 in the case of *In re Grand Jury Proceedings, Doe No 700*[6] that the current government of a State also had, by analogy with Article 32, the power to revoke the immunity of a former Head of State, so that the Government of the Philippines could waive the immunity of their former President Ferdinand Marcos and his wife from the jurisdiction of US courts.

Where a diplomat wishes to stand trial, but the sending State is unwilling to waive immunity, it is of course open to the diplomat to resign his or her appointment. This was the course chosen by Lubna Ahmed al-Hussein, a UN information officer in Sudan entitled to diplomatic immunity, when charged with wearing indecent clothing (loose trousers and a long smock) at a private party in a restaurant in Khartoum. The offence carried a potential penalty of forty lashes and a fine. The UN Secretary-General did not waive her immunity, but publicly expressed concern and denounced flogging as a violation of human rights. In the event she was not sentenced to flogging but only to a fine, which was paid—contrary to her wishes—by the journalists' union.[7]

[4] 74 ILR 519.
[5] 86 ILR 517. See also *Public Prosecutor v JBC* 94 ILR 339.
[6] 81 ILR 599.
[7] *The Times*, 30 July 2009; *Al-Jazeera*, 8 September 2009.

The second question of authority—that of the evidence which a court may require to establish that a valid waiver has been made by the sending State—is not addressed by Article 32. This question is thus one to be determined under the national law of each receiving State Party. Some States may require a statement emanating from a minister of the government of the sending State—particularly if the immunity of the head of mission is in issue.[8] A more usual national practice would be that followed in the United Kingdom, where it is provided in section 2(3) of the Diplomatic Privileges Act 1964[9] that: 'For the purposes of Article 32, a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State.' This practice reflects a more general rule that a State is entitled to assume that an ambassador is authorized to perform any act which he purports to perform in the name of his sending State.[10] States might also accept a waiver by a member of the diplomatic staff of the mission where it purported to be made on behalf of the sending State—but if there is any likelihood of a challenge at a later stage to the validity of the waiver, this would be a risky course.

The question of the appropriate test of authority was examined thoroughly by the US Court of Appeals in 1989 in the case of *First Fidelity Bank NA v Government of Antigua and Barbuda—Permanent Mission.*[11] The Ambassador of Antigua to the United Nations obtained as his Government's representative a loan of US$250,000 from the predecessor to First Fidelity Bank, apparently for renovations to the Permanent Mission. In fact the loan was invested in a casino. In proceedings for a default judgment against the State of Antigua, the ambassador agreed to waive sovereign immunity from jurisdiction, attachment, and execution. In later proceedings, Antigua argued that the ambassador had exceeded both his actual and his apparent authority and that it had not waived its right to sovereign immunity. The majority in the Court of Appeals held that the appropriate test of authority was the agency law of the United States, that the correct test was therefore one of apparent authority, and, since the lenders had mistrusted the ambassador's bona fides at the time, the default judgment would be set aside on certain conditions. Circuit Judge Newman, dissenting, held, however, that the correct test was one of 'inherent authority', since the test favoured by the majority would lead to enquiries as to his actual or apparent authority. Such enquiries would put relationships with foreign governments more widely at risk.

Where there may be a challenge to the validity of a waiver—more likely in criminal cases—the authorities of the receiving State will be very careful to ensure that a waiver has been made with authority. It may well not be possible to regularize the situation at a later stage. Thus in the case of *R v Madan*[12]—an English case prior to the Diplomatic Privileges Act 1964—the solicitor appearing before the court purported to waive

[8] See Harvard Draft Art 26, 26 AJIL (1932 Supp) 125. In the UK case of *Fayed v Al-Tajir* [1988] 1 QB 712, [1987] 2 All ER 396, [1987] 3 WLR 102, 86 ILR 131 the Ambassador of the United Arab Emirates expressly waived his own immunity from proceedings for libel.

[9] C 81. See also *In Re Suarez* [1918] 1 Ch 176 at 191.

[10] cp Art 7.2(b) of the Vienna Convention on the Law of Treaties, 1969, UKTS No. 58 (1980), which provides that heads of diplomatic missions are considered as representing their State without having to produce full powers, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited.

[11] 877 F 2d 189 (1989); 99 ILR 125.

[12] [1961] 2 QB 1, [1961] 1 All ER 588.

diplomatic immunity on behalf of his client, a member of the staff of the High Commissioner for India, in proceedings for obtaining a season ticket and money by false pretences. On appeal from conviction the appellant argued that this had not been a valid waiver, so that the proceedings were a nullity. Although the High Commissioner had by then written to the court to say that he was prepared to waive immunity in the case, the Court of Criminal Appeal held that he had not purported to do so with retrospective effect, and they quashed the convictions. In 1987 a member of the administrative and technical staff of the Irish Embassy in London was discovered to have been selling Irish passports to persons not lawfully entitled to them. He was dismissed and his immunity waived by the Government of Ireland, but before he could be arrested he returned to Ireland and it became necessary to seek his extradition to the United Kingdom. The Irish courts in the case of *Deputy Commissioner McMahon v Kevin McDonald*[13] took the position that the English warrants which formed the basis for the extradition proceedings would be valid only if at the time of their issue an effective waiver of diplomatic immunity was in existence. The evidence tendered to the Irish courts on behalf of the Irish State included the formal request to the ambassador for waiver of immunity, consultation by the ambassador with the Irish Department of Foreign Affairs in Dublin, and written confirmation of a telephone call to the Foreign and Commonwealth Office in London stating that the Irish Government had given formal agreement to waiver of immunity in the case. The Irish Ambassador to the United Kingdom also testified that he had no independent power to waive immunity and that his own understanding was that the waiver had already started when he signed his formal letter—two days before issue of the warrants. The Irish courts accepted that this waiver was effective under English law, and Kevin McDonald was extradited, tried, and convicted in England.

States may provide in internal rules how decisions on waiver of the immunity of members of their own diplomatic missions are to be taken. They may provide that all decisions on how to respond to a request for waiver are to be referred back for instructions. Alternatively they may delegate authority to heads of mission to waive immunity in certain categories of case. The UK Government, for example, requires missions abroad to seek authority from the Foreign and Commonwealth Office in each case before any waiver of immunity is made. It also requires authority to be sought before legal proceedings are instituted by any member of a UK diplomatic mission abroad, because of the consequential loss of immunity under Article 32.3. The German Ministry of Foreign Affairs also requires its diplomats abroad to seek authority before waiving immunity or giving evidence in a court of the receiving State.[14] In 1970 The Netherlands Air Attaché in London asked his own government for waiver of his immunity so that he could stand trial in the United Kingdom on a charge of causing death by dangerous driving. The Netherlands agreed, and he was acquitted of the charge.[15] Article 32 does not, however, impose any requirement that the sending State should authorize initiation of legal proceedings. The Federal Tribunal of Switzerland emphasized in S *v India*[16] in 1984

[13] Supreme Court Judgment 185/88 of 27 July 1988 by Finlay CJ; further District Court judgment of 19 October 1988, unreported.

[14] Richtsteig (1994) p 75. See also Salmon (1994) para 434.

[15] 1971 RGDIP 212.

[16] 82 ILR 13.

that no provision of the Convention limited the right of a member of a diplomatic mission to institute proceedings without the consent of the sending State.

Waiver must always be express

There was prolonged discussion in the International Law Commission as to whether waiver must always be express or whether an implied waiver in regard to civil proceedings should be valid. There were many cases to the effect that although failure to enter an appearance at all did not constitute an implied submission to the jurisdiction of the courts of the receiving State, an appearance by the defendant with full knowledge of his rights and without any protest or claim to immunity was to be regarded as an implied waiver and was valid.[17] The Commission's draft article therefore provided that: 'In civil proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity.'[18] It was, however, argued against this provision, both in the Commission and at the Vienna Conference, that it was not logical to permit implied waiver when immunity belonged to the sending State and not to the member of its diplomatic mission. In theory there is no reason why a court should not be entitled to assume that an implied waiver, just as much as an express one, is made after proper internal consultation with the government of the sending State. But in practice a requirement for express waiver does lessen the chance that the sending government will not be informed of what is being done. This seems to have been the basis on which the Conference adopted a Polish amendment which provided that no distinction should be made in Article 31.2 between civil and criminal proceedings and that waiver in regard to all proceedings should be express.[19]

The Supreme Court of Malaysia in the case of *Public Prosecutor v Orhan Olmez*[20]—discussed above in the context of Article 31.2—attached importance to the requirement that waiver must be express in construing a diplomatic note offering the attendance of the First Secretary of the Turkish Embassy in court 'in his capacity as consul of this Embassy solely for authentication of the legal documents prepared and sent by the Turkish authorities as well as letters, notes and documents sent by this Embassy'. The Supreme Court held that this conditional offer of assistance did not constitute express waiver of immunity. There was similar reliance on the need for express waiver by the English Court of Appeal in *Propend Finance Pty Ltd v Sing and the Commissioner of the Australian Federal Police.*[21] The court held that undertakings not to remove documents from the Australian High Commission in London given to a High Court judge by the first defendant, a diplomat at the High Commission, in the context of judicial review of a decision to issue a search warrant, could not constitute express waiver of his diplomatic immunity in regard to the separate proceedings begun earlier by writ.

[17] eg *Taylor v Best* 14 CB 487, 139 ER 201; *In Re Suarez* [1918] 1 Ch 176; *Foureau de la Tour v Errembault de Dudzeele* 1891 Journal de Droit International Privé 157; *In Re Scarponi and others* 1952:19 ILR 382; *Re Franco-Franco* 1954:21 ILR 248.

[18] *ILC Yearbook* 1957 vol I pp 110–18; 1958 vol II p 99.

[19] UN Docs A/Conf. 20/C 1/L 171; A/Conf. 20/14 pp 174–7. See Barker (1996) pp 119–25.

[20] 87 ILR 212.

[21] Judgment of 17 April 1997, Times Law Reports, 2 May 1997.

In the case of *US v Deaver*,[22] in which efforts were made to secure the appearance of the Canadian Ambassador as a witness in criminal proceedings, the State Department wrote to the Independent Counsel investigating the case, setting out US practice on the nature of an express waiver as follows:

> The customary form of requesting a waiver of diplomatic immunity is through diplomatic channels. The United States, for its part, does not respond to requests for waiver received by other means. The customary means of responding to such a request, which is also followed by the United States, is to provide a diplomatic note expressly waiving immunity.

The United States later filed a Statement of Interest in the case, arguing that offers by the Canadian Government of informal and voluntary co-operation could not be construed as express waiver of diplomatic immunity. The District Judge agreed that there had been no waiver of immunity.

It follows from Article 32.2 that a failure to enter an appearance or to appeal does not constitute a waiver of diplomatic immunity. This was confirmed by the Court of Justice of Geneva in *Champel Bellevue v State of Geneva*.[23] Nor does the payment of a fine by a member of a mission.[24] In general, however, those entitled to diplomatic immunity are better advised to enter an appearance under protest and to take steps to ensure that the court or tribunal in question are aware of their diplomatic status. A default judgment given by a court unaware of the diplomatic status of the defendant, although not enforceable while immunity subsists, is liable to cause embarrassment and may lead to consequences set out more fully above in the context of Article 31.4.

Waiver is irrevocable

Although the absence of a valid waiver, or a newly acquired entitlement to immunity, may be raised at any stage of criminal or civil proceedings, the earlier cases tend to confirm that proceedings are to be regarded as a whole and that it is not possible for the sending State to revoke a waiver once it has been given with authority and with full knowledge of any entitlement. The International Law Commission stated in the Commentary to their draft articles that: 'It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance.'[25]

Prior undertaking to waive immunity

Neither the text nor the *travaux préparatoires* of Article 32 clearly resolve the question of the effect of a prior agreement by a diplomatic agent or a sending State to waive diplomatic immunity or to submit to the jurisdiction of the courts of the receiving State in regard to a particular contract or category of potential dispute. Diplomatic agents and others entitled to immunity frequently have difficulty in securing rented

[22] Cr No 87–0096 TPJ (DDC 1987). The State Department interventions are described in 1981–8 DUSPIL 980.

[23] 1986 ASDI 98, 102 ILR 180.

[24] 1983 Can YIL 309.

[25] *ILC Yearbook* 1958 vol II p 99, para (5) of Commentary on Art 30.

accommodation because landlords are reluctant to lease accommodation to persons who cannot be taken to a court or tribunal in the ordinary way. In the English case of *Parker v Boggan*[26] the court held that it was unreasonable for a landlord to refuse consent to an underlease on the ground that the proposed underlessee was entitled to diplomatic immunity, but this decision illustrated rather than ended the problem. An undertaking on behalf of the sending State that diplomatic immunity would be waived in the event of any dispute arising from the proposed tenancy might help to overcome any difficulty, but there remains the question of whether national courts would recognize such an undertaking as an express waiver of immunity.

In the related field of sovereign immunity it is now accepted that a State may agree in advance to submit a class of dispute to the jurisdiction of the courts of another State and that such an agreement may constitute a valid waiver of its own immunity. Article 2 of the European Convention on State Immunity of 1972[27] provides that a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court whether by international agreement, by express term contained in a contract in writing, or by an express consent given after a dispute has arisen. The Explanatory Report on the Convention states that, for these purposes, a specification that the law of a particular State is to be applied does not by itself imply submission to the jurisdiction of the courts of that State. Article 2 of the European Convention together with the above comment from the Explanatory Report are given effect in the United Kingdom by section 2(2) of the State Immunity Act 1978.[28]

Prior to the State Immunity Act English cases had decided that an advance undertaking to waive immunity or to submit to the jurisdiction was not an effective waiver for the purpose of particular proceedings.[29] In *Empson v Smith*[30] the English Court of Appeal held that these authorities applied in regard to diplomatic immunity, so that 'there could be no effective waiver of immunity until the court is actually seized of the proceedings'. It might be argued that given the decision that the principles applicable to waiver of state immunity were also applicable to waiver of diplomatic immunity, and given the change when the European Convention on State Immunity was implemented in English law, English courts should now recognize the possibility of an advance undertaking by a State to waive diplomatic immunity. The point arose in 1989 in the case of *A Company Ltd v Republic of X*,[31] where it was held at first instance that in the light of the earlier authorities the State could be bound only by an undertaking or consent given at the time when the court was asked to exercise jurisdiction. The case was, however, dealing with the special situation of possible execution against mission premises and diplomatic residences, it did not concern an express waiver of diplomatic immunity, and it was not taken on appeal. It should not therefore be taken as clearly decided in English law that a prior undertaking by a State to waive diplomatic immunity would not now be regarded as a valid waiver of diplomatic immunity. Provided that the undertaking was in clear terms and given for

[26] [1947] 1 All ER 46, 1946 AD 159.

[27] 1972:11 ILM 470; European Treaty Series No 74.

[28] C 33.

[29] *Mighell v Sultan of Johore* [1894] 1 QB 149; *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797; *Kahan v Pakistan Federation* [1951] 2 KB 1003.

[30] [1966] 1 QB 426, [1965] 2 All ER 881, 41 ILR 407.

[31] Judgment in Chambers by Saville J on 21 December 1989, 87 ILR 412, Times Law Reports, 9 April 1990.

consideration, there seems no reason of principle why the State, which has the sovereign power to waive immunity, should not be held to its agreement. There is some limited evidence of personal undertakings by ambassadors that diplomatic immunity will not be asserted on behalf of a named diplomat, but these undertakings have apparently been honoured and so their effectiveness has not so far been tested.[32]

A distinction must, however, be drawn between undertakings to submit to the jurisdiction of the courts of the receiving State and provisions that in the event of any dispute the law of the receiving State should be applied. In the case of *Embassy of Czechoslovakia v Jens Nielsen*[33] the Supreme Court of Denmark held that: 'Neither according to the Vienna Convention nor according to the rules of international law can an embassy be held to be exempt from proceedings based on a civil law contract concluded by the embassy which provides that disputes are to be settled by the courts of the receiving State.' By contrast, mere signature by a State of an agreement providing for arbitration was held by the Swedish courts in *Tekno-Pharma AB v State of Iran*[34] in 1972 and in *LIAMCO v Libya*[35] in 1980 not to constitute a waiver of immunity when there was no domestic legal relationship with the forum State.

These principles are accurately reflected in Article 7 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, which provides:

> Express consent to exercise of jurisdiction
> 1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
>   (a) by international agreement;
>   (b) in a written contract; or
>   (c) by a declaration before the court or by a written communication in a specific proceeding.
> 2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.[36]

The European Union in Article 12 of its 2006 Agreement with the International Criminal Court on co-operation and assistance has made the following undertaking:

> Privileges and Immunities
> If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if such person enjoys, according to the relevant rules of international law, any privileges and immunities, the relevant institution of the EU undertakes to cooperate fully with the Court and, with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with all relevant rules of international law.[37]

[32] See Satow (6th edn 2009) at para 9.27, where it is suggested that the 'safer course' is for a waiver to be sought for proceedings about to be instituted.

[33] 78 ILR 81.

[34] 65 ILR 383.

[35] 62 ILR 228.

[36] UN Doc A/RES/59/38. For an account of state practice on waiver in the context of state immunity see Fox and Webb (2013) ch 11 'The Consent of the Foreign State: Waiver and the Arbitration Exception'.

[37] OJ L115/49, 28 April 2006.

Such an advance undertaking by an international organization to waive immunity appears to be novel, and has not yet been tested in practice.

Initiation of proceedings by diplomat and counterclaims

Article 32.3 sets out a principle long accepted in decisions of national courts.[38] There was no challenge to it or detailed discussion of it during the preparation of the Convention. It should be noted, however, that its terms are in fact inconsistent with paragraphs 1 and 2 of the same Article. Submission to the jurisdiction for the purpose of instituting proceedings constitutes an implied and not an express waiver of diplomatic immunity, and nothing in the Convention obliges the diplomat to consult his government before instituting proceedings or allows the receiving State to treat the proceedings as invalid if he does not in fact consult. States may as a matter of internal law or professional discipline require that their own diplomats seek authority before launching proceedings in the receiving State, but as pointed out above, and emphasized by the Swiss court in *S v India*,[39] such a requirement does not derive from the Vienna Convention. The United Kingdom does impose such a rule, but it is not general practice.

The position was clearly set out by the Local Court of The Hague in the case of *Hart v Helinski*.[40] A member of the US Embassy in The Netherlands, Helinski, instituted legal proceedings against his landlord seeking repayment of excess rent, and the landlord counterclaimed. Both claim and counterclaim were accepted—the diplomat's claim being for a much larger amount—and the diplomat raised his immunity as a bar to execution of the judgment on the counterclaim. The Local Court noted that Article 32.3 differed from the previous paragraphs in that express authority of the sending State was not required to empower a diplomat to initiate proceedings and that the effect of his so doing was that he lost his immunity—'he cannot have it both ways'. They further commented: 'No doubt, any State has the power to deny to its diplomats the right to initiate civil proceedings in the receiving State. In that case it is an internal instruction that cannot be invoked by the opposing party.' The landlord Hart appealed to the Supreme Court of The Netherlands, but the appeal failed.

The same position was taken by the Supreme Court of Austria in 1977 in the case *Re RFN*.[41] RFN was the child of divorced parents living under the care and control of his mother. The father, an official of the International Atomic Energy Agency entitled under the Headquarters Agreement between the IAEA and Austria to the immunities accorded to diplomats by the Vienna Convention, lodged an application for custody of the child, expressly submitting himself to Austrian jurisdiction. The mother obtained an enforceable order against the father for maintenance and lodged a cross-petition for custody of the child. At this point the father withdrew his submission to the jurisdiction as well as his own claim, and sought to deny the jurisdiction of the court to determine the

[38] eg *Drtilek v Barbier* 1925–6 AD 320; *Chinese Embassy (Immunities) Case* 1925–6 AD 321. Giuliano in 1960 *Recueil des Cours* II vol 100 p 108 suggested that this was not really a case of waiver, but of non-applicability of immunity, but see critical comment on this theory in Salmon (1994) para 444.

[39] 82 ILR 13.

[40] 78 ILR 4 at 8.

[41] 77 ILR 452. To the same effect see later decision of the Austrian Supreme Court reported in 5 ARIEL 310 at 314.

cross-petition, arguing that his immunity could be waived only by the IAEA. On appeal by the curator appointed for the father, the Supreme Court held that:

> the initiation of proceedings by a diplomatic agent is not dependent on the consent of the sending State and has unavoidable consequences. A diplomat who initiates proceedings loses the right to invoke immunity in respect of a counter-claim directly connected with the principal claim... It can be inferred from the Convention that this connection between voluntary submission to the jurisdiction and subjection to counter-claims directly connected to the principal claims corresponds to general international considerations of justice.

The Supreme Court also held that: 'The term counter-claim (*widerklage*) is dependent not so much on the specific legal proceedings in which the claim is raised but rather on the connection between two competing claims.' Once jurisdiction had been established the position was not altered by withdrawal of the diplomat's claim.

The English case of *High Commissioner for India v Ghosh*[42] predated the Vienna Convention but contains a helpful comment on the connection necessary between claim and counterclaim for immunity to be lost. The High Commissioner for India had brought proceedings for recovery of money lent, and the defendant counterclaimed for slander related to his professional reputation as a doctor. An application to strike out the counterclaim was accepted, and the Court of Appeal in affirming the order said:

> By bringing their action in this country and submitting to the jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated upon but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim.

For the rule to apply, the diplomat himself must initiate the relevant legal proceedings. It is not sufficient for him to have an interest or involvement in the proceedings if they are formally begun by another person or entity. In the case of *Propend Finance Pty Ltd v Sing and the Commissioner of the Australian Federal Police*[43] mentioned above, the proceedings seeking assistance from UK courts by way of search warrants were begun by the Metropolitan Police on the direction of the Home Secretary who was responding, pursuant to an inter-Commonwealth scheme of Mutual Assistance in Criminal Matters, to a request from the Attorney-General of Australia. The diplomatic agent Mr Sing assisted and gave evidence in the proceedings, but since he did not institute them, the Court of Appeal held that Article 32.3 did not operate so as to cause him to lose his own immunity.

Where a diplomat institutes legal proceedings without full knowledge of his entitlement to immunity, he is entitled on becoming aware of the facts to have both claim and counterclaim dismissed. This was confirmed by the US Court of Appeals in *Abdulaziz v Metropolitan Dade County and Others*.[44] Prince Turki Bin Abdulaziz was a member of the royal family of Saudi Arabia resident in Florida. Following an allegation that he was holding an Egyptian woman against her will, and in the belief that he was not entitled to diplomatic immunity, a search warrant was issued and police officers attempted to execute

[42] [1960] 1 QB 134.

[43] Judgment of 17 April 1997, Times Law Reports, 2 May 1997.

[44] 741 F 2d 1328 (1984); 99 ILR 113. For a colourful account of events see Ashman and Trescott (1986) pp 148–52.

it. The attempt was resisted and there was a confrontation. The Prince and his family sued the police for violation of their civil rights and the police counterclaimed for injuries received during the incident. The State Department then filed papers confirming the entitlement of the Prince to diplomatic status as a 'special envoy', and he immediately moved to have both proceedings dismissed. The Court of Appeals confirmed that 'the action was properly dismissed when immunity was acquired and the court was so notified'.

Waiver and execution

Article 32.4, providing that waiver of immunity from jurisdiction in respect of civil or administrative proceedings should not be held to imply waiver of immunity from execution of any judgment, is firmly based on previous customary international law. Attempts at the Vienna Conference to delete the paragraph met with very little support.[45]

Article 32.4 deals only with civil and administrative proceedings. There is no mention of the position in regard to criminal proceedings. It may therefore be argued that the implication of the text is that in respect of criminal proceedings no separate waiver in respect of execution of any penalty is necessary and that waiver of immunity in a criminal case cannot be confined to the proceedings to determine guilt.

The omission of any reference to criminal proceedings in Article 32 is probably accidental. The original draft of Article 32.4 by the Special Rapporteur provided that: 'Waiver of immunity from jurisdiction in respect of legal proceedings shall not be held to imply waiver of immunity regarding execution of the judgment.' On this the Chairman of the International Law Commission commented that it 'laid down a principle that was, he thought, universally recognized', and it was debated no further. The Drafting Committee of the Commission, however, limited the provision to 'civil proceedings'.[46] The reason for this was probably that the earlier part of the Article had been modified to provide that while in criminal proceedings waiver must always be express, it could be implied in civil proceedings. It was therefore not necessary to make clear for criminal proceedings that waiver of immunity in regard to proceedings did not imply waiver of immunity in regard to execution, since an express waiver would usually make the position clear. But since implied waiver was then to be permitted for civil proceedings it was important to make clear that waiver of immunity from execution in civil proceedings could not be implied. The Conference reversed the decision of the Commission on the question of implied waiver, but appear to have overlooked the implications for the formulation of paragraph 4.

The argument against requiring a separate waiver in regard to execution, or permitting a waiver extending only to the point of a finding of guilt or innocence, is that criminal proceedings are an indivisible whole and that the penalty is inseparable from a finding of guilt.[47] This is, however, not in practice how criminal proceedings are carried out, and it is

[45] UN Docs A/Conf. 20/C 1/L 179 and L 200/Rev. 2; A/Conf. 20/14 pp 173–7.

[46] UN Doc A/CN 4/91, Art 21 para 3; *ILC Yearbook* 1957 vol I p 118, vol II p 139 (Art 25.4).

[47] See statement by UK representative in the Sixth Committee of the General Assembly, in 1989 BYIL 630: 'In the view of my delegation, a double waiver is both unreasonable and impracticable given the nature of criminal proceedings.' But see Satow (5th edn 1979) para 15.23: 'But execution of a judgment and the carrying out of penalty or sentence following criminal proceedings are regarded as separate from the issue of liability or guilt, and a separate waiver is required before they may be carried out.' See also Barker (1996) pp 126–7; Salmon (1994) para 450.

common under many legal systems for there to be an interval and further evidence and argument between verdict and imposition of a sentence or fine. Imposition of a monetary penalty against a diplomat raises the same issues as delivery of a civil judgment requiring payment of damages or compensation, and forcible execution would involve invasion of the diplomat's residence and property which are inviolable under Article 30. A penalty of imprisonment would involve his personal inviolability under Article 29, which to an even greater extent should be regarded as separate from the question of immunity from jurisdiction. Article 31.3 states that: 'No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.' It is difficult to argue that this very specific provision is to be limited by the mere absence of a reference to criminal proceedings in Article 32.4.

There may well be cases where the sending State is prepared to allow the issue of criminal responsibility to be determined by the courts of the receiving State where a diplomat protests innocence, but would not be prepared to allow him as a necessary consequence of conviction to suffer imprisonment, preferring in that event to recall and perhaps to dismiss him from its service. The receiving State would be able to declare him *persona non grata* if he were found guilty and not recalled and would be in a stronger position in so doing than if no proceedings had taken place. It is submitted that the better view is that the Convention does not exclude a waiver of immunity by the sending State expressly limited to the proceedings necessary to determine guilt. States should not, however, in view of the uncertainty of the position waive immunity from criminal proceedings without either making an express reservation in regard to sentence or accepting that the court may proceed without seeking a further waiver. The fact that the ambiguity has not apparently arisen in any reported case tends to show that the usual practice for receiving States when confronted by evidence that a member of their diplomatic mission has committed a serious criminal offence is to take either the protective course of immediate recall or the alternative course of waiver, often accompanied by dismissal. Although the intermediate course of waiver not extending to sentence would seem to be fairer to the accused as well as to victims of any crime, it has not proved attractive to sending States. This may well be due at least in part to the uncertainty as to whether such a course is permitted under Article 32.4.

Current practice

It is clear that in recent years waivers of immunity have been more rigorously sought in the light of public concern at abuse of diplomatic immunity, and—at least in those receiving States where the fairness of civil and criminal proceedings is guaranteed—more readily granted. In the United Kingdom it is standard practice to press for waiver of immunity in cases of drunken driving even in the absence of any previous offence, and if no waiver is forthcoming, the withdrawal of the diplomat will normally be requested from the sending State.[48] In 1985 the United Kingdom requested a waiver of immunity in regard to a drug-

[48] Circular Note to diplomatic missions, printed in 1984 BYIL 469; Review of the Vienna Convention, Cmnd 9497, paras 63–9.

related offence from the Zambian Government, and this was promptly granted.[49] In 1988, following a difference of view between the Governments of the United Kingdom and of Liberia as to whether Lorrain Osman had in May 1987 been notified to the Foreign and Commonwealth Office as Ambassador-at-large and Economic Consultant to the Government of Liberia (discussed below in the context of Article 39), the Liberian Embassy waived the immunity which they had claimed for him, so allowing proceedings to extradite him to Hong Kong on fraud charges to take their course.[50] Also in 1988 the UK Foreign and Commonwealth Office sought waiver of immunity to allow the Ambassador of Panama and his staff to be questioned about the seizure of the Panamanian Consulate in London—at the time under the control of supporters of the deposed President of Panama—by a private security firm. The ambassador was given a deadline and a threat that in the event of his refusing waiver his recall would be requested. Seven men from the security firm were charged with violent disorder, but the case was later dropped when it became clear that the raid had taken place following consultation with the police responsible for diplomatic protection.[51] In 1992 the Government of Thailand waived the immunity of a second secretary in its London Embassy charged and later convicted and sentenced to twenty years' imprisonment for the illegal import of heroin worth over £7 million.[52] In 2003 the President of Colombia, following a high-level intervention by Prime Minister Tony Blair, waived the immunity of Jairo Soto-Mendoza, a military attaché at the Colombian Embassy in London, who then stood trial for the murder of a man who had mugged and robbed his son. The diplomat's plea that he had acted in self-defence was accepted and he was acquitted.[53] The United Kingdom stated in 1987 that it had agreed on twenty-eight occasions to waiver of the immunity of its own diplomats and their families overseas—all but three of these involving appearance as a witness and the remaining three, minor traffic offences.[54]

In 1996 the French Government asked Zaire to waive the immunity of its ambassador to enable him to be tried in respect of an accident in which the car he was driving struck and killed two boys in the South of France. The Government of Zaire dismissed him, waived immunity, and insisted that he return from Zaire to France to stand trial.[55] France also persuaded UNESCO in 1999 to waive the immunity of one of its senior officers who was accused of enslaving and maltreating his niece, and a formal investigation was launched by French police.[56]

The US Government in 1988 secured waiver of the immunity of the Ambassador of Honduras to Panama who was then arrested on a charge of illegal import of cocaine.[57] In 1997 the Government of Georgia lifted the immunity of a senior diplomat in its embassy in Washington suspected of responsibility for a multiple car crash in which a young girl was killed. He stood trial and was convicted. The personal representatives of the girl who had been killed later brought civil proceedings against a number of defendants, including

[49] 1985 BYIL 436; 1987 BYIL 564.
[50] 1988 BYIL 483.
[51] *The Times*, 8, 9 and 11 March 1988, 4 June 1988.
[52] *The Times*, 29 May 1992, 5 December 1992.
[53] *The Times*, 23 July 2003.
[54] Hansard HC Debs 26 January 1987 WA col 42; 1987 BYIL 547; *The Times*, 27 January 1987.
[55] *The Times*, 3 and 4 December 1996, 22 and 27 January 1997.
[56] *The Times*, 19 March 1999.
[57] *The Times*, 18 May 1988.

the diplomat himself and the State of Georgia, but the court dismissed the diplomat from the proceedings on the ground that the waiver of his immunity from criminal jurisdiction did not include a waiver of his separate immunity from civil jurisdiction. This finding was in line with a suggestion to the court made by the State Department.[58] As to their own diplomats abroad, the US Government appears in practice to prefer immediate recall to waiver of immunity. State Department guidance in 1986 to the US Foreign Service stated that: 'While the power to waive immunity is always available, it is the usual practice of the Department of State to waive only in benign circumstances (e.g. to permit an employee or dependant to testify in court).' McClanahan commented, with reference to a particular incident in 1987, that 'even where there is little question of the fact of a serious crime having been committed, of the probable fairness of the courts, or of the treatment that would be accorded the accused if detained, other considerations may be of sufficient weight to cause refusal of a waiver of immunity'.[59] In recent years, however, the United States has given more careful consideration to the possibility of waiving the immunity from jurisdiction of staff of its overseas missions and has waived immunity in one case where criminal charges of embezzlement were brought against a member of the administrative and technical staff of one of its missions.[60]

In 2012, following the murder in her Embassy in Kenya of the recently appointed Venezuelan chargé d'affaires, Venezuela almost immediately waived the immunity of its first secretary Dwight Sagaray. Sagaray was charged with the murder a few days later and pleaded not guilty, but nine months later he was granted bail on surrender of his passport and no date was set for a trial.[61] Also in 2012, the Government of Mauritius waived the immunity of Somduth Soborun, its Ambassador to the US in respect of criminal proceedings relating to failure to pay a Filipina private servant the minimum wage under US law. The Ambassador pleaded guilty to the charge—though maintaining that he had paid the sum agreed under contract—and was fined and required to pay $24,153 in back wages to the domestic worker.[62]

In 2014, The Netherlands Government—following various criticisms of diplomats in the media—issued a statement saying that it would more frequently ask for diplomatic immunity to be waived in cases of serious misconduct.[63]

Waiver of other immunities

It should be noted that although Article 32 deals in express terms only with waiver of diplomatic immunity from jurisdiction, there may also be waiver of the inviolability of mission premises, archives, or communications, of the person, residence, or property of a diplomatic agent, or any other immunity accorded by the Vienna Convention. Waiver in respect of the giving of evidence has already been discussed above in the context of Article 32.1. In these cases, the fundamental principles established by Article 32 apply—in particular that the decision is in substance one for the sending State, but that the

[58] *US v Makharadze*, No F-1446–97 (DC Super Ct) described in 1999 AJIL 485 and in 1991–9 DUSPIL 1292; *The Times*, 7 January 1997, 17 February 1997.

[59] Barker (1996) pp 130–1; McClanahan (1989) pp 137–9.

[60] State Department information.

[61] *New York Times*; *Guardian*, 6 September 2012.

[62] *Washington Post*, 1 January 2014; US Attorney's Office Press Release. 26 November 2012.

[63] Ministry of Foreign Affairs statement, 23 April 2014, quoted in Duquet and Wouters (2015a) p 8.

receiving State is entitled to assume that the head of mission speaks for his State and that he either has delegated authority to give waivers or permissions or has consulted in regard to the specific case. Article 22.1 does refer to the possibility of 'the consent of the head of the mission'. There is no reference, in other provisions of the Convention conferring immunity to the eventuality of waiver or consent by the sending State, but this does not mean that these immunities cannot be waived. The possibility of waiver flows from the nature of inviolability and immunity as prerogatives of sending States and from the fact that their purpose is to ensure the efficient performance of the functions of diplomatic missions.[64]

[64] Salmon (1994) para 451 takes a similar view of the applicable principles.

EXEMPTION FROM SOCIAL SECURITY PROVISIONS

Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
   (a) that they are not nationals of or permanently resident in the receiving State; and
   (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.
3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.
5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 33 of the Convention represents new international law. Although a number of States, particularly in Eastern Europe, included specific provision in their social security legislation exempting some or all members of diplomatic missions from paying contributions,[1] such provisions were not a matter of international obligation. In *Regele v Federal Ministry of Social Administration*[2] an Administrative Court in Austria rejected a contention by an Austrian national employed by the US Embassy that her employment was 'exterritorial' and was therefore not employment in Austria within the meaning of the relevant social insurance legislation. There was under the Austrian legislation a specific exemption in regard to members of foreign missions who were not of Austrian nationality, and the court held therefore that it was clear that the appellant was liable to pay full contributions in Austria.

In most States there was no specific exemption for members of diplomatic missions, but in practice because of diplomatic immunity there was no attempt to apply social security legislation except in regard to local nationals. This was the position in the United Kingdom prior to the Diplomatic Privileges Act 1964.[3] Some members of missions

[1] eg Czechoslovakia: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 83; Finland: ibid pp 116, 118; Luxembourg: ibid p 194; Poland: ibid p 268; United States: ibid pp 372, 380, 397; Yugoslavia: ibid p 411.

[2] 1958:26 ILR 544.

[3] C 81.

participated voluntarily and it was accepted that even if it had been justified to require the others to participate, the law could not be enforced against them.

Negotiating history

The suggestion for making specific provision in the Convention in regard to social security legislation originated from Luxembourg in its comments on the 1957 draft articles of the International Law Commission. Luxembourg proposed a text which exempted diplomatic, administrative, and technical staff and their families in all cases from social security obligations. Service staff and private servants who were nationals of or previously resident in the receiving State would, however, not have been exempt, and in regard to them the diplomatic employer was bound to carry out obligations under local legislation. The International Law Commission in 1958 extended this exemption to all members of missions and their families, other than nationals of the receiving State, and provided that this should not exclude voluntary participation in social security schemes in the receiving State.[4]

At the Vienna Conference discussion on this Article was preceded by a statement made by Mr Jenks, then Assistant Director-General of the International Labour Organization. Mr Jenks set out clearly the principles which the Conference should implement in formulating rules on diplomatic exemption from social security legislation. He stressed that:

> continuity of protection was the primary condition of the effectiveness of social security. The importance of that continuity had been so widely recognized that a network of international agreements relating to the position of migrants under social security schemes had been concluded... For members of diplomatic missions and their families continuity of protection could only be secured by the sending State; in general, it was secured by applying to them the social security arrangements applicable to the public service of the sending State. The servants and employees of diplomatic missions, on the other hand, generally spent their whole working lives in one country, but not necessarily in the service of a particular diplomatic mission. Unless, therefore, they were covered by the social security system of the receiving State, they were liable to be without adequate social security protection in the event of invalidity, bereavement or old age.[5]

The amendment proposed by Austria which became the basis for Article 33 was taken from the text of the International Law Commission's draft articles on consular intercourse and immunities.[6] This set out more clearly and comprehensively than the Commission's earlier provision in their diplomatic draft articles the three relevant principles: exemption for those who should be covered by the law of the sending State, no exemption for the others coupled with a duty on diplomatic agents to carry out employer's responsibilities in regard to non-exempt private servants, and optional participation where permitted by the law of the receiving State. Article 33.5 also included a saving provision for bilateral and multilateral agreements on social security. A number of States, including the United Kingdom, already had a network of bilateral social security agreements with specific

[4] UN Docs A/CN 4/114 p 31; A/CN 4/116 p 88; *ILC Yearbook* 1957 vol I pp 119–20, 1958 vol I p 198, vol II p 99 (Art 31).

[5] UN Doc A/Conf. 20/14 pp 153–4.

[6] UN Docs A/Conf. 20/C 1/L 265; A/Conf. 20/14 pp 182, 193.

provision for members of diplomatic missions, and they attached importance to continuing such agreements and being entitled to conclude new ones.[7]

Interpretation of Article 33

The general scheme envisaged by Article 33 should normally operate in such a way that home-based career diplomats, junior staff, and their families are required to contribute and entitled to benefits under the law of the sending State, regardless of where they are posted.[8] Nationals and permanent residents of the receiving State on the other hand are required to contribute and entitled to benefits under the law of the receiving State. The sending State is not, however, expressly required by Article 33 to carry out employer's responsibilities in regard to non-exempt members of its mission, although Mr Jenks in his preliminary statement to the Vienna Conference described above had suggested involving the diplomatic missions in systematic arrangements for the payment of social security contributions. Moreover, if contributions have not been paid by the sending State, its employee may not be able to take proceedings against it in respect of consequential losses suffered. In *Panattoni v Federal Republic of Germany*[9] in 1987 the plaintiff, an Italian national employed as a Chancery usher by the Embassy of the Federal Republic of Germany in the Holy See, found on his retirement that his pension was lower than it should have been because his employers had failed to pay national insurance contributions before 1945. He brought proceedings against Germany claiming compensation, but the Italian Court of Cassation held that: 'Employment relationships involving a diplomatic mission as a contracting party constitute acts performed by the State in the exercise of its sovereign activities within the framework of its institutional organization and therefore must be exempted from the jurisdiction of the Italian State.' Even if the obligation to pay contributions formed a term of a contract of employment, an employee in a diplomatic mission in a State which was Party to the European Convention on State Immunity would not be able to take proceedings by virtue of Article 5 of the Convention which provides that a State is not immune in respect of certain contracts of employment, because Article 29 provides that the Convention shall not apply to proceedings concerning social security. The receiving State may, however, take administrative steps to ensure that sending States comply with local laws on payment of contributions—the French Government, for example, take up all omissions in this respect with the diplomatic mission concerned.[10]

A somewhat different case of failure by the sending State to meet its obligations was considered by the Superior Administrative Court of North Rhine-Westphalia in the *Somali Diplomat Case*[11] in 1992. The applicant, a diplomat in the Embassy of Somalia in Bonn, applied for social security assistance from the German authorities on the ground that Somalia due to the state of anarchy there had stopped salary payments to its

[7] Examples are in UN Laws and Regulations pp 467, 490. See also comments of UK Government on ILC draft Arts: UN Doc A/4164 p 33.

[8] See Lecaros (1984) p 156 for practice of Chile on this.

[9] 87 ILR 42.

[10] 1978 AFDI 1149. Belgian practice is similar: see Salmon (1994) para 492. A Circular, No 1415 of 7 June 1999, to diplomatic missions from the Belgian Ministry of Foreign Affairs setting out the regime for private servants of diplomats in Belgium is strongly criticized for lack of clarity by Salmon in 2002 RBDI 126 esp at 139–47.

[11] 94 ILR 597.

diplomats, that the German Foreign Ministry had no funds at its disposal for diplomats in need, and that she and her family had exhausted their resources. The German court found that Article 33 of the Convention in exempting diplomats from social security provisions did not exclude them from rights, claims, or privileges available under the law of the receiving State. Article 33.1 moreover was in terms of 'services rendered for the sending State' and did not deal with possible claims by diplomats under the law of the receiving State which were unconnected with those services. In principle it was for the sending State to provide social security for its diplomats, but if it failed to provide them with a livelihood so that they were in urgent distress, nothing in the Convention or in customary international law prevented the receiving State from providing assistance. The receiving State could seek the recall of a diplomat if it considered that the situation prevented him or her from properly fulfilling diplomatic functions. But a grant of social assistance could not be made dependent on a renunciation by the claimant of diplomatic status.

The term 'social security' is not defined in the Convention. The United Kingdom suggested in its comments on the draft articles of the International Law Commission that it should be regarded as having the meaning assigned to it in International Labour Organization Convention No 102 on Minimum Standards of Social Security.[12] This Convention covers medical care, sickness benefit, unemployment benefit, old-age benefit, employment benefit, family benefit, maternity benefit, invalidity benefit, and survivor's benefit. No decision was, however, taken by the Conference to establish any express link with the ILO Convention, and Article 33 may well apply to new or unusual forms of social security not clearly within these categories.

In the United Kingdom, section 2(4) of the Diplomatic Privileges Act 1964[13] provides that:

> The exemption granted by Article 33 with respect to any services shall be deemed to except those services from any class of employment in respect of which contributions or premiums are payable under the enactments relating to social security, including enactments in force in Northern Ireland, but not so as to render any person liable to any contribution or premium which he would not be required to pay if those services were not so excepted.

Specific provision has also been made in subsequent UK statutes dealing with social security.[14] The effect of this statutory exception is that participation on a voluntary basis by exempt members of diplomatic missions in London is no longer possible.

The Federal Tribunal of Switzerland held in 1984 in *Rastello and Permanent Delegation of Commission of European Community to International Organizations in Geneva v Caisse Cantonale Genevoise de Compensation and Another*[15] that Swiss law giving effect to Article 33 did not permit the making of voluntary contributions. But where a Commission employee entitled to the privilege of Article 33 mistakenly made contributions, she was entitled, in order to protect her good faith, not only to reimbursement of her contributions but also to the income which they had earned under the Swiss social security scheme.

[12] UN Doc A/4164 p 33; 210 UNTS 132.
[13] C 81.
[14] eg Redundancy Payments Act 1965 c 62, s 16(5); Employers' Liability (Compulsory Insurance) Act 1969 c 57, s 2(2)(b).
[15] 102 ILR 183.

EXEMPTION FROM TAXATION

Article 34

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

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;
(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

General background

Prior to the Vienna Convention certain broad principles could be deduced from state practice on personal taxation of diplomats, though there was uncertainty about the legal basis and the theoretical justification for these principles. In general diplomats were whether by custom, by specific domestic legislation, or (as in the United Kingdom) by a combination of the two, exempted from taxation. Some writers described this as customary international law,[1] while others said that it was a matter of courtesy or comity only,[2] that it depended on reciprocity or that it followed from the fact that no enforcement measures could be taken if the diplomat declined to pay the tax. In none of the leading English cases dealing with the position of a member of a diplomatic mission in regard to rates is a clear distinction drawn between immunity from legal process or seizure of goods and exemption from liability. Both in *Parkinson v Potter*[3] and in *Macartney v Garbutt*[4] it was assumed that if it was shown that the diplomat was entitled to immunity by virtue of the Diplomatic Privileges Act 1708[5] he was a 'person not liable by law to pay such rate'. Tax privileges were also justified on varying, though not incompatible grounds;

[1] eg Oppenheim (8th edn 1955) vol I pp 802–3; *ILC Yearbook* 1958 vol II p 100: 'it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions'. Salmon (1994) paras 470, 472, and 473, says that the Belgian position before the Convention was that exemption was a matter of international law, but subject to the condition of reciprocity.

[2] eg Genet (1931) vol I p 425; 26 AJIL (1932 Supp) 115 (comment on Art 22 of Harvard Draft); Lyons (1954) at pp 305 and 338–9.

[3] (1885) 16 QBD 152.

[4] (1890) 24 QBD 368.

[5] 7 Anne c 12.

first, that they derived from the principle that one sovereign does not tax another; secondly, that it was necessary to enable the diplomat to carry out his duties independently of the receiving State that he should be exempt from tax at least on goods and income connected with his work and residence in that State; and thirdly, that as a matter of administrative convenience—for revenue authorities as well as for diplomatic services—diplomats should be subject on a continuing basis to the tax regime of the sending State rather than to a succession of varying tax regimes in the States where they serve.[6] All of these justifications were and remain sound reasons for tax exemption—and the second and third are helpful in explaining the exceptions to the general rule of exemption.

In considering the justification for the general exemption granted under Article 34 it is important to note that the diplomat continues to be liable to taxation by the sending State. If the sending State levies tax at a high rate he may therefore be financially disadvantaged in comparison with non-privileged residents of the receiving State. He is not in an absolute sense 'privileged'. The position is, of course, different for staff of international organizations who, though they may well pay tax to the organization which employs them, are usually exempt from being taxed on their emoluments by their State of nationality or origin (assuming that it is a Contracting Party to the relevant agreement on privileges and immunities). An important consideration in determining the tax treatment of officials of international organizations is the need for parity of take-home pay among staff of equal rank. This is not a relevant consideration in the case of members of diplomatic missions.

Exceptions to the rule

The precise taxes in each State from which diplomats are exempt or not exempt pursuant to the implementation of Article 34 are, of course, very varied.[7] But the exceptions to the general exemption which are listed in Article 34 fall into three broad classes which are justified on different grounds. In applying the provisions of Article 34—which are of necessity cast in broad terms—to a particular national tax it is often helpful to look to the purpose of the national tax and the reasons for which an exception might be justified.

The first class comprises impositions which may under the relevant national revenue law be taxes, but which in substance are charges for services actually rendered. Examples in this class are road or bridge tolls and dues, charges or rates levied, usually by local authorities, in respect of such matters as water supply, road improvements, and street lighting. In a sense all taxation may be described as a charge for services rendered by the State, and there are considerable differences between States in the detailed application of this principle. But there does from examination of national provisions seem to be broad agreement that diplomats should not be required to contribute to such matters as national defence, public education, social security benefits, or the general expenses of central

[6] Hardy (1968) p 71. Pradier-Fodéré (1899) vol II p 45 also suggests 'hospitality' and the diplomat's foreign nationality as justifications. Neither is on its own adequate.

[7] For practice in a number of States prior to the Vienna Convention, see Genet (1931) vol I pp 423–50; Satow (4th edn 1957) pp 230–41; 26 AJIL (1932 Supp) 117–18; UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations'), *passim*.

government. This exception for charges is reflected in Article 34(e) and to some extent in Article 34(f).

The second class of exception comprises indirect taxes, and this is reflected in Article 34(a). The main reason for this exception is the administrative inconvenience of establishing within each State a system for ensuring that diplomats do not pay the tax element of the price of goods or services or that the tax element is refunded to them, and the difficulty of ensuring that such a system is not abused. Arrangements have been made in some States to relieve diplomats from indirect taxes—but these arrangements are normally applicable only to substantial purchases in a context where the receiving State is eager to promote purchase of a local product over the alternative option of duty-free import of a foreign product. As a general rule it has been concluded that the amounts of tax at issue do not justify the administrative complications.

The third class of exception comprises taxes levied on property or activities strictly personal to the diplomat and unrelated to his duties or ordinary living in the receiving State.[8] This exception flows from the functional approach under which privileges are granted 'not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions'. The principle was set out in the English case of *Novello v Toogood*[9] where the court said: 'Whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties or his religion, ought to be granted.' But where the servant of the ambassador carried on the business of a lodging-house keeper it did not follow that he was entitled to exemption from rates on the premises which he used for that purpose. The French Court of Cassation applied the exception in *Thams v Minister of Finance*[10] in 1930, deciding that a diplomat in the Monaco Legation should be exempt from a capitation tax assessed on a fixed basis and on the annual value of his residence, but should not be exempt from an assessment relating to his professional licence (enabling him to act as agent for business firms) and to rates on the business premises used for that purpose.

This third exception may be subdivided into three categories, which correspond broadly to the three categories of exception to the general rule of immunity from civil jurisdiction now set out in Article 31.1 of the Convention. The first category consists of taxes on real property held in the receiving State (Article 34(b) corresponding to Article 31.1(a)). The second category comprises inheritance duties (other than duties on property which was in the receiving State solely on account of the presence of the diplomat). This is reflected in Article 34(c) corresponding to Article 31.1(b). The third category consists of taxes on private profit-making activities in the receiving State (Article 34(d) corresponding to Article 31.1(c)).

The general exemption

The wording of the basic exemption contained in Article 34 is very wide. Although there are several specific exceptions to the exemption, it is probable that in cases of ambiguity, national revenue authorities and courts should in construing them lean in favour of the

[8] cp Vattel (1758) IV.VII para 105: 'A quelque point que s'étende leur exemption, il est bien manifeste qu'elle ne regarde que les choses véritablement à leur usage.'

[9] [1823] 1 B & C 554.

[10] 1929–30 AD 300.

general exemption. None of the terms used in Article 34 are defined in the Convention, and difficulty is sometimes encountered, given the diversity of national systems of raising revenue, in distinguishing between a tax, a social security contribution, and a charge. The Organization for Economic Co-operation and Development has given the following definition of a tax: 'The term taxes is confined to compulsory, unrequited payments to general government; unrequited in the sense that benefits provided by government to tax payers are not normally in proportion to their payments.'[11] Payments for licences required under national law in respect of vehicles, radio and television, dogs, hunting, firearms, and so on are generally regarded as 'dues and taxes' within the general exemption. It must be noted that the diplomatic agent is not thereby relieved from the obligation to obtain a licence as required by local laws and regulations, or from demonstrating that he is fit to hold the licence in question.

The general exemption in Article 34 is not limited to direct taxes. It applies to indirect taxes unless these come within the terms of the exception in Article 34(a). It follows that exempt income cannot be taken into account by the tax authorities in the receiving State in the context of determining the appropriate rate of tax to be applied to non-exempt income—for example in taxing a nonexempt spouse, or in giving effect to the exceptions permitting tax on private immovable property (Article 34(b)) or on private income having its source in the receiving State (Article 34(d)). This point is not dealt with expressly in Article 34, but as it has often caused difficulty in the context of the taxation of officials of international organizations, it has become common in drafting agreements conferring privileges on international organizations and persons connected with them, to make express provision. There was no express provision on the point in the Protocol on the Privileges and Immunities of the European Coal and Steel Community, which provided in Article 11 that officials of the Community were 'exempt from any tax on salaries and emoluments paid by the Community'. The European Court of Justice in *Humblet v Belgian State*[12] in 1960 held that:

> the imposition of taxes 'on' a category of income while taking account of other income to calculate the rate of tax has the effect, at least in substance, of taxing the latter income directly. In fact there exists a common fundamental element in taxing income directly and taxing it indirectly by aggregating it since in both cases there is a causal link between that link and the total amount for which the person concerned is liable.

Although the case is of course not authority for the construction of the Vienna Convention, the reasoning of the European Court of Justice appears to be applicable. It has always been the practice of the UK revenue authorities and of the US revenue authorities to disregard exempt income of a diplomat in calculating tax due on non-exempt income.

The position in regard to income tax and capital gains tax generally as it results in the United Kingdom from application of the general exemption in Article 34 is set out in Annex B to the Memorandum on Diplomatic Privileges and Immunities circulated to diplomatic missions in London by the Foreign and Commonwealth Office. Extracts from the version of this Memorandum issued in April 1996 are reproduced at the end of this Commentary on Article 34. Broadly speaking, diplomats are exempt from tax on their

[11] 1967/1987 *OECD Report on Revenue Statistics of OECD Member-Countries* p 37. See also Muller (1995) ch 8 'Fiscal, Customs and Financial Immunities'.

[12] Case 6/60 [1960] ECR 559 at 579.

official emoluments, on private income from sources outside the United Kingdom whether or not the income is payable in or remitted to the United Kingdom, and—with exceptions which reflect Article 34(b) and Article 34(d)—from capital gains tax. As regards local taxation, diplomats are regarded as exempt from the 'non-beneficial portion' of the council tax, and collection of the beneficial portion has been suspended. Since 1997 a dwelling of a person enjoying privileges and immunities under the Diplomatic Privileges Act (implementing the Convention) is treated as an exempt dwelling for which no council tax is payable.[13]

It is usual for double taxation agreements between States to make provision reflecting the exemption given under Article 34 and ensuring that members of diplomatic missions and their families, unless they are nationals or permanent residents of the receiving State, remain liable to tax in the sending State. For example, Article 26 of the Double Taxation Convention between the United Kingdom and Switzerland of 1977[14] provides that:

(1) Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.
(2) Notwithstanding the provisions of Article 4 [determining residence] an individual who is a member of a diplomatic mission, consular post or permanent mission of a Contracting State which is situated in the other Contracting State or in a third State may be deemed for the purpose of the Convention to be a resident of the sending State if:
  (a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State, and
  (b) he is liable in the sending State to the same obligation in relation to tax on his total income as are residents of that State.

In the *Dutch Diplomat Taxation Case*[15] in 1980 the Supreme Court of The Netherlands confirmed that the Double Taxation Convention between Belgium and The Netherlands, as well as Articles 34 and 37 of the Vienna Convention in the case of Belgium (The Netherlands had not then ratified), operated so as to make the wife of a Dutch diplomat serving in The Netherlands Embassy in Brussels exempt from tax in the receiving State, Belgium. Her income could thus be taken into account in assessing her husband to income tax in his home State, The Netherlands. When The Netherlands ratified the Vienna Convention in 1984 it was explained to its Parliament that the effect of Article 34 was generally that the diplomat should be treated as if he remained in his own State.

Exception (a): 'indirect taxes of a kind which are normally incorporated in the price of goods or services'

This exception was originally worded simply 'indirect taxes' in the International Law Commission's draft articles. In response to an observation by Luxembourg on the 1957 draft articles it was changed to 'indirect taxes incorporated in the price of goods'. The Commission then added the words 'or services' in response to a suggestion by Mr Yokota, who pointed out that such Japanese taxes as travel tax and entertainment tax should

[13] SI 1997/656 and 657.
[14] UKTS No. 102 (1978), Cmnd 7400.
[15] 87 ILR 76. Belgian practice is the same—Salmon (1994) para 475.

appropriately be included within the exception.[16] The more flexible wording 'of a kind which are normally incorporated in the price of goods or services' resulted from a UK amendment at the Vienna Conference and was intended to make clear that the exception included taxes which were normally included in the price of goods or services in that they formed part of the consideration given by the buyer to the seller, but which might in some circumstances be separately identified or separately payable.[17] For reasons of accounting to the revenue authorities, or because these indirect taxes may be passed on, taxes such as purchase tax or value added tax are often separately identified and may sometimes be separately payable. If, however, they are payable not to the provider of the goods or services but directly to the revenue authorities of the receiving State, there is a strong argument that they fall within the general exemption and not within the exception in Article 34(a).[18]

The United Kingdom have always treated value added tax and excise duties levied on goods sold in the United Kingdom as 'indirect taxes of a kind which are normally incorporated in the price of goods or services', with the result that, subject to what is said below, these taxes are payable by diplomats in the United Kingdom. Sales tax in the United States on the other hand, which is always separately identified, is treated by revenue authorities there as a direct tax, and exemption is granted through a system of sales tax exemption cards. A new system of credit cards and debit cards for entitled personnel is being devised. The new cards will bear the photograph of the holder and must be personally presented to secure the benefit of tax-free purchases. Where this is not possible (as with Internet purchases) exemption will not be available.[19] In Belgium, relief from tax on petrol is also granted through a system of cards for entitled holders.[20]

For the United States, giving effect to tax reliefs due under Article 34 raises the particular problem of ensuring compliance by each of the individual states as well as by the Federal Government. Hawaii for some time resisted giving exemption from excise and hotel taxes to diplomats even when the remaining forty-nine states did so. In a Memorandum to the Senate of Hawaii, which was considering altering its practice, Gilda Brancato of the State Department explained that for a sales tax to fall within the general exemption accorded under Article 34 it should be separately stated, readily identifiable, assessed on the value of the goods and uniformly borne by the buyer. Pointing out the obligation on the Federal Government to ensure uniform grant of tax reliefs due under the Vienna Convention, she noted:

> Treaties are binding on the States under the Supremacy Clause of the Constitution. The United States Supreme Court has recognized that 'although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'.

[16] UN Docs A/CN 4/91 p 5 (Art 22); A/CN 4/114 p 29; A/CN 4/116 p 64; *ILC Yearbook* 1957 vol II p 140 (Art 26), 1958 vol I p 157.

[17] UN Docs A/Conf. 20/C 1/L 202; A/Conf. 20/14 pp 184–5.

[18] See Muller (1993) at pp 52–4.

[19] See Office of Foreign Missions Circular Notices to diplomatic missions, available at www. state.gov/ofm/31311.htm, in particular Notice of 14 February 2003 on Internet Purchases.

[20] 2002 RBDI 158.

These arguments were accepted by Hawaii which fell into line with practice elsewhere in the United States.[21]

In some States there exist *ex gratia* arrangements for relieving diplomatic agents from excise duty and value added tax on specific high-value purchases. In the United Kingdom these arrangements apply to purchase by diplomatic agents from bonded warehouses of alcoholic liquor and tobacco products and from value added tax and duty on cars. Refund of value added tax paid on substantial purchases of high-grade British furniture and on furnishings for equipment of the premises of the mission is also available under detailed conditions set out by the Protocol Department of the Foreign and Commonwealth Office. Such arrangements are intended as an incentive to the purchase by diplomatic missions of local goods in preference to the duty-free import of foreign goods, and they do not affect the legal position under which the amounts in question fall within Article 34(a). Arrangements may also be made on a basis of reciprocity, in reliance on the permissive provision in Article 47.2(b), as for example by Germany.[22]

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

These words conceal what is perhaps the most difficult and complex ambiguity in the text of the Convention. Is the effect of the proviso 'unless he holds it on behalf of the sending State for the purposes of the mission' merely to exclude from the exception the common case where the premises of the mission, in order to comply with the law of the receiving State, are held in the name of the head of the mission or a member of the diplomatic staff of the mission? This interpretation is consistent with the related provisions Article 1(i) and Article 31.1(a), and it is supported, though not beyond argument, by the *travaux préparatoires* of the Convention. On the basis of this narrow construction a diplomat is liable to local tax on his principal private residence unless he is exempted on a basis of courtesy or reciprocity. A second possible interpretation would extend the exception wider to include the principal private residence of a diplomatic agent in all circumstances, whether owned or leased by the sending State or by himself. His principal private residence is clearly necessary to enable him to do his job in the receiving State and it can therefore easily be maintained that he 'holds it on behalf of the sending State for the purposes of the mission' and should be exempt from tax on it. A third possible interpretation, which would also lead to exemption for the diplomat's own residence, is that the term 'private immovable property' is not intended to include the diplomat's own residence. To allow exemption is probably more in line with the underlying principles justifying the tax privileges given to members of diplomatic missions, and it is this practice of exemption which has been adopted by the majority of States Parties to the Vienna Convention.

The unsatisfactory formulation of Article 34(b) results mainly from the fact that at several stages of its preparation it was brought into line with what is now Article 31.1(a) without consideration being given to the question of whether on grounds of principle this

[21] Memorandum of 4 February 2000 in 2000 DUSPIL 594.

[22] For details see Richtsteig (1994) pp 80–1. For similar provisions in Belgium see Salmon (1994) para 477.

was a correct approach. As pointed out in the context of Article 31.1(a) there are two possible justifications for the exception to immunity from jurisdiction in the case of real property. The first is that ownership of real property in the receiving State is not necessary to the functions of the diplomat in the receiving State. The principal private residence is, however, necessary to enable the diplomat to do his job, and on this approach he should therefore be immune from all actions in regard to it. The second justification is that if the diplomat is immune in respect of real property, a plaintiff will have no possible forum in which actions relating to that property can be determined. On this second approach the exception to immunity should cover the diplomat's own residence (given the safeguard that execution would not be permitted where it would infringe the inviolability of that residence). This second approach appears in fact to have been used by the International Law Commission in drafting Article 31. But it has no application to the question of tax on the diplomat's residence. The principles underlying the taxation of diplomats are that they should be exempt from all taxes proper in the receiving State except in regard to activities having no connection with their functions and in regard to cases where arrangements for exemption would be administratively impractical. Neither of these two exceptions applies to the case of property tax on a diplomat's private residence. General principles therefore support taxes or rates on such residences coming within the general exemption accorded by Article 34.

Little support for either interpretation emerges from previous State practice, which was extremely varied. In some States exemption was accorded only if the sending State was owner or lessee of the residence, so that exemption depended on sovereign rather than diplomatic immunity. The United States accorded no exemption from property tax on residences,[23] but some of the constituent states allowed exemption on a basis of reciprocity. The United Kingdom took the position that customary international law did not require exemption, but instead they concluded an extensive number of reciprocal arrangements under which exemption or refunds were accorded in respect of that portion of rates from which the residences were deemed not to derive direct benefit.[24]

The original draft of the Special Rapporteur to the International Law Commission accorded specific tax exemption in respect of mission premises to the sending State and the head of the mission (the provision which became Article 23.1). The exemption from tax accorded to the diplomatic agent had an exception relating to '(b) dues and taxes on immovable property in his private ownership on the territory of the receiving State'. It was not entirely clear whether the term 'immovable property' comprised residences at all, or whether official residences would be entitled to exemption because they were not regarded as being in 'private ownership'. In the Article which became Article 31 of the Convention there was an exception to the diplomat's immunity from jurisdiction which was expressed in similar terms. During the Commission debates in 1957 on the immunity from jurisdiction provision, Mr Tunkin proposed adding to the exception the words 'and representing a source of income'. He explained that his amendment was designed to cover cases where immovable property was held in the name of the head or a member of the mission because local law did not permit it to be held by the sending State. Several delegates agreed with Mr Tunkin's objective but had doubts about the language. Sir Gerald Fitzmaurice, endorsing Mr Tunkin's proposal, suggested adding instead, after the

[23] Moore (1905) vol IV pp 669–72.

[24] See draft letter from the Marquis of Salisbury in McNair (1956) vol I p 207; Lyons (1953) pp 140–7.

words 'immovable property': 'held by the agent in his private capacity and not on behalf of his government for the purposes of a mission'. It is clear that the object of these words when originally introduced was not to distinguish between a principal and a secondary residence—but it is not clear whether residences were understood as coming within the term 'property' at all. There is some slight evidence that Mr Tunkin did not regard residences as being 'property' whereas Sir Gerald Fitzmaurice did. The draft at this stage contained no definition of 'premises of the mission' and the provision which became Article 30 of the Convention distinguished between the 'private residence' of a diplomat and his 'property'. Shortly afterwards Mr Tunkin proposed during discussion of the provision which became Article 34 that an addition in similar terms to that in the immunity from jurisdiction Article should be made in exception (b), and this was agreed.[25]

Japan pointed out in commenting on the 1957 draft articles that the extent of the term 'mission premises' was unclear, and so was the effect of the exceptions from immunity and from tax exemption on the private dwelling of a diplomatic agent. Japan wished the position to be that the exception from immunity would not apply to the diplomat's private dwelling. The Rapporteur, in adopting a rewording of the exception suggested by The Netherlands, observed that this seemed to satisfy the wishes of the Japanese Government. The words 'in his private capacity' were omitted from this redraft.[26] During the 1958 debates of the Commission a similar change was, at the request of the Japanese member, made to the taxation article.[27] The effect of the Commission's 1958 draft was thus probably to exclude all residences from the scope of the two exceptions in regard to immovable property.

The discussion at the Vienna Conference is not conclusive as to whether delegates intended residences of diplomats to be caught by the exception in regard to private immovable property. In debate on the taxation article France introduced two amendments—one designed to replace in paragraph (b) the proviso 'unless he holds it on behalf of the sending State for the purposes of the mission' by the words 'subject, however, to the application of the provisions of Article 21 to immovable property owned by the diplomatic agent on behalf of the sending State for the purposes of the mission'; and the other to introduce a new exception for 'dues and taxes payable by reason of occupation in the territory of the receiving State of residences other than the official residence'. The second of these amendments might have suggested an intention to exempt the principal residence of the diplomat, but the representative of France in introducing the first amendment made clear the intention that 'all buildings held privately . . . even by the sending State in cases where that State had acquired or rented premises for the exclusive purpose of housing the members of the mission' should be subject to the tax legislation of the receiving State. The Soviet Union representative Mr Tunkin made clear that he believed that the intention of the Commission had been to exempt all residences occupied by diplomats. Both French amendments were rejected, and it is highly probable that there was among delegates no common understanding of the resulting position.[28]

[25] UN Doc A/CN 4/91, Art 22(1)(b); *ILC Yearbook* 1957 vol I pp 94–5, 119.
[26] UN Docs A/CN 4/114 pp 20–1, A/CN 4/116 p 55.
[27] *ILC Yearbook* 1958 vol I p 157.
[28] UN Docs A/Conf. 20/C 1/L 219; A/Conf. 20/14 pp 185–7.

Japan did not regard the position in regard to residences as at all clear, and later it moved an amendment[29] to extend the definition of premises of the mission by adding to the test of 'used for the purposes of the mission' the words 'including the residence of the head of the mission'. The object was to make clear that the residence of the head of the mission at least would be exempt from dues and stamp duty, and from property taxes. The definition of mission premises thus assumed its final form: 'buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission'. It thus became clear that residences of members of the mission other than the head could not be regarded as *'used* for the purposes of the mission' and it therefore became very difficult to argue that such residences were, under Articles 31.1(a) and 34(b) *'held* for the purposes of the mission'. It is possible to argue that it was not the intention of the Conference to include residences in the expression 'private immovable property', though it cannot be denied that this argument does a certain violence to the language used in the Convention. If this argument is adopted it is perhaps defensible to impose taxes on a diplomat's weekend cottage on the ground that it would be administratively impractical to exempt it only for the short periods when it was actually used as his residence. (In the context of Article 30 it is suggested that an occasional residence *should* be accorded inviolability for the relevant period of occupation, but the problem of administrative complexity does not arise under Article 30.)

Not surprisingly, in view of the tortuous history of Article 34(b) States have tended to interpret it as they found convenient—usually continuing their previous practice in regard to taxation of diplomatic residences. Where exemption or relief was previously accorded, as in the United Kingdom, it continues to be accorded, though the United Kingdom regards exemption as now dependent on the Convention instead of the earlier reciprocal arrangements. Where it was not previously accorded, as in Canada, the position also continued unchanged, and some authors have supported this view of the position.[30] The United Kingdom receives reciprocity from the great majority of other States Parties to the Convention. This need not mean that all these States regard themselves as obliged to accord relief under Article 34, for no formal steps were taken by the United Kingdom to terminate the old reciprocal arrangements, and Article 47.2(b) permits States to extend to each other by custom or agreement more favourable treatment than is required by the Convention. It may, however, be said that there has emerged among States a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'[31] and that this practice supports exempting a diplomat from taxes imposed on his residence. This result may not have been intended by the Vienna Conference, but it is fully in accordance with the underlying principles regarding the taxation of diplomatic agents.

The United States which in 1986 stated that it would grant tax exemption on property used for diplomatic residences, subject to confirmation of reciprocal treatment, also receives almost universal reciprocity. A survey conducted in 1997 found that in 97 per cent of missions abroad, tax relief was accorded to the US Government in respect of

[29] UN Docs A/Conf. 20/C 1/L 305; A/Conf. 20/14 p 225.

[30] 1966 Can YIL 278. Cahier (1962) p 285 says that diplomats other than the head of mission are not exempt from tax on their residences.

[31] Vienna Convention on the Law of Treaties, Art 31.3(b).

diplomatic residential property. The State Department in a Note to Sweden maintained that this showed:

> That the nearly uniform custom and practice of States have ripened into a customary law obligation to provide tax exemption to Government owned residences housing members of the diplomatic mission, subject to reciprocity.[32]

In *US v County of Arlington, Virginia*[33] in 1982 the US Court of Appeals had to consider the effect of an Agreement of 4 May 1979 between the United States and the German Democratic Republic which provided for reciprocal tax exemption from real estate taxes for property owned by either State when such property was used exclusively for the purpose of their diplomatic missions, including residences for diplomatic staff and members of their families. When the 1979 Agreement was concluded, both the United States and the German Democratic Republic were already Parties to the Vienna Convention, and it was said to be a supplementary agreement, under the authority in Article 47.2(b) of the Convention permitting the grant of more favourable treatment than that required by the Convention. The conclusion of this Agreement does not, however, necessarily indicate that the United States and the German Democratic Republic took the view that Article 34(b) did not require the grant of tax exemption in respect of diplomatic residences, since Article 34 deals only with the diplomat's own privilege while the 1979 Agreement in issue gave exemption to the two States. The Court of Appeal held that the United States was constitutionally entitled to conclude the 1979 Agreement and to enforce its provisions against the wishes of the County of Arlington. As regards the period before entry into force of the 1979 Agreement the position depended on construction of the Foreign Sovereign Immunities Act 1976,[34] which permitted execution against immovable property situated in the United States provided 'that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission'. The State Department took the position that this expression covered a building used exclusively for the housing of members of the mission and their families, and the wording of the 1979 Agreement followed this interpretation. The court held that the State Department view was reasonable and entitled to great weight, and they concluded that the German Democratic Republic was immune from enforcement of a tax lien in respect of the period before the 1979 Agreement. Although this case did not expressly turn on the construction of Article 34 (b) it does support the conclusions suggested above.

Exception (c): 'estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39'

Article 39.4 deals *inter alia* with the question of exemption from estate, succession, and inheritance duties in the event of the death of a diplomat or other privileged member of a diplomatic mission or a member of his family. It is discussed in the context of Article 39.

[32] 2001 DUSPIL 545.
[33] 702 F 2d 485 (1983); 72 ILR 652.
[34] 28 USC §§ 1609 and 1610.

Exception (d): 'dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State'

The justification for this exception is discussed above in the context of the general exemption. Also discussed above is the question whether, in determining the applicable rate of tax to be applied to non-exempt income such as that caught by Article 34(d), the receiving State is required to disregard exempt income.

Exception (e): 'charges levied for specific services rendered'

The interpretation of these words in regard to property taxes is discussed above, in the context of the identical exception in Article 23 which confers a general exemption on the sending State and the head of the mission from tax in respect of the premises of the mission. At the Vienna Conference, the Austrian representative stated his understanding that this exception included 'charges for permission to install and operate a wireless or television receiver'.[35] The United Kingdom, however, does not require members of diplomatic missions to purchase television or radio licences. In view of the inviolability of the premises where radios and television sets are operated, it would be impossible to enforce a national requirement to obtain or pay for such licences. Generally speaking, however, as pointed out above, a distinction should be made between a requirement to obtain a licence, which may involve a demonstration of fitness to hold or to operate, and payment for the licence, which is normally regarded as a tax and not as a charge for any 'specific service rendered'.

One imposition which has caused controversy, particularly in London, are 'surtaxes' or 'charges' imposed on users of particular kinds of vehicle or on users of specified roads such as motorways or roads in central city areas. Road or bridge tolls, where the proceeds of the toll are used to pay for the past construction or for the future upkeep of a particular road or bridge, would clearly be within the exception. The driver can choose whether to purchase the 'specific service' of travel on the restricted road or bridge or to use an alternative route. But in 1985 there was considerable controversy as to whether privileged diplomats were liable to pay a Swiss 'surtax' imposed on users of motorways and on heavy vehicles. The Canton of Geneva was unwilling to grant relief, but diplomats collectively refused to pay on the ground that the surtax was not a 'charge for a specific service rendered'.[36] Under German practice, the exception has been applied only where there is a reasonable relationship between the charge and the value of the service rendered.[37]

The congestion charge imposed and administered by Transport for London is different in a number of respects from a road toll. It is a flat rate imposition on any vehicle driven within the central London congestion charge zone. It applies even where the driving is inadvertent, for example, where the driver approaching the boundary road discovers too late that a right or left turn is prohibited and trespasses within the zone for only a few seconds in order to return lawfully to the boundary road. There are discounts for residents within the zone who have in many cases no real choice as to whether to drive within it, as

[35] A/Conf. 20/14 p 186.
[36] 1985 RGDIP 177 and 807.
[37] Richtsteig (1994) p 81.

well as for disabled drivers and drivers of alternative fuel vehicles. The revenue raised by the scheme must be used for improvements to public transport, which may provide an alternative or a benefit for some drivers but not for all who contribute. The primary purpose of the scheme, whose priorities are described in the transport strategy of the Mayor of London published on 10 July 2001, is to deter drivers from using the zone and so reduce congestion.[38] Transport for London take the position that the central London congestion charge is analogous to a road toll or a parking fee and that the 'specific service rendered' to those who pay it is a quicker journey by car or better public transport. The UK Government have supported this position, while suggesting that the issue should be resolved between Transport for London and foreign diplomatic missions. In November 2005 the Government told Parliament:

> We informed all missions by Note Verbale in March 2002 of our sustained view that there were no legal grounds to exempt diplomatic missions from payment of the congestion charge. Since then, in formal and informal exchanges, we have informed missions of our view that the congestion charge does not constitute a form of direct taxation under the Vienna Convention, but is a charge analogous to a motorway toll, and that they are expected to pay.[39]

The US Embassy, supported by a large number of other diplomatic missions, maintains that the congestion charge is not a charge for a specific service rendered and so falls within the general tax exemption granted to diplomatic agents by Article 34 of the Convention. There are a number of reasons justifying the position that the congestion charge in its present form is an imposition from which diplomats should be exempt:

1. On the basis of the Organisation for Economic Co-operation and Development's definition of a tax as set out above, the charge is 'unrequited in the sense that benefits provided by government to tax payers are not normally in proportion to their payments'. There is little proportionality in the way that the congestion charge operates—the driver is liable for a flat amount regardless of whether his use of the zone lasts for one minute or for the entire eleven hour period in a day.
2. It is arguable whether any 'specific service' is being rendered by Transport for London. Many drivers have no alternative but to use the zone because they live within it or must use it for their work. The 'service rendered' in the form of a quicker journey by car has been delivered to only a limited extent and 'improved' public transport may in many cases not be a realistic alternative. This is particularly true for diplomats given that they are obliged to work in embassies which in practice must be located in central London and to transact their business with the Foreign and Commonwealth Office which is also located within the zone. For many ambassadors and senior diplomats, travel by public transport is for reasons of security not a realistic alternative. The main purpose of the congestion charge is to regulate driving conduct and choice of vehicle, which is a perfectly proper objective for a tax but not a normal factor in a charge for a service. The basis for the charge as a regulator of conduct has been accentuated by the introduction of discounts for ultra low emission vehicles.
3. Diplomats are on a general basis not required to pay for police protection either of their premises or their persons. Although it is obvious that diplomats do derive direct

[38] Available at www.tfl.gov.uk.

[39] Hansard HC Debs 10 November 2005 vol 439 W col 745, cited in 2005 BYIL 848; Notes to Diplomatic Missions No A102/02 of 18 March 2002 and No A330/02 of 18 June 2002.

benefit from police services, the receiving State is required to provide protection under Articles 22 and 29 of the Vienna Convention in particular and so the general practice in all countries is to treat embassies and diplomats as exempt from paying for police protection. As explained above in the context of Article 22, this position may be altered by agreement between sending and receiving States, but this does not affect the underlying rule. Diplomats must be accorded freedom of movement and travel within the United Kingdom under Article 26 of the Convention, they are required by Article 41 to conduct official business with the Foreign and Commonwealth Office, and the location of diplomatic missions in London is in practice controlled under the Diplomatic and Consular Premises Act 1987. The security of diplomats must be protected under Article 29 and they must under Article 25 be given full facilities for the performance of their functions. By analogy with the position in regard to police protection they should be treated as exempt from payment for driving in central London, a facility which is in practice indispensable for the normal performance of their functions.

The fact that diplomats have apparently paid congestion charges imposed in other cities is not in itself conclusive. Schemes imposed in Singapore, in Trondheim, Norway, and in Melbourne are closer to road tolls. The Trondheim scheme was originally designed to fund construction of ring roads rather than explicitly as a congestion charge. The Melbourne scheme is limited to a specific 'Citylink' toll road. Other schemes, apart from those in Singapore, Oslo, and now Stockholm, do not operate in capital cities and so do not pose for diplomats the special problems described above. The London scheme in terms of size and scope is unparalleled elsewhere in the world, and that is why it has become a test case for the distinction between a tax and a charge for a specific service rendered.[40]

When the London congestion charge was originally introduced, most diplomats appear to have accepted, though with some reservation, statements by the UK authorities that they were required to pay it. In 2005, however, when the charge was raised from £5 to £8, the US Government announced that they regarded it as a tax from which their diplomats were exempt and would no longer pay.[41] In a Diplomatic Note of 11 July 2005 to the Foreign and Commonwealth Office, the US Embassy set out the legal reasons for their position. As regards the reliance by the UK Government on Article 34(e) of the Vienna Convention they commented:

> This reliance is misplaced because no specific service is rendered in exchange for payment; the revenue raised is used to provide services to those other than those paying the charge; and the charge bears no reasonable relationship to the cost of the service supposedly rendered to the payer. Like the tax on petrol from which diplomats and diplomatic missions are exempt, the Congestion Charge is a tax imposed to discourage driving and to encourage the use of public transport.[42]

Germany, following legal analysis in Berlin, followed suit, as did over fifty other diplomatic missions. A number of the other non-payers are States such as Japan and Russia which in all other respects comply with their obligations under the Vienna Convention and have emphasized that their non-compliance in this case is based on legal principle.

[40] See www.tfl.gov.uk.

[41] *The Times*, 18 October 2005, Timesonline, 20 October 2005; Satow (6th edn 2009) at para 9.42.

[42] Extracts from this Note are in 2005 DUSPIL at 570. The full text of the Note is at www.state.gov/s/l/c8183.htm.

Russia has stated that it is prepared to engage in a discussion on the matter between diplomatic missions and the FCO based on a strict observance of the Vienna Convention.[43]

In February 2007 the congestion charge area was extended to the west, bringing within the zone a number of embassies previously outside it. At that point a survey showed that about half the embassies in London, including those of France, Russia, Belgium, and Saudi Arabia, said that their diplomats were exempt from the charge.[44] The former Mayor of London Ken Livingstone has accused the recalcitrant embassies of exploiting diplomatic immunity (which is not the case), has stated that the UK Government has the legal right unilaterally to classify the imposition as a 'charge for a specific service rendered' (which is a highly dubious proposition), and has described the US Ambassador in London as a 'chiselling little crook' (which led to his being reported to the Standards Board for England).[45] In 2012, a biography of Queen Elizabeth revealed that following the presentation of credentials by the new US Ambassador at Buckingham Palace she said that she understood that his position was that the charge was a tax and when he confirmed that, said 'Well, it is a tax.'[46]

In July 2014 the amount due from diplomatic non-payers was £82 million.[47] So far there is no indication in public of any proposals to submit the dispute to any of the formal settlement procedures available under the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes.

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

The words 'with respect to immovable property' appear to qualify all the previous words in Article 34(f). The United States' amendment, intended to clarify the exception in this way, was adopted by the Conference. In principle therefore other kinds of registration fees and duties fall within the general exemption, unless they can properly be described as 'charges levied for specific services rendered'.[48] Stamp duties on documents having no relation to immovable property, such as share transfers, also fall within the general exemption.

ANNEX B to Memorandum on United Kingdom practice, April 1996 Income tax and capital gains tax

1. Schedule 1 of the Diplomatic Privileges Act 1964 sets out the immunities from income tax and capital gains tax of the members of a diplomatic mission. The effect of the Act, so far as United Kingdom income tax and capital gains tax are concerned, is summarised in the following paragraphs.

[43] Russian Federation Press Release, 29 June 2010.
[44] *The Times*, 21 February 2007.
[45] *The Times*, 29 March 2006.
[46] *Elizabeth The Queen*, by Sally Bedell Smith, quoted in *The Times*, 15 January 2012.
[47] BBC News, 15 July 2014.
[48] UN Docs A/Conf. 20/C 1/L 263; A/Conf. 20/14 p 186. See also statement by Austrian representative on exception (e). For Canadian practice see 1966 Can YIL 279.

Official emoluments of members of the mission

2. All members of the mission, as defined in Article 1 of Schedule 1 of the Act who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens or British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on the official emoluments they receive by reason of their employment. For the purposes of this Annex, a person who is a member of a mission of certain Commonwealth countries or is a private servant of a member and is a Commonwealth citizen and in addition to being a British national is to be regarded as if he were a citizen of the Commonwealth country only.

Emoluments of private servants

3. Private servants of members of the mission as defined in Article 1 of Schedule 1 of the Act, if not British Citizens, British Dependent Territories Citizens, British Overseas Citizens or British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on the emoluments they receive by reason of their employment.

Private income from sources outside the United Kingdom

4. Diplomatic agents who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on private income from sources outside the United Kingdom, whether or not the income is payable in, or remitted to, the United Kingdom. The members of the family of a diplomatic agent forming part of his household, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, or British Nationals (Overseas), are also exempt from United Kingdom income tax on private income from sources outside the United Kingdom.

5. Similarly, members of the administrative and technical staff of the mission, together with members of their families forming part of their respective house-holds are, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, British Nationals (Overseas), or permanently resident in the United Kingdom, exempt from United Kingdom income tax on private income from sources outside the United Kingdom.

6. The Inland Revenue will repay any United Kingdom income tax which has been deducted from exempt income before it is received. The Diplomatic Privileges Act 1964 does not provide any exemption from United Kingdom income tax in respect of income from sources outside the United Kingdom which accrues to members of the service staff of the mission or to private servants of members of the mission.

Income liable to United Kingdom income tax

7. In no case does the Diplomatic Privileges Act 1964 provide for exemption from United Kingdom income tax of income arising from sources within the United Kingdom. A member of a mission or those forming part of his household who has received non-exempt income should apply for, and submit, a return relating to this income.

8. Where there is income liable to assessment to United Kingdom income tax, the Inland Revenue will take into account personal allowances and any of the other usual reliefs which are applicable when calculating any tax payable. They will then issue a notice of assessment in the usual way. Details are in Inland Revenue booklet sent to all missions in 1995.

Capital gains

9. Members of diplomatic missions (except service staff) who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom capital gains tax except where it arises on the disposal of private immovable property not held on behalf of the sending State for the purposes of the mission, or of investment in commercial undertakings in the United Kingdom. Those forming part of the household of a member of a diplomatic mission are, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, or British Nationals (Overseas), also exempt from United Kingdom capital gains tax except in relation to private immovable property in the United Kingdom, and investments in commercial undertakings in the United Kingdom.
10. Members of diplomatic missions should include any capital gains liable to United Kingdom capital gains tax in the return of income referred to in paragraph 7. The Inland Revenue will issue a notice of assessment and application for payment in due course.

Income and Corporation Taxes Act 1988, Section 321

11. In certain circumstances, income arising from employment as a consul, or an official agent, for a foreign State may be exempt from income tax, provided that the nationality requirements in that section are satisfied. Advice on this aspect can be obtained from International Division 1/1, Inland Revenue, Somerset House, London, WC2R.

EXEMPTION FROM PERSONAL SERVICES

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public services of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

It was well established in international practice that diplomats were treated as exempt from such obligations imposed on the general public as compulsory military service and jury service. Many States made explicit provision for this in their domestic laws.[1] Curiously, however, there was little mention of such an exemption in the textbooks on diplomatic law—perhaps because diplomats as foreign nationals would in any event not usually be subject to civic obligations and in the rare cases where they were liable would be protected by their inviolability.

The proposal to include special provision for personal and public services came from the Soviet Union in its comments on the International Law Commission's 1957 draft articles. The Rapporteur prepared a new draft article and this was discussed by the Commission in 1958.[2] Acceptance of the principle of exemption was uncontroversial, and it was agreed that its scope would cover not only the obvious cases of military and jury service but also obligations to help in public emergencies such as forest fires, though details were not set out in the text.

At the Vienna Conference Belgium proposed an amendment[3] which after minor drafting changes became the final text of Article 35. The object was to bring the article into line with the more specific provision in the Commission's draft articles on Consular Relations which later became Article 52 of the Vienna Convention on Consular Relations. Neither of the two successive Vienna Conferences of 1961 and 1963, however, succeeded entirely in doing this. The Consular Convention goes wider in that it requires exemption to be given to service staff of the mission.

[1] eg Belgium: Salmon (1994) 493; Czechoslovakia: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') pp 83–5; Denmark: ibid p 101; Greece: ibid pp 136–7; Israel: ibid p 184; The Netherlands: ibid p 199; Poland: ibid pp 269–75; Portugal: ibid p 288; United Kingdom: VII BDIL VII 808.

[2] UN Doc A/CN 4/114/Add. 1 p 20 (comment on Art 26); *ILC Yearbook* 1958 vol I p 157.

[3] UN Docs A/Conf. 20/C 1/L 266; A/Conf. 20/14 pp 187–8.

EXEMPTION FROM CUSTOMS DUTIES AND INSPECTION

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) articles for the official use of the mission;
   (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Historical background

Prior to the Vienna Convention there was general agreement among writers, strongly supported by state practice and national legislation, that the grant of customs privileges to members of diplomatic missions was not a legal requirement of customary international law, but a matter of courtesy, comity, or reciprocity only.[1] Customs privileges were almost universally accorded at least in respect of official supplies for the mission and articles for the personal use of the head of mission. Almost certainly, therefore, the reason why this universal practice did not acquire the force of a binding customary rule was the fact that all States found it necessary to impose some controls and limits on the privilege, and they believed that their position in doing so would be weakened if they did not insist that they accorded exemption only as a courtesy or on the basis of reciprocity. Of all the various diplomatic privileges, customs privileges are notoriously the most open to abuse, and instances of abuse occurred during the seventeenth century which were more flagrant than anything that would have been tolerated at a later date when controls became general.[2]

In every country legislative or administrative provisions were laid down to regulate customs privileges—what categories of mission staff were entitled to benefit, what kinds of goods could be imported and in what quantities, the procedures to be followed to obtain exemption, whether examination could take place, the period during which duty-free import might take place, and provisions controlling subsequent disposal of articles

[1] See Vattel (1758) IV. VII para 105: 'c'est une civilité a laquelle le ministre ne pouvait préten-dre de droit'; Martens-Geffcken (1866) pp 111–12; Pradier-Fodéré (1899) vol II pp 50–62; Adair (1929) pp 93–100; Law Officers' Opinion of 1939 in McNair (1956) vol I p 204; Genet (1931) vol I pp 436–44; Harvard Research, 26 AJIL (1932 Supp) 107–8; Cahier (1962) p 289; Lyons (1954) pp 320–6; Lee (1991) p 550; *ILC Yearbook* 1957 vol II p 140 (paras (1) and (2) of Commentary).

[2] See Adair (1929) pp 98–9; Callières (1716) p 163; Satow (5th edn 1979) para 16.10.

imported duty-free.[3] Very little common practice in regard to detail could be deduced from these provisions. Virtually all States imposed some quantitative restrictions on consumables imported after the initial establishment. Many States did not, however, disclose either the existence of restrictions or the limits set except in the context of complaints to an individual mission, for fear that the limits might be regarded as an incentive rather than an ultimate control. Almost all States admitted without further examination packages certified or shown to contain only official documents or other printed material. Such packages might, however, be regarded as unaccompanied diplomatic bags and so entitled to a higher degree of protection than other diplomatic consignments. Apart from these common elements, each State had its own detailed regulations, usually set out in circular Notes to diplomatic missions, and diplomats were expected to conform to them. During the twentieth century, general national controls on exports and imports for reasons of health or public policy became much more extensive, so making customs privileges for diplomats both more valuable and more difficult for the authorities to police.

Negotiating history: national controls

There was during the preparatory work on Article 36 very little dissent from the proposition that the obligation to admit and to grant exemption from customs duties on diplomatic goods should be made a binding rule, no longer dependent on reciprocity. But as a corollary of that decision, a great deal of importance was attached to ensuring that States Parties would preserve their former freedom to administer detailed national control of privileged imports. The International Law Commission's 1957 draft articles contained no express words on this matter, though the Commentary stated that:

> It is not inconsistent with the exemptions proposed, that the receiving State should, with possible abuses in mind, impose reasonable restrictions on the quantity of goods imported for the diplomatic agent's use, or limit the periods during which articles for his establishment must be imported if they are to be exempted from duties.[4]

In its observations on the draft article Belgium submitted a redraft qualifying the duty to admit free of customs duty by the words 'in accordance with such regulations as it shall prescribe'. They cited as examples of common regulations 'the form of applications for exemption, the services assigned to deal with them, the import routes etc., and where applicable, the health formalities to be complied with, the conduct of plant pathology inspections and the like'. The Commission adopted a similar wording in their 1958 draft. They stressed that the regulations in question must be of general application and could not be adopted ad hoc to meet a particular case.[5]

The Vienna Conference devoted much attention to the wording of the reference to national laws and regulations. On the one hand there was concern that failure to specify

[3] For examples see Genet (1931) vol I pp 438–42; Moore (1905) vol IV pp 673–8; Satow (4th edn 1957) pp 230–1; (5th edn 1979) paras 16.11–13; Harvard Research, 26 AJIL (1932 Supp) 110–12; UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations'), *passim*.

[4] *ILC Yearbook* 1957 vol II p 140.

[5] UN Doc A/CN 4/116 pp 68–9; *ILC Yearbook* 1958 vol I pp 158–60, vol II p 100 (Art 34 and para (3) of Commentary).

the kind of national regulations to be permitted would make it possible for diplomatic customs privileges to be entirely nullified by restrictive regulations. On the other hand, if specific types of permissible regulations were enumerated, as was proposed in one amendment,[6] receiving States might find that entirely reasonable regulations were excluded by the terms of the Convention. The Conference declined therefore to specify the kinds of regulation which would be permissible. It is, however, clear from the Conference records[7] that the common understanding was that permissible regulations would include those which laid down procedural formalities and those which were designed to prevent abuse—for example, quantitative restrictions, a limit on the period of duty-free entry of goods related to establishment (in the case of mission staff entitled to privileges only on first installation), and regulations on subsequent disposal of articles imported duty-free. Regulations whose effect is to nullify the substantive privileges set out in Articles 36 and 37 (for example, by limiting the categories of staff given customs privileges) or whose motive is neither control of procedure nor control of abuse are not justified by the words 'in accordance with such laws and regulations as it may adopt'. The UK Government in common with others have, for example, protested at protectionist national regulations whose purpose was to make it impossible for missions to import their own cars for official use and to oblige them to purchase locally manufactured ones instead. These are seen as different from incentives to local purchase, which are widely offered to diplomats and have not been challenged.

Article 36 imposes obligations on the receiving State and entitles the receiving State to prescribe a procedural framework to counter abuse. But the sending State also has an interest in preventing abuse and may also—often in collaboration with the receiving State—impose regulations on members of its missions for the same purpose. The US State Department authorized its ambassadors in Latin American States to issue regulations to control profiteering through the sale by members of diplomatic missions of goods—particularly automobiles—imported duty free. In *Artwohl v United States*[8] the Court of Claims dismissed claims that this amounted to a taking of profits without compensation which violated the Fifth Amendment of the United States Constitution. They confirmed that 'the Ambassador had the right to regulate these sales and even prohibit them altogether if he thought it in the interest of better relations with Brazil to do so'. The Embassy Instruction which was challenged, in explaining the background for the rules to be imposed, said: 'It is imperative that each and every individual, as a guest in Brazil, conduct himself in such a manner so as to be free from any breath of suspicion concerning improprieties in any aspect of his life in Brazil, and particularly with regard to his duty-free privileges.'

Negotiating history: the duty to permit entry of articles

Article 36 obliges the receiving State to 'permit entry' of articles for diplomatic use. The question arises whether this obligation covers articles which are for official use or for the personal use of a diplomatic agent, but whose import is prohibited under the law of the receiving State. Alcohol, drugs, plants, and weapons are examples of articles whose

[6] UN Doc A/Conf. 20/C 1/L 255 (India).
[7] UN Doc A/Conf. 20/14 pp 188–9, p 22 (representatives of India and Chile).
[8] 434 F 2d 1319 (1970); 56 ILR 518.

import may be banned. During the period of prohibition the United States maintained that even foreign diplomatic missions were not entitled to import alcohol, though this position was somewhat softened at a later date.[9] Other States where the import, possession, and consumption of alcohol is forbidden have also allowed exceptions for diplomatic missions. The United States has prohibited even diplomats from importing merchandise of Cuban origin.[10] At the Vienna Conference Switzerland proposed an amendment[11] which would have laid down precise rules on import controls—exempting missions from import or export prohibitions or restrictions of an economic or financial nature, but not from restrictions based on reasons of morality, security, health, or law and order. The amendment, however, met with no support.

The answer to the question of whether there is an obligation to permit import of articles where this would contravene national law is to be found in Article 41. The diplomatic agent is under an obligation to respect the laws and regulations of the receiving State, including laws on articles and substances whose import is banned by national laws or regulations relating, for example, to drugs, weapons, or currency control. The sending State and its diplomatic agents thus have no entitlement to import items contrary to the law of the receiving State, even where these items are for official use of the mission or for personal use of a diplomat. The position is underlined by the terms of Article 36.2 which entitle the authorities of the receiving State to search personal baggage of a diplomatic agent, *inter alia,* on grounds that it contains 'articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State'. This right to search would have no point if the duty to permit entry of articles for official or personal diplomatic use extended to such articles. Laws and regulations prohibiting diplomats from importing certain items, so long as the prohibition can be justified on grounds of general public interest, are therefore permissible under Article 36. Some writers, and no doubt some state practice, favour a less rigid position in regard to alcohol under which a diplomatic mission would be permitted to import limited quantities for personal consumption or for private receptions, but if this compromise approach is not accepted by the particular receiving State it is difficult to find any basis in the Vienna Convention which would justify a diplomat in disregarding the local law on the ground that it was out of line with the international norm.[12]

The question of import by diplomats of firearms or ammunition is particularly complex. In the United States there is a general prohibition on the import of firearms and ammunition by foreigners, but there are certain exceptions covering hunting or lawful sporting activities, and there is also a limited exception for temporary import by diplomats bringing in a firearm for his or her own official use. This does not apply to weapons restricted by the National Firearms Act such as machine guns, short-barrelled rifles, and shotguns. Diplomats must also comply with applicable state or local laws on the possession or carrying of firearms.[13]

[9] Harvard Research, 26 AJIL (1932 Supp) 113–14; Lecaros (1984) pp 157–8.

[10] 1976 DUSPIL 197. The prohibition still applies, even following the agreement in December 2014 to restore normal diplomatic relations, since the lifting of the embargo requires legislation by Congress: *New York Times*, 17 December 2014; CBC News, 21 January 2015.

[11] UN Docs A/Conf. 20/C 1/L 240; A/Conf. 20/14 pp 188–9.

[12] See legal advice to Swiss Federal Government, 1982 ASDI 135; Salmon (1994) p 359.

[13] The requirements are explained in Department of State Diplomatic Note 04–03 of 6 May 2004, available at www.state.gov/ofm/31311.htm.

The duty of the diplomat to respect the laws and regulations of the receiving State applies equally to the export of articles, and evidence that a diplomat's baggage contains articles whose export is prohibited by laws, for example on cultural treasures or on currency control, may also justify search of that baggage. In 1989, for example, police in Tanzania briefly detained the Indonesian Ambassador following search of his baggage as he was about to return home accompanied by an illegal load of ivory from more than a hundred elephants, weighing more than three tons, and valued at £300,000.[14] An important difference is that the Convention confers no substantive right on the sending State or on diplomatic agents to export articles. This is underlined by the exceptional provision set out in Article 39.4 which applies in the case of the death of a diplomatic agent or a member of his family. The position is the same under Article 50 of the Vienna Convention on Consular Relations, though there was controversy on the point during the 1963 Vienna Conference.[15]

Meaning of 'customs duties, taxes and related charges'

In the Commentary to their 1958 draft articles, the International Law Commission said that: 'The expression "customs duties", as used in this article means all duties and taxes chargeable by reason of import or export.' These words formed the basis for the introductory words of Article 36 which were taken into the text by a US amendment.[16] The word 'customs' governs 'taxes' as well as 'duties', and the question which determines whether the revenue authorities apply Article 36 rather than Article 34 is whether the imposition results from import. Article 36 normally applies only to goods of foreign origin. The United Kingdom at the Vienna Conference proposed an amendment to exclude reimport of articles originating in the receiving State from the scope of Article 36.[17] The amendment failed, but the power to control abuse of privileges by national laws and regulations would be sufficiently wide to deal with any deliberate attempt to evade taxes due under the terms of Article 34 by systematically exporting and reimporting articles for diplomatic use.

Article 36 is in general applied only where the mission or diplomatic agent imports an article directly from abroad. Where the mission or diplomat buys from a local retailer an item which has already been subjected to customs duties on import, the customs duties—which would not normally be separately identifiable—are regarded as 'indirect taxes of a kind which are normally incorporated in the price of goods or services', which by virtue of Article 34(a) are not within the general diplomatic exemption. UK regulations, set out in Annex C to the 1996 Memorandum on Diplomatic Privileges and Immunities—which is reproduced at the end of this Commentary on Article 36—make clear that the diplomatic agent 'may import or withdraw from a Customs and/or Excise warehouse free of Customs charges' the goods within the scope of Article 36. Exceptionally, however, the UK authorities refund the element of customs duty and value added tax

[14] *The Times*, 21 January 1989. For allegations of extensive involvement by foreign diplomats in export of treasures from Chinese tombs, see *The Times*, 11 December 1999.

[15] Lee (1991) pp 556–7; Lee and Quigley (2008) pp 509–10.

[16] UN Docs A/Conf. 20/C 1/L 272; A/Conf. 20/14 pp 188–9.

[17] UN Docs A/4164 p 35; A/Conf. 20/C 1/L 208; A/Conf. 20/14 p 188. The question became highly sensitive in the context of preparation for UK ratification of the Convention: see Bruns (2014) at pp 192–5.

in the retail price paid by diplomatic missions and privileged persons for hydrocarbon oils (petrol, diesel, and fuel oil for heating). The concession required special statutory cover, which was accorded under section 1 of the Diplomatic and Other Privileges Act 1971.[18]

'articles for the official use of the mission'

Under international practice, if there is any question whether any articles are 'for the official use of the mission' this will be resolved by reference to the head of the mission.[19] Apart from the problem of articles whose import is prohibited by the law of the receiving State, which is discussed above, it is for the sending State to decide in good faith what it requires for its own official use and for its diplomats to decide what they require for their own personal use. Similar words used in the context of an agreement giving customs privileges to an international organization would by contrast have an objective sense confined to the purposes and agreed activities of the particular organization.[20] Subject to what is said above about prohibitions on import under the law of the receiving State and about quantitative ceilings to deter abuse, a mission or a privileged diplomat may import in addition to personal effects, means of transport, and office equipment consumables such as wines, spirits, and tobacco for official entertainment or private use. Articles for the use of non-privileged persons or enterprises or imported for sale or other commercial purposes cannot of course benefit from customs franchise under Article 36.

The United States at the Vienna Conference put forward an amendment which would have included in 'articles for the official use of the mission' the words 'including materials and equipment intended for use in the construction, alteration, or repair of the premises of the mission'.[21] The US representative said that this conformed to his country's practice, but he agreed to withdraw it. The representative of Senegal then commented that 'in practice, small countries would not fail to show liberality in exemptions for materials and equipment of missions'. There seems, however, to be no reason to doubt that construction material is equipment if it is stated to be for the official use of the mission and is entitled to the benefit of Article 36, and this interpretation is supported by international practice, in particular by that of the United Kingdom, of the United States, and of the Soviet Union during the Cold War.[22] Under German law exemption for such material is, however, granted only on condition of reciprocity.[23] As pointed out above in the context of Article 27, States make considerable efforts to protect their new diplomatic buildings from being systematically compromised during construction by listening devices, and import of construction materials is a laborious but effective way of doing this.

[18] C 64.

[19] Under Belgian regulations the head of mission must certify that articles are for the official use of his mission: Salmon (1994) para 360.

[20] See Muller (1995) pp 252–5.

[21] UN Doc A/Conf. 20/C 1/L 272 para 1; A/Conf. 20/14 pp 188–9.

[22] Satow (5th edn 1979) para 16.12. In the incidents relating to Soviet lorries—discussed above under Art 27.3 and 27.4—Switzerland and Germany did not challenge the entitlement of the contents to benefit from Art 36, but only their right to be regarded as 'diplomatic bags': Salmon (1994) para 354.

[23] Richtsteig (1994) p 86.

Inspection of mission and personal baggage

Prior to the Vienna Convention there was no uniform rule of international law exempting diplomatic agents from search of their personal baggage. Such exemption would usually be extended to heads of mission, and in many States it was extended to other diplomatic agents as a consequence of their inviolability of property. Like inviolability of property, however, exemption from baggage search was subject to exceptions. Article 30 of the Convention now extends full inviolability to the property of a diplomat, subject to a limited exception in Article 31.3 for execution of a judgment where the diplomat was not entitled to immunity. Article 36.2, however, entitles the receiving State to search the personal baggage of a diplomatic agent where there are serious grounds for suspecting abuse of customs privileges. Since the personal baggage of a diplomatic agent will normally consist almost entirely of articles which are his property there is an inconsistency between Articles 30 and 36 which was in fact drawn to the attention of the Conference. The Conference made quite clear that the provisions in Article 36 regarding search of personal baggage were to prevail. Although no proviso or cross-reference was added to Article 30, it is clear that one should be implied.[24]

In March 2015, a North Korean diplomat was briefly detained at Dhaka airport when Bangladesh officials scanning his luggage discovered twenty-seven kilos of gold bars and ornaments. The gold was impounded under the law of Bangladesh and the diplomat was said to have confessed to attempted smuggling. He was released into Embassy custody and later required to leave Bangladesh.[25]

'Personal baggage' does not have to accompany the diplomat to qualify for the exemption from inspection conferred by Article 36.2. At the Vienna Conference the Soviet Union proposed an amendment which would have limited protection from inspection to baggage accompanying the diplomat on the same train, ship, or aircraft, and this was defeated.[26] States may, however, lay down a qualifying period after which a consignment would not be regarded as personal baggage.

Consignments of articles for official use of the mission or for personal use of a diplomatic agent are *not* exempted from the ordinary law relating to inspection unless they are personal baggage. The receiving State may also adopt laws and regulations specific to incoming diplomatic consignments with the object of preventing abuse of customs privileges. An unaccompanied consignment is protected from inspection or search only if it constitutes an unaccompanied diplomatic bag and is thus protected under Article 27 of the Convention from being opened or detained. The UK customs authorities were thus not precluded from searching the crates which arrived at Stansted airport in the custody of a member of the Nigerian High Commission in 1984, given that these crates were not identified as diplomatic bags and given the reasonable suspicion that they might contain the kidnapped Nigerian ex-Minister. The incident and its consequences are considered more fully in the context of Article 27 above.[27]

[24] UN Doc A/Conf. 20/14 pp 22–3.

[25] *The Times*, 7 March 2015, *Al Jazeera*, 9 March 2015.

[26] UN Docs A/Conf. 20/C 1/L 194 para 1; A/Conf. 20/14 pp 190–1. The ILC Commentary also makes clear that personal baggage may be sent separately, especially when the diplomat travels by air: *ILC Yearbook* 1958 vol II p 101.

[27] See House of Commons Foreign Affairs Committee 1st Report, 1984–5, on *The Abuse of Diplomatic Immunities and Privileges*, paras 106–10, and Evidence pp 50–1. Akinsanya (1985) contains some errors of fact and law.

Since the spread in hijacking of aircraft during the 1970s it has become standard that diplomatic agents and others entitled to exemption from inspection for their baggage under Article 36.2 are expected as a condition of carriage to submit to screening even in the absence of any particular reason for suspicion. These searches are in general carried out not by customs authorities but by or on behalf of the air carrier, and in the light of hijacking incidents by persons carrying diplomatic passports, the need for such precautions has been accepted by diplomats generally.[28] The US *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States* says that: 'The United States does not regard the exemption from inspection as preventing an airline from refusing to carry any individual who does not voluntarily submit to personal or technical inspection of his or her person and personal baggage for security reasons.'[29] Missions have also been reminded that they are not exempt under Article 36 from charges for inspection of diplomatic cargo by US Government agencies, which became more frequent following the events of 11 September 2001.[30]

ANNEX C to Memorandum on United Kingdom practice, April 1996 Customs facilities

Diplomatic missions

1. The Diplomatic Privileges Act 1964 provides in Schedule 1 (Articles 36 and 37) for Customs privileges for diplomatic and other staff of foreign Embassies and Commonwealth High Commissions in the United Kingdom. It also provides for the importation, free of customs charges, of goods for the official use of an Embassy or High Commission.

Diplomatic agents (Articles 36(1)(b) and 37(1))

2. Diplomatic agents may import or withdraw from a Customs and/or Excise warehouse free of Customs charges goods which are for their official or personal use, including the use of members of their family forming part of their household. Application should be made on the appropriate form direct to the Customs Officer, except in the case of motor cars, spirituous beverages and cigarettes, when the form must be submitted to Privileges Section, Protocol Department, Foreign and Commonwealth Office, for approval.

Administrative and technical staff (Article 37(2))

3. Members of the administrative and technical staff of missions may import their personal and household effects, including a motor car, free of Customs charges at the time of first arrival. The importation of such goods may take place at any time during a period of six

[28] See UK Note of 24 November 1982 to diplomatic missions in London printed in 1983 BYIL 439; reply on behalf of UK Secretary of State to House of Commons: Hansard HC Debs 1 December 1989 WA col 457.
[29] Section 16—Airline Search Policy.
[30] Office of Foreign Missions Notice of 19 September 2002.

months following this date. Application for the release of such goods free of Customs charges should be made in accordance with the procedure outlined in paragraph 2.

Official supplies (Article 36(1)(a))

4. HM Customs and Excise may release articles required for the official use of a mission free of Customs charges on application in accordance with the procedure outlined in paragraph 2.

General

5. Goods may be delivered under the above arrangements only on condition that they are for the personal use of the entitled person or member of his family forming part of his household, or for the official use of a mission. Such goods must not, therefore, be sold, hired, lent, given away or otherwise disposed of to non-privileged persons. Exceptionally, permission may be given, on payment of the appropriate Customs charges, for the disposal of certain articles such as motor cars to a person not entitled to Customs privileges. Application for such permission should be made to Privileges Section, Protocol Department, Foreign and Commonwealth Office, before any goods imported free of Customs charges are disposed of.

6. HM Customs and Excise will not normally place restrictions on the quantities of goods imported under the above arrangements provided that the goods are genuinely required for the personal use of a privileged individual or for the official use of a mission; but if, in any particular case, quantities in excess of reasonable genuine requirements are imported, the Commissioners of Customs and Excise reserve the right to place a limit on the quantities which may be released free of Customs charges. There is a quota system for motor vehicles, spirituous beverages and cigarettes.

7. HM Customs and Excise will normally release goods delivered free of Customs charges under the above arrangements without examination. The Commissioners of Customs and Excise reserve the right, however, to examine any such goods in exceptional circumstances (Vienna Convention on Diplomatic Relations, Article 36(2)). They would normally make this examination after consultation with the privileged importer and, if desired by him, in his presence or that of his appointed representative.

MEMBERS OF THE FAMILY OF A DIPLOMATIC AGENT

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

...

Negotiating history

The early writers on diplomatic law had mixed views about the desirability of an ambassador being accompanied by his wife. But as during the second half of the seventeenth century permanent missions gradually replaced special missions as the normal form of representation, and diplomats would spend several years in a post, it came to be the practice for an ambassador to bring with him his immediate family as well as a retinue of servants to minister to his comforts and enhance his prestige. Collectively they were known as 'the diplomatic suite'. Practice in regard to servants was always very varied, but for the wife and minor children it was accepted from the time of Bynkershoek[1] that they were entitled to the same privileges and immunities as the diplomat himself. In consequence there was no dispute either in the International Law Commission or at the Vienna Conference over the principle of extending full diplomatic privileges and immunities to the family of a diplomatic agent.

The question which caused difficulty was that of defining which family members should be entitled to this treatment. The writers had always stressed that the privileges and immunities given to members of the family were derivative—his wife and children were regarded as extensions of the person of the diplomat, and their protection was equally necessary in order to ensure his independence. But only close members of the family living in the diplomat's household were regarded in this way. The words which were introduced by the International Law Commission 'forming part of his household' corresponded to general practice.[2] The majority of States did not define with precision which members of the family they would accept as entitled to privileges and immunities, but preferred to retain some flexibility and to settle difficult or unusual cases by agreement with individual diplomatic missions.

At the Vienna Conference the Committee of the Whole twice discussed the question of defining the term 'members of the family'. Four amendments were submitted, by the United States, India, Ceylon, and by Argentina and Spain.[3] Those from India and Ceylon retained the general reference to 'household' from the International Law Commission's draft, but the other two were enumerative. Argentina and Spain suggested: 'Members

[1] (1721) ch XV; Young (1964) p 163.
[2] *ILC Yearbook* 1957 vol I pp 123, 134–7; vol II p 140; O'Keefe (1976).
[3] UN Docs A/Conf. 20/C 1/L 17 (United States); L 90 (India); L 91 (Ceylon); L 105 (Argentina and Spain).

of the family are the spouse, minor sons, adult persons incapable of work, unmarried daughters and ascendants in the first degree.' The United States' amendment, which attracted substantial support, was: 'A member of the family is the spouse of a member of the mission, any minor child or any other unmarried child who is a full-time student and any such other members of the immediate family of a member of the mission as may be agreed upon between the receiving and the sending States.' In response to comments, the United States expressed willingness to withdraw the words 'or any other unmarried child who is a full-time student'.[4] The definition was criticized on the ground that it failed to specify whether the law of the sending or of the receiving State would determine the meaning of the terms 'spouse' and 'minor child', but it had the merit of defining a central core family with precision while leaving flexibility on the question of more peripheral members.

The Committee of the Whole, after formulating the substantive provisions of the Convention, came back to the definition of family. But although most delegations in principle favoured adding a definition, differing concepts of the family made it impossible to draft a generally acceptable formula.[5] An important term in the Convention was thus left without either a true definition or a procedure for settling differences of opinion between sending and receiving States.

Subsequent practice

The rationale for extending privileges and immunities to the immediate families of diplomatic agents has remained largely unchallenged under the Convention regime. In evidence to the House of Commons Foreign Affairs Committee inquiry into The Abuse of Diplomatic Privileges and Immunities in 1984[6] the UK Diplomatic Service Wives Association said:

> The extension of immunities and privileges to spouses and families has long been established. It derives from the need to protect diplomats from harassment particularly by means of 'framed' or politically motivated legal proceedings, so that they can do the job they are sent to do, whatever the situation in the receiving State. Families are regarded essentially as extensions of the persons of the diplomats themselves. The protection of diplomatic dependants has therefore been regarded as quite as necessary as that of the diplomats, to ensure the diplomats' independence and their ability to carry on their governments' business however unpopular their country, their mission or their instructions.

Subsequent cases clarifying the interpretation of the term 'member of the family forming part of his household' are surprisingly few. What appears to have happened is that the United States' proposal, having failed to be formally included in the Convention, has been accepted in general state practice. The spouse of a diplomat not legally separated from him or her (in increasing numbers these spouses are husbands) is universally accepted as a member of the family,[7] as are children below

[4] UN Docs A/Conf. 20/14 p 76; A/Conf. 20/C 1/L 312.

[5] UN Doc A/Conf. 20/14 pp 225–6.

[6] 1st Report, 1984–5, App 4 to Evidence.

[7] *Ribeyro v Massari*, Court of Appeal of Paris, 30 June 1981, 77 ILR 495; *affaire Bjerg*, 1990, cited in Salmon (1994) para 506; *R v Guildhall Magistrates' Court, ex parte Jarrett-Thorpe*, Times Law Reports, 6 October 1977. The Swiss Government was advised in 1976 that the '*époux de fait*' (in contemporary terminology a 'partner') of a woman diplomat should be accepted as a member of her family, given the length and official recognition of the

the age of majority.[8] Beyond this, each receiving State applies its own rules with some degree of flexibility, and unusual cases are settled in negotiation at the time of notification rather than left to any kind of arbitration or adjudication in the context of legal proceedings. The increasing number of States making legal provision for same-sex marriage has extended the number of spouses seeking acceptance as family members in other States which also make such provision or accept same-sex marriages valid under foreign laws. Article 10 of the Convention requires notification to the receiving State, *inter alia*, of '(b) . . . the fact that a person becomes or ceases to be a member of the family of a member of the mission'—and such a notification will normally provide an appropriate context for resolution of differences between sending and receiving States.

Most States have not published formal rules on who will be accepted as a member of the family, but the United Kingdom and the United States have made their practice public. The United Kingdom, in the context of administering privileges, includes the spouse, civil partner, and minor children—construing the term 'minor' in accordance with UK law to mean under eighteen. Since the entry into force in December 2005 of the Civil Partnership Act 2004,[9] the United Kingdom accepts as members of the family forming part of the household same sex partners of entitled members of diplomatic missions in the United Kingdom, provided that the relationship meets the criteria defining an 'overseas relationship' in the Act or the relationship has been registered as a civil partnership in the United Kingdom under the Act. The Marriage (Same Sex Couples) Act 2013[10] makes the marriage of same sex couples lawful and provides for the conversion of civil partnerships into marriages, and this automatically enlarges the construction of the term 'spouse' for the UK both as sending and as receiving State.

In addition, other persons are included in exceptional circumstances, and the usual additional categories are:

1. the child of a diplomat between the ages of eighteen and twenty-five clearly resident with and financially dependent on him or her, in full time education at a recognized educational establishment and not engaged in paid full time employment;
2. in certain cases, a dependent parent of a diplomat normally resident with him or her.

If members of diplomatic missions wish to accredit relatives other than spouses and minor children they should notify them to the Foreign and Commonwealth Office Protocol Directorate, explaining why they wish the relative to be accepted as a member of the family forming part of the household. Guidance sent to diplomatic missions in London makes clear that 'Each case is judged on its own merits, and there is no guarantee that all applications will be successful.'[11] The United Kingdom does not accept more than one

relationship: 1977 ASDI 224–6. Salmon (1994) para 506 suggests that the same reasoning would lead to acceptance of stable homosexual relationships.

[8] The Court of Rome in *Re P d MB* in 1969 held that both affiliated and adulterine children of a diplomat recognized under the law of the sending State, Costa Rica, were members of his family, even though adulterine children were not recognized under Italian law: 1975:1 Italian Yearbook of International Law 252.

[9] C 33.

[10] C 30.

[11] See statement by Foreign and Commonwealth Office Minister to House of Lords during debate on an Order in Council under the Consular Relations Act, Hansard HL Debs 16 June 1978 cols 763–4, printed in 1978 BYIL 368; Hansard HC Debs 22 January 1987 WA col 672, printed in 1987 BYIL 546; Satow (6th edn

wife of a polygamously married diplomat as a member of his family. In evidence to the House of Commons Foreign Affairs Committee in 1984 the Foreign and Commonwealth Office said: 'The practice applied in the UK has not been generally challenged but individual cases such as adult students in their twenties living away from home give rise to difficulty.' A determination of family member status by the Foreign and Commonwealth Office would not be binding on a UK court in the event of legal proceedings, since the interpretation of Article 37.1 is a question of law and not one of fact.[12]

The practice of Canada, Australia, and New Zealand is similar to that of the United Kingdom.[13]

In the 1983 case *Skeen v Federative Republic of Brazil*[14] the plaintiff brought proceedings in the United States against the Ambassador of Brazil, his grandson, and the Republic of Brazil in respect of a shooting by the grandson outside a nightclub. The State Department sent the court certification of the status of the ambassador, also asserting that the grandson was a member of his family, and on this basis they were dismissed from the proceedings. The court found more difficulty in determining whether Brazil was also immune—a question which under section 1605(a)(5) of the Foreign Sovereign Immunities Act turned on whether the grandson had been acting 'within the scope of his office or employment'.

The US practice was, however, revised—possibly in the light of the *Skeen* case—and was set out in a Note to chiefs of mission by the State Department in 1986 which read in part as follows:

> For the purposes of the application in the United States of the Vienna Convention on Diplomatic Relations, 'family... forming part of... household' means the spouse of the member of the mission and his or her unmarried children under 21 years of age, who are not members of some other household, and who reside exclusively in the principal's household. Additionally, the term 'family' includes children under 23 years of age who are attending an institution of higher learning on a full-time basis. Other persons who are not members of some other household, who reside exclusively in the principal's household, and who are recognized by the sending State as members of the family forming part of the household, under exceptional circumstances and with the express approval of the Department of State, also may be considered 'family' for the purposes of the Vienna Convention. In such exceptional cases, the sending State must formally request

2009) at paras 10.2 and 10.3. Practice on recognition of family members was revised following the entry into force of the Civil Partnership Act 2004: the above account is based on the Protocol guide for diplomatic missions in London, supplied by Protocol Directorate. See also *Re C (an Infant)* [1959] Ch 363, [1958] 2 All ER 656, where the court said that ordinary residence with the father, or control, was required to make the minor son a member of a diplomat's family. A similar approach was taken by the Supreme Court of Austria in 1977 in *Re R.F.N.* 77 ILR 452: 'the ward has been living with his mother since December 1970. He cannot therefore be regarded as forming part of the household of a diplomatic agent (his father) within the meaning of Article 37(1) of the Vienna Convention.'

[12] In the case of *Apex Global Management Ltd v Fi Call Ltd and Others* [2013] EWHC 587 (Ch) the English High Court construed the term 'member of the family forming part of the household' in the context of claims to immunity by the half-brother and nephew of the King of Saudi Arabia. The two defendant princes lived apart from the monarch, but claimed that they exercised Royal constitutional and representational functions on his behalf. Section 20 of the UK State Immunity Act 1978 confers on foreign heads of State and their families the immunities given to diplomatic agents under the Vienna Convention, but 'subject to any necessary modifications', and it was clear that modifications were required in this context. The Foreign and Commonwealth Office declined to provide a certificate on the ground that the question was one of law for the court.

[13] 1979 Can YIL 342; Brown (1988).

[14] 566 F Supp 1414 (1983); 121 ILR 482.

consideration by the Department of State and include full justification for the requested exception.[15]

In 2009, the State Department issued a further Note stating that in addition to the categories already accepted as 'members of the family forming part of the household' same-sex domestic partners might be included. Opposite-sex domestic partners would, however, not be included. Acceptance as a domestic partner was conditional on not being a member of some other household, on regular residence in the household of the principal and on recognition as a family member by the sending State. The Note said that 'The drafters of the Convention recognized that the concept of "family" differs among the societies of the world and left the matter to be resolved according to the standards of the respective receiving States.' At the same time US missions abroad were requested to explore—in the first instance orally—whether same-sex partners of US Foreign Service officers would be accepted as members of the officer's household, and in the event of a positive reply to notify the partners as members of the family. Posts who took the view that such an approach would do more harm than good were to refer back, with reasons, to the State Department.[16]

In the case of *US v Al-Hamdi*[17] a court in Virginia, considering the possible immunity of the adult son of a Yemeni diplomat charged with a firearms offence, accepted the certification by the State Department, given in accordance with the above practice, as conclusive and concluded that the defendant was not entitled to immunity. On appeal, it was confirmed that a US court would give 'substantial deference' to the interpretation of a treaty by the State Department, provided that it was reasonable.

The United States would in practice accept more than one wife of a polygamously married diplomat as members of his family forming part of his household. There are also signs that in many other capitals an unmarried partner is accepted as a 'spouse' in the context of defining the diplomat's family for the purpose of administering privileges, though this does not seem to have been widely acknowledged. The UK Foreign and Commonwealth Office in 1997 for the first time announced that a British Ambassador would be accompanied on his forthcoming posting by a partner who was not his wife, and added that the United Kingdom might request diplomatic immunity for her.[18]

The German Foreign Ministry interprets the term family to include, as well as the spouse and minor children, unmarried children of full age, provided that they live in the same household as the privileged member of the mission and are economically dependent on him or her.[19] Belgium accepts, in addition to the core categories, unmarried daughters of full age living with the privileged parent.[20] In the case of *A v State Secretary for Justice*[21] a Netherlands court reviewed a determination by the State Secretary for Justice that an

[15] *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States*, Introduction; Lee (1991) p 32; Brown (1988) at pp 65–6 (text of US Note); 2010 DUSPIL 436 (acceptance of resident unmarried daughter).

[16] Note State Department of 4 November in 2009 DUSPIL 375; *Washington Blade*, 8 January 2010; information from State Department.

[17] District Court for Eastern District of Virginia No 03-CR-158, 356 F 3d 564, noted in 2003 DUSPIL 573. The decision was confirmed on appeal: 356 F 3d 564 (4th Cir 2004), noted in 2004 DUSPIL 534.

[18] *The Times*, 23 September 1997.

[19] Richtsteig (1994).

[20] Salmon (1994) para 506.

[21] District Court of The Hague, RV (2000) No 25, noted in 2002 NYIL 342.

adult daughter of a diplomatic official in the Consulate of Morocco who had not come to The Netherlands along with her parents but had initially remained behind with her grandmother in order to complete her studies was not a dependent so as to qualify for privileged entry status as a member of the family forming part of the household. The court held that there was no condition in the Vienna Conventions on Diplomatic or on Consular Relations that to be accepted as dependent a child must accompany her parents to the receiving State at the outset of an appointment and granted a stay of the proposed deportation.

Gainful occupation by members of the family

It has already been noted in the context of the Commentary on Article 31.1(c) that members of the family of a diplomatic agent (as well as junior mission staff and their families) are not within the scope of the prohibition in Article 42 of the Convention on practice *by a diplomatic agent* of any professional or commercial activity for personal profit. Paid employment outside the mission or provision of services for remuneration is, however, by the terms of Article 31.1(c) clearly excluded from the family member's entitlement to immunity from civil and administrative jurisdiction. Article 34(d) also provides an exception from the general tax exemption in regard to private profit-making activities in the receiving State, and this exception clearly applies to income of a member of the family of a diplomatic agent arising from his or her employment or provision of services in the receiving State. As a matter of law these provisions remove the argument, as between Parties to the Convention, that spouses or other members of the families of members of diplomatic missions may not be given leave to work in the receiving State because their status would preclude suit against them or provide them with unfair tax advantages. There are, however, in some States other obstacles to family members working, which may be cultural, political, procedural, or concerned with protection of employment opportunities for local nationals. An increasing number of States have therefore found it useful, in order to widen job opportunities for the families of their diplomatic staff abroad and to avoid bureaucratic obstacles to their securing work permits, to conclude special bilateral agreements. These agreements generally provide for permission on a reciprocal basis for family members to carry on remunerated activities in the receiving State subject to some safeguards, they set out a procedural framework for authorization, emphasize that there is no exemption from the need to comply with requirements on professional qualifications, and usually they also contain specific exclusions of immunity and of tax privileges.

The Council of Europe in 1987 drew up a model agreement to enable members of the family forming part of the household of a member of a diplomatic mission or consular post to engage in a gainful occupation.[22] The covering Recommendation of the Committee of Ministers noted 'the difficulties encountered in many states by members of the family forming part of the household of a member of a diplomatic mission or consular post who wish to engage in a gainful occupation'. The model agreement requires members of the family of a member of a diplomatic mission or consular post of the sending State to

[22] Recommendation No R(87)2 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 and Explanatory Memorandum.

be authorized, on a reciprocal basis, to engage in a gainful occupation in the receiving State in accordance with its laws. Requests for authorization are to be sent to the Ministry of Foreign Affairs of the receiving State, and requirements on work permits and similar formalities are to be favourably applied. For members of the family entitled to immunity from civil and administrative jurisdiction 'such immunity shall not apply in respect of any act carried out in the course of the gainful occupation and falling within the civil or administrative law of the receiving State'. This formula may be regarded as being for the avoidance of any doubt or argument as to the scope or application of Article 31.1(c). Where the family member has immunity from criminal jurisdiction there are two alternatives. Under the first, the sending State 'shall give serious consideration to waiving the immunity of the member of the family concerned from the criminal jurisdiction of the receiving State'. Under the second alternative, 'the sending state shall waive the immunity of the member of the family concerned from the criminal jurisdiction of the receiving state in respect of any act carried out in the course of the gainful occupation save in special instances when the sending state considers that such a waiver could be contrary to its interests'. A further provision requires the sending State to 'give serious consideration to waiving the immunity of the member of the family from the execution of a sentence'. The agreement finally provides that: 'In accordance with the Vienna Convention . . . members of the family shall be subject to the fiscal and social security regimes of the receiving state for all matters connected with their gainful occupation in that state.' Nationals of the receiving State are excluded from the agreement.

The Explanatory Memorandum says that although the definition of 'member of the family' covers only the spouse and minor child forming part of the household (including adopted and stepchildren), States may extend this by including, for example, a *de facto* spouse or older dependent children. An agreement closely based on the Council of Europe model was concluded in 1990 between the United Kingdom and Zambia.[23] On criminal jurisdiction, this agreement contained the first of the two alternatives described in the previous paragraph, and it contained nothing about waiver of immunity from execution of a sentence.

A much less desirable form of agreement was concluded by Exchange of Notes in 1987 between the United Kingdom and Brazil.[24] This reads, in part:

> 6. Immunity from civil and administrative jurisdiction relating to all matters stemming from employment will be suspended irrevocably in respect of those dependants who exercise remunerated activity within the terms of this Agreement.
>
> 7. The dependants who exercise remunerated activity within the terms of this Agreement will cease to be exempt from tax and social security obligations stemming from the above mentioned activity. They will in consequence become subject to the relevant legislation which is applicable to physical persons resident or domiciled in the receiving State.

The implications of this formula are that in the absence of the agreement the family members authorized to work would be entitled to immunity in regard to acts and omissions during their work and exempt from tax on remuneration deriving from it. Such implications are inconsistent with Articles 31 and 34 of the Vienna Convention, and could be damaging to family members seeking authority to work in receiving States which

[23] Material provisions in 1990 BYIL 533.
[24] UKTS No. 4 (1991), Cm 1397.

are not party to special agreements of this kind. Presumably for this reason no similar agreement has since been concluded by the United Kingdom.

Other European States have since the adoption of the Council of Europe model concluded numerous bilateral agreements. The Netherlands in the guidance issued to staff of foreign missions states categorically that persons forming part of the household of staff members of diplomatic missions are not permitted to engage in gainful employment in The Netherlands with certain exceptions—where there is an entitlement under European Union law and where The Netherlands has concluded an agreement or memorandum of understanding with the diplomat's State of origin, for example, with Chile, Argentina, the Czech Republic, Australia, and Brazil.[25] Spain has concluded agreements with Venezuela, Peru, and Chile.[26]

Canada starts from the opposite position from The Netherlands—its Guidelines on Employment of Family Members of Foreign Representatives states that 'It is the goal of the Government of Canada to make every reasonable effort to extend facilities to spouses and children of accredited foreign representatives interested in accessing the local labour market'—a commitment met through reciprocal employment agreements and arrangements and by efforts to ensure that their application respects reciprocity and fairness.[27]

The United States has also concluded agreements with the same object. Following establishment of a formal procedure for granting of authority to members of diplomatic families to take up or continue employment in the United States, authority was given to the Secretary of State to conclude bilateral agreements to permit employment of dependants of members of US diplomatic missions and other government employees abroad. The State Department drew up a model agreement, and by June 1997 the United States had work agreements with sixty-six other States, although some of these were limited, for example, in the number of family members permitted to work or the employment fields permitted.[28] By February 2007, after a Global Employment Strategy was drawn up, the United States had enlarged its network of agreements to 100 and there were also informal work arrangements with a further forty-eight States.[29] Informal arrangements apply where a State has issued an employment permit to a family member of a US mission employee and so established a precedent for reciprocity.

The agreement concluded by Exchange of Notes with Sweden in 1981[30] reads, in part:

> In the case of dependents who obtain employment under this Agreement and who enjoy immunity from jurisdiction of the receiving State in accordance with the Vienna Convention on Diplomatic Relations, or under any other applicable international agreement, the sending State agrees to waive irrevocably such immunity with respect to civil and administrative jurisdiction relating to all matters arising out of the employment. Such dependents shall also be obliged to pay income taxes imposed by the receiving State on any remuneration received as a result of their employment.

[25] Guidance at www.government.nl/issues/staff-of-foreign-missions-and-international-organisations; 1998 NYIL 203.

[26] 1999–2000 SYIL 191; 2003 SYIL 196. Israel also has a restrictive attitude in the absence of a bilateral agreement, but permits employment of family members in the relevant mission: Being a Diplomat in Israel 4.6.3.

[27] Guidelines at www.international.gc.ca/protocol-protocole/policies-politiques/employment-emploi.aspx?lang=eng.

[28] Department of State Family Liaison Office Direct Communication Project, Paper No 2.

[29] 2004 DUSPIL 560. A full list of countries with formal agreements or informal arrangements with the United States is available at www.state.gov/m/dghr/flo/c4338.htm.

[30] TIAS 10291.

This formula is open to the same criticism as that offered above in respect of the United Kingdom–Brazil Agreement. The most satisfactory formula from the wider point of view is that contained in the 1981 arrangement between the United States and the United Kingdom.[31] This provides:

> Concerning the question of waiver of immunity from the civil and administrative jurisdiction of the receiving State with respect to all matters arising out of such employment, Her Britannic Majesty's Embassy notes that in accordance with the provisions of Articles 31(1)(c) and 37(1) and (2) of the Vienna Convention on Diplomatic Relations, such immunity does not exist.

There is no arrangement in regard to waiver of any immunity from criminal jurisdiction, and no provision on taxation, which is therefore dealt with under Article 34 of the Vienna Convention and the relevant Double Taxation Convention. More recent agreements concluded by the United States follow this acceptable pattern. In an Agreement with the Government of Sierra Leone in 1996, for example, the two Governments:

> confirm their understanding that dependents who obtain employment under this Agreement and who have immunity from the jurisdiction of the Receiving State in accordance with the Vienna Conventions... have no immunity from civil or administrative jurisdiction with respect to matters arising out of such employment. Such dependents are also responsible for payment of Income and Social Security Taxes on any remuneration received as a result of employment in the Receiving State. Dependents continue to enjoy all other privileges and immunities to which they are entitled.[32]

[31] TIAS 9971.
[32] Text of Exchange of Notes supplied by State Department. See also 1981–8 DUSPIL 1016–19.

JUNIOR STAFF OF THE MISSION AND PRIVATE SERVANTS

Article 37

...

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Background

The question of the extent of privileges and immunities to be accorded to subordinate staff of the mission and to private servants of members of the mission was among all questions of diplomatic law the one on which previous state practice was most inconsistent. But since administrative, technical, and service staff and private servants not only constitute the larger portion of the total of persons connected with a diplomatic mission but are also more likely to neglect their obligations or to commit offences in the receiving State, since they are less restrained by the professional traditions and discipline of a diplomatic service, the absence of a uniform rule caused a great deal of uncertainty and friction.[1]

Some States gave full privileges and immunities to all members of the staff of the mission. In the United Kingdom the Diplomatic Privileges Act 1708[2] was interpreted to give immunities to all members of the mission and to the private servants of the

[1] The earliest analysis of the problem was by Zouche (1657) ch XIV.
[2] 7 Anne c 12. See Gutteridge (1957).

ambassador only. When the Act was passed it was unusual for more than one person other than the ambassador to be carrying out genuinely diplomatic functions in a mission, but later the words 'domestic or domestic servant' were given a very extensive construction.[3] Only by the Diplomatic Immunities Restriction Act 1955[4] was there a substantial limitation, on a basis of reciprocity, of the classes of mission staff and private servants entitled to full immunities. The United States, Germany, and Belgium also followed this very generous approach.[5]

At the other extreme, some States gave only immunity in respect of official acts to administrative and technical staff and nothing to any others.[6] Most States took positions somewhere in between. In many States local nationals or residents were excluded from immunities, and this had the effect that many servants and junior employees were excluded, even if the receiving State did not distinguish on the basis of rank within the mission.[7] There was no general division between diplomatic staff and administrative and technical staff—until the twentieth century the secretary to the ambassador would perform duties which would range from the advisory to the clerical copying of dispatches. Nor was there a division between the categories now styled administrative and technical staff and service staff.

Negotiating history

The draft submitted by the Rapporteur to the International Law Commission provided for all members of the mission to enjoy the full range of privileges and immunities accorded to a diplomatic agent.[8] But it soon became apparent that there was no general support for such an extensive grant of privileges and immunities. Some members of the Commission favoured limiting the maximum scale on a basis of reciprocity, others suggested a minimum of immunity for official acts with permitted extension on the basis of bilateral agreements, while others again favoured an attempt to establish general rules as a 'step towards the progressive development of international law'. Once it was decided—by a rather narrow majority—to draw a distinction between administrative and technical staff and service staff, the Commission quickly agreed that administrative and technical staff should enjoy the same privileges and immunities as diplomatic staff. It was accepted that many of them did responsible work and had access to important secrets, and that an ad hoc approach examining the exact duties of each officer would give rise to endless arguments and confusion. The Commission also proposed that families of administrative and technical staff should have full privileges and immunities. Service staff on the other hand were to receive only immunity in regard to acts performed in the course of their duties and tax exemption in regard to their official emoluments. Private

[3] See *Triquet v Bath* [1764] 3 Burr 1478; *Assurantie Compagnie Excelsior v Smith* 40 Times Law Reports 105; AD 1923–4 No 173; McNair (1956) vol I pp 199–200.

[4] 4 Eliz 2 c 21.

[5] *Carrera v Carrera* 1949 AD No 99; Deak, American International Law Cases vol 9 p 162; Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933) vol I p 563; Salmon (1994) para 516.

[6] eg France, Egypt, Chile: see *Pacey v Barroso* 1927–8 AD No 250.

[7] Harvard Research, 26 AJIL (1932 Supp) 118–21; Denza (2007) at pp 158–61; UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations'), *passim*.

[8] UN Doc A/CN 4/91 Art 24.

servants of members of the mission would receive only tax exemption for the emoluments of their employment.[9]

The Commission debated the question again in 1958 but decided, again by majority vote, to retain the 1957 text. Members were, however, aware that several States were opposed to a provision which was more generous than current practice to administrative and technical staff, and it was suggested that a possible compromise position might be to withhold from such staff certain privileges, in particular full customs privileges.[10]

At the Vienna Conference the Commission proposals on service staff and private servants were accepted almost without discussion or change. The treatment to be accorded to administrative and technical staff, however, was one of the most controversial issues of the negotiation. Many delegates could accept the Commission's proposal, and they justified it as a progressive development of international law which was in accordance with the needs of the mission as a whole. The representative of Romania said it had been clearly recognized that the duties of administrative and technical staff in modern times differed greatly from those of similar staff a century ago. Many non-diplomatic members of the mission had access to secret information, and the sending State must be assured that they would be protected from possible action by the authorities of the receiving State which might endanger their personal safety, in an attempt to make them divulge secrets. A cipher clerk might, for example, be arrested on a charge not directly connected with his official work. Other delegations, however, argued that a more realistic approach was needed to the various functions of the administrative and technical staff, and that the needs of States would be met by according them only immunity for official acts while permitting more favourable treatment to be extended on a basis of reciprocity. The representative of Pakistan said that:

> It would seem idealistic and even imprudent, however, to suggest that the standards and requirements of an ambassador and his doorman were identical, although in some cases that might well be true... It has in the past been normal to extend both privileges and immunities to recognised diplomats not only by reason of their functional capacity, but because it was presumed that they knew by education, experience or training what their responsibilities were, not only to their own country, but also to the receiving State. It would however be undesirable to extend diplomatic privileges too far; there had been many cases in his own country in which they had been flagrantly abused.[11]

The strongest attack was made against the proposal that administrative and technical staff should enjoy full customs privileges throughout their stay in the receiving State. The Committee of the Whole eventually adopted a Canadian amendment under which customs privileges were limited to articles imported at the time of first arrival, but otherwise administrative and technical staff retained in the text submitted by the Committee of the Whole entitlement to the full range of diplomatic privileges and immunities as proposed by the International Law Commission.[12]

In plenary session of the Conference two amendments were put forward to the text prepared by the Committee of the Whole. Libya, Morocco, and Tunisia proposed that diplomatic privileges and immunities should be accorded only to administrative and

[9] *ILC Yearbook* 1957 vol I pp 123–4, 127–34, 137–40; vol II pp 140–1.
[10] *ILC Yearbook* 1958 vol I pp 161–6; vol II pp 101–2.
[11] UN Doc A/Conf. 20/14 p 197.
[12] UN Docs A/Conf. 20/L 258/Rev. 1; A/Conf. 20/14 pp 198–9.

technical staff performing confidential duties, and only 'to the extent of the reasonable needs of the mission'. Other administrative and technical staff would receive the privileges and immunities given to service staff, but with the addition of first arrival customs privileges. A nineteen-nation amendment proposed to limit immunity of administrative and technical staff to their official acts.[13] In a long and heated discussion both these amendments were strongly criticized, and neither could gather the necessary two-thirds majority needed for adoption. It seemed possible that the Conference might fail altogether to agree on rules for administrative and technical staff, which would have been a significant gap in the comprehensive code set out in the Convention. The omission would have left the treatment of the immunities of administrative and technical staff to customary international law—which was interpreted differently in many States. At this point the United Kingdom, which had until then supported the Commission's text, proposed a compromise amendment under which administrative and technical staff would be given full immunity from criminal jurisdiction, but their immunity from civil jurisdiction would not extend to acts performed outside the course of their duties. This compromise failed on a first vote to obtain the necessary two-thirds majority, but after acceptance by the United Kingdom of a reference to 'administrative' as well as civil jurisdiction and a deferment during which greater support for the revised amendment was marshalled, the necessary majority was narrowly achieved—in the final Plenary session of the Conference.[14]

Reservations

Four States—Egypt, Morocco, Cambodia, and Qatar—have made reservations to Article 37.2 which remain in effect. Egypt and Morocco were, of course, strong opponents at the Vienna Conference of such extensive immunities for administrative and technical staff. Two other States made reservations which have been withdrawn, and a number of others stated on ratification that they would apply Article 37.2 only on the basis of reciprocity.[15] Such statements do not modify the legal position as between Contracting Parties to the Convention, but emphasize the fact that the State concerned regards the provision as going beyond pre-existing customary international law. The States making reservations did not make clear what regime they intended to apply to administrative and technical staff, but one may assume from the records of the Conference that they would apply to them the more limited privileges and immunities given under Article 37.3 of the Convention to service staff.

A substantial number of States in their own instruments of ratification or accession, or subsequently, objected to the reservations. Some of the objecting States said that they did not regard the reservations as valid and a few said that they regarded them as incompatible with the object and purpose of the Convention—which probably amounted to the same thing. Many of the objecting States expressly said that their objections should not be regarded as precluding the Convention from entering into force as between themselves and

[13] A/Conf. 20/L 9/Rev. 1; L 13 and Add. 1; A/Conf. 20/14 pp 31–7.

[14] UN Docs A/Conf. 20/L 20; L 21 and Add. 2; A/Conf. 20/14 pp 39–41. For a vivid account of the negotiations see Bruns (2014) pp 143–50.

[15] For full texts of reservations and objections to them see Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1996, 51/LEG/SER E/15.

the reserving States. The remaining objecting States appear to have applied the Convention regime without exception in regard to the reserving States, and so may be taken as having the same position. The Netherlands stated that it did not accept the reservations to Article 37.2, and that it took 'the view that these provisions remain in force in relations between it and the said States in accordance with international customary law'.

Provided that, as is suggested above, the intended effect of the reservations is that the reserving States will extend to administrative and technical staff only the treatment provided under Article 37.3 for service staff, it is difficult to sustain the view that they are in fact incompatible with the object and purpose of the Convention. It is true that a uniform regime was an important objective of the negotiations and remains an important objective of the Convention, but the Convention itself in Article 47 allows some scope for more or less favourable treatment on a basis of reciprocity. It is clear from study of earlier state practice and from the history of the negotiations that by giving almost the full range of diplomatic privileges and immunities to administrative and technical staff the Conference was carrying out 'progressive development' rather than codification of the previous customary international law, and that a substantial number of States were not ready to accept this particular development. There is no provision in the Convention in regard to reservations, so that they are neither authorized nor expressly prohibited. On this basis, by applying the provisions of Articles 19 to 21 of the 1969 Vienna Convention on the Law of Treaties[16]—persuasive, though not binding authority for the earlier Vienna Convention on Diplomatic Relations—one may conclude that these remaining reservations are not prohibited, that they did not generally preclude entry into force of the Convention and that for those Parties which raised no objection they modify on a reciprocal basis the application of Article 37.2. As regards those Parties which did object, none of whom opposed the entry into force of the Convention, the formal legal position is that Article 37.2 is severed, and does not apply as between reserving and objecting States. But since under customary international law administrative and technical staff must be given at least the level of treatment given under the Convention to service staff, the effect is probably the same as if the reservation had been established with regard to the objecting States.

The objections have, however, served a useful purpose in confirming the continuing importance attached to a uniform regime based on the provisions of the Convention. As noted above, two States have withdrawn their original reservations to Article 37.2 and others may have been deterred from lodging similar reservations by fear of the uncertainty which would result.

It may well be that in these few States Parties with outstanding reservations regarding Article 37.2, administrative and technical staff of foreign missions are in fact being accorded the Vienna Convention standard of privileges and immunities on a basis of reciprocity. There is no indication that application of any of the reservations is leading to reciprocal retaliation from other States. The United Kingdom, for example, in legislating to give effect to the Vienna Convention took power in section 3(1) of the Diplomatic Privileges Act 1964[17] to withdraw privileges and immunities from missions in London and from persons connected with them where it appeared that the privileges and immunities accorded to a UK mission in another State were less than those prescribed by the Convention. It has never been found necessary to make use of this power in

[16] Cmnd 4818; 1969 AJIL 875. See also analysis in 1976 BYIL 79.
[17] C 81.

relation to any other Party to the Convention. Orders restricting immunity which were originally made under the Diplomatic Immunities Restriction Act 1955[18] were retained in force, but as each of the States concerned became party to the Vienna Convention and gave assurances that its provisions would be applied without modification the relevant Order was revoked. Since 1972, with the revocation of the last of these Orders, all diplomatic missions in the United Kingdom (including missions of those few States not Parties) have received treatment at least as favourable as that prescribed by the Vienna Convention.

Restrictive and more favourable application of the provisions of the Convention is discussed more fully in the context of Article 47.

Limited immunity given to administrative and technical staff

Administrative and technical staff are under the Vienna Convention regime given full immunity from criminal jurisdiction, as well as inviolability for their person, residence, and property, which should ensure that they cannot be physically harassed or intimidated by charges of any kind. In *Re DK*[19] in 1978, for example, the Supreme Court of Austria quashed the conviction and fine of a member of the administrative and technical staff of the Yugoslav Embassy in Vienna for negligently causing personal injury in a road accident to the driver of a moped. The limitation on the immunity of such mission staff from civil and administrative jurisdiction of the receiving State relates to acts 'performed outside the course of their duties'. It must be emphasized that this is a lesser limitation than that which applies to a diplomatic agent who is a national or permanent resident of the receiving State and who is entitled to immunity only 'in respect of official acts performed in the exercise of his functions'. Administrative and technical staff enjoy immunity for acts performed during the working day which are reasonably incidental to employment with the diplomatic mission—for example, driving to an official appointment or giving instructions for delivery of equipment to mission premises. 'Official acts performed in the exercise of his functions', on the other hand would include only acts performed on behalf of the sending State.[20] Administrative and technical staff may, however, be sued in regard to personal obligations, such as repayment of a loan or the price of goods supplied. Any judgment cannot be enforced, since there is no specific exception provided in Article 31.3 and the residence and property of the member of the administrative and technical staff remain inviolable, but failure to honour a judgment would probably be regarded as a reason to declare the individual not acceptable under Article 9 of the Convention.

In the case of *Empson v Smith*,[21] already discussed in the context of Article 31 above, the defendant, a member of the administrative and technical staff of the High Commission of Canada in London, was sued for breach of a tenancy agreement. The Court of Appeal were mainly concerned with the question whether the action—which had been begun when the defendant was entitled to full immunity from civil jurisdiction—could be maintained given that before it was struck out the defendant lost his full immunity by the coming into force of the Diplomatic Privileges Act 1964, but they also said that it was

[18] 4 & 5 Eliz 2 c 21.
[19] 77 ILR 467.
[20] Satow (6th edn 2009) para 10.7.
[21] [1966] 1 QB 426, [1965] 2 All ER 881; 41 ILR 407.

arguable that acts done in relation to a tenancy of a private residence were performed 'outside the course of his duties' and this issue was remitted to the lower court for determination on the evidence. As to the evidence which would be needed, it is likely that evidence from the sending State or its head of mission would carry great weight on the question of whether a given act was performed in the course of the duties of a member of its mission. Only the sending State and the head of the mission would be in a position to state what the duties of individual members of its mission were, and rejection of such evidence would be likely to cause offence to the sending State.[22] The interpretation of the phrase is, however, a matter of law for the relevant national court.

The Family Division of the English High Court in the case of *Re B (Care Proceedings: Diplomatic Immunity)*[23]—considered above in the context of Article 30—had to determine whether they could continue an interim care order in respect of the thirteen-year-old child of a member of the administrative and technical staff of a foreign mission who was found to have suffered serious non-accidental injuries consistent with repeated and severe hitting. The father and his family were accepted as having no immunity from care proceedings, which were civil proceedings, provided that they related to acts performed outside the course of the duties of the father (who was employed as a driver with the mission). It was not suggested that the beating and bruising of the child came within the scope of the duties of the father, and on this basis the court found that the father, the mother, and the child had no immunity from family proceedings and so continued the interim care order.

Limited customs privileges of administrative and technical staff

While diplomatic staff of the mission and their families enjoy customs privileges throughout their tour of duty and can on the basis of this 'continuing customs franchise' import free of duty supplies of wine, spirits, and tobacco and other luxury goods, Article 37.2 limits administrative and technical staff to 'first arrival privileges'. Article 37.2 must be read in conjunction with Article 36, which makes clear that the receiving State may adopt laws and regulations which prescribe procedures for securing exemption from duty or for controlling abuse of privileges. In this context, all States impose some time limit for import of 'articles imported at the time of first installation', though the period may vary between three and twelve months after the relevant member of a diplomatic mission takes up his position. Most States will allow the period to be extended if there is an unexpected delay in the arrival of household or personal effects. The United Kingdom expects articles to be in the ownership or possession of the entitled member of the mission, or at least to have been ordered by him before he arrives.

Service staff

The service staff of the mission—defined in Article 1 of the Convention as members of the mission in the domestic service of the mission—include embassy drivers, cooks, gardeners, door-keepers, and cleaners. They are employed by the sending State, which

[22] See debate on Second Reading of Diplomatic Privileges Act in Hansard HC Debs vol 697 cols 1363–4; Hardy (1968) pp 64–7.

[23] [2002] EWHC 1751 (Fam), [2003]1 FLR 241.

distinguishes them from 'private servants' who are employed by individual members of the mission and are not themselves members of the mission. Under Article 37.3 service staff are entitled to civil or criminal immunity only 'in respect of acts performed in the course of their duties', exemption from tax on the wages they receive for their job, and exemption from social security provisions. If they are local nationals or permanent residents they receive no privileges or immunities.

The Court of Appeal of Brussels in the case of *Ministère Public and Republic of Mali v Keita*,[24] in 1977, had to determine whether the murder of the Ambassador of Mali by a chauffeur who was a member of the service staff of the embassy was an act performed in the course of his duties. It was agreed that the crime was committed 'during his hours of service, whilst on the premises of the Embassy and at the disposal of the legation'. But the court found that the act occurred during a personal dispute between Keita and the ambassador. They held that the immunity from jurisdiction of service staff covers only:

> those acts which are a natural consequence of those duties or are performed in the actual exercise of those duties... The act of homicide committed by the accused bears no relation to the duties which he exercised. It was committed neither within the framework nor in the interests of the task entrusted to him of acting as an embassy chauffeur. It was rather the ultimate expression of a personal feud which was privately motivated.

An embassy chauffeur may on the other hand rely on his immunity when charged with the offence of driving under the influence of drink. The Netherlands Supreme Court so held in 1975 in the case of *Public Prosecutor v A di SF*,[25] concluding 'that, further, driving a car may occur in the performance of the duties of a servant, in which case acts contrary to road traffic provisions are committed in the performance of such duties'.

Private servants

Private servants employed by members of the mission and who are nationals or permanent residents of the receiving State receive no privileges or immunities. If they are not within either category they receive only two privileges—and these should properly be regarded as privileges of their employer. First, they are exempt from tax on the wages they receive for their employment. Secondly, they are by virtue of Article 33.2 of the Convention exempt from the social security provisions of the receiving State, on condition that they are covered by the social security provisions of the sending State or a third State. This is to the advantage of the employing member of the mission in that he does not have to master the details of the tax and social security laws of each State to which he may be posted during his diplomatic career. The private servant who is exempt in the receiving State will usually be liable to tax in the sending State.[26]

Article 37.4 also provides for local jurisdiction over private servants to be exercised 'so as not to interfere unduly with the performance of the functions of the mission'. How this is carried out is a matter of administrative discretion and would affect only such matters as the timing of a judicial hearing, deferral of a summons for jury service or of the deportation of an illegal immigrant. Some other provisions of the Convention, such as

[24] 1977 Journal des Tribunaux 678; 77 ILR 410.
[25] 1976 NYIL 338.
[26] Satow (6th edn 2009) para 10.12.

the prohibition on service of process on premises of the mission or on execution in the private residence of a diplomat, may, of course, impose legal obstacles even though these immunities are not intended directly to benefit private servants of members of a mission.

Article 37.4 allows the receiving State to extend more generous immunities and privileges to the private servants of members of diplomatic missions. The Supreme Court of Austria examined this provision in 1971 in the *Private Servant of Diplomat Case.*[27] Two children brought affiliation and maintenance proceedings against the defendant as their natural father. The defendant was the private servant of a diplomat at the Greek Embassy in Vienna. The appellate court held that two Imperial Decrees of 1834 and 1839 remained in force and constituted exceptional treatment as permitted under Article 37.4. The Supreme Court, however, reversed this finding. They held that a Law of 1919 had limited immunity to those persons who were entitled under public international law, and that in 1919 there was no rule of international law requiring immunity to be granted to private servants of diplomats. The Supreme Court commented: 'It is obvious that Article 37.4 of the Vienna Convention starts from the assumption that neither uniform practice nor unanimous *opinio iuris* exist so far as privileges granted to private servants are concerned. This is precisely the reason for making the reservation in the case of a State granting wider immunities to those persons.' The decision of the Vienna Conference not to grant immunities to private servants was 'obviously based on the view that there is a lack of functional necessity as far as these persons are concerned'.

[27] 71 ILR 546.

NATIONALS AND PERMANENT RESIDENTS OF THE RECEIVING STATE

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Background

State practice, and the views of seventeenth and eighteenth century writers on diplomatic law, differed on the question whether a diplomatic agent or other member of the mission who was a national of the receiving State should be entitled to privileges and immunities. Bynkershoek, as a logical consequence of his theory that the basis of immunities was a general understanding that the ambassador should remain subject to the jurisdiction of his own prince, maintained strongly that there was no justification for allowing immunity to the ambassador who was a national of the receiving State.[1] Vattel on the other hand assumed that any ambassador would be immune from the jurisdiction of the receiving State in matters relating to his mission. As regards other matters, he took the view that whether the ambassador was immune depended on whether he was a 'subject' of the State to which he was sent. If the receiving State accepted him as an envoy without either a specific reservation or a general provision in its laws denying privileges and immunities to its own nationals, then it was to be presumed that he became independent of the receiving State for the duration of his mission. This presumption of independence could however be rebutted if the ambassador engaged in trading in the receiving State.[2] The writer and diplomat Wicquefort was a Dutch national acting as representative of the Duke of Lüneburg to Holland when he was imprisoned and his property was confiscated. It is not surprising that in his later book *L'ambassadeur* he strongly advocated the independence from local jurisdiction of a diplomat who was a national of the receiving sovereign.[3] It is perhaps easier to reconcile these apparently conflicting views by recollecting that nationality did not at that period have the precise meaning later given to it and that a change of allegiance could be effected without the formalities which would be necessary under twentieth-century laws.

[1] (1721) ch XI.
[2] (1758) IV.VIII para 112; cp Genet (1931) vol I pp 577–9.
[3] (1681) Book I s 11. See Satow (5th edn 1979) para 17.13.

The rule expounded by Vattel was followed much later in England in the case of *Macartney v Garbutt*,[4] where the court held that a member of a mission was not disqualified from entitlement to immunity under the Diplomatic Privileges Act 1708 unless at the time of his reception it had been made a condition that he should not be entitled to privileges and immunities. By the Diplomatic Immunities (Commonwealth Countries and the Republic of Ireland) Act 1952[5] and the Diplomatic Immunities Restriction Act 1955,[6] however, UK nationals in diplomatic missions were deprived of immunities. Many other States also provided in their law that their own nationals should not be entitled to privileges and immunities, or at least that they should not be accorded tax privileges.[7] It was, however, relatively rare for nationals of the receiving State to be appointed as diplomatic agents of some other State without specific agreement as to their privileges and immunities. There is no evidence that civil or criminal proceedings were ever brought against such persons in respect of their official acts—this would have been regarded as a breach of sovereign immunity.

Negotiating history

In the International Law Commission opinions were sharply divided between members who held that in the case of a national of the receiving State all privileges and immunities should be subject to the express grant of the receiving State and other members who believed that more extensive immunities were necessary to enable such a diplomatic agent properly to perform his duties for the sending State. The final text represented a compromise, specifying the absolute minimum of inviolability and immunity in regard to official acts which must be conferred on a diplomatic agent to enable him to carry out his functions on behalf of the sending sovereign. Other privileges and immunities were to be left entirely to the discretion of the receiving State. The 1958 draft articles spelt out more clearly the implication of the 1957 draft that subordinate staff of the mission who were nationals of the receiving State—who would be unlikely to be acting officially on behalf of the sending sovereign so as to benefit from sovereign immunity—would receive privileges and immunities only at the discretion of the receiving State.[8]

At the Vienna Conference the compromise elaborated by the International Law Commission proved to be acceptable to delegations. Even those delegations which were opposed in principle to nationals of the receiving State being appointed as diplomatic agents by another State accepted that if this possibility was to be permitted, a minimum of inviolability and immunity for official acts of such persons must follow as a logical consequence. The text was redrafted to make it clear beyond doubt that for a diplomatic agent who was a national of the receiving State inviolability as well as immunity from

[4] [1890] 24 QBD 368.

[5] 15 & 16 Geo 6 & 1 Eliz 2 c 18 (s 1).

[6] 4 Eliz 2 c 21 (s 2).

[7] Decree of States-General of United Provinces of Belgium and Holland of 19 June 1681, cited in Vattel (1758) IV.VIII para 112; Argentina: UN Laws and Regulations pp 3, 4; Canada: ibid p 58; Colombia: ibid p 65; Denmark: ibid p 98; Finland: ibid pp 114–17; Germany: ibid pp 126–7; New Zealand: ibid p 218; Philippines: ibid p 236; Sweden: ibid pp 295–7; Switzerland: ibid p 324; South Africa: ibid p 332; United States: ibid all tax legislation. See also *In Re di Sorbello (Marchese)* 1941–2 AD No 108; *Public Prosecutor v Sluys* 1957 AD p 529; Resolution of Institute of International Law 1895, Art 2 in 26 AJIL (1932 Supp) 162.

[8] *ILC Yearbook* 1957 vol I pp 98–108, 124–7; vol II pp 141–2; 1958 vol I pp 168–72; vol II pp 102–3.

jurisdiction was limited to 'official acts performed in the exercise of his functions'. The scope of the Article was also extended by the Vienna Conference to cover persons permanently resident in the receiving State.[9]

Subsequent practice

In 1967, three years before France ratified the Vienna Convention, Article 38.1 was applied by the Court of Appeal of Paris in the case of *Querouil v Breton*[10] on the basis that the Convention 'is merely a codification of existing practice in international law, that it was signed by the Minister of Foreign Affairs in France, that it is applied by his Department and that as current practice it necessarily governs the position of diplomatic agents who, like Breton, possess the nationality of the receiving State'. A letter from the Protocol Department of the Ministry of Foreign Affairs was also taken as evidence of custom. The defendant, a French national serving as a diplomat in the Embassy of Chad, could therefore not raise immunity in respect of an action to repossess the flat which he had leased as his private residence.

In 2009, Hossein Rassam, an Iranian national acting as political analyst in the UK embassy in Iran, was detained and later charged and sentenced for espionage on the basis that he had on instructions observed the riots which followed elections which led to the re-inauguration of President Ahmadinejad. The UK Government and the EU complained of breach of assurances and of denial of his human rights, but made no claim of immunity. He was released after one year of imprisonment.[11]

'official acts performed in the exercise of his functions'

In the context of Article 37.2 above these words were contrasted with the words 'acts performed outside the course of their duties', and it was suggested there that 'official acts performed in the exercise of his functions' covered only acts performed on behalf of the sending State. A diplomatic agent who is a national or permanent resident of the receiving State would on that basis not be entitled to immunity from criminal proceedings in respect of a driving offence nor to immunity from civil jurisdiction in regard to claims arising from a motor accident even if he was at the time driving on official business. Junior mission staff given the nature of their work do not normally carry out official acts in the exercise of their functions. If they are nationals or permanent residents of the receiving State they are given no immunity—but if the court accepted evidence that the act in question was in fact an official act done on the instructions of the government of the sending State, the member of the diplomatic mission whatever his rank should be able as an agent of the sending State to rely on its sovereign immunity.[12]

The question whether the immunity of nationals and permanent residents is diplomatic immunity or, as suggested by Salmon, state immunity would be relevant if the act in question were performed on behalf of the sending State but before the individual was

[9] UN Docs A/Conf. 20/C 1/L 224, L 279, and L 246/Rev. 1; A/Conf. 20/14 pp 204–6.

[10] 70 ILR 388.

[11] *Telegraph*, 8 August 2009, EU Presidency Statement, 29 October 2009, *The Times*, 5 October 2010.

[12] Salmon (1994) para 420 suggests that in all those cases where a member of a mission is entitled to immunity only in respect of official acts performed in the exercise of his functions, this is really state immunity.

entitled to diplomatic immunity. The individual could, for example, be an agent or officer of the sending State not yet appointed to a diplomatic post or not yet notified to the receiving State at the time the act took place. If by the time of legal proceedings he was entitled to immunity for official acts performed in the exercise of his functions it could be argued that as his diplomatic functions had not begun at the time of the relevant act, he should not be given immunity for this act by virtue of a subsequent appointment. But if his immunity is correctly to be regarded as the immunity of an agent of the sending State, it would be immaterial that at the time of the act he was not yet exercising diplomatic functions and he should be treated as immune.

'additional privileges and immunities'

The United Kingdom in giving effect under national law to the Vienna Convention granted additional privileges and immunities to its own nationals in only one respect. Members of Commonwealth missions in London who were nationals of the United Kingdom as defined in section 2(2) of the Diplomatic Privileges Act 1964 and are also citizens of the sending Commonwealth State are treated as if they possessed only the citizenship of the sending State.[13] There were in 1964 considerable numbers of dual nationals in Commonwealth missions in London, and this concession in their case was a continuation of the legal position before the United Kingdom became a party to the Vienna Convention. This more favourable treatment of some members of Commonwealth missions in London may therefore be justified under Article 47.2(b) of the Convention as not amounting to discrimination because it is based on custom. The special treatment has been maintained—the implementing Order in Council was brought up to date in 1999 by adding more recent members of the Commonwealth.[14]

New Zealand under its Diplomatic Privileges and Immunities Act 1968[15] gave to administrative and technical staff and service staff of foreign missions who are citizens or permanent residents of New Zealand immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions. There appears, however, to be very little evidence that States are using the latitude given in Article 38 to grant additional privileges and immunities to their own nationals or permanent residents.

Avoiding undue interference with the functions of the mission

The obligation imposed on the receiving State to 'exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission' is identical to the obligation under Article 37.4 in regard to jurisdiction over private servants of members of the mission. In that context it was suggested that its

[13] The term 'national of the receiving State', pursuant to s 51(3)(a) of the British Nationality Act 1981 (c 61), now means British citizen, British Dependent Territories Citizen, British Overseas Citizen, or British National (Overseas). Provision for dual citizens in Commonwealth missions was made by the Diplomatic Privileges (Citizens of the United Kingdom and Colonies) Order 1964, SI 1964/2043 (Pt III s 2 p 5133), and by amending Orders.

[14] Diplomatic Privileges (British Nationality) Order 1999, SI 1999/670. For an account of the explanation of the amending Order given to Parliament, see 1999 BYIL 490.

[15] Public Act 1968 No 36, s 6.

application was a matter of administrative discretion which would affect such matters as the timing of a judicial hearing or deferral of a summons for jury service. The extent of the obligation under Article 38.2 was given very careful consideration in 1963 by the Ministry of Foreign Affairs of Switzerland in response to the question whether Swiss nationals could be integrated into the civil protection service. The obligations involved at most a three-day period of instruction at the outset with follow-up exercises each subsequent year lasting at most two days. In the event of war the obligations would be more onerous, but there had never been any question of exempting Swiss nationals working in foreign diplomatic missions from military service in the proper sense. The Ministry of Foreign Affairs advice concluded that in interpreting the last sentence of Article 38.2 it was necessary to balance the interests concerned and that having regard to the importance to national defence and the safety of the civilian population in wartime of a properly trained civil protection service, it would not be a violation of Article 38 to impose the necessary obligations on Swiss nationals working in foreign diplomatic missions.[16]

'permanently resident in the receiving State'

There is normally no difficulty in determining whether a member of a diplomatic mission is a national of the receiving State, since international law provides that subject to a few limitations this is a question to be determined by the municipal law of each State. But the meaning of the words 'permanently resident in the receiving State' is not clearly established in international law and its interpretation in the context of the Vienna Convention has given rise to considerable difficulty.

In a number of States there does exist a distinct status of 'permanent resident' which may give rise to certain rights to continuing stay in the territory or to apply to become a naturalized citizen. There was, however, little evidence of its being used widely as a justification for withholding privileges or immunities. Amendments intended to withdraw privileges and immunities from permanent residents as well as nationals of the receiving State were proposed at a late stage of the Vienna Conference by Australia and by Canada, but although they were accepted by the Conference there is no record of clarification of the term by either of the sponsors.[17] The Convention does not define the term and no power is given either to the sending or to the receiving State to determine unilaterally which members of a diplomatic mission are to be classed as permanently resident in the receiving State. Sending and receiving States must, therefore, for the purpose of administering privileges reach agreement on principles or procedures to be applied generally or at least on difficult cases as they arise.

The UK Government soon after becoming a party to the Convention in 1964 formed the view that the most satisfactory interpretation of the term depended on asking the question whether, but for his or her employment with the mission, the person concerned would choose to remain in the receiving State. At first there were differences with embassies in London over particular cases where the government authorities believed that a member of a mission claiming tax reliefs was permanently resident in the United Kingdom and so not entitled to diplomatic privileges. The greatest number of difficult

[16] 1966 ASDI 99.
[17] UN Docs A/Conf. 20/C 1/L 279 (Australia) and L 246 Rev. 1 (Canada); A/Conf. 20/14 pp 205–6.

cases involved women members of missions who were married to British husbands settled in the United Kingdom and who had been serving in the relevant mission in London for longer than the normal diplomatic or secretarial tour of up to five years. After a few years the Foreign and Commonwealth Office formulated general rules in the light of experience, and in January 1969 a Circular Note was sent to all diplomatic missions in London by the Secretary of State for Foreign and Commonwealth Affairs. The guidance was as follows:

When determining whether or not a particular member of your staff should be regarded as a permanent resident of the United Kingdom the test should normally be whether or not he would be in the United Kingdom but for the requirements of the sending State. In applying this test, I suggest that you should be guided by the following considerations:

(i) the intention of the individual: a person should be regarded as permanently resident in the United Kingdom unless he is going to return to his own country as soon as his appointment in the United Kingdom ends. It is suggested that points which may be relevant to this question include the links of the individual with the State which he claims as his home, e.g. payment of taxes, participation in social security schemes, ownership of immovable property, payment of return passage by the sending State.

(ii) the prospect of the individual being posted elsewhere as a career member of the service: he should be regarded as permanently resident in the United Kingdom if his appointment in the United Kingdom is likely to continue or has continued for more than five years, unless the Head of Mission states that the longer stay in the United Kingdom is a requirement of the sending State and not a result of personal considerations.

(iii) local recruitment of the individual: a person who is locally engaged is presumed to be permanently resident in the United Kingdom unless the Head of Mission concerned shows that he is going to return to his own country or to proceed to a third country immediately on the termination of his appointment in the United Kingdom; and

(iv) marital status of the individual: a woman member of the Mission who is married to a permanent resident of the United Kingdom is presumed to be herself permanently resident in the United Kingdom from the time of her marriage unless the Head of Mission shows that in addition to her satisfying the other criteria, there remains a real prospect in view of the special circumstances of her case that she will be posted as a normal career member of the service.

4. If a review in the light of this guidance leads Your Excellency to conclude that any of your staff should henceforward be regarded as permanent residents of the United Kingdom for the purposes of the Diplomatic Privileges Act, I suggest that any change of status should take effect from 1 April 1969 and would request that such cases be notified to this Office by that date. Thereafter it would be helpful if Your Excellency could arrange for prompt notification to this Office of any change in the residential status of members of your staff. Should a difference of opinion arise between a Mission and Her Majesty's Government as to whether an individual is permanently resident in the United Kingdom, I suggest that each side should inform the other of any relevant evidence which may be in their possession.

The guidance was to apply also to members of consular posts, and it was made clear that determinations of permanent residence in the context of the two Vienna Conventions would not affect the position of individuals under UK immigration laws. The rules cannot in themselves decide all difficult cases and it has sometimes been found necessary for consultations as envisaged in paragraph 4 of the Note to take place. But they have not been generally challenged either by criticism from the diplomatic corps in London or in the context of legal proceedings and the length of time during which they have been

applied has strengthened their claim to constitute a reasonable interpretation of permanent residence for the purposes of Article 38.

The status of the 1969 Circular was judicially considered for the first time in the United Kingdom in 2004 in the case of *Lutgarda Jimenez v Commissioners of Inland Revenue*.[18] Mrs Jimenez was employed as a locally engaged cook by the High Commission of Namibia in London in 1992 and claimed that she was entitled as a member of the service staff of the mission to tax relief under Article 37.3 on her earnings. Members of the service staff who are 'permanently resident in the receiving State' are, however, excluded from tax relief. Her claim was rejected by Special Commissioner John Walters QC mainly on the ground that her appointment as a member of the diplomatic mission of Namibia had never been notified to the Foreign and Commonwealth Office, and this aspect was considered above in the context of Article 10 of the Convention. It was also argued on behalf of Mrs Jimenez that she was not permanently resident in the United Kingdom because she had not acquired an English domicile of choice, but this approach to the interpretation of the term was rejected by the Special Commissioner. He maintained that he should in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties take into account 'any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation'. He noted that it was accepted by counsel for the parties that the provisions of the 1969 Circular had never been challenged by heads of mission in the United Kingdom and considered that on this basis it reflected customary international law which according to the Preamble to the Vienna Convention 'should continue to govern questions not expressly regulated by the provisions of the Convention'. The key test set out in the Circular was whether the person was resident for a purpose unconnected with the holding of the status of membership of the mission. Under the terms of the Circular Mrs Jimenez was to be regarded as permanently resident in the United Kingdom and so she was disqualified from tax exemption.

In Belgium the Tribunal de Travail of Brussels also emphasized the importance of local recruitment in holding in 1971 in the case of *Smith v Office National de l'Emploi*[19] that a British national locally engaged in 1962 to work for the British Embassy in Brussels was permanently resident in Belgium. The court held 'that the applicant has had his permanent residence in Belgium since 1959 and that he was recruited on the spot as an employee by the services of the Embassy and that he did not have the status of a career diplomatic or consular agent'.

In Canada the Legal Bureau of the Department of External Affairs in a memorandum of December 1976[20] gave the following advice on construction of 'permanently resident':

1) If a person living in Canada is considered by a Court to have changed his/her domicile of origin and acquired a domicile in Canada in common law (civil law) then *a fortiori* that person is permanently resident in Canada for the purpose of the Vienna Convention on Diplomatic Relations as he would be for the purpose of any federal or provincial statute that does not define precisely the term 'permanently resident'.
2) Even in the absence of acquisition of a domicile of choice in Canada, a person could be considered permanently resident in Canada for the purpose of the Vienna Convention on Diplomatic Relations if he meets certain criteria which could include an extended period of

[18] [2004] UK SPC 00419 (23 June 2004).
[19] 69 ILR 276.
[20] 1977 Can YIL 317.

residence in Canada, having acquired a particular status such as landed immigrant and other facts establishing a remoteness or unlikelihood (for physical, financial, familial, political reasons) to leave Canada in the foreseeable future.

Although it would be convenient to be able to formulate a clear-cut definition of the phrase 'permanently resident' in Article 38 of the Vienna Convention on Diplomatic Relations, it seems necessary to consider each case on its merits. We could not say that residence for five years in Canada, for instance, or the fact of holding (or surrendering) landed immigrant status would in itself be conclusive in each case. Acquisition of landed immigrant status may be persuasive evidence of permanent residence, but surrender of that status does not necessarily mean the end of permanent residence....

Australia in a Circular Note of February 1989 to all diplomatic missions stated its policy as follows:[21]

A member of a diplomatic mission or consular post who has remained in Australia for a period exceeding six years may be determined, in the terms of the Vienna Conventions on Diplomatic and Consular Relations, to be permanently resident in Australia unless the Head of the Diplomatic Mission or Consular Post can satisfy the Department of Foreign Affairs that it should be otherwise. In making such a determination, the Department of Foreign Affairs will take into consideration a number of factors. These factors include:

(a) whether the person took up residence in Australia and at the post for personal reasons or at the direction of the sending State;
(b) whether the person was recruited locally or overseas, and whether the sending State intends repatriating the officer at the termination of the posting or appointment, together with members of the family forming part of the household;
(c) the length of time the person has been in Australia, whether continuously or in aggregate periods;
(d) any intention the person has of making a home indefinitely in Australia, and any conduct or action consistent with that intention;
(e) whether the person is or has become married to an Australian citizen or a permanent resident of Australia; and
(f) the links the person has with Australia and the sending State that are relevant to determining to which community the person is more likely to belong, such as ownership of residential accommodation, participation in pension or superannuation schemes etc.

German practice is broadly similar in that locally recruited personnel are presumed to be permanently resident unless the sending State gives binding assurances that they will be posted within the foreseeable future. Persons who are posted to Germany may change their status and become permanently resident if factors such as length of posting or marriage to a German national indicate intention to remain permanently in Germany.[22] Switzerland and The Netherlands also start from the presumption that locally recruited staff are permanently resident in the receiving State.[23]

The US Government became a party to the Convention in 1972 and at first interpreted the words 'permanently resident' as equivalent to the term 'permanent resident alien' as that expression was employed in US immigration law. This status was the result of personal initiative by the individual, often in the context of an ultimate intention to

[21] Text of Note printed in Brown (1988) at pp 69–70.
[22] Richtsteig (1994) p 91.
[23] 1984 ASDI 189; 1984 NYIL 311.

seek US citizenship. In 1991, however, the Secretary of State in a Circular Note to chiefs of mission in Washington[24] announced:

> Upon careful review of the definition of 'permanently resident in', including the drafting of the Vienna Convention, the practice of other states, and the fundamental purposes of the Vienna Convention, the Department has determined that members of the administrative and technical and service staffs of diplomatic missions and consular employees and members of the service staff of consular posts in the United States *will be considered permanently resident in the United States for the purpose of the Vienna Conventions unless* the employing foreign state provides appropriate documentation to indicate that the sending state:
> (1) pays the cost of the employee's transportation to the United States from the employee's normal place of residence;
> (2) undertakes to transfer the employee and his or her immediate family out of the United States within a specific time frame consistent with the sending state's transfer policy; and
> (3) undertakes to pay the cost of the employee's transportation from the United States to the employee's normal place of residence or to the country of the employee's next assignment at the end of the employee's tour of duty in the United States.
>
> Such documentation may include a copy of the person's contract with the employing foreign state, a copy of the person's travel orders or any other material showing that the above criteria are satisfied.

Missions were given two months' grace before implementation of this change in US practice to enable them to review the standards, communicate them to their governments, and prepare supporting documentation for staff who would *not* be considered permanently resident.[25] In some cases tax privileges continued to be given on a basis of reciprocity as permitted under Article 47 of the Convention.

The US criteria—though applied only to junior staff of diplomatic missions—are otherwise considerably more restrictive than those applied by the United Kingdom, Canada, and Australia. They may be said to proceed on the basis of the same fundamental test—that the person would not be in the receiving State but for the requirements of the sending State—but the onus is clearly placed on the sending State to provide documentary evidence of its 'requirements', and the intentions of the individual are not taken into account. The United States claims more categorically than do those other States whose practice is described the right to make a unilateral determination of status for the purpose of Article 38. It does so, however, in the light of evidence from the sending State, and assurances from sending States, though they may be queried by the State Department, are ultimately accepted. Other States have not challenged the compatibility of the US criteria with Article 38, and they greatly reduce the scope for argument and for abuse.

The practice of all these States contemplates the possibility of a change of residence status during a diplomatic posting. France, however, has determined permanent residence status by reference only to circumstances at the time of the original notification, treating as permanently resident in France those persons who at that moment had normally lived in France for more than one year. In the context of a dispute with Iran in 1987 over M Gordji, a member of the diplomatic mission of Iran in Paris who was summoned to

[24] Circular Diplomatic Note of 10 April 1991, supplemented by Notes of 28 May 1991 and 1 November 1991, available at www.state.gov/ofm/31311.htm.

[25] 1991 AJIL 546; *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States* para 9.3.3.

appear before a French court, the Ministry of Foreign Affairs, who had accepted M Gordji in 1984 as a permanent resident of France and so not entitled to immunity from jurisdiction, claimed that they were entitled to determine the residence status of employees of a diplomatic mission.[26] The different approaches taken by France and the United Kingdom gave rise during the 1980s to bilateral and to European discussions. In 1987 the matter was resolved in the following terms:

> Without prejudice to the views of the Governments of the Twelve concerning their interpretation of the concept of permanent residence for the purposes of the application of the Vienna Conventions on Diplomatic and Consular Relations, the Twelve take note of a *modus vivendi* whereby the United Kingdom will not treat as having permanent residence those members of the Diplomatic and Consular missions of the Twelve who were not permanent residents on the date on which they took up their posts and who remain in post for less than 10 years. At the end of this period should the Ambassador to whom the persons concerned are responsible certify that they remain in post because of a decision by the sending State, and that they remain liable to be re-assigned from the United Kingdom at any time, they would not be regarded as permanent residents.[27]

One curious feature of the Convention which may perhaps be accidental[28] is that under Article 37.1 members of the family of a diplomatic agent forming part of his household do not lose entitlement to privileges and immunities if they are permanently resident in the receiving State but only if they are nationals of the receiving State. Families of junior staff under Article 37.2 lose entitlement on both grounds.

[26] 1984 ASDI 189; 1987 AFDI 1001; Brown (1988) at p 67.
[27] Text supplied by Foreign and Commonwealth Office.
[28] This is suggested by Lecaros (1984) at p 147.

COMMENCEMENT OF PRIVILEGES AND IMMUNITIES

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

...

Background and negotiating history

Previous state practice and the opinions of writers were inconsistent on the question of the exact moment when entitlement to diplomatic privileges and immunities began. Some writers maintained that privileges and immunities began with the grant of *agrément* to a head of mission or the receipt of notification of appointment in the case of other members of the mission by the receiving State.[1] Others claimed that in the case of a head of mission entitlement began only on the formal presentation of credentials. The third view, supported by Vattel,[2] by the 1929 Resolution of the Institute of International Law[3] and the 1928 Havana Convention regarding Diplomatic Officers[4] was that privileges and immunities began when the diplomat entered the territory of the receiving State and made his appointment known. The text of Article 39.1 was based on this third view, which enjoyed the widest support, and its substance was not altered by the International Law Commission.[5]

Where the receiving State has been notified in advance of a proposed diplomatic appointment—as is obligatory under Article 4 for a head of mission and as may be made obligatory for defence attachés by the receiving State under Article 7—there is no problem in requiring privileges and immunities to be applied from the moment of arrival in the territory. If the arrival of another member of the mission is notified in advance to the receiving State under Article 10.2 there is also no problem for the receiving State, for although its consent to the appointment is not required (Article 7) it has the right under Article 9 to declare the person *non grata* or not acceptable before arrival in the territory of the receiving State. Article 10 does not, however, oblige the sending State to give advance notification of the arrival of staff of its diplomatic mission, but says merely that: 'Where possible, prior notification of arrival and final departure shall also be given.'

[1] Harvard Research, 26 AJIL (1932 Supp) 89–90; Hurst (1926) pp 237–8; *Vitianu Case* 1950 ASDI 146; 1949 AD 16.94, and Salmon (1994) paras 234 and 264; comment of US Government on ILC draft Arts: UN Doc A/CN 4/116 p 81.

[2] (1758) IV.VII para 83. See also Pradier-Fodéré (1899) vol II pp 19–20; Genet (1931) vol I p 520.

[3] 26 AJIL (1932 Supp) 186 (Art 4).

[4] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 421 (Art 22).

[5] *ILC Yearbook* 1957 vol II p 142, 1958 vol II p 103.

If no advance notice has been given, the authorities of the receiving State may be unable to fulfil their obligation of according immunity from baggage search or other customs privileges on the first arrival of the member of a diplomatic mission. In some States entitlement may be accepted on the basis of a diplomatic passport, but the passport does not constitute evidence of appointment to the receiving State. If customs privileges or other courtesies are not provided on arrival, however, the sending State which has not given advance notification or at least provided the member of its mission with proper evidence of his appointment is unlikely to complain. A much more serious problem arises when the receiving State, on being informed of the appointment, refuses to accept it and immediately exercises its right to declare the new member of mission *persona non grata* or not acceptable. It may, for example, be the case that serious civil proceedings or even criminal proceedings against him are pending. If the receiving State suspects that the individual is attempting to make use of his appointment to evade the jurisdiction of its courts it is placed in a difficult position by Article 39 paragraphs 1 and 2 which on their face appear to confer immunity from the date of arrival or of notification until a 'reasonable period' after the termination of the person's functions under Article 9.

These problems were foreseen by several States at the Vienna Conference. France and Italy moved an amendment whose purpose was to make commencement of privileges and immunities on entering the territory of the receiving State conditional on prior consent to the appointment, acknowledgement by the receiving State or express or implicit acceptance of the appointment in some other way. The same conditions were also to apply where the person appointed was already in the territory of the receiving State. The United States proposed a more limited amendment but withdrew it in favour of the French-Italian amendment. The Soviet delegate opposed the amendment on the ground that the persons concerned would already have received *agrément*, consent to their appointment or a visa before entering the receiving State—but this is certainly not the case everywhere, and in any event it is with persons already in the receiving State when notification takes place that problems are more likely to occur. The French–Italian amendment—perhaps because it was drafted in a very complex way—was rejected in Committee. In Plenary Session the United States said that it would vote for the text on the basis that it meant that persons already in the receiving State would enjoy privileges and immunities only provisionally following notification of their appointment to the receiving State. Italy said that the reference to 'every person entitled to privileges and immunities' should be interpreted to mean 'persons whose appointment had been notified to the receiving State and had been formally or tacitly accepted'.[6] In view of the clear rejection by the Conference of an amendment in this sense it is difficult to accept the Italian statement as a permissible interpretation.

Subsequent practice

In the *Diplomatic Immunity from Suit Case*[7] a man appointed as attaché at the Embassy of Panama in the Federal Republic of Germany and issued with a diplomatic passport was charged with drunken driving and pleaded diplomatic immunity. Some five months later

[6] UN Docs A/Conf. 20/C 1/L 251, L 275/Rev. 1; A/Conf. 20/14 pp 207, 37.
[7] 61 ILR 498.

Panama notified the authorities of the Federal Republic of his appointment—apparently for the first time—and these authorities replied refusing to accept his appointment on the basis that he was enrolled as a student at a university and did not work at the Embassy of Panama. The Provincial Court of Heidelberg later accepted his plea of immunity on the basis of Article 39.1 of the Vienna Convention. The Note rejecting the appointment was taken as a declaration of *persona non grata*, but as it was not followed either by his recall or by notice that he was no longer recognized as a member of the mission, he continued to be entitled to immunity.

There have been a number of other cases where a person the subject of criminal charges has sought to rely on the apparent protection of Article 39.1. UK courts have been especially determined to stop such individuals establishing entitlement to immunity, but the methods they have relied on have not always been easy to reconcile with the provisions of the Convention. If the receiving State is notified, or informed of an earlier notification as a member of a diplomatic mission entitled to immunity of a person who has been charged, or is about to be charged with a serious criminal offence, its best response is to explain the circumstances to the sending State and ask it to treat the appointment and notification as never having been made. This method has been used successfully by the United Kingdom.[8] Where the sending State accepts the request there is no question of any entitlement to immunity for a 'reasonable period' or any need for a formal waiver.

Several English cases circumvented the difficulty of Article 39.1 by developing the theory that notification of a member of a mission was a prerequisite of entitlement to immunity. The case of *R v Governor of Pentonville Prison, ex parte Teja*[9] in 1971, concerned a roving agent of the Government of Costa Rica carrying a diplomatic passport and a letter of credence describing him as an economic adviser to the Government of Costa Rica studying the possibility of developing a steel mill in Costa Rica. While on a short visit to the United Kingdom (among other countries) he was arrested and detained on the request of the Government of India who sought his extradition. The Foreign and Commonwealth Office issued a certificate that he was not accredited to the Court of St James, but he argued in applying for a writ of habeas corpus that he was nevertheless a diplomatic agent of Costa Rica and as such entitled to immunity under Article 39.1 of the Vienna Convention from the moment of his arrival in the United Kingdom. The court accepted that he was not a member of the mission of Costa Rica and so not within the scope of the Vienna Convention or the implementing Diplomatic Privileges Act. Lord Parker said 'it is almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the government, can be said to be engaged on a diplomatic mission at all'. This should have concluded the matter, but Lord Parker went on: 'As I see it, it is fundamental to the claiming of immunity by reason of being a diplomatic agent that the diplomatic agent should have been in some form accepted or received by this country.' These words reflected the law in England before the enactment of the Diplomatic Privileges Act 1964[10] and remain true in a general sense. They cannot, however, be taken as qualifying or overriding Article 39.1.

[8] Satow (5th edn 1979) para 15.24.

[9] [1971] 2 QB 274 esp at 280–5, [1971] 2 All ER 11 esp at 15–19.

[10] C 81. See *Fenton Textile Association v Krassin* [1921] 38 Times Law Reports 259. In *In Re Vitianu* 1949 AD No 94 Switzerland refused to accept the nomination of Vitianu as a diplomatic agent and arrested him on

This was, however, what was done by the Divisional Court in 1985 in the case of *R v Lambeth Justices, ex parte Yusufu*.[11] Yusufu was one of those charged with kidnapping the Nigerian ex-Minister Dikko under circumstances described more fully in the context of Article 27. He had been trained in the Ministry of External Affairs in Lagos and issued with a diplomatic passport before being assigned on official duty to London. No notification of his appointment as a member of the Nigerian diplomatic mission was ever received by the Foreign and Commonwealth Office. He argued, however, that the absence of notification was immaterial and that by virtue of Article 39.1 of the Convention he was entitled to immunity from the moment of his entry into the United Kingdom. Watkins LJ said that *Teja* was binding authority to the effect that the act of appointing a diplomatic agent did not confer diplomatic immunity on him until this country had accepted and received him. He added, on Article 39: 'that in agreement with what was argued in Teja's case, Article 39 is procedural in effect. It provides, it seems to me, at most, some temporary immunity between entry and notification to a person who is without doubt a diplomat.' He went on to stress that the applicant had not in the first place come to the United Kingdom as a diplomat, and neither his Ministry nor the Nigerian High Commission seemed to regard him as such—findings which on their own would have justified the denial of immunity on a more satisfactory basis.

Teja and *Yusufu* were followed in 1988 by the Divisional Court in *R v Governor of Pentonville Prison, ex parte Osman (No 2)*.[12] Osman was arrested in 1985 and in 1987 was committed to custody under the Fugitive Offenders Act 1967 to await return to Hong Kong for trial on forty-two charges of dishonesty. In May 1987 the Liberian Foreign Ministry sent a Note to the Foreign and Commonwealth Office claiming that Osman had been appointed Ambassador-at-Large and Economic Consultant to the Government of Liberia in October 1985 and asking for his release on grounds of diplomatic immunity. The Foreign and Commonwealth Office replied that he was not a member of the Liberian mission in the United Kingdom nor a diplomatic agent to any other State and they therefore did not regard him as entitled to any immunities. The Liberian Embassy replied that his entitlement was a consequence of his appointment as Ambassador-at-Large of Liberia within the European Economic Community. The Foreign and Commonwealth Office refused to accept what they said was 'retrospective notification'. In a certificate to the court the Vice-Marshal of the Diplomatic Corps said that Osman had not been notified or accepted as a member of the Liberian Embassy, and in a supporting affidavit he said that there was no trace in the files of any Note of October 1985 and that in any event the alleged notification was not in the correct form. Osman argued that notification of his appointment was not a precondition for entitlement to immunity, but the Divisional Court said that although the decisions in *Teja* and *Yusufu* could have been sustained on other grounds they were binding on it. The court also stated that the receiving State was

serious criminal charges. A Swiss court held that 'a member of a legation cannot, without violating the sovereignty of the receiving State, be foisted upon it, even temporarily, and until refusal, by the unilateral act of the sending State'.

[11] [1985] Crim LR 510, [1985] Times Law Reports 114. See also comment in 1985 BYIL 328 and text of affidavit, ibid at 431.

[12] Times Law Reports, 24 December 1988. For list of Osman's appeals and petitions against extradition between 1985 and 1990 see Hansard HC Debs 7 February 1990 WA cols 700–1. The affidavit to the court by the Vice-Marshal of the Diplomatic Corps is in 1988 BYIL 483. See also comments by Warbrick (1989) at p 974 and (1990) at p 953.

entitled to impose administrative conditions, such as the form of notification, before forming an opinion on recognition. Osman could not therefore succeed in his claim to immunity. The decision could in fact have been based on the terms of a Note from the Liberian Embassy which waived immunity[13] or indeed on the fact that his appointment was not as a diplomatic agent to the United Kingdom.

These cases, and others in the field of immigration which followed them, were, however, reviewed by the Court of Appeal in the case of *R v Secretary of State for the Home Department, ex parte Bagga and others*,[14] already discussed in the context of Article 7. The Court of Appeal over-ruled the earlier conclusion that Article 39 was procedural in effect and afforded merely temporary immunity to a person who was without doubt a diplomat. They held that: *'Teja, Yusufu,* and *Osman,* although plainly right on the facts, were wrong on the point that immunity under the 1964 Act depends on notification and acceptance.' This finding brought UK law into line with the proper meaning of the Vienna Convention. Although it might be argued that it leaves open the possibility of abuse of diplomatic immunity, it should be recalled that in all the cases described above the sending State co-operated so as to allow the jurisdiction of the receiving State to be established—whether by withdrawing a notification, by not making a notification at all or (as in Osman) by waiving any immunity.

In the case of *Lutgarda Jimenez v Commissioners of Inland Revenue*[15]—discussed above under Articles 10 and 38—Special Commissioner John Walters QC after describing the *Bagga* case noted that the case also made clear that the enjoyment of immunities by a person already in the receiving State does under Article 39.1 of the Convention depend on notification of their appointment as a member of a diplomatic mission.

There is some similarity between the cases of *Teja, Yusufu,* and *Osman* and the case of *US v Sissoko*, already mentioned in the context of Article 10. Sissoko, a national of Mali acting as 'Special Advisor' to a special mission of The Gambia to the United States, was arrested in Switzerland and charged in September 1996 before the US District Court in Florida with attempted illegal export of two helicopters and bribery of a US Customs Agent. He was released on bail and later pleaded guilty. At no time did he himself claim diplomatic immunity, but several months later The Gambia by diplomatic Note requested diplomatic status for him on the basis of a diplomatic passport issued by The Gambia and a visa issued by the United States, and they moved to dismiss the case. The United States in their Response to this motion said:

> Whether or not an individual is entitled to diplomatic immunity in the United States is a matter for the Department of State to decide... Courts generally accept as conclusive the decision of the Department of State as to diplomatic immunity... The United States Department of State has not conferred diplomatic status to Defendant Sissoko... Therefore the matter is closed. The defendant has no diplomatic status, no diplomatic immunity, no diplomatic identity card, nor does he appear on any diplomatic list.

This was accepted by the US Magistrate Judge and confirmed by the US District Court in 1997.[16]

[13] Text of Note in 1988 BYIL 484.

[14] [1990] 3 WLR 1013, [1991] 1 All ER 777, [1990] Imm AR 413, Times Law Reports, 19 April 1990. See comment by Staker (1990).

[15] [2004] UK SPC 00419 (23 June 2004).

[16] 995 F Supp 1469 (1997); 121 ILR 600.

Should a national court be confronted with a case where the defendant in a serious criminal case was notified in proper form as a member of a diplomatic mission entitled to immunity, and the sending State refused to co-operate, a possible method of establishing jurisdiction would be to rely on the wording of Article 39.2. This provides that privileges and immunities 'shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so'. It could be argued that the word 'normally' permits a receiving State, where it rejects a member of a diplomatic mission immediately on receiving notification, to regard his immunities as ceasing with immediate effect. This would, however, be a last resort method of dealing with a case of manifest abuse.[17]

In December 2013, Devyani Khobragade, Deputy Consul General at the Consulate General of India in New York, was arrested, subjected to strip search, held and charged with visa fraud and making false statements to the US Government in connection with her employment of a maid and the salary paid to her. Khobragade's position entitled her to consular immunity—covering only acts performed in the exercise of consular functions. The arrest and subsequent treatment provoked public outrage in India and retaliation against the US mission there. On 8 January 2014 she was appointed a Counsellor to the Permanent Mission of India to the United Nations—a position which entitled her to diplomatic immunity. The US had no grounds on which to reject her appointment. On 9 January 2014 she was indicted on the charges described and the US Government asked the Indian Government to waive her diplomatic immunity. When waiver was declined, the US Government requested her immediate departure from the United States and she left on the evening of the same day.

The US later argued that the case could proceed since Khobragade did not enjoy diplomatic immunity at the time of her arrest and lost it on her departure. The New York District Court held, however, that the question of immunity fell to be decided on the date of her indictment, 9 January, and the indictment was dismissed. The Court noted that in several US civil cases it had been held that diplomatic immunity destroyed jurisdiction even if a suit had been validly commenced before immunity applied.[18] The Department of Justice made clear that the charges would remain pending until Khobragade's immunity was waived, or she returned to the US with a non-immune status[19] and a new indictment was duly issued.

[17] Satow (5th edn 1979) para 15.24.

[18] For example, *Abdulaziz v Metropolitan Dade County*, 741 F 2d.

[19] *US v Devyani Khobragade*, US District Court, Southern District of New York Case 1:14-cr-00008-SAS Opinion and Order.

TERMINATION OF PRIVILEGES AND IMMUNITIES

Article 39

...

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

...

The two rules in Article 39.2 were clearly established in customary international law. The position was set out by Vattel in the following way: 'ses fonctions cessent: mais ses privilèges et ses droits n'expirent point dès ce moment: il les conserve jusqu'à son retour auprès du maître à qui il doit rendre compte de son ambassade, dans le départ que dans la venue'.[1] Subsequent writers almost without exception stated the same rules on termination of immunity.[2] In numerous cases ambassadors were subjected to civil or criminal proceedings or denied privileges after their appointments had ended and they had had a 'reasonable period' to wind up their affairs and leave the country.[3] The fact that the offence or the act or contract on which proceedings were based had taken place during the subsistence of immunity was no bar to subsequent proceedings so long as it was of a private nature and not performed in the exercise of diplomatic functions. The leading English cases which stated these principles were *Magdalena Steam Navigation Company v Martin*,[4] *Musurus Bey v Gadban*,[5] and *In re Suarez*.[6]

The effect of the lifting of diplomatic immunity whether by change in the law or on the ending of the functions of the entitled person is discussed in the context of Article 31.1.

[1] (1758) IV.IX. para 125.

[2] eg Pradier-Fodéré (1899) vol II p 20; Genet (1931) vol I p 521; Harvard Research, 26 AJIL (1932 Supp) 133–7; Denza (2007) at pp 159–61; 1928 Havana Convention on Diplomatic Officers, Arts 22, 25: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') pp 421, 422; Hurst (1926) vol II pp 178, 238–40; Jones (1948).

[3] *The Empire v Chang and Others* 1919–22 AD No 205; *Bank of Portugal v A. de Santos Bandeira* 1929–30 AD No 201; *In re Garcia y Garcia* 1931–2 AD No 180; *In re Khan* 1931–2 AD No 182; *In re Bolguin* 1933–4 AD No 163.

[4] [1859] 121 ER 36, 2 EI & EI 94.

[5] [1894] 2 QB 352.

[6] [1918] 1 Ch 176.

'when he leaves the country'

In normal cases privileges and immunities come to an end when the entitled person leaves the country. In a few cases, however, there has been controversy as to whether this has actually happened. *In Re Regina and Palacios*,[7] in 1984, was a prosecution for drug trafficking and weapons offences of a Nicaraguan diplomat in Canada. His functions terminated on 12 July 1983 and from 16 to 23 July 1983 he visited the United States while his family remained in Canada. On his return he was arrested and charged, and the question was whether he had lost his immunity because he had left the country. The Ontario Court of Appeal said that there was no significance between the difference in wording between 'final departure' in Article 10 of the Convention and 'when he leaves the country' in Article 39.2. The Convention could not be construed as intended to derogate from any immunities previously recognized under customary international law. Article 39.2 referred to:

> permanent departure from the host country. It would require the clearest possible language in the Convention to compel the conclusion that a diplomat would have any lesser protection under it and could lose his immunity by a temporary visit outside the country before he was ready or required to leave the country permanently. I can find no such intention expressed in art. 39(2).

The facts of this case are somewhat similar to those relating to Taigny, French Minister to Venezuela, who following a dispute in 1905 between sending and receiving governments was recalled. When he boarded a French ship in order to ascertain the instructions of his government he was refused permission to return to shore and in effect summarily expelled. The Venezuelan Government argued that immunity had lapsed on his recall, but the diplomatic corps did not accept this and protested at the violation of the Minister's immunity.[8]

The Irish High Court took a similar approach in 1992 in the even more unusual case of *Gomaa v Ministry of Foreign Affairs*.[9] Mr Gomaa was a chef at the Egyptian Embassy in Dublin until his employment as a member of the service staff was terminated on 1 September 1990. On 8 September 1990 he left Ireland with his wife, who was in the final month of pregnancy, and their departure was notified to the Department of Foreign Affairs. The Department would have granted permission to remain in Ireland until after the birth of the child, but this had not been sought. In London Mrs Gomaa was unwell and visited hospital, where earlier warnings against travelling by air to Cairo were repeated. The couple returned to Dublin where the child was born on 14 October. The issue before the court was whether the child was an Irish citizen by birth—as Mr Gomaa argued—or was disqualified as 'the child of an alien who at the time of the child's birth is entitled to diplomatic immunity in the State'. It was not disputed that if Mr Gomaa had chosen to remain with his family until after the birth, his stay on the basis of medical advice to his wife would have been within the 'reasonable period' specified in Article 39.2. The court also held that even though he had in fact left Ireland Mr Gomaa remained entitled to diplomatic immunity. In the view of the judge, the use of the word 'normally' in Article 39.2:

[7] 101 ILR 306. See also Richtsteig (1994) p 93.
[8] Satow (5th edn 1979) para 21.18.
[9] Judgment of 24 July 1992, unreported, described in 1992 Annual Review of Irish Law 20.

opens the door sufficiently wide to encompass a special situation such as that in the present case where, because of a medical emergency which occurred in the course of the journey home, the departing person deemed it prudent to return to Ireland where the patient had been having specialist treatment prior to departure, so that similar treatment and care might be resumed.

The court also expressed doubts as to Mr Gomaa's bona fides, and it may be that these doubts together with the unusual context of the need to determine entitlement to immunities (in that the former member of the mission was arguing that he was *not* entitled to immunity) conditioned the judicial approach.

The 'reasonable period'

States have been unwilling to commit themselves to a precise definition of the days or weeks which constitute a reasonable period for a member of a diplomatic mission to leave the country. There are very few provisions in national legislation formulating a precise time limit, and those that there are vary widely—six months in Switzerland and only one month in Venezuela.[10] Decisions of national courts have also varied substantially, and courts have had regard to the actual circumstances of the diplomatic defendant—immunity may be granted for a longer period if the delay in departure was for reasons beyond his control.[11] A diplomat who is winding up the affairs of an entire diplomatic mission following its withdrawal or a breach of relations with the receiving State is likely to be regarded as protected for a longer period. As already stated in the context of Article 22, the United Kingdom has applied the concept of the 'reasonable period' by analogy to the inviolability of embassy premises, accepting that it subsists for a time after they cease to be 'used for the purposes of the mission'.

Conversely a diplomat may be granted an unusually short period in which to leave the country if he has been declared *persona non grata*, particularly if this has happened in notorious circumstances or in the context of abuse of diplomatic immunity. When the United Kingdom broke diplomatic relations with Libya in 1984 following the shooting from the premises of the mission which killed a policewoman who was protecting the premises, those who were expelled were given only seven days in which to leave the United Kingdom. Between these two extremes it is generally necessary for the authorities of the receiving State to apply a set period for termination of taxation and customs privileges where departure takes place in the normal way. In the United Kingdom and in the United States this period is one month.

Flexibility in both directions with regard to the 'reasonable period' was well illustrated by the attitude of the State Department when they informed the Iraqi Interests Section of the Embassy of Algeria that one of their diplomats was declared *persona non grata* for having engaged in behaviour inconsistent with the limitations in the Protecting Power Arrangement. The diplomat himself was required to depart directly from Washington in a little over forty-eight hours. The Note, however, continued: 'The Department of State has no objection to Mr [M's] family remaining in New York until the end of the current

[10] UN Laws and Regulations pp 305, 403; 1983 Can YIL 307–8. See Salmon (1994) paras 551–3.

[11] See *Christidi* 1899 Journal de droit international privé 369—eight days after termination of functions; *In re Suarez* [1918] 1 Ch 176—one month; *Dupont v Pichon* Supreme Court of Pennsylvania, 4 Dall 321.

school year. Mr [M's] family will be required to depart the United States directly from New York no later than one week after the conclusion of the current school year.'[12]

Where the sending State waives diplomatic immunity under Article 32 of the Convention the member of the mission is, of course, not entitled to any 'reasonable period' of extended immunity to allow him to leave the country. Mere dismissal by the sending State of a member of its mission from its diplomatic service would, however, operate as a termination of his functions and in the absence of any waiver the 'reasonable period' would apply. If therefore the sending State on hearing of serious criminal charges against a member of its diplomatic mission decides to dismiss him it is essential for the receiving State also to seek a waiver of his immunity from jurisdiction to allow him to be held in custody and tried. The sending State may, of course, prefer to recall and dismiss him, for reasons which were considered in the context of Article 32.

Members of families

Article 39.3 giving privileges and immunities to family members to enable them to leave the receiving State following the death of a member of the mission was based on Article 24 of the 1928 Havana Convention regarding Diplomatic Officers. It was introduced at the Vienna Conference by an amendment proposed by Mexico.[13]

Article 39 of the Convention does not deal expressly with the alternative in which a member of the family of a diplomat or of a member of the administrative and technical staff of a mission loses the status of 'member of the family forming part of the household' whether by divorce or separation in the case of a spouse or by reaching the age of majority or economic independence in the case of a child. Nor does Article 39 deal with the termination of the status of a servant of a member of a mission. Given that members of families and private servants are accorded privileges and immunities essentially for the protection of the diplomat himself, it may be assumed that they are not entitled by analogy to any 'reasonable period' of extension, and that their privileges and immunities end with immediate effect when they lose their status as family members or servants.[14]

Subsistence of immunity for official acts

The acts of a diplomatic agent in the exercise of his official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in respect of such acts since this would be indirectly to implead the sending State. The Law Officers of the United Kingdom advised in 1858 in regard to Bingham, a British diplomatic agent who had terminated his functions in Venezuela but continued to live there, that:

if it should be clearly established upon the hearing of the case that the acts in respect of which he is now to be made amenable to criminal or civil procedure or consequences, were in fact done by him

[12] Text of Note provided by State Department.

[13] UN Laws and Regulations p 421; UN Docs A/Conf. 20/C 1/L 181; A/Conf. 20/14 p 208. The English Law Officers in an Opinion of 20 November 1872 (FO 83/1660) noted the existence of an established usage of extending immunity to the widow of a diplomat and her property but did not believe it was yet a rule of customary international law.

[14] See *ILC Yearbook* 1957 vol I p 142 Commentary; Jones (1948) at pp 275–7.

exclusively in his Diplomatic Character, and within the scope of his duty, and more especially if they were previously commanded or subsequently sanctioned and approved by the government by which he was accredited, and were thus in effect 'privileges' this consideration ought, in our opinion, to avail him fully in his defence.[15]

This rule of continuing immunity was restated in all textbooks on diplomatic law and in codifications such as the Resolutions of the Institute of International Law,[16] the Havana Convention regarding Diplomatic Officers,[17] and the Harvard Research on Diplomatic Privileges and Immunities.[18]

The English Court of Appeal considered the rule of the continuing immunity accorded to an envoy in 1964 in the case of *Zoernsch v Waldock*.[19] The plaintiff lodged a petition with the European Commission of Human Rights against the Federal Republic of Germany, and when it was rejected he brought proceedings against Sir Humphrey Waldock, who had been until 1962 a member and President of the European Commission of Human Rights, and against the Secretary to the Commission, claiming damages for negligence and corruption. The defendants were entitled by international agreement given effect under UK legislation to diplomatic immunity 'in respect of words spoken or written and all acts done . . . in their official capacity', but it was argued that this immunity ceased when Sir Humphrey Waldock ceased to be a member of the European Commission of Human Rights. The court unanimously rejected this submission. Diplock LJ said that: '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 the suit.'

In *Propend Finance Pty Ltd v Sing and the Commissioner of the Australian Federal Police*,[20] already discussed in the context of Articles 3, 31, and 32, the English Court of Appeal considered whether the defendant Superintendent Sing, who had been serving as a diplomat at the Australian High Commission in London, remained immune after returning to Australia in respect of acts which, it was alleged, were performed by him as an officer of the Australian Federal Police. The court noted that his role in the mission was 'to represent the interests of the Australian Federal Police on matters of law enforcement, in particular, to receive and distribute crime intelligence at post and to facilitate provision of crime intelligence to Australian police forces'. The acts in respect of which proceedings for contempt of court were brought were performed in the course of applying the scheme for assistance between Commonwealth governments in criminal matters, including assistance in search and seizure and obtaining evidence. They were therefore performed 'in the exercise of his functions as a member of the mission' and so within the scope of continuing immunity under Article 39.2.

In the case of *Tabatabai*,[21] on the other hand, the Provincial Court of the Federal Republic of Germany in 1983 held that Article 39 could not continue to protect a special envoy of Iran (as to whose diplomatic status there was, moreover, considerable argument)

[15] McNair (1956) vol I pp 196–7.
[16] 1895 Resolution, Art 14; 1929 Resolution, Art 16: 26 AJIL (1932 Supp) 164, 187.
[17] Art 20: UN Laws and Regulations p 421.
[18] Art 18: 26 AJIL (1932 Supp) 97–9; Denza (2007) at pp 159–61.
[19] [1964] 2 All ER 256.
[20] Judgment of 17 April 1997, Times Law Reports, 2 May 1997.
[21] 80 ILR 389.

from a criminal charge of possessing opium which was discovered on a routine check of his baggage. The court said:

> How the various acts in this particular case are to be distinguished from each other need not be decided. It is manifestly clear from the submissions of the Public Prosecutor that the importation of narcotic substances which is the subject of this prosecution and which occurred without the authorization of the receiving State is not to be classified as one of the official functions of a special envoy.

The words in Article 39.2 ('acts performed . . . in the exercise of his functions as a member of the mission') are not identical to the words used in Article 38.1 ('official acts performed in the exercise of his functions'), but there appears to be no difference of substance between these two formulas. What is said in the Commentary to Article 38 would apply equally to Article 39.2. Continuing immunity, like the residual immunity given to diplomatic agents who are nationals of or permanently resident in the receiving State, applies only to acts performed on behalf of or imputable to the sending State—and it may not cover all such acts, as will become apparent below. Given the limitations under modern international law and practice on state immunity it will often be advisable to bring proceedings against the sending State rather than against its diplomatic agent, or to sue both the sending State and the diplomat directly involved. There will undoubtedly be some cases where the sending State under restricted rules of state immunity may be subject to local jurisdiction whereas its diplomatic agent remains immune on an indefinite basis under Article 39.2 because the acts in question were performed in the exercise of his functions as a member of the mission.[22]

The limits of the expression 'in the exercise of his functions as a member of the mission', as well as the interaction between the rules of state and diplomatic immunity at the end of a diplomatic posting, were considered by the President of the Family Division of the English High Court in the case *P v P (Diplomatic Immunity: Jurisdiction)*.[23] The case was a sequel to *Re P (Minors)* already described in the context of Article 31.4. Following the failure of his marriage, the defendant P who had served as a diplomat in the Embassy of the United States in London was recalled along with his family to Washington and his appointment in London was terminated. The family travelled together to Washington and the plaintiff, Mrs P, began divorce and child custody proceedings in Virginia. For the ultimate purpose of the proceedings in Virginia she sought from the English courts a declaration under section 8 of the Child Abduction and Custody Act 1984 that the removal by their father of the two children to the United States was a 'wrongful removal' within the meaning of the Hague Convention on Child Abduction. She maintained that the removal of the children was a private action which fell outside the performance of the defendant's diplomatic duties and took place after termination of his appointment so that his immunity no longer had effect. It was, however, contended by the defendant and by his government (which formally intervened in the case) that this recall by the State Department amounted to an order so that his return with his children (and his wife) was both an official act of the

[22] See Dinstein (1966). The analysis of the overlapping immunity *ratione personae* and *ratione materiae* remains valid, although in the intervening thirty years the scope of state immunity has been greatly reduced. See also Salmon (1994) paras 420 and 580–621.

[23] [1998] Times Law Reports 119, 1 FLR 1026, 114 ILR 485, 1998 BYIL 316.

US Government and an act undertaken in the exercise of P's functions as a member of the US diplomatic mission to the United Kingdom.

The President of the Family Division, Sir Stephen Brown, agreeing with the submissions of the *amicus curiae* who had been appointed by the Attorney-General, held that the actions of the father in taking his children from the United Kingdom after the termination of his diplomatic status there could not be considered to have been in the exercise of his functions as a member of the mission within the meaning of Article 39.2 of the Vienna Convention. He was therefore not entitled to continuing diplomatic immunity from UK jurisdiction. The President did, however, accept in the light of affidavits submitted by the US Government that the act of the defendant P in taking his children back as instructed by the State Department was an act of a governmental nature so that state immunity applied and the court had no jurisdiction to determine the proceedings. The mother appealed against the decision that the court had no jurisdiction to make the declaration sought, while the father, supported by the United States as intervenor, cross-appealed against the finding that diplomatic immunity did not apply. Before the Court of Appeal it was submitted by the respondent and the United States that:

> If the Court were to hold that the Defendant's act of returning to the United States with the minors, as ordered by his government, was a wrongful act, that would amount to an interference with the right of the United States Government to determine the manner of its representation in the United Kingdom and would have serious repercussions for the conduct of diplomatic relations in general.

The Court of Appeal, however, decided that, given that a declaration made by a UK court would not be binding on the court in Virginia, any such declaration would delay the proceedings in the United States and would be contrary to the interests of the children. It therefore dismissed the appeal on the issues of jurisdiction without making any findings relevant to the construction of Article 39.2 and in particular on what weight should be given to the evidence of the United States that the act which was challenged was performed in the exercise of functions as a member of a diplomatic mission.[24]

A more extensive interpretation of acts performed in the exercise of diplomatic functions was given by the German Federal Constitutional Court in the *Former Syrian Ambassador Case*.[25] The court accepted that the Syrian Ambassador to East Germany had acted in the exercise of diplomatic functions when on instructions from his government to 'do everything possible to assist' a terrorist group ('Carlos') he accepted for temporary safekeeping a bag containing explosives which were later removed and used a few hours later in a terrorist attack in West Berlin, causing one death and more than twenty serious injuries. The ambassador knew that the bag contained explosives at the time when he permitted it to be removed and for this he was charged by German authorities—following the absorption of East Germany into the Federal Republic of Germany—with having assisted in the attack. It was held that Article 39.2 did not have *erga omnes* effect so as to bind the Federal Republic of Germany either as a third State or as a successor State to the German Democratic Republic to accord continuing immunity, but on the question of whether the act was performed in the exercise of the ambassador's diplomatic functions the court took the view that express instructions by the sending State with consequent direct attribution to that State were the determining factor. The court regarded it as

[24] Judgment of 11 March 1998, Times Law Reports, 25 March 1998; Foakes (2014) pp 146–7.
[25] Case No 2 BvR 1516/96, 115 ILR 595, 1998 AJIL 74.

immaterial whether the act fulfilled functions within the meaning of Article 3 of the Vienna Convention.

The interaction between state and diplomatic immunity also caused difficulty in the case of *Knab v Republic of Georgia*,[26] which was a sequel to the *Makharadze Case* discussed above in the context of Article 32. Personal representatives of the victim of the car crash caused by the diplomat from Georgia whose diplomatic immunity from criminal proceedings was waived by his government sought to bring civil proceedings against the former diplomat as well as against the State of Georgia. For their more important purpose of establishing the responsibility of the defendant State they argued that Makharadze, who was at the time of the accident on his way from a diplomatic reception, had acted in the course of his official duties. The District of Columbia Court accepted this since it was agreed between the parties to the case, but they saw it as a corollary that residual immunity continued to attach by virtue of Article 39.2 to the diplomat himself and he was dismissed from the proceedings. The case underlines the importance of bringing proceedings both against the individual diplomat and against his sending State where there may be doubt as to which should properly be held responsible.

In the case of *Wokuri v Kassam*,[27] an English court held that a former Deputy Head of Mission at the High Commission of Uganda in London did not enjoy continuing immunity in respect of an employment claim brought by her former chef and general domestic servant. It was argued that a parallel should be drawn with Article 31.1(c) of the Convention which excludes immunity for a diplomat in respect of 'commercial activity exercised . . . in the receiving State outside his official functions' but which had been held not to apply to day-to-day activities such as dry cleaning or domestic help. The court rejected this approach, holding that continuing immunity did not apply to actions relating to household or personal life and which might provide, at best, an indirect rather than a direct benefit to diplomatic functions.

A somewhat similar case in the United States was *Swarna v Al-Awadi*[28] where a claim for forced labour and sexual abuse was brought by a former personal domestic servant—who had escaped from virtual captivity—against a former diplomatic employee of Kuwait in its mission to the UN in New York, his wife, and the State of Kuwait. The plaintiff's entry to the US was on a visa for employment as a private servant of the Al-Awadis and not as a member of the Kuwait mission. The New York Court of Appeals found that Mrs Al-Awadi had never been a member of the mission and enjoyed no residual immunity as a family member. Although Swarna had carried out some peripheral duties for the benefit of the mission, the court found that there was no formal employment relationship either with Kuwait or with Mr Al-Awadi, so that the plaintiff's suit against both was dismissed, while the proceedings against Mrs Al-Awadi continued.

The *Pinochet* cases

The question of entitlement to continuing immunity for official acts became a matter of universal interest in 1998 when English courts had to determine the immunity of Senator

[26] 97-CV-03118 (TPH) DDC 29 May 1998.

[27] [2012] EWHC 105 (Ch); [2012] WLR (D) 13; 152 ILR 557.

[28] 622 F 3d 123 (2d Cir 2010); Fox and Webb (2013) p 271; 152 ILR 617; 2010 DUSPIL 430. See also the US District Court judgment in *Baoanan v Baja*, 627 F Supp 2d 155 (2009), 152 ILR 596.

Pinochet, formerly Head of State of Chile, in respect of crimes committed during his period in office for which Spain sought his extradition from the United Kingdom. During Pinochet's period as Head of Government and then State from 1973 until his resignation in 1990 there occurred mainly in Chile but also elsewhere in America and in Europe many acts of murder, torture, and unexplained 'disappearances' of individuals opposed to his regime. In October 1998 while undergoing medical treatment in London he was arrested on an international warrant issued in Spain. A few days later a second provisional warrant was issued by Bow Street Magistrates' Court listing extradition charges including torture, conspiracy to torture, taking of hostages and conspiracy to take hostages, and conspiracy to murder. Pinochet although travelling on a diplomatic passport had no entitlement to diplomatic immunity, but he challenged the warrants on the ground that as a former Head of State he was under section 20 of the UK State Immunity Act 1978 entitled to the immunities given to a former ambassador which extended by virtue of Article 39.2 of the Vienna Convention to the crimes listed in the warrants. He maintained that the charges related to his official conduct as Head of State. The challenge was first heard in the Divisional Court which held that the warrants should be quashed. In the case *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, the Lord Chief Justice Lord Bingham maintained that a former Head of State was clearly entitled to immunity in relation to criminal acts performed in the exercise of public functions. There was no exception from this immunity in regard to genocide, torture, or taking of hostages. Collins J agreed that the continuing immunity of a Head of State was limited to acts done in the exercise of his functions as Head of State, but that there was no other limitation based on the nature of the crimes alleged, while Richards J agreed with both judgments.

The Crown Prosecution Service appealed from the Divisional Court to the House of Lords on the question of 'the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State'. Amnesty International was given leave to intervene. The case, of course, raised other questions relating to jurisdiction and extradition law which are not mentioned in this brief account. In its first *Pinochet* judgment[29] the House of Lords held by a majority of three to two that although section 20 of the State Immunity Act accorded immunity from criminal jurisdiction with respect to official acts performed in the exercise of functions of a former Head of State, torture and taking of hostages fell outside the functions of a Head of State. Lord Nicholls of Birkenhead and Lord Steyn set out this view, and Lord Hoffmann concurred with them. Two dissenters, however, Lord Slynn and Lord Lloyd of Berwick, held that Senator Pinochet remained immune in respect of acts performed in his official capacity and that no exception to this rule could be established in regard to torture or taking of hostages. The first House of Lords judgment was set aside in January 1999—the second *Pinochet* judgment[30]—on the ground that the failure of Lord Hoffmann to disclose his connections with Amnesty International which had intervened meant that justice could not manifestly be seen to have been done. The appeal was reheard by a fresh

[29] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 3 WLR 1456, HL (E), [1998] 4 All ER 897, 119 ILR 27.

[30] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, [1999] 1 All ER 577, 119 ILR 50.

panel of seven judges. In the third *Pinochet* judgment in April 1999,[31] the House of Lords by a majority of six to one held that Senator Pinochet was not entitled to immunity and could be extradited to Spain on certain torture charges on the basis of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[32] (the Torture Convention). The reasons given by the seven judges, on immunity as on other aspects, differed. They differed in particular on the question whether Pinochet was acting in the exercise of functions as Head of State when the acts forming the basis of the charges took place.

Lord Goff, the single dissenter in the third *Pinochet* judgment, drew a distinction between individual responsibility before international tribunals and criminal proceedings before national courts. There was no evidence of loss of state immunity from criminal proceedings before national courts, no express exclusion in the Torture Convention, and no room for implying an exception even where the acts constituted international crimes. Lord Saville, Lord Hope, and Lord Millett also considered that torture within the meaning of the Torture Convention was capable of being carried out in the exercise of official or government functions. For different reasons, however, these three judges maintained that the Torture Convention did not protect former Heads of State from charges of torture, though serving Heads of State were so protected. The remaining three judges, Lord Browne-Wilkinson, Lord Hutton, and Lord Phillips took the view that torture—or other conduct constituting a crime under international law—is not a function of a Head of State. The Home Secretary Jack Straw issued a new Authority to Proceed (with extradition). In 2000, however, he concluded on the basis of a medical report that Pinochet was unfit to stand trial and should be released. After contacts with other countries which had also requested his extradition and consideration of the possibility of trial in the United Kingdom he was allowed to return to Chile where he died a few years later.[33]

The judgments, in spite of the world-wide interest which they generated, are of limited relevance to the interpretation of Article 39.2 of the Vienna Convention on Diplomatic Relations. The difficulties in regard to immunity in the *Pinochet* cases arose from the UK State Immunity Act transposition to Heads of State of the privileges and immunities of a head of mission, 'with necessary modifications'. As was clearly explained by Lord Nicholls of Birkinhead, the first majority judge in the first *Pinochet* case:

> Transferring to a former head of state in this way the continuing protection afforded to a former head of a diplomatic mission is not an altogether neat exercise, as their functions are dissimilar. Their positions are not in all respects analogous.

The principles established in the *Pinochet* case were again applied by an English court in the case of *Harb v HRH Prince Abdul Aziz*[34] in which proceedings were brought by the

[31] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)* [1999] 2 WLR 827, [1999] 2 All ER 97, 119 ILR 135. See also 1999 BYIL 277 for analysis and comment on the first and third *Pinochet* cases in the House of Lords.

[32] UKTS No. 107 (1991).

[33] Barker and Ghandhi (2000) give a full list of literature already published on the cases (n 1) as well as a clear analysis of the immunity aspects. Most relevant on immunity are Fox (1999); Bianchi (1999); Barker (1999); Denza (1999); Hopkins (1999). See also Dominice (1999); Cosnard (1999); Alebeek (2000). Wuerth (2012) provides a cogent and comprehensive assessment of the longer term legacy of the *Pinochet* cases.

[34] [2014] EWHC 1807 (Ch).

(secretly married) wife of the late King Fahd of Saudi Arabia against his son Prince Aziz claiming maintenance and fulfilment of promises of support made by him. It was argued on behalf of the Prince that the effect of Article 39.2 as applied in the UK by the State Immunity Act 1978 was that the personal immunity to which the late King had been entitled continued indefinitely. The court, on the basis of the decision in *Pinochet*, dismissed this argument and the claim of the Prince to continuing immunity. The Court of Appeal, after careful analysis of the customary international law, confirmed that the Prince enjoyed no immunity in consequence of his late father's position as Head of State.[35]

For former diplomatic agents and others entitled to continuing immunities, 'in the exercise of his functions as a member of the mission' may be interpreted by reference to the functions of a diplomatic mission listed in Article 3 of the Convention which could not by any stretch of the imagination include torture or indeed any of the other crimes which formed the basis for the request for the extradition of Pinochet. It can, however, be taken as established by the majority judgments in *Pinochet* that the assertion of the sending State as to whether conduct was in the exercise of official functions, whether as a Head of State or member of a diplomatic mission, is not necessarily binding on the State where continuing immunity is in issue.

There is further support for giving a restricted interpretation to official acts in the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant Case*.[36] The case was brought by the Congo requesting annulment of an international arrest warrant issued by a Belgian investigating judge against Mr Yerodia, then Minister for Foreign Affairs of the Congo, which sought his provisional detention pending a request for extradition to Belgium on charges of violations of international humanitarian law. By the time judgment was delivered by the International Court of Justice in 2002, Mr Yerodia no longer held ministerial office in the Government of the Congo. The case turned mainly on the lawfulness of the assertion of jurisdiction by Belgium in respect of these particular crimes against a serving Foreign Minister not present in its territory, and the three judges who gave the Joint Separate Opinion while agreeing on jurisdiction and admissibility had reservations about some aspects of the ICJ's judgment on the merits. They agreed that the issue of the arrest warrant infringed the inviolability which Mr Yerodia enjoyed while he was Minister for Foreign Affairs of the Congo. But they pointed out that:

> Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for 'official' acts. It is now increasingly claimed in the literature . . . that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform . . . This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions.

The authority cited included the judgments in the first and third *Pinochet* cases of Lords Steyn, Nicholls, Hutton, and Phillips of Worth Maltravers which are described above.

[35] [2015] EWCA Civ 481.

[36] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, 2002 ICJ Rep 1. For criticism of the ICJ judgments, see Sands (2002); Winants (2003); Nouwen (2005).

It is clear that in the light of the contemporary emphasis on the need to restrict immunities in the interests of access to justice for victims and plaintiffs, a more restrictive approach is evident in national courts. This is particularly so where the entitled individual, whether a Head of State or a diplomat, is no longer in office so that any immunity is granted *ratione materiae* rather than *ratione personae*. The cases described above are difficult to reconcile and some of them are open to question or might now be decided differently. In the context of Article 39 of the Vienna Convention it is suggested that the correct approach to determining whether continuing immunity applies should be first to determine whether the entitled person acted 'in the exercise of his functions as a member of the mission', and that the determination should be made in the light of Article 3 of the Convention. The test is not whether the action was carried out under instructions from the sending State, though this may be relevant to state immunity and to state responsibility. On this analysis the approach taken by the German Federal Constitutional Court in the *Former Syrian Ambassador Case* to the question of whether the act was performed in the exercise of diplomatic functions was incorrect. Where, however, there could be doubt as to whether an act was performed in the exercise of mission functions, as in the cases of *P v P* or *Knab v Republic of Georgia*, weight should properly be given to the assertion of the sending State.

PROPERTY OF A DECEASED MEMBER OF A MISSION

Article 39

...

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 39.4 resulted from a proposal made to the International Law Commission by Sir Gerald Fitzmaurice.[1] The first of the two rules, concerning the entitlement to export movables of a deceased member of a mission, was entirely in line with previous international usage and caused no problems. The second sentence, however, caused some difficulties and controversy.

There was no previously established rule of customary international law to the effect that if a diplomat died in the receiving State his estate or even parts of it must be exempted by that State from estate or inheritance duty. The matter was not covered by the general exemption of the diplomat from taxation because this exemption was personal and did not survive him or necessarily attach to his property after his death. But in practice exemption was given in most cases by application of general principles. Estate or inheritance duty is normally levied either on a basis of domicile or residence or on account of the presence of the property, whether real or personal, within the territory of the State levying the duty. In most cases the diplomat would not be regarded as domiciled in the receiving State (unless he was a national or permanently resident there).[2] Nor (with the same exceptions) would he usually be regarded as resident there. His personal property on the premises of the mission or in his inviolable residence was often deemed on the basis of the fiction of exterritoriality not to be present in the receiving State. In the United Kingdom, unless the diplomat was determined to be domiciled in England, duty would in the event of his death normally be payable only on real property in the United Kingdom (other than his residence) and on his personal assets in the United Kingdom not situated in the premises of the mission.[3]

[1] *ILC Yearbook* 1957 vol I p 142.

[2] In the case of *In Re Succession of Doña Carmen de Goyeneche* 1919–22 AD No 209, the Supreme Court of Peru held, however, that the sister of the Peruvian Minister to the Holy See, who lived with him in Rome, was not domiciled in Peru since the Minister had before his appointment established a voluntary domicile abroad.

[3] Lyons (1954) at pp 316–19 and UK comments on 1958 draft Arts of ILC, UN Doc A/4164 p 38.

As a result of Sir Gerald Fitzmaurice's suggestion and later proposals by Luxembourg and The Netherlands in the context of the Article on taxation (now Article 34) the 1958 draft articles of the International Law Commission included provision permitting the receiving State to levy estate or inheritance duties only on immovable property within its territory belonging to the deceased member of a diplomatic mission.[4] This provision would have imposed on receiving States restrictions going beyond previous international usage, and these were felt by many States to be inconsistent with the general principles underlying tax exemption—namely that tax exemption should be extended only to property and activities of a member of a mission and his family which were indispensable to normal residence and official duties in the receiving State. The Commission's text would have obliged States, for example, to exempt from duty or tax the personal fortune which a member of the mission might have amassed from share dealings in the receiving State.

At the Vienna Conference several amendments were proposed to the Commission's text. The one which attracted most support and was adopted as the final text was that of the United Kingdom which most clearly reflected the functional approach to exemption described in the previous paragraph.[5] This new rule could certainly be described as progressive development—it introduced a new principle regarding taxation of property of members of a diplomatic mission, but one which was fully justifiable under the general principles set out in the Preamble to the Convention.

[4] UN Docs A/CN 4/114 pp 29–30; A/CN 4/114/Add. 1 p 17; A/CN 4/116 pp 65–6; *ILC Yearbook* 1958 vol II p 103.

[5] UN Docs A/Conf. 20/C 1/L 207/Rev. 1; A/Conf. 20/14 pp 208–9.

DUTIES OF THIRD STATES

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

The opinions of writers on diplomatic law had long been divided on the questions of whether a diplomat proceeding to or returning from his post was entitled to a right of innocent passage through third States, and secondly on whether when in transit through a third State he was entitled to some or all of the privileges and immunities accorded to him in the receiving State. Clear customary rules did not emerge because there were so few cases where a diplomat encountered difficulties in transit States, or where it mattered whether baggage privileges were extended to him as a matter of courtesy on production of his diplomatic passport or on a basis of law.

In the early period of diplomatic exchanges it was customary for diplomats intending to travel through countries where they had reason to fear interference with their free passage to seek a safe conduct. A safe conduct—which was also available to any private person—guaranteed safe transit through the territory of the State granting it, and in the case of a diplomat the sending State would certainly protest if there was any breach of the undertaking.[1] An alternative basis for protection was a bilateral treaty providing for reciprocal guarantee of safe passage for the ambassadors and couriers of the two Contracting Parties.[2] The fact that States concluded treaty provisions of this nature, while they

[1] Adair (1929) pp 110–14; Satow (5th edn 1979) para 18.2.

[2] For example, the Treaty of 1623 between Britain and Russia: De Intercursu Mercandisarum cum Imperatore Russiae, Rymer, Foedera vol 17 p 506.

did not conclude treaties providing for immunities of their resident ambassadors, strongly suggests that it was not thought that a diplomatic agent in transit was entitled in the absence of special provision to inviolability or immunity. The early writers on diplomatic law all agreed that in the absence of a safe conduct there was no obligation on third States to accord inviolability or immunity to a diplomat in transit.[3] On the other hand, the 'right of innocent passage' seems to have been generally accepted until the end of the nineteenth century—provided that there was no war between the transit State and the sending or receiving State. In general States did not impose the control on entry of aliens into their territory which became general early in the twentieth century, and so long as there was no air travel and methods of travel were slow and unreliable, all States had an interest in maintaining a practice permitting diplomats to travel in security by the most direct route to and from their posts.

By the early twentieth century the position had changed. States increasingly reserved the right to refuse to admit a diplomat in transit.[4] Although the 'right of innocent passage' survived in books on diplomatic law,[5] diplomats were in practice expected to obtain a visa if such a visa was required for any ordinary person of their nationality. But States accepted that once a diplomat had been admitted he was entitled at least to freedom from arrest and detention. The transit State could refuse entry to a diplomat in transit if for any reason it found his presence unacceptable, or it could admit him with the immunities attendant on his status. The position was explained thus by Wheaton:

> the inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly State by the permission, express or implied, of the local government. Both are equally entitled to the protection of that government against every act of violence and every species of restraint, inconsistent with their sacred character.[6]

The right of transit became of less importance with improvement in methods of travel, in particular the development of air travel, but with safe conducts falling into disuse it became necessary for the diplomat to be given basic protection in third States solely on the basis of his status as diplomat in transit. This might be accepted on the evidence of his diplomatic passport, perhaps with a copy of his credentials. There were few occasions for clarifying whether a diplomat in transit was entitled to any further immunity—diplomats had enough sense not to pass through States where they were wanted on criminal charges or their creditors were waiting to pounce on them, and they did not stay long enough to fall foul of the authorities. If they did delay for personal reasons it was agreed that they lost their entitlement to immunity.[7] Unless the diplomat had property in the transit State

[3] Gentilis (1585) II ch III; Grotius (1625) II.XVIII.V; Bynkershoek (1721) ch IX; Wicquefort (1681) vol I para 29; Pradier-Fodéré (1899) vol II p 21. Martens (1827) vol I p 387 describes the case of Rinçon and Frégose, envoys of France to Venice and Turkey, who were assassinated in transit through Milan, allegedly with the complicity of the Emperor Charles V.

[4] In 1854, for example, France detained Pierre Soulé, making clear he would only be permitted to transit if they were assured he would not remain in France: Moore (1905) vol IV p 557; Satow (5th edn 1979) para 18.3.

[5] eg Oppenheim (8th edn 1955) vol I para 398: 'there ought to be no doubt that such third State must grant the right of innocent passage (ius transitus innoxii) to the envoy, provided that it is not at war with the sending or the receiving State'.

[6] (1866) s 247. See also Vattel (1758) IV.VII para 84; Genet (1931) vol II p 395; Hurst (1926) vol II pp 221–7.

[7] *Sickles v Sickles* 1910 Journal de Droit International Privé 529; *US v Rosal*, 191 F Supp 663 (SDNY 1960); 31 ILR 389; Deak, American International Law Cases vol 19 p 166.

there was little incentive to bring civil proceedings against him, since any judgment could not be enforced against him while his appointment continued.

In several cases, however, in France,[8] the United Kingdom,[9] and the United States[10] diplomatic agents in transit were held to be entitled to immunity from civil jurisdiction. Provision to this effect was included in the 1928 Havana Convention regarding Diplomatic Officers,[11] and the 1929 Resolution of the Institute of International Law.[12] In the Lateran Treaty of 1929 between Italy and the Holy See envoys to the Holy See were guaranteed admission to Italian territory on the basis of their national passport and a visa issued by a Papal representative abroad and were entitled to full diplomatic immunities even if their sending State maintained no diplomatic relations with Italy.[13] The Harvard Research in 1932 provided only a duty to permit transit and accord 'such privileges and immunities as are necessary to facilitate his transit', on condition that the transit State was notified of the official character of the diplomat. Other privileges and immunities were to be a matter of comity only.[14]

Article 40.1 thus reflects the modern customary law. It provides no right of transit to diplomatic agents. The International Law Commission considered provision for a right of free passage, but in the light of conflicting arguments 'did not think it necessary to go further into this matter'.[15] The Vienna Conference clarified the right of the transit State to refuse passage by adding the words proposed in an amendment by Spain: 'which has granted him a passport visa if such visa was necessary'.[16] In addition to inviolability, the immunities granted to the diplomat in transit are limited to what is 'required to ensure his transit or return'. There is thus no bar to institution of civil proceedings against him provided that he is not arrested or detained, which would in any event now be rare in any country in the context of civil proceedings. The term 'inviolability' probably denotes only personal inviolability and would not extend to personal property or a temporary residence such as a hotel room. His papers would, however, be entitled to the inviolability of archives of a foreign sovereign State. As for other privileges—customs privileges and exemption from baggage search may be accorded on a basis of courtesy, but are not required by Article 40. Other privileges are not required and are in any event unlikely to be relevant in the context of a transit journey.[17]

In the case of the *Former Syrian Ambassador to the German Democratic Republic*[18]—discussed above in the context of Article 39.2—the German Federal Constitutional Court

[8] *Bayley c Piedana et Mauroy* (1840) Tribunal de la Seine, 1901 Journal de Droit International Privé 341.

[9] *New Chili Gold Mining Co v Blanco* 4 Times Law Reports 346 (a doubtful precedent with conflicting dicta).

[10] *Holbrook v Henderson* (NY 1839) 4 Sandf 619; *Wilson v Blanco* (NY 1889) 4 NY Suppl 714; *Bergman v De Sièyes*, 71 F Supp 334, 170 F 2d 360, 1947 AD No 73, where the New York court said: 'it will ordinarily more interfere with duties to be obliged to attend the trial of an action pending in a third State than that of one pending in the State of his post'. In *Carbone v Carbone* (1924), 123 Misc (NY) 656, 1923–4 AD No 170, a New York court refused immunity in an action for divorce.

[11] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 421 (Art 23).

[12] Art 5: 26 AJIL (1932 Supp) 186.

[13] Text of Arts 18 and 19 of Treaty is in Satow (5th edn 1979) para 18.5.

[14] 26 AJIL (1932 Supp) 144, Art 15; Denza (2007) at pp 167–9.

[15] *ILC Yearbook* 1958 vol II p 103.

[16] UN Docs A/Conf. 20/C 1/L 319; A/Conf. 20/14 pp 209–10.

[17] Satow (6th edn 2009) paras 11.1–13.

[18] Case No 2 BvR 1516/96; 115 ILR 595.

pointed to the requirement under Article 40 for the diplomat to obtain a visa in order to transit a third State as a form of protection for the transit State, which balanced the duty to guarantee immunity. The fact that there was no such requirement for other third States suggested that diplomatic immunity did not apply in such other third States, and supported the conclusion of the court that:

> Diplomatic law as a self-contained regime, with its integrated possibilities of protection and reaction, is in principle not designed to cover the relations between diplomats and third States.

An illustration of the limited protection given by Article 40.1 occurred in 1972 when an Algerian diplomat in transit from Damascus to Brazil (though it is not certain whether this was the State where he was accredited) was found on search of his baggage at Schiphol airport in The Netherlands to be carrying quantities of grenades, rifles, revolvers, letter bombs, and other explosives. His luggage was confiscated but after questioning he was allowed to proceed on his journey. The Netherlands was then not a Party to the Vienna Convention but was generally applying its provisions and took the position that he could not be arrested or charged.[19]

Article 40.2 was added by the International Law Commission in response to a suggestion by the United States that the protection to be given to diplomats and their families should be extended to other members of a mission and their families.[20] The Commission, however, chose to make the obligation in respect of other members of a mission and their families more limited than the immunity from arrest and detention accorded under Article 40.1. In consequence it is very difficult to see what if any are the specific duties of a transit State towards junior staff of a third country mission and their families. There is no obligation under Article 40.2 to admit them for transit and probably there is no obligation to grant them inviolability or other immunities from jurisdiction.

Article 40.3 originally formed part of the Article on communications, now Article 27, but the International Law Commission thought it more appropriate to include in one Article all the obligations of third States. The effect of Article 40.3, which is based on customary international law, is that third States are bound to accord to all communications, bags, and couriers in transit and belonging to States Parties to the Convention the full range of privileges and immunities set out in Article 27 with the exception of Article 27.7 on diplomatic bags entrusted to the captain of a commercial aircraft. Article 27.7 is relevant only when the bag reaches the State of destination.

Article 40.4 was introduced at the Vienna Conference by a Dutch amendment.[21] In contrast to the obligations under paragraphs 1, 2, and 3 which arise where the transit State has expressly or by implication consented to transit, the obligations under Article 40.4 arise in a case of *force majeure* and without any consent by the transit State. The most common case of this is the forced landing or diversion of an aircraft.

Recognition

The obligations imposed by Article 40 apply as between Contracting Parties to the Convention even where the transit State is not in diplomatic relations with either the sending or the receiving State. But where the transit State does not recognize the sending

[19] UN Doc S/10816; 1974 RGDIP 247.
[20] UN Docs A/CN 4/114 p 66; A/CN 4/116 p 83; *ILC Yearbook* 1958 vol I pp 172–4.
[21] UN Docs A/Conf. 20/C 1/L 191; A/Conf. 20/14 pp 209–10.

State as a State or does not recognize as a government the authorities who accredited the diplomat, it will in consequence not regard that person as a diplomatic agent at all, so that it will not regard itself as bound by the duties in Article 40 so far as he is concerned. Thus, for example, when in 2002 Pakistan broke off diplomatic relations with the Taliban Government of Afghanistan and escorted its former Ambassador to the frontier with Afghanistan where it handed him to pro-United States Afghan forces, the United States—which had never recognized the Taliban Government—arrested him and ultimately transported him to Guantanamo Bay.[22] A person holding a diplomatic passport is also not necessarily a 'diplomatic agent' for the purposes of Article 40—there must also be evidence that he has been accredited to a specific State. For Article 40 to confer immunity there must in the eyes of the transit State be both a sending and a receiving State.

'while proceeding to take up or to return to his post . . .'

The obligations imposed on transit States by Article 40 arise only where the beneficiary is in the course of direct passage to the receiving State or to the home State, though it is not essential that the passage should be between these two States. It was clearly established even before the Vienna Convention that if a diplomat made or broke his journey for purely personal reasons, such as a holiday, he could not claim any special status. In *US v Rosal*[23] in 1960, for example, the Guatemalan Ambassador to Belgium and The Netherlands was held not to be immune from prosecution for a narcotics offence on the ground that he had flown to New York on personal business and intended to fly not back to his post but to Paris. He was not therefore 'within the rule of international law granting immunity to a diplomat en route between the official post and his homeland'. At the Vienna Conference the United States—perhaps with this case in mind—attempted by amendment to limit transit immunity to diplomatic agents 'in immediate and continuous transit on official duty', but there was virtually no support for this addition.[24] The wording in Article 40.1 allows a certain degree of flexibility.

There is, however, no entitlement to inviolability or immunity under Article 40.1 if the diplomatic agent remains in a transit State even if this stay is on some form of official business. (The diplomatic agent in such a situation may, of course, be entitled to immunity in some separate capacity such as representative to an international organization.) This was in part the ratio of the decision in the UK case of *R v Governor of Pentonville Prison, ex parte Teja*,[25] already discussed in the context of Article 39.1. Teja carried a diplomatic passport and held a roving commission on behalf of the Government of Costa Rica, but as he was not accredited to or received by any one State the court held that he could not be a diplomatic agent 'proceeding to take up or to return to his post'. As Lord Parker CJ put it: 'He had come from Geneva and he was going back to Geneva, and indeed he had a round-the-world ticket, one might say, beginning in Costa Rica and ending in Costa Rica'. Article 40 was also invoked in the case of *R v Lambeth Justices, ex*

[22] Information from lawyers representing Abdul Salam Zaeef, the former Taliban Ambassador.

[23] US District Court, Southern District of New York, 191 F Supp 663; 31 ILR 389; noted in 1961 AJIL 986.

[24] UN Docs A/Conf. 20/C 1/L 276; A/Conf. 20/14 pp 209–10.

[25] [1971] 2 QB 274, [1971] 2 All ER 11, [1971] 2 WLR 816.

parte Yusufu,[26] also discussed under Article 39.1, on the basis that Yusufu while he was working in the Nigerian High Commission in London applied for and was granted a diplomatic multiple entry visa to the United States, but the Divisional Court did not take seriously the claim that Yusufu was a diplomatic agent in transit.

In 1979 in the case of *Vafadar*,[27] the wife of the Ambassador of Afghanistan to India was denied immunity by the Court of Cassation in Belgium when she was arrested on criminal charges while passing through Belgium in order to visit her sick mother in Moscow. The Court of Cassation agreed with the lower court that she 'was not accompanying the diplomatic agent, was not travelling in order to join him and did not return to his country'. She therefore had no immunity under Article 40.1. Similarly a diplomatic agent in the Zambian Embassy in Kenya who was travelling in The Netherlands but not for the purpose of taking up his post or returning to his own country was held in 1984 by the District Court of Haarlem in *Public Prosecutor v JBC*[28] not to be entitled to immunity from a charge of smuggling heroin. In 1980 a Belgian diplomat accredited to Iraq was arrested and charged on the order of a Greek court with the murder of his wife. The shooting of the wife took place in a taxi on the way to Athens airport, whence they intended to return to Iraq. The decision may have depended more on the flagrant nature of the crime than on the reasons why the diplomat had stopped over in Athens before returning to his post.[29]

That the transit need not be directly between sending and receiving States for entitlement to immunity under Article 40.1 to apply was illustrated in 1977 by the case of *R v Guildhall Magistrates' Court, ex parte Jarrett-Thorpe*.[30] Jarrett-Thorpe was the husband of a diplomat in the Embassy of Sierra Leone in Rome. His wife had travelled to London to buy furnishings for the embassy in Rome, and it was intended that her husband would join her there to help her with luggage and to travel with her back to Rome. When he arrived he received a message that his wife had already left for Rome, and while at Heathrow airport awaiting a flight to Rome he was arrested on criminal charges. The Divisional Court held that he was 'travelling separately in order to join' his wife and that he was therefore entitled to immunity under Article 40.1. The court specifically rejected the argument that Article 40 applied only to transit between sending and receiving States.

Although it was not material in the *Jarrett-Thorpe* case, the second sentence of Article 40.1 under which members of the families of diplomatic agents derive their entitlement to inviolability and transit immunities is worded less precisely than the first sentence. On the facts described above, for example, Mrs Jarrett-Thorpe would *not* have been entitled to immunity while travelling to London or during her stay in London, while her husband 'travelling separately to join' his diplomatic spouse would appear to qualify. It may be, however, that the words 'the same shall apply' are intended to import into the second sentence of Article 40.1 the limitations as to destination which appear in

[26] [1985] Crim LR 510. Brown (1988) at p 61 describes the *Meier* case in which an Australian magistrate granted immunity to a Canadian national with a Tongan diplomatic passport who claimed to be in Australia to arrange a state visit by the King of Tonga. He was neither a member of any Tongan diplomatic mission nor accredited to any State, and Brown states simply that the decision was wrong.

[27] 82 ILR 97.

[28] 94 ILR 339.

[29] 1980 RGDIP 1079.

[30] Times Law Reports, 6 October 1977.

the first sentence. Given the derivative nature of immunities for family members of diplomatic agents, this is probably the correct interpretation.

In 2012, Amelework Wondemagegne, an Ethiopian diplomat in Washington, was arrested at Heathrow Airport on 7 April and found to be in possession of large quantities of cannabis. She had booked a flight to Washington for 17 April and had applied for a UK visa for a family visit and intended to visit Italy and France before returning to the USA. The Crown Court held that she was at the material time a visitor and not passing through the UK to resume her diplomatic duties in Washington. Immunity was denied and she was jailed for thirty-three months.[31]

[31] *Mail Online*, 2 August 2012; BBC News, 2 August 2012.

DUTIES OF THE MISSION TOWARDS THE RECEIVING STATE

Article 41

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

Articles 41 and 42 of the Convention set out the general obligations towards the receiving State of diplomatic agents and other persons enjoying privileges and immunities. There are four distinct duties set out in Article 41. Each of these duties was already clearly established in customary international law.

Duty to respect laws and regulations of the receiving State

This is much the most important of the four general obligations of a diplomatic agent. Vattel, as always, set out the position succinctly: 'Cette indépendance du ministre étranger ne doit pas être convertie en licence: elle ne le dispense point de se conformer dans ses actes extérieurs aux usages et aux lois du pays, dans tout ce qui est étranger à l'objet de son caractère: il est indépendant, mais il n'a pas droit de faire tout ce qu'il lui plaît.'[1] In the older writers this duty was seen as a corollary of the duty on the part of the receiving State to accord privileges and immunities. Many of these writers saw the diplomat as being exempt as a matter of substance from the legal duties and liabilities prescribed by the laws of the receiving State, but having instead a moral duty, or a duty of courtesy to respect them. The duty to 'respect' the laws of the receiving State was something less than a legal duty to obey them.[2] The modern theory, however, is that certainly in regard to his private acts and now even in regard to his official acts a diplomat is subject as a matter of legal substance to the laws of the receiving State except where these laws make a specific exception in his favour. Such exceptions may be made in order to give effect to an international rule (as in matters of tax and social security) or they may be made as a matter of domestic policy, perhaps for reasons of comity or of reciprocity.[3] To regard a diplomat

[1] (1758) IV.VII para 93.

[2] See for example, Hurst (1926) vol II p 142: 'L'obligation qui leur incombe de respecter ces lois ne provient d'aucune obligation de leur obéir.'

[3] Cahier (1962) pp 145–7.

as not merely protected by immunity from enforcement of the laws of the receiving State but also exempt from liability under them would produce absurd results. It would mean that a diplomat could pay a debt and sue for recovery of the money on the basis that it had been paid in the absence of any obligation. It would lead to an absurd position where immunity was waived or came to an end on termination of functions or operation of law in that the defendant could again plead his status in order to dispute liability. In the cases already discussed in the context of Article 31.1 regarding the legal effect of the establishment or lifting of immunity, national courts have emphasized that immunity is procedural in character and does not affect any underlying substantive liability, and this is now a well-established rule.[4]

When absolute immunity of a sovereign State for acts performed within the jurisdiction of another sovereign State was a general rule, it might have been arguable that official acts of a diplomat, which are in reality acts of the sending State, did not create rights or obligations within the receiving State. But such a theory cannot be sustained in modern conditions where overseas activities of most States are multifarious and complex and they have numerous agencies abroad engaged in purchasing, investing, tourist promotion, immigration control in regard to their own territory, transmission of their culture and language. Many of these activities are no longer protected by state immunity from the jurisdiction of local courts, and when no state immunity exists, or when it has been waived, local courts will proceed as if dealing with rights and obligations in the ordinary way. Sometimes a local court may conclude that a dispute involving a foreign State is non-justiciable—that is to say that it is more appropriately decided by diplomatic negotiations or by international adjudication—or they may decline on grounds of policy to review the legality of certain acts of foreign sovereigns carried out in the territory of those foreign sovereigns. Courts do not, however, treat the foreign sovereign as in any way incapable of acquiring rights or incurring obligations under their own laws. The foreign State, acting on its own behalf or through its diplomatic agent, is generally regarded in other jurisdictions as a legal person with rights and correlative duties, but protected to a certain extent by procedural cloaks of sovereign and diplomatic immunity.

There will be some occasions where it would be inappropriate for political or social reasons, or excluded by reason of treaty commitments that foreign States should be bound by certain national legislation. Very rarely the application of some forms of domestic legislation could be regarded as infringing sovereign rights of another State—for example, to regulate admission or employment in its own territory. Such problems can, however, be tackled by specific legislative or administrative exemption and they are not a basis for qualifying the normal principle of substantive liability.

Article 41.1 is of considerable assistance to States seeking to control abuse of diplomatic immunity. A Memorandum on Diplomatic Immunity sent to all new diplomats in London states that:

> In accordance with Article 41 of the Vienna Convention on Diplomatic Relations, members of diplomatic missions and their families are expected to respect the laws and regulations of the United Kingdom. Diplomatic immunity in no way absolves members of diplomatic missions or their

[4] See *Dickinson v Del Solar* [1930] 1 KB 376, 1929–30 AD No 190; *Empson v Smith* [1966] 1 QB 426; *Shaw v Shaw* [1979] 3 All ER 1; 78 ILR 483; *Gustavo JL and Another* 86 ILR 517; *US v Guinand* 99 ILR 117. See also Denza, 'Diplomatic Privileges and Immunities' in Grant and Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein, 2007) pp 173–4.

families from their duty to obey the law. The police investigate all allegations that the law has been broken and report the results to the Foreign and Commonwealth Office. The Foreign and Commonwealth Office draw these to the attention of the Head of Mission (or sometimes a senior official).

Diplomats are particularly reminded of the law regarding firearms (which as regards import and possession is stricter than that of most other States), on driving under the influence of alcohol or drugs, on traffic offences, theft, and other serious crimes. In their Review of the Vienna Convention in 1985 the UK Government also stressed that: 'UK staff serving overseas are expected to respect the laws and regulations of the receiving State in accordance with Article 41 of the Convention.'[5] The State Department also reminded diplomatic missions in 1993 that where functions open to the public are held on embassy premises, heads of mission must ensure that they are aware of and conform to local fire regulations, capacity limits, and the prohibition on serving alcohol to persons under twenty-one.[6]

Non-compliance by some diplomats with local employment laws is another matter which has given rise to public scandal. France, in an attempt to control this form of potential abuse without infringement of immunities, has devised a system under which when a member of a diplomatic mission applies for a visa for a private servant, the Protocol Service of the Ministry of Foreign Affairs reminds the applicant of Article 41.1 of the Convention and invites him to draw up a written contract of service regulating working hours, wages, holidays, and social security. Servants are then given special status cards which assist the Ministry to carry out checks on the working conditions of the servants.[7] A similar system is applied in the United States by the Office of Foreign Missions. Missions are advised that the State Department will examine closely any case of alleged abuse of a personal servant brought to its attention, and that complainants will be advised of possible methods of redress.[8] In London, diplomatic missions were reminded in 2002, with particular reference to complaints from domestic staff in some missions that they had not been paid the amounts due to them under the National Minimum Wage Act 1998, of their duty under Article 41 of the Convention to comply with the laws of the receiving State.[9]

In the case of *Skeen v Federative Republic of Brazil*,[10] already discussed under Article 37.1, the US court considered the argument raised by the plaintiff that the duty imposed by Article 41.1 of the Convention on the Ambassador of Brazil to respect local laws and regulations implied a specific duty on him to control the conduct of his grandson (who had been involved in a shooting outside a nightclub). The court held that tort law did not impose any general duty to control the conduct of another and that Article 41.1 did not create between an ambassador and members of his mission any specific duty of control.

[5] Cmnd 9497, para 73. Older guidance to diplomats in London on firearms law is in 1981 BYIL 431 and in 1985 BYIL 457.

[6] Circular Note to chiefs of mission, 2 November 1993, available at www.state.gov/ofm/ 31311.htm.

[7] 2001 AFDI 570.

[8] Circular Note to chiefs of mission of 18 June 2000, available at www.state.gov/ofm/31311.htm and in 2000 DUSPIL 637. It was in pursuit of this activist policy that the State Department took the lead in the investigation and prosecution of Dr Khobragade, discussed above in the context of Article 39.1.

[9] Note A520/02 of 6 September 2002 to diplomatic missions in London.

[10] 566 F Supp 1414 (1983); 121 ILR 482.

Duty not to interfere in internal affairs

The International Law Commission discussed at length in 1957 the nature of this duty.[11] It became apparent that there was some confusion between the duty of the sending State not to intervene in the domestic affairs of the receiving State—an important rule of international relations, but one which it was ultimately agreed was not suitable for inclusion in a codification of diplomatic law—and the much more limited question of the duty of the diplomat in his personal activities not to meddle in the domestic affairs of the receiving State. It may sometimes be difficult to determine whether it is the duty of the State or the duty of the diplomat which is in issue—this will normally be determined by whether the diplomat was acting on instructions of his sending State. It was the second of the two duties which was reflected in Article 12 of the Havana Convention regarding Diplomatic Officers which stated: 'Foreign diplomatic officers may not participate in the domestic or foreign policies of the State in which they exercise their functions.'[12] Where a diplomat on instructions made some statement or took some step which was regarded by the receiving State as interference in its internal affairs, the question was whether the sending State had *locus standi* in the matter—as it would if the treatment of its own nationals or relations between the two States were involved. The long-standing rule now reflected in Article 41.1, however, related to personal comments or activities by diplomats not made on instructions. There were many cases where disregard or alleged disregard of the rule led to the offending diplomat being declared *persona non grata*. The most famous was the incident where Lord Sackville, British Minister in Washington, in 1888 wrote a letter advising the recipient, who had pretended to be a naturalized citizen of British birth, how he should vote in the forthcoming Presidential election. This letter was made public, in breach of the promise of secrecy which the correspondent had given, and led to the dismissal of Lord Sackville by the Government of the United States.[13] The memory of this affair might explain the vigour with which the US Embassy disassociated itself from a U K Conservative Party fund-raising appeal in 2001 which suggested that previous generous donors had gained access to the outgoing US Ambassador. The Embassy spokesman swiftly made clear that to link the ambassador to a fund-raising drive by any political party was 'incorrect and inappropriate'.[14] Diplomatic cables published by Wiki-Leaks, however, indicate that US diplomatic staff continue to try to exercise covert influence on impending elections, particularly in Latin America.[15]

The original formulation of the rule submitted to the International Law Commission was based on the wording of the Havana Convention. The Commission, however, removed the reference to intervention in the 'foreign' affairs of the receiving State on the basis that the main function of the diplomat in the receiving State was to deal with and influence relations with the sending State, which was surely 'foreign affairs'.[16]

[11] *ILC Yearbook* 1957 vol I pp 143–50.

[12] UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 420.

[13] The case is discussed more fully under Art 9. See Hackworth, *Digest of International Law* vol IV pp 472–4; *ILC Yearbook* 1957 vol I p 147; Cahier (1962) pp 141–3; Satow (5th edn 1979) paras 15.32, 18.13; Satow (6th edn 2009) paras 9.58–9.

[14] *The Times*, 28 February 2001.

[15] Duquet and Wouters (2015a) n 22.

[16] *ILC Yearbook* 1957 vol I pp 143–5.

It is unfortunate that in Article 41.1 the duty of non-interference in internal affairs is so closely juxtaposed to the duty to respect the laws of the receiving State. In fact, the two rules are quite distinct in origin and application. Most conduct which on the part of a diplomatic agent lays him open to the charge of interference in the internal affairs of the receiving State will at least in democratic societies be permissible under local law and quite proper in the case of a citizen of the receiving State.

The difficulties which diplomats may sometimes face in observing the rule of non-interference were well illustrated at the time of the fall of the Communist regime of Ceaușescu in Romania in December 1989. Some UK diplomats joined in the march of students and workers which overwhelmed the national television studios, and later defended their conduct on the ground that they were swept along by the tide of revolution in Bucharest as 'fairly passive observers', and that the crowd 'wanted us there because we were British'. They also claimed justification on the ground that they were properly engaged in the diplomatic function of observation. A former British Ambassador, however, commented publicly on these accounts that: 'Whatever the personal feelings of individual diplomats, active participation, as distinct from observation, in the politics of the country to which their ambassador is accredited is inconsistent with their diplomatic status.'[17]

Some receiving States may, on the other hand, regard as improper interference in their internal affairs words or actions which in the eyes of the sending State or its envoy are no more than the encouragement of democratic freedom. With the greater emphasis in modern international relations on the encouragement and protection of human rights in other States, conflicts between the diplomatic duty of non-interference and the objective of promoting observance of human rights are frequent. In 1988 a first secretary at the US Embassy was expelled by the Government of Singapore on the ground that he had encouraged a local lawyer to stand against the government in general elections. Ministers made clear in public that only his diplomatic immunity had protected him from arrest and indefinite detention without trial and that any other diplomat who advocated wider democracy or freedom of the press in Singapore would also be expelled.[18] Even attempts to seek political information may be misinterpreted as interference in internal affairs—in 1998 China strongly attacked the action of the British Consul-General's Office in Hong Kong of inviting candidates in forthcoming elections to meet British diplomats.[19] In 2000 the Government of Burma accused the British Ambassador of 'meddling' in Burma's domestic affairs and overstepping 'universal diplomatic norms' by attempting to reach the house of the pro-democracy opposition leader Aung Suu Kyi. The Foreign and Commonwealth Office, however, defended the ambassador's conduct, emphasizing that 'Human rights are a matter for international concern and a democratically elected political party should be able to receive visitors.'[20] In Eritrea, in 2001, the European Union made an official protest to the Government at a wave of arrests of opposition members. Since Belgium, which at the time held the Presidency of the European Union, had no mission in Eritrea, the protest was delivered by the Italian Ambassador, who was promptly declared *persona non grata.* On the following day the Eritrean Ambassador in Rome was

[17] *The Times*, 27 and 30 December 1989 (letter from Sir John Graham).
[18] *The Times*, 24 May 1988.
[19] *The Times*, 8 May 1998.
[20] *The Times*, 6 September 2000.

given seventy-two hours to leave, and all European Union ambassadors were recalled for consultations by way of collective protest at the authoritarian conduct of the Government of Eritrea.[21] The US Embassy in Belarus has also openly pursued a policy of supporting non-governmental organizations opposed to the Communist regime of President Lukashenko while not supporting opposition political parties on the basis that this was prohibited by law.[22]

In 2012, the Russian Parliament accused the new US Ambassador of 'fomenting revolution' after he held talks with organizers of street protests campaigning against Vladimir Putin's plan to return to the Presidency. The Ambassador, Michael McFaul, defended his action as being part of a 'dual-track engagement' with the Russian Government and with civil society leaders. He had met with government officials on the previous day.[23]

Ambassadors, however, tread a fine line when they publicly criticize the human rights practices of receiving States with an enthusiasm going beyond what their sending government is prepared to endorse. The British Ambassador to Uzbekistan, Craig Murray, soon after his appointment made outspoken criticisms of the regime of President Karimov. His approach was at first supported in public by the Foreign and Commonwealth Office, but he was later recalled to London on health grounds. After considerable public controversy over his actions and an indication from the Government of Uzbekistan that he was no longer welcome, he was finally recalled from his post.[24]

Even over-enthusiastic endorsement of the policies of the government of the receiving State may carry risks. In 1979 the military attaché in the French Embassy in Argentina expressed public support and admiration for the conduct of the Argentine military forces in defending freedom against subversion—at a time when a Commission of Inquiry established by the Organization of American States had just announced that cases of 'disappearance' and flagrant breaches of human rights in Argentina were even more numerous than international humanitarian organizations had previously believed. In response to a question in the National Assembly the French Minister for Foreign Affairs distanced himself from the statements by the military attaché and announced that he had been removed from his embassy post.

The position is admirably summed up in a Memorandum of Reply prepared by The Netherlands Government for its Parliament in the context of approval of the Vienna Convention. This states:

> There are no international guidelines for the application of Article 41 paragraph 1, and we doubt whether it would be at all possible to develop such guidelines, given the fact that views on what should, or should not, be regarded as inadmissible interference in the internal affairs of a receiving State vary from place to place and from time to time.

The Memorandum went on to discuss the particular difficulties for diplomats assisting in individual cases of human rights, and concluded that any attempt to secure international acceptance of the view that such assistance was not a form of interference in internal affairs

[21] 2002 RGDIP 149.

[22] *The Times*, 3 September 2001. In 1997 a US diplomat was declared *persona non grata* by Belarus for taking part in an anti-government rally. The Foreign Ministry described this action as 'incompatible with his diplomatic status': *The Times*, 24 March 1997.

[23] *The Times*, 25 January 2012; *The New Yorker*, 11 August 2014.

[24] *The Times*, 1 April, 1 and 15 October 2004.

was likely to be counterproductive.[25] Richtsteig also emphasizes, in describing German practice in regard to Article 41.1, that the duty not to interfere in the internal affairs of the receiving State cannot override the responsibility of the diplomat to protect the interests of his sending State, within the limits permitted by international law. Criticism must be accepted as proper if it is made in the course of protecting the interests of the sending State.[26]

Behrens, however—after setting out a comprehensive account of both older and more recent practice—has claimed that criticisms made by diplomats of the human rights performance of the receiving State may under modern rules also be justified as an exercise of the diplomatic function of observation and as upholding the general interest in enforcing universal norms. He has argued that any alleged hierarchy of norms would not assist in resolving the tension between the duty of non-interference and the right to protest on human rights grounds, but that conflicts may often be resolved using proportionality as a 'mediating method'.[27]

The relationship between the duty of diplomatic protection and the duty on diplomats not to interfere in the affairs of the receiving State was considered by the English Court of Appeal in 1999 in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Butt*.[28] The applicant was sister to one of a group of British citizens arrested in Yemen and charged with terrorist offences. She asked the UK Prime Minister and the Secretary of State for Foreign and Commonwealth Affairs to intervene with the President of Yemen as head of the judiciary of Yemen on the ground that the defendants had been tortured and that their trial had been unfair. The Foreign and Commonwealth Office, which had made substantial efforts to extend consular protection, replied that it could not intervene in the judicial process of another State or make formal representations until all local remedies had been exhausted. The High Court refused permission for judicial review proceedings, and the Court of Appeal confirmed the refusal, pointing to the duties in Article 41 of the Vienna Convention on Diplomatic Relations and in the corresponding Article 55 in the 1963 Vienna Convention on Consular Relations as precluding interference in the judicial process of a foreign State.

Even the publication of factual data by the US Embassy in Beijing was criticized by the Chinese Vice-Minister of Environmental Protection on the grounds that it infringed both elements of Article 41.1. In June 2012, Wu Xiaoping protested that the practice of US diplomatic and consular establishments of monitoring air quality and publishing the hourly results online infringed Chinese environmental regulations and interfered with China's internal affairs. The Chinese Government complained that the evaluation on the basis of one point within an area was not scientific. US Embassy readings—relied on by US citizens resident in China—were generally worse than those released by Chinese authorities. The US refused to accept that the practice violated Article 41 of the Convention and continued to release the data. The Chinese authorities apparently accepted the situation but on a few occasions of visits by foreign heads of State suppressed or manipulated the US data.[29]

[25] 1984 NYIL 308. See also Lecaros (1984) pp 126–7. Other cases are recorded in Nahlik (1990), esp ch III at pp 293–306.

[26] (1994) p 98. For a comprehensive account and analysis of theory and practice in this area, see Kim (later Behrens) (2007) and Behrens (2011) .

[27] Behrens (2014).

[28] 116 ILR 607.

[29] *China Daily*, 5 June 2012; 2012 AJIL 851–2.

Comment on international affairs

Article 41 has in practice been confined to diplomatic words and actions potentially affecting the internal affairs of the receiving State, as was intended by the International Law Commission. Some astonishingly undiplomatic words and actions by ambassadors in relation to international affairs have passed without response or with only mild disapproval from the receiving State. Thus, for example, the Ambassador of Saudi Arabia to the United Kingdom, Ghazi Algosaibi, published in an Arab newspaper a poem praising Palestinian suicide bombers while saying that the White House heart was 'filled with darkness'. The Foreign and Commonwealth Office declined to comment on the poem.[30] A few months later he described the Israeli occupation of Palestinian land as worse than the Nazi occupation of Europe, which the Foreign and Commonwealth Office did describe as 'wrong and insensitive'. The Israeli Ambassador to Sweden in 2004 publicly vandalized an exhibit at the Museum of National Antiquities in Stockholm on the ground that it glorified Palestinian suicide bombers. Even before the Swedish Government summoned the ambassador to hear his explanation, the Israeli Foreign Ministry with the backing of the Prime Minister Ariel Sharon summoned the Swedish Ambassador in Tel-Aviv in order to express its disgust at the exhibit.[31]

Blogs by ambassadors

A recent practice which is liable to cause problems in the context of Article 41.1 is the authorization to their ambassadors by some governments to publish blogs commenting on events in the receiving State. In 2011, Simon Collis, UK Ambassador to Syria, not only attended a vigil for a human rights activist who had died after being held and tortured by Syrian security forces, but later issued a blog—approved by the Foreign and Commonwealth Office—entitled 'The Truth is what Big Brother says It Is'. The blog accused the government of denying entry to foreign journalists, systematically imprisoning Syrian journalists and bloggers, and cutting satellite phones and television channels. The UK Embassy was closed in March 2012 for security reasons and the Ambassador thus released from any constraints on his criticisms of the regime, which became even more outspoken.[32]

Also in 2011, the UK Ambassador to Sudan, Nicholas Kay, was summoned for a reprimand by the Ministry of Foreign Affairs after a blog in which he criticized the Sudan Government's refusal to allow international aid into conflict zones and expressed concern over soaring food prices even in Khartoum. He had described Sudan as a country 'where hunger stalks the land'. The Foreign and Commonwealth Office made clear that it actively encouraged such public comments and saw them as another means of communicating Britain's foreign policy objectives. Blogs have also caused protests from receiving States in North Korea and Iran.[33] It is clear that not all diplomats believe that this novel departure from normal diplomatic discretion is necessarily to be encouraged, and it is

[30] *Observer*, 14 April 2002.
[31] *The Times*, 19 January 2004.
[32] *The Times*, 27 September 2011, 6 March 2012.
[33] *The Times*, 3 November 2011.

usually difficult to reconcile with the duty of diplomats to refrain from interference in the internal affairs of the receiving State.

As regards public comment on the affairs of the receiving State, the position of the ambassador should be distinguished from that of the sending State. It is both proper and customary for governments to send messages of congratulations to a new leader following an election—though this may sometimes emphasize the legitimacy of the process rather than pleasure at the outcome—and governments now generally practise systematic comment on and evaluation of the human rights performance of others on the basis that their collective interest in standards required by customary international law and by numerous treaties outweighs any argument that this amounts to intervention in the internal affairs of other States.[34] The confidential reporting by diplomats to their own governments of course contributes significantly to these public evaluations, although it is not the only source used.

Duty to communicate through the Ministry of Foreign Affairs

Just as a diplomatic mission is entitled to insist that communications to it from organs of the receiving State and in particular from its courts should be channelled through the Ministry of Foreign Affairs,[35] that Ministry is in return entitled to regard itself as *prima facie* the sole channel of communication to receive communications from the diplomatic mission to the government. The rule is a long-established and universal one, based on common sense. In France it was prescribed by Decrees of 1799 and of 1810 issuing from the Emperor Napoleon.[36] The task of the Ministry of Foreign Affairs is made smoother and relations are conducted more efficiently if all communications are normally channeled through the Ministry which is in the light of its overall knowledge of the bilateral relations between the two countries best qualified to help with requests, information, and negotiations. Article 13 of the 1928 Havana Convention on Diplomatic Officers set out the rule without any qualification.[37]

Under modern practice, however, which is reflected in Article 41.2, it is becoming more usual for direct contact with other government departments to be permitted by agreement in particular cases or by practice. It has long been the understanding that specialist attachés, whether military, cultural, or economic, are authorized to do business directly with the corresponding specialist ministry in the receiving State.[38] The extension of this practice to wider categories of diplomatic staff reflects the degree to which the substance of international relations has become highly technical as well as a greater tendency in the conduct of relations between States to use the most informal and effective channels for communication. The Ministry of Foreign Affairs will, however, always expect

[34] See, eg, the annual UK Foreign and Commonwealth Office Human Rights and Democracy Reports available at www.gov.uk/gpvernment/collections/human-rights-and-democracy-reports. The latest, for 2014, was published on 2 March 2015. See also Satow (6th edn 2009) para 9.58; Behrens (2011); Duquet and Wouters (2015a) pp 8–12, where it is stated that online comment on human rights performance by The Netherlands Embassy in Zimbabwe is attributed to the Embassy cat.

[35] See *In re Austrian Legation* 1949 AD No 95, where the Supreme Court of Argentina confirmed that the Austrian Minister was entitled to insist that a request for depositions and documents would be complied with only if transmitted through the Ministry of Foreign Relations and Worship.

[36] The texts of the two Decrees are in Salmon (1994) para 208.

[37] UN Laws and Regulations p 420.

[38] Hackworth, *Digest of International Law* vol IV p 612; *ILC Yearbook* 1957 vol I pp 50–1, 143–50.

to be kept informed of the substance of exchanges of any importance or potential political sensitivity between an embassy and another ministry. This was in effect what was meant by the reply given in 1979 by the UK Prime Minister to a Parliamentary Question: 'All foreign countries which maintain missions accredited to the Court of St. James' conduct their business with Ministers and officials of Her Majesty's Government under the auspices of the Foreign and Commonwealth Office.'[39] The German Ministry of Foreign Affairs by Circular Note to diplomatic missions has made clear that they are not permitted to correspond directly with provincial or local authorities on general questions.[40] The Belgian Ministry of Foreign Affairs encourages foreign diplomatic missions to establish direct contacts with the communities and regions in Belgium's highly decentralized structure, though it is again made clear that certain topics are reserved to the Federal Ministry.[41]

Although the words 'or such other ministry as may be agreed' when used elsewhere in the Vienna Convention were intended to safeguard the UK practice whereby missions of Commonwealth States (High Commissions) dealt not with the Foreign Office but with the Commonwealth Office, they have in the context of Article 41.2 a wider significance, as explained in the previous paragraph.

Duty regarding use of mission premises

The duty not to use mission premises in any manner incompatible with the functions of the mission is to some extent an aspect of the duty in Article 41.1 to respect the laws and regulations of the receiving State. To take the most extreme case, the members of the diplomatic mission may not use the premises to plot the removal or the destabilization of the government or the political system of the receiving State.[42] On a more mundane level, if for example the receiving State bans the manufacture of alcohol or the operation of gaming houses, then mission premises may not be used for those purposes. It has been common for embassies to be used for marriage ceremonies—an expressly recognized consular function under the 1963 Vienna Convention on Consular Relations—but not all receiving States permit this, and the local law must be respected as required by Article 41. Just as personal immunity from jurisdiction does not confer or imply exemption from local laws and regulations, so inviolability of mission premises does not confer or imply exemption from local laws for acts or events taking place on these premises. The meaning of inviolability and of the now discredited theory of exterritoriality is discussed more fully above under Article 22. Even though the local law cannot be supervised by inspection from local fire or building safety officers or enforced through legal proceedings, States do in general accept without question that they are subject to local law on such matters as obtaining planning permission before carrying out structural alterations to their premises.

The use of mission premises for the purposes of registration and voting in elections being held in the sending State is common and falls within the function—listed in Article 3

[39] Hansard HC Debs 19 February 1979 WA col 43, printed in 1979 BYIL 328.

[40] Richtsteig (1994) p 99. For Belgian practice see Salmon (1994) para 210.

[41] Duquet and Wouters (2015a) pp 15–16.

[42] In 1927 the Chinese Government with the prior permission of the Diplomatic Corps entered the diplomatic quarter and on search of two Russian owned buildings, though not the embassy itself, found substantial evidence of Soviet support for the Chinese Communist Party. The documents were published and led to serious recriminations between the two States: 1928 RGDIP 184–92.

of the Convention—of protecting nationals of the sending State. Many States, however, expect prior notice to be given, and some impose detailed conditions and requirements.[43]

The duty in regard to use of mission premises is, however, wider than the duty to respect local laws. It would, for example, cover such activities as running a commercial restaurant or a trade promotion shop on mission premises—activities which are not in themselves illegal but which are not within the scope of the proper functions of a diplomatic mission as described in Article 3 and which if carried on in mission premises are likely to offend the receiving State or to constitute an abuse of the special status of the premises. Premises which are used solely for such purposes may, of course, not be accepted by the receiving State as constituting 'premises of the mission' at all within the definition given in Article 1 of the Convention. Thus, for example, the UK Government in their Review of the Vienna Convention said:

> we will take appropriate administrative action in the event of abuse or suspected abuse, including withdrawal of diplomatic status from existing premises where they are not being used for purposes compatible with the legitimate functions of a mission. As a general rule we regard the following types of activity as being incompatible with the functions of a mission: trading or other activities conducted for financial gain (e.g. selling tickets for airlines or holidays, or charging fees for language classes or public lectures) and educational activities (e.g. schools or students' hostels).[44]

The US Secretary of State, in a Circular Note to chiefs of mission at Washington in 1987, emphasized the Government's position that the use of premises or other property of diplomatic missions to engage in commercial activity (other than that incidental to the maintenance and operation of the post or performance of diplomatic functions) was incompatible with the status of these establishments. Particular attention was drawn to the use of mission bank accounts for commercial transactions other than those identified above.[45] A later Circular Note to chiefs of mission in 2002 made clear that 'the use of embassy and chancery premises for a fee to host wedding receptions or other private events is not permitted'. Such premises could, however, continue to be used for social events in support of charitable causes provided that any charge was limited to costs actually incurred by the mission and not intended to make a profit. The Note stressed that such use 'is well established and furthers the promotion of friendly relations between states'.[46]

The reference to 'other rules of general international law' and to 'special agreements' was intended primarily to cover the problem of asylum on diplomatic premises, with which the Conference ultimately did not deal in express terms. This wording ensures that nothing in this Article alters the position regarding the right of sending States to give diplomatic asylum in circumstances where it is permitted under customary international law or where (as among States in Latin America) there is a bilateral or multilateral agreement permitting it.[47] Where a continuing grant of diplomatic asylum clearly falls outside the circumstances covered either by customary international law or by special agreements—as in the case of Assange which is discussed in the context of Article 22

[43] Duquet and Wouters (2015a) pp 17–18.

[44] Cmnd 9497, para 39(a).

[45] 1987 AJIL 642–3. See also Foreign Missions Act, s 215(a) on use of mission premises for residences other than by members of missions or their families, described in 1988 AJIL 808.

[46] Circular Note of 15 May 2002, available on www.state.gov/ofm/31311.htm.

[47] See *ILC Yearbook* 1957 vol I p 144 (para 63); Lecaros (1984) pp 105–19.

above—the State granting asylum is in violation of Article 41.3. The continued toleration by the United Kingdom of the shelter afforded by Ecuador to Julian Assange since 2012 cannot be reconciled with their stated intention of curbing abuse of the inviolability of mission premises as set out above in their Review of the Vienna Convention.[48]

Diplomatic asylum, the freedom of private worship on mission premises, and the possibility of a narrow exception to the prohibition on forcible entry of mission premises are discussed fully under Article 22. A breach of the duty imposed by Article 41.3 is not in itself sufficient to entitle the receiving State to take measures contrary to the inviolability of mission premises. As was emphasized by the International Court of Justice in the *Hostages Case*[49] the Convention contains its own provisions of remedies which may be used to respond to any breach of the duties in Article 41.

[48] See n 44 above.

[49] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at paras 83–7.

PROFESSIONAL OR COMMERCIAL ACTIVITY BY DIPLOMAT

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Unlike the four duties of a diplomatic agent which are set out in Article 41, the duty to abstain from professional and commercial activities was not established before the Vienna Convention as a rule of customary international law. It was at least from the nineteenth century onwards regarded as somewhat improper and incompatible with his status for a diplomat to engage in trading in the receiving State. In the case of *Taylor v Best*[1] Jervis CJ said:

> If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our court, by engaging in commercial transactions, that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character.

It was quite usual for the diplomatic service rules of a particular State to prohibit the diplomats of that State from trading or from having a second occupation while serving abroad, and it was also usual for States to refuse to accept in a diplomatic capacity anyone already engaged in trading activities, or to declare them *persona non grata* if they traded—particularly if they abused their status by taking advantage of their immunity from jurisdiction.

But the prohibition was not universal. States could and sometimes did receive a diplomat who engaged in professional or commercial activities if they perceived him as particularly suitable for the proposed appointment. In this event he was subject to the ordinary trading or professional requirements relevant under the law of the receiving State to his unofficial activities.[2] Because it was uncertain under customary law whether he would remain entitled to diplomatic immunity in regard to his professional or commercial activities, many States made a specific reservation to the effect that the diplomat himself, or his involvement in unofficial activities, was acceptable only on the basis that he would not be accorded immunity in regard to those activities.

Article 42 was proposed as a new Article at the Vienna Conference by Colombia, which justified its amendment in the following terms:

> The proposed new article would give the sending State the assurance that its diplomatic agents abroad would limit their activities to their official duties. It would assist the receiving State by eliminating difficult problems, and would enhance the dignity of the diplomatic corps accredited to its government. Lastly, it would serve to protect diplomatic agents from any suggestion that they might be using the prestige of their office to further their outside interests.[3]

[1] [1854] 14 CB 487 at 519, 139 ER at 214.
[2] See Art 24 of Harvard Research: 26 AJIL (1932 Supp) 121.
[3] UN Docs A/Conf. 20/C 1/L 174; A/Conf. 20/14 pp 211–13.

The subsequent discussion clarified the proposal in a number of ways. It was made clear that the prohibition applied only to diplomatic agents and not to their families or to subordinate staff of the mission. The implications of this for possible gainful occupation by members of diplomatic families are discussed more fully in the context of Article 37.1. The Vienna Conference also made clear that it was not intended to outlaw literary, cultural, or academic activities attracting modest remuneration. These are essentially not carried out 'for personal profit'.

Relationship between Article 42 and Articles 31.1(c) and 34(d)

As already explained, the prohibition under Article 42 on the diplomat from exercising in the receiving State any professional or commercial activity for personal profit does not obviate the need for provision to ensure that immunity does not apply to those activities (Article 31.1(c)) and that income or capital gains from them are subject to local tax (Article 34(d)). The specific exceptions to immunity and privilege are needed because Article 42 applies only to diplomatic agents, whereas immunity from jurisdiction and tax privileges extend to families and junior staff of a diplomatic mission. They are also needed because sending and receiving States may agree to waive the prohibition in Article 42 in the case of a particular diplomat, or the diplomat himself may breach the rule.

It is also the case that even for the diplomat himself, the scope of the prohibition under Article 42 may be somewhat narrower than the exceptions in Article 31.1(c) and Article 34. It has already been stressed, in the context of Article 31.1(c), that the exception there does not relate to a single act of commerce but to a continuous activity. But if the diplomat invests his private capital in property or in shares in enterprises in the receiving State, for example, it is likely that courts in the receiving State would hold that he is not immune, by applying Article 31.1(a) or Article 31.1(c) as appropriate. He would under Article 34(d) be liable to pay tax on profits or capital gains arising from such investments. It may, however, be open to question whether such conduct necessarily amounts to a breach by a diplomatic agent of his duty under Article 42. The problem of investment by a diplomat on the Stock Exchange in the receiving State was raised during the Vienna Conference without an answer being given. Many receiving States would not want to prohibit all diplomats in their territory from local investments. It may be that the position is best left for regulation by the diplomatic service regulations of sending States. Unless the activities of a particular diplomat become very extensive or in some way improper, they are unlikely to come to the attention of the authorities in the receiving State. If, for example, a diplomat became a director or officer in a public company or enterprise in the receiving State, this would be quite different from acquisition of a private shareholding and would become public knowledge.[4] In this event the receiving State could rely on Article 42 in order to protest or in an extreme case to declare the diplomat *persona non grata.*

The United States made clear in 1975 and again in 1986 that private gainful employment by diplomatic officers in the United States was inconsistent with their status, though approval might be granted on request in exceptional cases 'in the educational, cultural or

[4] For UK attitude to the possibility, see Hansard, HC Debs 14 March 1986 WA col 601. For Swiss practice, see 1979 ASDI 170.

medical field, where the visa holder has specialized knowledge in the particular field'.[5] As to US Foreign Service Officers abroad, internal regulations impose strict and detailed prohibitions which cover, *inter alia*, currency speculation, transfers of blocked funds in violation of US rules, acting as intermediary in the inter-state transfer of private funds, investment in bonds, shares or stock of commercial concerns with headquarters in the State of assignment or conducting a substantial portion of their business there, and investment in real estate or mortgages on properties in the State of assignment (unless for private occupancy).[6]

[5] 1976 DUSPIL 201; Circular Note to chiefs of mission of 18 June 1986 provided by State Department.

[6] Extracts from Regulations: Restrictions on Employment and Outside Activities, supplied by State Department.

END OF DIPLOMATIC FUNCTIONS

Article 43

The function of a diplomatic agent comes to an end, *inter alia*:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 43 shows the effects of the pressure under which the Vienna Conference was working in its concluding stages—its scope and purpose are unclear and the rules which it sets out are incomplete. The Conference was aware of this, but lacked the time to clarify the text. The Article ought to prescribe not simply the various methods by which the functions of a diplomatic agent may be brought to an end, but the time at which this occurs. Article 13 lays down how it is determined when the head of mission is considered as having taken up his functions, and Article 43 ought to be its counterpart, prescribing when a diplomatic agent is regarded as having concluded his functions in the receiving State. This question may be of importance when it is necessary to know whether a particular act of the departing diplomat should be regarded as an official act, so that he would be immune in respect of it by virtue of Article 39.2, or whether a departing head of mission remains in charge of the mission for the purpose of receiving communications from the receiving State and acting in that capacity under the law of the receiving State—for example, in regard to a trust or a disposition of property of the sending State. The International Law Commission seem, however, to have regarded the provision as purely descriptive and of doubtful use in a codification of diplomatic law. While the Vienna Conference accepted that it ought properly to contain an exhaustive list of circumstances which would bring the functions of a diplomatic agent to an end, they failed to formulate such a list.[1]

Article 43 does lay down a clear rule for the time of termination in the most common case where the sending State notifies the termination of functions with the mission (as it is bound to do under Article 10.1(a)) and also for the case of a declaration of *persona non grata*, where in the absence of recall or termination of functions by the sending State, the receiving State exercises its power under Article 9.2 to refuse to recognize the diplomatic agent as a member of the mission. What is referred to in older textbooks on diplomatic law and in the Havana Convention regarding Diplomatic Officers[2] as 'the delivery of passports to the officer by the Government to which he is accredited' should now be assimilated in substance to Article 9 of the Vienna Convention. It was formerly the practice for diplomatic agents to deposit their passports on arrival with the Ministry of

[1] UN Doc A/Conf. 20/14 pp 213–14.
[2] Art 25: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 422; Cahier (1962) p 128.

Foreign Affairs and to collect them—whether voluntarily or on demand—on departure, but the practice is now obsolete.[3]

A fuller account of the ways in which the function of a diplomatic agent may be terminated is contained in Satow's *Diplomatic Practice*.[4] One may leave aside the case of mission dispatched for a fixed period or for a specific task—which the Vienna Conference quite properly decided were special missions and therefore not within the scope of the Vienna Convention. The remaining cases fall into three categories:

1. Death of the diplomatic agent. Mention of this case was omitted by the International Law Commission on the ground that it was self-evident that death terminated the functions of a diplomatic agent.[5] There is no difficulty in determining the exact time of termination in this case.
2. Breach of diplomatic relations, which may or may not occur on the outbreak of armed conflict. It is increasingly common for diplomatic missions to remain in position even during violent conflict so long as sending States believe that the physical safety of the members of the mission can be reasonably assured. Where safety becomes a serious concern, the practice is often for the sending State to withdraw mission staff or even to withdraw the entire mission, while the two States remain in diplomatic relations. The sending State may notify under Article 10 the termination of the functions of those staff who are withdrawn on a permanent basis, but others may not be so notified in the hope that they may return when conditions are better, and in those circumstances they may be regarded as continuing to exercise their functions. Where a breach of diplomatic relations does take place, given that the maintenance of diplomatic relations like their establishment under Article 2 is dependent on mutual consent, termination of diplomatic functions takes place on the notification by the State initiating the break in diplomatic relations.[6]
3. Disappearance of the sending or the receiving sovereign. This may occur because the Head of State of either State dies, abdicates or is deposed, or because either State disappears totally as a result of annexation or merger with another State. In these circumstances fresh credentials are normally required by heads of mission who continue in their posts. Where this is a mere formality, heads of mission and other diplomats may carry on business in the expectation that their position will duly be regularized with retroactive effect. They are, however, properly to be regarded as having terminated their functions and then resumed them under a fresh appointment which may be express or implied. This happened after the fall of the Shah of Iran—the United States in particular continued diplomatic dealings through a chargé d'affaires with the Government of Ayatollah Khomeini until the seizure of the US Embassy, and it was never argued by Iran that the hostages did not have normal diplomatic status.[7] Heads of mission may also remain at their post if the disappearance of the receiving

[3] For the instructions to the French Ambassador in Berlin on 3 September 1939 to ask for his passports if the German response to the French ultimatum was negative, see Salmon (1994) para 647.

[4] (4th edn 1957) pp 274–5; (5th edn 1979) paras 21.1–15; (6th edn 2009) ch 15. See also Salmon (1994) paras 646–8.

[5] *ILC Yearbook* 1958 vol I p 181.

[6] Sfez (1966) at p 400.

[7] See *Hostages Case* 1980 ICJ Reports 3 at para 14. Apologies were made by the Prime Minister of Iran for an earlier attack on the US Embassy, together with an indication of readiness to make reparations.

State is not recognized by their sending State. Thus in 1990 the annexation of Kuwait by the Government of Iraq was never recognized by the overwhelming majority of other States, and their position was endorsed by Security Council Resolution. Diplomatic missions remained in Kuwait for as long as it was physically safe to do so, and continued to regard themselves as being in diplomatic relations with Kuwait and their diplomatic staff as exercising functions there until Iraq broke relations with coalition members in 1991.[8]

By contrast, after the deposition of Saddam Hussein as Head of State of Iraq, the United States made clear that ambassadors and other diplomats accredited to him were not regarded as continuing in post even if they remained in their missions.[9] A State Department spokesman said that this resulted from the absence of an Iraqi Government with which they could interact and which could grant privileges and immunities. 'They are accredited to a regime that is no longer existent and, therefore, their accreditation would have lapsed... They and their premises don't have diplomatic status anymore.' This argument was categorically rejected in a statement by the Russian Foreign Ministry shortly afterwards, and was clearly inconsistent with the position taken by the US and by other States in the earlier contexts of Iran and Kuwait as described above.[10]

While the Coalition Provisional Authority acted as the Government of Iraq, the United Kingdom sent a Special Representative, Mr David Richmond. In Iraqi Embassies abroad, diplomats burnt or shredded documents and in most capitals quietly melted away.[11] A year later an Interim Iraq Government assumed sovereign powers and a new UK Ambassador, Mr Edward Chaplin, was appointed. Somewhat improperly, his appointment was formally announced several weeks before there was an Interim Iraq Government in existence to grant him agrément, to approve the exceptionally large numbers of mission staff to be appointed, or the projected opening of a Representative Office in northern Iraq.[12]

A change of government on either side not involving the Head of State, or the constitutional replacement of an elected Head of State following his death, resignation, or the end of his term of office does not on the other hand automatically end the function of the diplomatic agent.[13] A receiving State will normally continue to regard diplomats appointed by a government which has been overthrown as continuing to exercise their functions until they recognize (whether formally or by beginning to do business) the new regime in the sending State. In 1973, for example, the UK Government following the overthrow of President Allende continued to regard his representative as Ambassador of Chile until it recognized the government which had replaced his. The question was material because the representative of the new Government, following a split in loyalties among members of the mission, sought the assistance of the UK Government for the purpose of gaining immediate control of the ambassador's residence—assistance which

[8] See Commentary on Art 2 and Security Council Resolution 667 (1990); James (1991) at pp 373–4.

[9] Press Briefing by State Department spokesman on 29 May 2003, quoted in Kirgis, 'Diplomatic Immunities in Iraq', *ASIL Insights* June 2003, at www.asil.org/insights/insigh109.htm.

[10] Russian Foreign Ministry statement, 12 July 2003; RIA Novosti, 29 July 2003; Talmon (2006).

[11] *The Times*, 11 April 2003; 24 July 2003 (the Ambassador to Beijing resisted by force of arms orders to return to Baghdad).

[12] *The Times*, 27 April, 3 May (Court Circular: Diplomatic Appointments), 10 July 2004.

[13] Satow (5th edn 1979) para 21.11; (6th edn 2009) para 15.23.

was not given. (On formal recognition by the United Kingdom of the government which had taken control of Chile, led by General Pinochet who later became Head of State, the former ambassador and those remaining loyal to him left the residence voluntarily.) On recognition of a new regime in a sending State the status of members of its diplomatic mission will normally become apparent quickly. Sometimes they may already have resigned. After the fall of the Government of the Republic of Vietnam (South Vietnam) in 1975 the ambassador notified the UK Government of his own resignation and that of his entire staff some nine days before the UK Government recognized the Provisional Revolutionary Government as the Government of South Vietnam. The UK Government accepted that this resignation terminated their functions with immediate effect.

In exceptional cases a change of government in the sending State may divide the loyalties of the mission staff to such an extent that some may resign or be dismissed while others willingly serve the new regime. Even more exceptional were the circumstances following the replacement in 1975 of the Royal Government of National Union of Cambodia by the Communist Government of the Khmer Republic. The ambassador and most of the staff of the mission made clear to the new Government in Phnom Penh that they were willing to serve them, but no response was ever made by the new Government either to the Cambodian Ambassador's expressions of readiness to serve, or to the UK Government's indication of willingness to maintain diplomatic relations.[14]

Where a change of government takes place by unconstitutional means in the receiving State, it is for the new Government to determine whether it wishes to remain in diplomatic relations with all those States which formerly sent embassies to that capital. The new Government may send heads of mission who have continued in residence a Circular Note informing them of the Government's wish to continue diplomatic relations. Heads of mission respond only if they have been authorized by their sending government to recognize or to do business with the new regime.[15]

If clarification of status is necessary under any of the circumstances described above it is for the Ministry of Foreign Affairs to seek it from the representative of the government which it recognizes or with which it has dealings, and the courts of the receiving State will in turn usually seek clarification from their own Ministry of Foreign Affairs.

[14] Satow (5th edn 1979) paras 9.23 and 21.10; (6th edn 2009) para 15.25.

[15] On the termination of consular functions, which differs for legal and practical reasons in a number of respects, see Lee and Quigley (2009) ch 6.

FACILITIES FOR DEPARTURE

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

The rule set out in Article 44 is firmly grounded in a near universally observed custom of international law.[1] The duty to grant facilities for departure was of no special significance in ordinary circumstances, though in some States it was interpreted as conferring exemption from exit visa requirements.[2] In the case of a deterioration in relations between sending and receiving State, however, and in particular on breach of relations or outbreak of war or armed conflict, the right to safe departure assumed great importance. Envoys then became hostages in the receiving State, but the interest of each State in securing the return of its own diplomats was normally sufficiently strong to guarantee its observance of the duty to permit the safe departure of enemy diplomats from its own territory. In the unusual case of the Chinese engineers in The Hague, already discussed in the context of Article 22 above, The Netherlands Chargé d'Affaires in China was in 1966 effectively held hostage for the release by The Netherlands of several Chinese engineers who were not entitled to diplomatic immunity but had taken refuge in the Chinese diplomatic mission when The Netherlands authorities sought their evidence in regard to the death of a colleague in suspicious circumstances. The Chinese Chargé d'Affaires was declared *persona non grata* and required to leave The Netherlands, but The Netherlands Chargé d'Affaires, who had by way of response also been declared *persona non grata*, was not permitted to leave China.[3]

The International Court of Justice in the *Hostages Case* in 1980 laid emphasis on the guaranteed right to depart while setting out the remedies available to the receiving State under diplomatic law under which a diplomat regarded as unacceptable would in practice be compelled to depart at once. They said that '[t]he fundamental character of the principle of inviolability is, moreover strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961'.The ICJ's judgment, as well as stating unanimously that Iran must immediately terminate the unlawful detention of the diplomatic hostages, required Iran to 'ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport'.[4]

[1] Havana Convention regarding Diplomatic Officers, Art 25: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 422; Satow (4th edn 1957) p 179.

[2] eg Israel: UN Laws and Regulations p 181.

[3] Barnhoorn (1994) p 39.

[4] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at paras 86 and 95. See also *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, 2005 ICJ Reports at para 323.

Provision for the facilitation of departure was included by the Special Rapporteur in his original draft articles. The text was modified by the International Law Commission to make it clear that the obligation to provide special means of transport for departing members of a mission applied only where there was need for this.[5] The Vienna Conference debated the Article with care, recognizing its potential importance, and several alternative formulations were put forward. But the only change resulted from UK and German proposals to make clear that the obligation on the receiving State to grant facilities for departure would not apply to its own nationals, but that for members of the families of persons enjoying privileges and immunities it would apply regardless of their nationality.[6]

The final wording which resulted from adoption of the German amendment contains an anomaly which was probably not intended. Entitlement to facilities for departure is given under Article 44 not to members of diplomatic missions, but to 'persons enjoying privileges and immunities'. Under Article 37.1 of the Convention a member of the family of a diplomatic agent enjoys privileges and immunities unless he or she is a national of the receiving State. The diplomatic agent who is a national of or permanently resident in the receiving State is under Article 38 entitled only to immunity from jurisdiction in respect of official acts performed in the exercise of his functions, but his family members do not lose their entitlement to privileges and immunities on account of his status. The diplomatic agent's family members if not themselves nationals of the receiving State would thus be entitled in their own right to facilities for departure and also to take with them members of their families 'irrespective of their nationality'. The family member could then take with him or her the actual diplomatic agent, even if he or she was a national of the receiving State. The anomaly does not affect administrative and technical staff, where members of families never enjoy privileges or immunities if the member of mission is a national of or permanently resident in the receiving State.

Following the invasion and occupation of Kuwait by Iraq in 1990, considerable difficulty was experienced by diplomats trying to leave Kuwait. The Security Council condemned violations of the Vienna Convention on Diplomatic and Consular Relations, and specifically demanded that Iraq should permit and facilitate the immediate departure of those members of diplomatic and consular missions in Kuwait who wished to leave. The resolution did not, however, put an end to the difficulties.[7]

Where missions are being withdrawn following a breach in relations, the timing may be synchronized in order to emphasize the reciprocal nature of the guarantees. In 1984, for example, when the United Kingdom broke relations with Libya following the shooting of a policewoman from the Libyan mission in London, the evacuation of the two embassies took place in parallel and the aircraft carrying returning members of the two missions took off at the same moment from London and Tripoli.

The case of Abdul Salam Zaeef, Ambassador of the Taliban Government to Pakistan has been mentioned above in the context of Article 40 and the conduct of the US Government which took custody of him in Afghanistan and later transported him to Guantanamo Bay. The Government of Pakistan, however, had a clear obligation under

[5] UN Docs A/CN 4/91 p 6 (Art 25); A/CN 4/114/Add. 1 p 9 (observation by Chile); A/CN 4/116 p 86; *ILC Yearbook* 1958 vol II p 104.

[6] UN Docs A/Conf. 20/C 1/L 300 and L 327; A/Conf. 20/14 pp 214–17.

[7] SC Res 674, 29 October 1990; UKMIL in 1990 BYIL 541.

Article 44 to make facilities available for the ambassador's departure following the ending of its diplomatic relations with the Taliban. Conducting him under arrest to the frontier with Afghanistan and there handing him over to pro-United States Afghan forces cannot be said to comply with the requirements of the Vienna Convention.[8]

In March 2013, the Supreme Court of India ordered the Italian Ambassador, Daniele Mancici, not to leave the country when he failed to honour an undertaking to the Court that two Italian marines would return to stand trial for shooting Indian fisherman (whom they claimed to have mistaken for pirates). A watch was placed on Indian airports. The European Union supported Italy's protest that this action violated the Vienna Convention. In the event the marines did return—staying in the Italian Embassy—but in the face of prolonged delays to a trial, Italy recalled its Ambassador in February 2014.[9]

[8] Information from lawyers representing Abdul Salam Zaeef.
[9] BBC News, 14 March 2013; *New York Times*, 18 March 2013; *Wall Street Journal*, 20 March 2013.

BREACH OF RELATIONS AND PROTECTION OF INTERESTS

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Breach of diplomatic relations

The Vienna Convention does not actually make provision for the right to break diplomatic relations. It follows by implication from Article 2 which provides that the establishment of diplomatic relations takes place by mutual consent that if either State withdraws that consent diplomatic relations are broken. Breach therefore takes place normally in consequence of a unilateral act—even though it frequently follows a sequence of reciprocal or retaliatory moves between two States to downgrade their relations or a collective political decision by a number of States directed against another State whose conduct is regarded as unacceptable. Relations are broken from the moment of the initial action.[1] The other State has no option in the matter. There are no legal limitations on the right of a State to break diplomatic relations with another, but the action is now invariably taken for political reasons. Practical considerations will almost always favour the continuation of relations, though not necessarily the retention of a permanent mission. This has become more obvious in the light of some recent cases where diplomatic relations subsisted even while armed conflict was taking place between sending and receiving States—as between India and Pakistan in 1965 and 1971.[2] During the nineteenth century, by contrast, breach of relations was often seen as a prelude to armed conflict, and diplomatic relations were always broken before the use of force. On one occasion, the

[1] For an account of the series of incidents and complaints between France and Iran which led France to break diplomatic relations in July 1987, see 1987 AFDI 1000. See also Do Nascimento e Silva (1973) pp 173–4.
[2] Dembinski (1988) p 96.

British Ambassador to Persia was instructed by dispatch that the UK Government intended to break diplomatic relations—he was to prepare to close his embassy and return home but meanwhile to say nothing to the Persian authorities in order to allow time for a British gunship to reach the Gulf.[3]

Breach of diplomatic relations generally precludes direct contact between sending and receiving States other than what is needed to effect orderly departure and some form of interim regime. It does not, however, preclude the sending and receiving of special missions (which may later herald a resumption of normal diplomatic relations), meetings between diplomatic representatives of the two States in a third State (for example, the regular meetings in Warsaw over many years of representatives of the United States and of the People's Republic of China) or contacts between representatives of the two States to an international organization. Detailed rules on permissible contacts are usually provided in the internal diplomatic service regulations of each State. As Satow points out, it is a feature of modern diplomacy that on occasions 'a much-advertised breach of relations may turn out to be only partially real. This occurs when two States, having broken off diplomatic relations, usually on the initiative of one of them, continue an active, if quiet, direct relationship despite the appointment of third States to protect the interests of each in the territory of the other.'[4]

Article 45 is concerned with the legal framework for preserving interests against a background in which diplomatic relations have already been suspended or broken, while the sending and receiving States continue to exist as sovereign States which recognize one another. It does not apply where either the sending or the receiving State ceases to exist as an independent State and thus loses the right of legation. The disappearance of a State and consequent end of its diplomatic relations are dealt with under Article 2 of the Convention. The rules in Article 45 were clearly based on long-established customary law and practice. Article 45(a) and (b), which appeared in the original draft articles of the Special Rapporteur, were based on the Harvard Research.[5] Article 45(c), which was added by the International Law Commission, also reflected clearly established custom.[6] The practice described in Article 46 on the other hand was a much more recent innovation.[7]

The words 'acceptable to' in paragraphs (b) and (c) of Article 45 were deliberately chosen by the International Law Commission rather than 'accepted by' in order to make clear that prior approval by the receiving State of a particular protecting power was not necessary. Informal consultation would be the usual practice, and a receiving State could take exception to a particular proposed protecting State. Thus a UK Minister when questioned as to the right of the government to decline to accept arrangements for protection of interests following breach of relations, said that: 'Her Majesty's Government as the receiving State will consider the nomination by the sending State of a third State to assume the role of a protecting power. It is for Her Majesty's Government alone to decide whether or not the nomination is acceptable.'[8] What would never be permissible as between Parties to the Convention would be a refusal to allow any protection of the

[3] Information from a former member of the British Embassy in Tehran drawn from files now in Public Records Office.

[4] (5th edn 1979) para 22.1; James (1991) p 375.

[5] Art 7: 26 AJIL (1932 Supp) 66; Sfez (1966); UN Doc A/CN 4/91 p 3 (Art 15).

[6] *ILC Yearbook* 1957 vol I pp 71–3, 223; 1958 vol I pp 182–4; vol II pp 104–5.

[7] UN Docs A/Conf. 20/C 1/L 103 (Colombian proposal); A/Conf. 20/14 pp 85–6, 217.

[8] Hansard HC Debs 15 February 1991 WA cols 607–8.

interests of a State with which relations had been broken. Such a refusal was made by Indonesia in 1961 when following its breach of diplomatic relations with The Netherlands it refused to permit Dutch interests to be protected by the United Kingdom or by any other State—a decision which even at the time was criticized as unprecedented and contrary to international practice.[9]

Under Article 46, on the other hand, the prior consent of the receiving State is required before a sending State may undertake the protection of the interests of a third State—usually one which has not previously been represented in the receiving State. The Article 46 procedure is now frequently used by small or new States which could not justify maintaining permanent diplomatic missions in a large number of States, but seek some limited presence and facilities for their nationals falling short of an established mission or even shared representation under Article 6. Luxembourg, for example, usually looks either to The Netherlands or to Belgium for the protection of its interests in other States, San Marino looks to Italy, and Liechtenstein to Switzerland.[10] Article 46 was also used by Germany following reunification as an interim method of maintaining the relations which the German Democratic Republic previously had with North Korea and Cambodia.[11] It is perhaps anomalous that in this case the prior consent of the receiving State should be needed whereas a State which has just broken diplomatic relations does not need the consent of the receiving State before entrusting its interests there to a third State. The difference may be explained by the fact that the Article 46 procedure is seen as a halfway house to the establishment of diplomatic relations or—where these already exist—a permanent mission by the third State, which under Article 2 of the Convention would require mutual consent. It may also be due to the relative novelty—at least in 1961—of the procedure in Article 46, so that the safeguard of consent was thought necessary to protect the position of the receiving State.

Temporary recall of a mission

The temporary recall of a diplomatic mission is a more frequent procedure than was formerly the case—both because of the greater ease of travel and because of greater awareness of the physical and financial obstacles which would have to be overcome in order to re-establish them. It may be carried out to indicate a sharp cooling in relations, where neither side wishes to proceed to formal breach of relations and each hopes that difficulties or displeasure may be short-lived. In 1987, for example, the United Kingdom and Iran, following a dispute which began with the arrest of an Iranian consular official in Manchester on charges of shoplifting and escalated with the detention of a UK diplomat in Tehran, withdrew some mission staff from the two capitals. (The United Kingdom had withdrawn its embassy from Tehran between 1980 and 1988 and operated through a British Interests Section in the Swedish Embassy, but still regarded itself throughout this stage as having full diplomatic relations with Iran.) In February 1989, following the *fatwa* (decree) of death issued by the Ayatollah Khomeini against the British author Salman Rushdie, the United Kingdom closed its embassy in Tehran and asked the Iranian Government to withdraw its chargé d'affaires and one other remaining diplomat from

[9] 1961 RGDIP 611; Cahier (1962) p 138; Lecaros (1984) p 101.
[10] James (1991) at p 362; Newsom (1990); Salmon (1994) paras 177, 178.
[11] Richtsteig (1994) p 105.

London. In this case, however, Iran responded a few days later by breaking diplomatic relations with the United Kingdom.[12] Following support given by the United Kingdom for bombing attacks by the United States in 1998 on a factory in Sudan alleged to have been implicated in terrorism, Sudan recalled its ambassador from London and asked the United Kingdom to withdraw its ambassador from Khartoum. The UK Embassy remained in place, but all diplomatic staff were withdrawn for some months.[13]

There may be more than one factor in a decision to withdraw a mission. Following strong criticism of the Holy See by the Irish Prime Minister in the context of publication of the Cloyne Report in July 2011 into the Catholic Church's handling of clerical abuse of children, the Holy See recalled its nuncio for consultations. In November 2012, Ireland closed its Embassy to the Holy See, but presented this as a measure of cost-cutting in which Irish embassies in Iran and East Timor were also withdrawn.[14] A mission may be recalled where, because of armed conflict or civil disturbance, it is unable to carry out its functions effectively or safely, as happened in 1992 when French, Italian, and Bulgarian diplomats who had remained in Kabul during the civil war were withdrawn from intense fighting between government and rebel troops.[15] The United States in the wake of the bombing by Al Qaeda of its embassies in Kenya and Tanzania closed a number of its other embassies in Africa because of fears for their security.[16] In 1998 it evacuated from its embassy in Israel mission staff and dependants under eighteen or over sixty-five because of fears that Saddam Hussein might use anthrax against Israel in response to Allied air strikes on Iraq. Evidence was available that the President of Iraq had acquired special delivery systems which would make this possible, and anti-anthrax drugs had never been tested on people under eighteen or over sixty-five.[17]

The unrest in many Middle East States following the Arab Spring led to many closures of diplomatic missions for security reasons by the United States and United Kingdom in particular. Between 2012 and 2014, diplomatic missions were closed in Syria, Egypt, Yemen, and Libya. In Tripoli, in July 2014, the US Embassy spent two weeks close to the front line of civil conflict, protected by concrete bunkers and by marines before ultimately staging a night-time evacuation.[18]

Closure for political reasons

In 1981 the United States asked Libya to close its diplomatic mission in Washington and to withdraw all members of the mission within five working days, in response to Libya's support for international terrorism. The US Embassy in Tripoli was also closed, but the emphasis in the official statement issued by the State Department was on the requirement for the Libyan mission to be withdrawn from the United States. The statement said: 'This action reduces our relations with Libya to the lowest level consistent with maintenance of

[12] 1986 BYIL 548; *The Times*, 30 May 1987, 1 and 5 June 1987, 23 March 1989, and 11 November 1988, and 23 March 1989. Hansard HC Debs 8 March 1989 cols 895–8. Lowe (1990).

[13] *The Times*, 25 and 28 August 1998, 25 June 1999.

[14] *Catholic Herald*, 29 July 2011; *The Times*, 4 November 2011.

[15] *The Times*, 25 August 1992.

[16] *The Times*, 1 September 1998.

[17] *The Times*, 19 December 1998.

[18] *The Times*, 6 March 2012 and 7 August 2013; *Observer*, 27 July 2014; *Washington Post*, 11 February 2015.

diplomatic relations.'[19] Only in 2004 was it confirmed that a US diplomat was operating in Tripoli from within the Embassy of Belgium, and full diplomatic relations were not restored until 2006.[20] The United Kingdom broke diplomatic relations with Libya in 1984 following shooting from the mission premises which caused the murder of a British policewoman, and with Syria in 1986 after discovery of active Embassy involvement in a plot to sabotage an El Al airliner.[21]

The United States took similar action in 1991 against Somalia and in 1994 against the Embassy of Rwanda. President Clinton explained that the reason for the action against Rwanda was that: 'The United States cannot allow representatives of a regime that supports genocidal massacre to remain on our soil.'[22] In 1997, following a Nigerian refusal to issue a visa to a Canadian security officer and Nigerian allegations that Canada was involved in terrorism, Canada 'suspended' diplomatic relations with Nigeria, recalled its High Commissioner, and closed its mission premises in Lagos.[23]

An unusual situation arose in 1975 after the fall of the Government of South Vietnam, when the Ambassador to the United Kingdom resigned with all his staff prior to the recognition by the United Kingdom of the new Government, and handed over the premises, property, and archives of the mission to the custody of the UK Government. Although the mission had not in reality been 'recalled', the UK Government regarded themselves as obliged under Article 45(a) of the Convention to accept temporary custody of the diplomatic property of South Vietnam and to arrange special protection for the empty premises. After the fall of President Saddam Hussein, exuberant Iraqi exiles broke into the former Iraq Embassy in London, destroying property and searching for incriminating documents, but their activities were quickly curtailed by British police who arrested twenty-four men for criminal damage.[24]

Duty to 'respect and protect' premises of a discontinued mission

It has been suggested above, in discussing the termination of inviolability under Article 22, that although this is not expressly provided in the Convention, it would be reasonable to imply, on analogy with the provisions in Article 39 regarding termination of personal immunities, that the inviolability of premises should continue for a short period after they cease to be 'used for the purposes of the mission' and thus to be 'premises of the mission' as defined by Article 1(i). After that period they normally lose their inviolability, for Article 45 does not require inviolability to be given indefinitely and the duty to 'respect and protect' does not imply that the authorities of the receiving State may not enter the premises. If the premises have been left empty, the authorities of the receiving State will need to inspect them, for example, to check that they have been made as secure as possible and to check any inventory of contents. After the United Kingdom broke relations with Libya in 1984, following the shooting from the mission premises which killed a policewoman, the premises were treated as inviolable until expiry of the period which had been

[19] 1981 AJIL 937.
[20] *The Times*, 11 February 2004 and 16 May 2006.
[21] Satow (6th edn 2009) paras 15.19–21.
[22] White House Press Statement, 15 July 1994; Department of State Guidance on Diplomatic Relations.
[23] *The Times*, 14 March 1997.
[24] *The Times*, 10 April 2003.

allowed for departure of all mission staff (seven days from breaking of relations) but were then entered by police searching for evidence relevant to their murder inquiry. The receiving State would also no longer be required—in the absence of special arrangements—to prevent re-entry of rented premises by a landlord so long as this was permissible under local law in response, for example, to breach of covenant or non-payment of rent. The Libyan premises, after remaining empty for three years in the custody of Saudi Arabia as protecting power, were leased by the landlord in 1987 to an Australian brewery.[25]

If the premises were held in the name of the sending State they would retain the character of real property of a foreign sovereign State, but it would depend on the law of the receiving State on state immunity whether proceedings could be brought in regard to title or possession. This is discussed more fully under Article 22 above. The receiving State would not, however, in normal circumstances be entitled itself to expropriate the premises, since this would be a violation of the duty to 'respect and protect'. In 1963 Cuba issued a decree expropriating the former mission premises of the United States, but this was never actually implemented.[26] Nor could the receiving State expropriate mission property or archives—both of which unlike the premises would retain indefinitely their character as property or archives of the mission.

The United Kingdom by the Diplomatic and Consular Premises Act 1987[27] now makes precise provision for the termination of the status of 'premises of the mission'. This status for purposes of national law now depends on acceptance or consent by the Secretary of State, and under section 1(3):

> if—
>
> (a) a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post; or
>
> (b) the Secretary of State withdraws his acceptance or consent in relation to land, it thereupon ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law.

Section 1(4) provides that the Secretary of State may only withdraw consent or acceptance if he is satisfied that to do so is permissible under international law. Section 1(6) requires States intending to cease to use land as mission premises to give notice of this, with the intended date.

Sections 2 and 3 of the same Act confer on the Secretary of State power to expropriate and to sell former premises of a diplomatic mission 'if he is satisfied that to do so is permissible under international law'. The procedure for doing this requires a statutory instrument subject to annulment by either House of Parliament and a deed poll by the Secretary of State. Following sale, the proceeds are to be applied to discharge of expenses and liabilities attaching to the land and the residue paid to the former owner or held on trust. These powers were taken in response to the exceptional situation created by the fact that when the UK Government recognized the new Government of Cambodia headed by Pol Pot in 1975, that Government did not respond either to an invitation to open diplomatic relations or to provide instructions for the use, care, or disposal of the former embassy premises. The Government reluctantly concluded that—short of expensive

[25] *Observer*, 20 September 1987.
[26] 1963 RGDIP 896.
[27] C 46. The Act was drawn to the attention of missions by Circular Note, printed in 1987 BYIL 541.

twenty-four hour security protection which the Cambodian Government showed no readiness to pay for—the premises could most effectively be protected by permitting a supervised occupation by squatters. The impasse continued for several years and was further complicated by the fact that following the invasion of Cambodia by Vietnam the United Kingdom recognized no government in Cambodia. The United Kingdom in the light of its continued efforts to ascertain the wishes of Cambodia was satisfied that under international law it would be justified in selling the premises and returning the proceeds to Cambodia or holding them in trust. They could not, however, without primary legislation confer a proper legal title under domestic law so as to obtain the normal value on a sale of the premises.

The powers under the Act were duly exercised, but were challenged by the squatters who were thereby prevented from acquiring title by operation of limitation rules. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Samuel*[28] the English Court of Appeal held that the decision by the Secretary of State, on legal advice, that he was satisfied that the action was permissible under international law could not be reviewed by English courts unless it was unreasonable or taken in bad faith. The court upheld the action taken as being 'the most satisfactory method available to the Secretary of State of giving protection to the State of Cambodia's interest in the embassy premises'. They rejected the argument put forward on behalf of the squatters that it was in breach of the duty of the United Kingdom under Article 45 of the Vienna Convention.

The Cambodian Embassy in Paris was also left unoccupied from 1975 when diplomatic relations between France and Cambodia were broken. In 1983 the French Minister for Foreign Affairs explained to the National Assembly that pursuant to its obligation under Article 45 of the Vienna Convention, the French Government had sealed the building and was guarding it.[29]

The United States has also taken power in section 205(c) of the Foreign Missions Act 1982[30] for the Secretary of State to protect and preserve property of a foreign mission which has ceased to conduct diplomatic activities in the United States and has not designated an approved protecting power. One year after the end of diplomatic activities, the Secretary of State may dispose of the property and remit the proceeds to the sending State. These powers were used in 1996 in relation to the former mission premises of Somalia.[31] In 2007 it was reported that the former US Embassy in Tehran had been seized by Iranian enforcement authorities with the object of satisfying a judgment obtained in an Iranian court four years earlier against the United States and which the United States had failed to satisfy.[32] In the case of *Bennett v Islamic Republic of Iran*,[33] the US Court of Appeals, in holding that former diplomatic properties of Iran were protected from attachment under statute law making terrorist state property available to compensate victims of terrorism, confirmed that the US was entitled, pursuant to its duty under Article 45 of the Convention to 'respect and protect' such properties, to reduce its own maintenance costs by letting the properties to other missions and to private individuals.

[28] Times Law Reports, 17 August 1989; 83 ILR 231.
[29] 1983 AFDI 920.
[30] 22 USC § 4305; 1984 AJIL 430 at 432.
[31] State Department information.
[32] *The Times*, 13 April 2007.
[33] No 09-5147, decided 10 September 2010.

Practical arrangements for protection of interests

When diplomatic relations are broken and a sending State entrusts the protection of its interests to a third State it is usual for the sending State and the third State to negotiate at least an informal understanding as to the functions to be carried out by the third State, the powers which its officers should have when acting on behalf of the sending State, and whether expenses incurred through acting on behalf of the sending State should be recoverable. The details of these understandings will vary according to the diplomatic service regulations of the two States and the nature of the interests to be protected. United States' instructions to its officers, for example, contain highly detailed instructions, and emphasize that in protecting the interests of a third State their function is limited to 'unofficial good offices on the request of the third State'.[34]

Where consular functions are to be undertaken more complex arrangements will be necessary. In some cases special arrangements may not be needed for consular functions because consular relations continue between two States which have broken diplomatic relations or are resumed in advance of diplomatic relations. After the United Kingdom broke diplomatic relations with Argentina at the time of the invasion of the Falkland Islands in 1982, for example, the two States resumed consular relations a year before full diplomatic relations were re-established in 1990.[35] In the case of Guatemala also, after its breach of diplomatic relations with the United Kingdom in 1963, consular relations remained in existence for many years and resumed in 1986 some months before full diplomatic relations were restored.[36]

The United Kingdom, during the period after Rhodesia's unilateral declaration of independence in 1965 when nine States in Africa broke off diplomatic relations,[37] pioneered a new method of protecting its interests under such circumstances, and this method is now widely applied.[38] It became the practice to agree with the protecting State and with the receiving State that a number of British diplomatic and supporting staff should remain in the receiving State after the break in relations and should form a 'British Interests Section' of the embassy of the protecting State. These British staff are then notified as members of the mission of the protecting State, and the former British Embassy becomes in law part of the premises of the mission of the protecting State. On this basis it continues to be entitled not only to respect and protection as provided under Article 45, but also to continuing inviolability. The staff of the British Interests Section continue routine reporting and may continue to have low level contact with the authorities of the receiving State on consular, commercial, and cultural matters. The protecting State may only become involved if it is desired to make representations at a senior political level.

[34] Hackworth, *Digest of International Law* vol IV pp 498–506.

[35] 1982 BYIL 417; *The Times*, 16 February 1990; 1991 ICLQ 473 esp at 477–8.

[36] Hansard HC Debs 22 May 1990 WA cols 110–11; 1990 BYIL 535.

[37] Algeria, Tanzania, Ghana, Guinea, Mali, Congo (Brazzaville), Sudan, United Arab Republic, Mauritania. See Sfez (1966) at pp 386–7; 1990 BYIL 535.

[38] The technique was used earlier by the United States in the context of its breach of diplomatic relations with Cuba (which has lasted since 1961), and when Egypt broke diplomatic relations with them following the six-day war in 1967, but on an informal basis: Satow (5th edn 1979) para 22.11. France, following its break in relations with Iran in 1987, maintained an Interests Section within the Italian Embassy in Tehran until relations were re-established in 1988: *The Times*, 19 May 1988.

Arrangements on such lines may be complex to set up, but once in place they offer marked advantages both to the State which has broken diplomatic relations and to the protecting State. The protecting State is spared work for which its mission staff are not well qualified and expense which may be considerable—particularly for States such as Switzerland and Sweden which on account of their neutrality were popular choices as protecting powers and might find themselves protecting in a particular receiving State the interests of a large number of other States which had broken diplomatic relations.[39] The State which has broken diplomatic relations has the advantage of protection of its interests, at least at a junior level, by its own diplomats, whose confidential reporting will be better attuned to its interests and requirements. When Iceland broke relations with the United Kingdom in 1976, a British Interests Section of the French Embassy in Reykjavik was composed of all the members of the former UK Embassy other than the ambassador and was instructed so far as possible to continue business as usual.[40] These arrangements would not have been practicable if the break in relations were (as used often to be the case) a prelude to armed conflict. But where the break is intended to indicate strong political disapproval of conduct by a State, or where a mission is withdrawn for reasons of economy or physical security, the establishment of an interests section within the mission of the protecting State has proved to be an attractive and effective method of continuing to do business. Among Member States of the European Union it has now become practice, reflecting moves towards a Common Foreign and Security Policy, to entrust the protection of their interests in a third State following any breach of diplomatic relations to a fellow Member State. When the United Kingdom withdrew its embassy from Serbia in 1998, in advance of airstrikes by NATO directed at the liberation of Kosovo, the Brazilian Embassy in Belgrade agreed to provide emergency help to British nationals—but the unusual choice of Brazil in this case was because most European States were associated with the impending airstrikes and so were vulnerable to possible retaliatory action.[41]

An example of a diplomatic Note from the receiving State to the protecting State outlining such arrangements was that sent by the United Kingdom to the Lebanese Embassy in London on 31 October 1986. This was seven days after they broke diplomatic relations with Syria following the conviction of a terrorist, Hindawi, whose attempt to blow up an El Al airliner in mid-air was shown during the trial to have been planned with support from the Syrian Ambassador and other Syrian diplomats in London. The Note read, in part:

> The Foreign and Commonwealth Office... confirm that the British Government accept the appointment of Lebanon as protecting power in the United Kingdom of the Syrian Arab Republic on the understanding that the Syrian Government has accepted the appointment of Australia as protecting power of the United Kingdom in Syria.
>
> Subject to confirmation from the Embassy of Lebanon that this reciprocal arrangement is acceptable to the Syrian Government, the Lebanese Embassy in London and the Australian Embassy in Damascus will assume the responsibility of representing the interests of Syria and the United Kingdom respectively with effect from midnight on 31 October/1 November.

[39] For some figures on Swiss commitments as protecting power, see James (1991) at p 379.
[40] Satow (5th edn 1979) para 22.12.
[41] *The Times*, 13 October 1998.

The Foreign and Commonwealth Office wish to establish an interests section within the Australian Embassy in Damascus and to allow the Syrian Government to establish a reciprocally-staffed interests section within the Lebanese Embassy in London subject to a maximum of 4 diplomats and 2 Administrative and Technical staff in each case. [Names of diplomatic personnel on each side were then set out.] The Foreign and Commonwealth Office propose that both interests sections should be accommodated in the present Syrian and British chancery premises in London and Damascus and that both should retain radio communications and cypher facilities.[42]

As between the protecting State and the State whose interests are to be protected more detailed bilateral arrangements are also needed, which would not require any approval by the receiving State. The UK practice was originally to draft these in non-binding terms so that they were not published. In the context of the protection by Sweden of UK interests in Iran, however, at the request of Sweden (whose national legislation now requires the Swedish Government to conclude bilateral agreements with States whose interests they have agreed to protect) a formal agreement was drawn up in 1989 and was published.[43] The key provision was Article 1 which read:

(1) Sweden undertakes to represent the United Kingdom as protecting power in the Islamic Republic of Iran.
(2) The commission as protecting power comprises administrative, humanitarian and consular matters. If the commission is to be extended to cover other matters a separate agreement to that effect is required.
(3) In dealing with protection matters, the protecting power may avoid taking action that could damage its position or good name in the receiving country, or in relation to any other country. In case of doubt in dealing with a matter, the Ministry for Foreign Affairs in Stockholm shall take the decision. This always applies to letters and other messages from the commissioning country to the receiving country.

Other provisions provided for establishment of a British Interests Section, for courier and telegraphic communications between the United Kingdom and its Interests Section to be subject to the approval of Iran, for lines of communication between the Interests Section and London and Stockholm, for custody of specified diplomatic premises, care of any British property taken into protection, including British Embassy bank accounts, and for reimbursement of expenses. When the United Kingdom and Iran re-established diplomatic relations, following return of property and settlement of accounts, Sweden's commission as protecting power for the United Kingdom was terminated by a further agreement.[44]

The transparency of these arrangements may be contrasted with the position of the Government of Belgium which in 1975 declined to tell its Parliament the names of the States in which it had agreed to protect the interests of Israel.[45]

[42] 1986 BYIL 554 and 625.
[43] UKTS No. 45 (1989), Cm 809, printed in full at 1990 ICLQ 472. See also 1989 BYIL 632.
[44] Exchange of Notes between the Government of the United Kingdom and the Government of the Kingdom of Sweden concerning the Termination of Sweden's Commission as Protecting Power for the United Kingdom in the Islamic Republic of Iran, UKTS No. 33 (1991), Cm 1544.
[45] Salmon (1994) para 184.

NON-DISCRIMINATION AND RECIPROCITY

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
   (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
   (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

The International Law Commission decided to include among its draft articles a general article setting out the obligation not to discriminate between States because it might otherwise be thought that the specific references to non-discrimination, now in Articles 11.2 and 13.1, implied that in other contexts discrimination was permissible.[1] But the duty of non-discrimination could and frequently did conflict with the practice of States of regulating their bilateral relations on a basis of reciprocity. It was clear that in this context States attached more importance to reciprocity than to non-discrimination and that they would be reluctant to join a Convention which would require them to withdraw from special agreement or arrangements already in force and preclude them from adopting new ones and from withdrawing privileges or immunities because their own missions abroad were not receiving reciprocal treatment.

Article 47 lays down a general duty of non-discrimination before setting out circumstances in which discrimination is deemed not to take place. The emphasis is therefore placed on non-discrimination and on the application in each State Party of a uniform regime for diplomatic missions. Departures from this regime were to be regarded as exceptional. The permitted exceptions were so widely drafted that it was usually possible to justify any particular form of discriminatory treatment on a basis of custom, agreement, or retaliation. In the early years of the operation of the Convention there was in practice quite extensive discrimination on this basis. But the tendency has been for the Convention rules to be widely applied as settled law. States Parties have found it more convenient and more flexible to demonstrate increasing warmth or cooling in their relationships by using the modalities offered by the Convention, such as temporary withdrawal of mission staff or of a mission, limitation on the size of diplomatic missions, tighter control of mission premises, and declarations of *persona non grata*, rather than by discriminating in how they apply the Convention rules. Article 47 has accordingly tended to decline in importance.

[1] *ILC Yearbook* 1958 vol I pp 112, 194–8; vol II p 105; Hardy (1968) pp 83–7.

Restrictive application

It was made clear by the International Law Commission that the words 'restrictive application' in Article 47.2(a) did not include treatment which was clearly contrary to the terms of the Convention. What was covered was treatment which was at the restrictive end of a scale or discretion permitted under the terms of the Convention—for example, according no additional privileges or immunities to private servants under Article 37 or to junior staff who were nationals or permanent residents of the receiving State under Article 38, or applying in a restrictive sense a provision which was ambiguous. To impose a restrictive application of this kind on the diplomatic mission of a State which accorded the same treatment would be a form of retorsion because it would involve no breach of the terms of the Convention.

If on the other hand State A broke the terms of the Convention in regard to the diplomatic mission of State B, State B would be justified under general principles of law in refusing to implement towards the mission of State A the obligation which State A had itself failed to carry out. In this case the response would constitute a reprisal for the original illegality. In the *Hostages Case*[2] the International Court of Justice (ICJ) questioned the justifiability of reprisals by Iran as a response to allegedly unlawful conduct by the United States in violation of the Convention. They stressed that:

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

The emphasis laid by the ICJ on remedies within the Convention regime—even though they did not entirely exclude the possibility of reprisals in all circumstances—has probably played a part in leading States Parties to respond to violations by using these remedies rather than by reciprocal conduct. One possible exception to this pattern was in relation to Article 26, where the refusal of rights of free movement within their territory by the Soviet Union and other Communist States was met not by any downgrading of relations by other States but by the imposition of precisely reciprocal restrictions. As pointed out in the Commentary to Article 26, the original limitations on access may have been regarded as a 'restrictive application' by the States whose rights of free movement were curtailed. The legal basis for countermeasures was never made entirely clear.[3]

The United Kingdom in its national legislation giving effect to the Vienna Convention, the Diplomatic Privileges Act 1964,[4] took power to withdraw by Order in Council privileges and immunities from diplomatic missions in London '[i]f it appears to Her Majesty that the privileges and immunities accorded to a mission of Her Majesty in the territory of any State, or to persons connected with that mission, are less than those conferred by this Act on the mission of that State or on persons connected with that mission'. The power may be exercised whether the unfavourable treatment is a breach, a 'restrictive application' of the Convention, or the result of a reservation to the Convention. In fact it has never been exercised against any Party to the Convention. Restrictive

[2] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 at paras 83–7.
[3] Lecaros (1984) pp 91, 126, and 151.
[4] C 81.

Orders made under earlier legislation[5] were initially continued in force against some States which were then not Parties to the Convention. As each became a Party and gave an assurance that they would apply all the Convention provisions to UK missions and staff, the relevant provisions were revoked until none remained. UK policy has been to do everything possible through negotiation to secure Convention treatment for its missions abroad, though the legislative powers to retaliate remain for use in the last resort.

The Canadian Law giving effect to the Vienna Convention contains similar provision to that in the United Kingdom enabling the Secretary of State for Foreign Affairs to withdraw privileges and immunities where reciprocal treatment appears not to be granted to Canadian missions abroad.[6] The Netherlands provides, in a Decree of the Minister of Finance of 1978 on the exemption of diplomats from municipal taxes, that: 'No exemption will be granted in cases in respect to which the Minister of the Interior and the Minister of Finance have declared that no reciprocity is warranted.'[7] Belgium also regards tax exemptions as dependent on reciprocal treatment.[8] Again, however, there seems to be no evidence of actual use of these national powers to withdraw privileges or immunities.

More favourable treatment

Greater use has been made by States Parties of the possibility of granting more favourable treatment on the basis of custom or agreement, particularly where such agreements were already in force before the Vienna Convention. The United Kingdom took powers only to give effect to agreements and arrangements which were in force before the Diplomatic Privileges Act came into force, and only in relation to two matters. Section 7(1)(a) provides for 'such immunity from jurisdiction and from arrest and detention, and such inviolability of residence as are conferred by this Act on a diplomatic agent'. This power was used to give full immunity to junior staff of the Embassies of the Soviet Union, Bulgaria, Czechoslovakia, and Hungary, pursuant to earlier agreements. The Agreement with Hungary was terminated when Hungary became a Party to the Convention. Section 7(1)(b) permits continuation of diplomatic customs privileges to junior staff of nine States where it was required under prior agreements. The States concerned are Belgium, Bulgaria, France, Germany, Indonesia, Luxembourg, The Netherlands, Poland, and the United States, and all these arrangements for more privileged treatment remain in effect.[9] Tax and customs privileges are the areas which offer the greatest possibility for granting more favourable treatment on a basis of reciprocal agreement.[10]

US policy

The United States when it first became a Party to the Convention in 1972 passed no special legislation to give effect to its terms. Earlier legislation, like that of the United

[5] Diplomatic Immunities Restriction Act 1955, 4 & 5 Eliz 2 c 21.
[6] 1986 Can YIL 395.
[7] 1979 NYIL 435.
[8] Salmon (1994) para 473.
[9] *London Gazette*, 1 October 1964; Satow (6th edn 2009) paras 10.11 and 10.16.
[10] See for example, powers taken under German legislation, described in Richtsteig (1994) p 106.

Kingdom, accorded privileges and immunities to a wider class of members of diplomatic missions than does the Convention. The Assistant Attorney-General of the United States advised the Acting Legal Adviser to the State Department that in his opinion the Convention did not repeal or supersede prior US legislation. Where more favourable treatment was granted by statute than was required by the Convention, this could be based on the power under Article 47 to grant more favourable treatment 'by custom or agreement'.[11] In 1978, however, the Diplomatic Relations Act[12] brought US domestic law into line with the Convention. Section 4 of the Act provided that:

> The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

The Foreign Missions Act of 1982[13] was passed to enable the Secretary of State to regulate the provision of benefits, as therein defined, to foreign missions and their members in order to obtain reciprocal treatment for US missions abroad. Benefits are defined to include acquisition of real property, public services including customs, import, and utilities, supplies, maintenance, and transport, provision of locally engaged staff, travel, protective, financial, and currency exchange services. The Act provides that the treatment to be accorded to a foreign mission in the United States is to be determined 'after due consideration of the benefits, privileges and immunities provided to missions of the United States in the country or territory represented by that foreign mission'. Under the Act the Office of Foreign Missions was established within the State Department and under the supervision of a Director with the rank of ambassador. The Secretary of State is given wide power to implement the Act, particularly in regard to the acquisition, location, and expansion of mission premises. No further legislative measures are required, so that a response can be made with immediate effect—even where this entails, for example, restricting or restoring tax exemptions. The provisions of the Foreign Missions Act were explained to chiefs of mission at Washington by Circular Note of 14 January 1983.[14] They have also been considered in the context of Article 21 above.

In 1984 the State Department announced that wider measures of retorsion extending to cutting of telephone lines, refusal of customs clearance for diplomatic imports, and refusal of permission to purchase private residences had been taken under the Foreign Missions Act against the missions of the Soviet Union, China, Czechoslovakia, Iran, Vietnam, and Cambodia.[15] The Act was invoked in 1986 to counter a Mexican Law of 1983 for diplomats to use only cars manufactured in Mexico—and resulted in the revocation of the Mexican requirement.[16] On the 'more favourable treatment' side, the United States, like the United Kingdom, has bilateral agreements with States formerly part of the Soviet Union and with China extending full diplomatic privileges and immunities to all members of the mission who are nationals of the sending State. The

[11] 1973 AJIL 760.

[12] Public Law 95–393; 22 USC 254b; 1978 RGDIP 882.

[13] Title II of Department of State Authorization Act, Fiscal Years 1982 and 1983, Public Law 97–241; 22 US Code § 4301 *et seq*; 1984 AJIL 431.

[14] Printed in 1984 AJIL 434. See also comment in 1983 RGDIP 394.

[15] 1985 RGDIP 141.

[16] 1986 RGDIP 118.

Act is used to accord full customs franchise (exemption from duty on imports throughout a posting and not merely on first arrival) to missions of States which accord a reciprocal franchise to members of US missions. The Department of State systematically monitors tax exemptions granted to US missions abroad and adjusts the privileges accorded to missions in the United States so as to ensure a high level of reciprocity.[17] Evidence of the practice of other States suggests that this degree of fine-tuning—although clearly permitted under Article 47 of the Convention—is unique, and it is possible only because of the rapid response facility offered by the Foreign Missions Act.

[17] 1981–8 DUSPIL 1043. See also Satow (6th edn 2009) paras 10.11 and 10.18.

FINAL CLAUSES

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention, after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;
(b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

The debate in the Committee of the Whole and in Plenary Session of the Vienna Conference on the final clauses of the Convention followed the lines which were customary at that time. There was a seven-Power proposal, presented by the United States, that the Secretary-General of the United Nations should act as depositary of the Convention (the usual practice where a negotiating Conference is held under the auspices of the United Nations) and that participation in the Convention should be open to States Members of the United Nations or of any of its specialized agencies, parties to the Statute of the International Court of Justice, and any other State invited to join by the General Assembly. This formula, based on the final clauses of the 1958 Geneva Conventions on the Law of the Sea, effectively excluded at that time North Korea and North Vietnam. They did not fall within any of the above categories, but were recognized as States by some participants in the Conference, in particular by the Soviet Union and Eastern European Communist States. These States and some others therefore supported a proposal by Poland and Czechoslovakia to appoint Austria depositary of the Convention and to permit accession to it by 'any State'. After prolonged debate and two separate votes, the seven-Power proposal was adopted by the Committee of the Whole. In Plenary Session the proposal to permit accession by 'any State' was again debated, and the standard clauses were adopted with some abstentions but no contrary vote.[1] A number of the States made 'reservations' to the final clauses, or objected to their discriminatory character, in depositing their instruments of ratification or accession. As these statements were without legal significance there were few responses by other States.

The Committee also accepted suggestions made orally by the representatives of Poland and of the United Kingdom that the title of the Convention should be the Vienna Convention on Diplomatic Relations. The work of the International Law Commission and the Conference itself had been on 'diplomatic intercourse and immunities', but the title chosen was more elegant and shorter as well as paying tribute to Vienna as the host city to the Conference.

The Vienna Convention on Diplomatic Relations entered into force on 24 April 1964. The full text of the Convention is printed at Appendix 1. A list of States Parties to the Convention, with the dates of the relevant instruments, is printed at Appendix 2.

[1] UN Docs A/Conf. 20/C 1/L 289 and Add. 1 and 3; L 175; A/Conf. 20/14 pp 231–40, 45–6.

ACQUISITION OF NATIONALITY

Optional protocol concerning acquisition of nationality

THE STATES PARTIES TO THE PRESENT PROTOCOL AND TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 2 March to 14 April 1961,

EXPRESSING THEIR WISH to establish rules between them concerning acquisition of nationality by the members of their diplomatic missions and of the families forming part of the households of those members,

HAVE AGREED as follows:

Article I

For the purpose of the present Protocol, the expression 'members of the mission' shall have the meaning assigned to it in Article 1, sub-paragraph (b), of the Convention—namely 'the head of the mission and the members of the staff of the mission'.

Article II

Members of the mission not being nationals of the receiving State, and members of their families forming part of their households, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Article III

The present Protocol shall be open for signature by all States which may become parties to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article IV

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article V

The present Protocol shall remain open for accession by all States which may become parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VI

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.
2. For each State ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this Article, the Protocol shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article VII

The Secretary-General of the United Nations shall inform all States which may become parties to the Convention:

(a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles III, IV and V;
(b) of the date on which the present Protocol will enter into force, in accordance with Article VI.

Article VIII

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in Article III.

The International Law Commission and the Vienna Conference attempted to formulate a provision on the acquisition of nationality by members of diplomatic missions as an Article of the Vienna Convention. Their failure to do this was due to two reasons—lack of appreciation by the Commission of the difficulty of drafting an acceptable text which might affect the nationality laws of a very large number of States and the broadening of the scope of the customary rule for reasons of principle but without sufficient regard to whether the extensions were really important or to all their consequences. The subject was an aspect of diplomatic law only in a very general sense and formulation of a precise and binding rule likely to be acceptable to States with complex and varying nationality laws required more preliminary study and the attention of experts in nationality laws. Nationality law differs from diplomatic law in being intimately bound up with domestic and social policies of each State, so that harmonization of even a very narrow aspect is difficult to achieve.

Prior to the Convention the position was that States which conferred their nationality as a matter of course on children born within their territory (the *ius soli* principle) generally made an exception where the father of the child was the diplomatic agent of another State and was not a national of the receiving State.[1] During the period of

[1] 1929 Resolution of the Institute of International Law Art 10: 26 AJIL (1932 Supp) p 187; Harvard Draft Art 28: ibid p 133; 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws, CLXXIX LNTS 103, Art 12; Satow (4th edn 1957) p 207.

diplomatic law when the fiction of exterritoriality was heavily relied on, this rule was accepted as a natural consequence. By the twentieth century, however, exterritoriality had been largely discarded, and most States formulated their nationality laws with considerable precision. Specific exceptions for children born to diplomatic fathers in the receiving State became necessary. France, for example, in view of the uncertainty of the position, introduced provision in a law of 10 August 1927 rather than rely on providing exceptions in regard to military service.[2] The United Kingdom in the British Nationality Act 1948[3] made an exception to acquisition of nationality by birth within the United Kingdom and Colonies if the father at the time of the birth was entitled to diplomatic immunity and was not a citizen of the United Kingdom and Colonies. The United States conferred citizenship by birth within the United States only where the birth was to a person 'subject to the jurisdiction of the United States'.[4] Although all these provisions reflected a general principle, there were differences in their formulation and the persons to whom they applied.

The text formulated by the International Law Commission after considerable discussion,[5] and which now forms Article II of the Protocol, extended the general rule in several ways. The effect of this text is that a child whose father or mother is a member of a diplomatic mission of whatever rank and is not a national of the receiving State will not automatically acquire the nationality of the receiving State by virtue of birth within its territory. The exception therefore includes a child born to a father who is a member of the service staff of the mission and whose wife is a national of the receiving State, the illegitimate child born to a woman member of the mission, a child born to the sister of a diplomat married to a national of the receiving State (provided that the child is part of the diplomat's household), and a child born to a woman member of the mission married to a national of the receiving State (provided that she has not acquired her husband's nationality). It takes no account of the extent of the connection of the child's family with the receiving State—both parents may be permanently resident there and the parent who is not the member of the mission may also be a national of the receiving State. It also takes no account of whether the child receives another nationality—in several of these cases failure to acquire the nationality of the place of birth could make the child stateless. Sending States are not obliged to accord their nationality to any child born to a member of any of their diplomatic missions abroad, and in any event the member of the mission may be a national of a third State. Although it is clear from the discussions and Commentary of the International Law Commission[6] that it was not intended to exclude the possibility of acquisition by choice of the nationality of the receiving State, this is not entirely clear from the text. A clearer formulation in this regard was the French amendment: 'No law of the receiving State conferring its nationality, in virtue of the principle of *ius soli*, upon children

[2] Niboyet, *Manuel de Droit International Privé* (1928) pp 117, 133–4; Audinet, 'La nationalité des enfants d'agents diplomatiques et consulaires' 45 Journal du Droit International Privé (1918) 1031; Genet (1931) vol I p 538.

[3] 11 & 12 Geo 6 c 56, s 4, later amended by Diplomatic Privileges Act 1964, c 81, s 5(2) (s 5(2) was repealed by British Nationality Act 1981, c 61, s 52, Sch 9; see, however, ss 1(1) and 50(4) of the 1981 Act).

[4] See UN Doc A/Conf. 20/14 p 203 (representative of United States).

[5] *ILC Yearbook* 1957 vol I pp 142–3, 216–17; 1958 vol I pp 165, 246–7.

[6] *ILC Yearbook* 1958 vol II p 101 (Commentary on Art 35).

born in its territory shall apply to children of members of the mission unless they voluntarily request the application of that law in accordance with its provisions.'[7]

The second effect of the text is to exclude the possibility of a woman member of the mission on marriage to a national of the receiving State automatically acquiring her husband's nationality. This did not appear to be a significant problem, though it might be expected to occur more often in the future. But the provisions drafted to deal with women members of the mission caused difficulties to a number of States—in particular to Switzerland. A Working Group set up by the Committee of the Whole to consider the various amendments submitted abandoned the attempt to cover this aspect and drafted a text confined to the more significant problem of births to members of diplomatic missions. The redraft also attempted to meet the requirements of some Latin American States which referred in nationality provisions in their laws to 'private domicile' as a criterion.[8]

The redraft was, however, still not acceptable to all the States which had found difficulties with the International Law Commission's text, and many representatives preferred the wider formulation set out in the original text. The Working Group's redraft and the other amendments were all rejected and the Commission's text was adopted by the Committee of the Whole. In Plenary Session, however, those States which preferred to delete the Article and leave the matter to be regulated by customary international law (as envisaged in the Preamble to the Convention) maintained their objections and the Article failed to obtain the required two-thirds majority. The representative of Spain then proposed that the text should form a separate Optional Protocol which could be accepted by those States which had suggested its terms, and this was accepted.[9]

The Protocol entered into force along with the Convention on 24 April 1964. A list of States Parties to the Optional Protocol concerning Acquisition of Nationality, with dates of deposit of their instruments, is at Appendix 2. At 20 August 2015 fifty-one States had become Parties, but they do not include France, the United Kingdom, the United States or those other States which at the Conference had major reservations in regard to the text.

[7] UN Doc A/Conf. 20/C 1/L 223. cp original formulation of the Special Rapporteur in UN Doc A/CN 4/91 p 7.

[8] UN Docs A/Conf. 20/C 1/L 314; A/Conf. 20/14 pp 191–2, 204, 23, 29–31.

[9] UN Doc A/Conf. 20/14 pp 23, 29–31; Bruns (2014) pp 175–7.

SETTLEMENT OF DISPUTES

Optional protocol concerning the compulsory settlement of disputes

THE STATES PARTIES TO THE PRESENT PROTOCOL AND TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 2 March to 14 April 1961,

STRESSING THEIR WISH to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

HAVE AGREED as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Article II

The Parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute arises, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

Article III

1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.
2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Article IV

States Parties to the Convention, to the Optional Protocol concerning Acquisition of Nationality, and to the present Protocol may at any time declare that they will extend the provisions of the present Protocol to disputes arising out of the interpretation or application of the Optional Protocol concerning Acquisition of Nationality. Such declarations shall be notified to the Secretary-General of the United Nations.

Article V

The present Protocol shall be open for signature by all States which may become Parties to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article VI

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article VII

The present Protocol shall remain open for accession by all States which may become Parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VIII

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever day is the later.
2. For each State ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this Article, the Protocol shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article IX

The Secretary-General of the United Nations shall inform all States which may become Parties to the Convention:

(a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles V, VI and VII;
(b) of declarations made in accordance with Article IV of the present Protocol;
(c) of the date on which the present Protocol will enter into force, in accordance with Article VIII.

Article X

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in Article V.

The Optional Protocol concerning the Compulsory Settlement of Disputes originated in a proposal to the International Law Commission to include an additional Article as follows: 'Any dispute that may arise between States concerning the exercise of diplomatic functions shall be referred to arbitration or submitted to the International Court of Justice.'[1] Varying views were expressed in the Commission on the proposal, even when it was expanded to include reference to negotiation and conciliation. Mr Tunkin said 'that it was inadvisable to include the article in the draft at all, since it might make the draft as a whole less acceptable to States'. Sir Gerald Fitzmaurice on the other hand originally maintained that:

> Diplomatic intercourse and immunities was, in his view, a subject with regard to which it was singularly appropriate to provide for compulsory recourse to arbitration, since it was one where it was very common for points to arise that had to be judicially determined, and since it was largely non-political in nature.

But during the discussion in 1958 he and Mr François expressed doubts whether it was appropriate for the Commission to include provision for compulsory arbitration or adjudication in a draft which did no more than codify customary international law. In a draft containing an element of progressive development, insertion of provision for compulsory arbitration might be necessary since in its absence States might be reluctant to commit themselves to the new provisions. Mr Matine-Daftary suggested that the arbitration clause should be separated from the body of the draft and that it should be left for later decision by States whether to include it as a separate Protocol or otherwise. The majority of members, however, favoured inclusion of provision to permit reference to the International Court of Justice by either of the parties to a dispute concerning the interpretation or application of the Convention.[2]

At the Vienna Conference States divided on customary lines. Western European States, with Japan, the United States, Israel, and the Philippines strongly supported inclusion of the Commission's proposal, Eastern European and Latin American States were with a few exceptions opposed, and the majority supported the proposal[3] that the settlement of disputes should be made the subject of a separate Optional Protocol, as had happened in the context of the United Nations Conference on the Law of the Sea in 1958.[4] Switzerland, having failed in the Committee of the Whole to obtain a roll-call vote on the Commission's proposal, tried to do so a second time by resubmitting the Commission's draft in the form of an amendment. But it failed to obtain the normal priority for this proposal. The draft Optional Protocol was then adopted by a very large majority and no vote was therefore taken on the Commission's proposal.[5]

The Protocol entered into force along with the Convention on 24 April 1964. A list of the States Parties to the Optional Protocol concerning the Compulsory Settlement of Disputes, with dates of deposit of their instruments, is at Appendix 2. By 20 August 2015 seventy States had become Parties. With a very few exceptions this list does not include former Communist States or Latin American States.

[1] *ILC Yearbook* 1957 vol I p 151.
[2] *ILC Yearbook* 1957 vol I pp 152, 223; 1958 vol I pp 184–91; 1958 vol II p 105.
[3] UN Docs A/Conf. 20/C 1/L 316 and Add. 1 (Iraq, Italy, Poland, and the United Arab Republic); A/Conf. 20/14 pp 219–25.
[4] Cmnd 584, pp 43–4.
[5] A/Conf. 20/14 pp 41–5. See also Kerley (1962) at pp 126–8.

As a general rule, disputes over the interpretation or application of the Vienna Convention are not ideally suited to resolution by arbitration or by judicial settlement. Most of them relate to matters which must be resolved speedily by the Ministry of Foreign Affairs and other authorities of the receiving State in determining whether criminal proceedings may be brought, by national courts when diplomatic immunity is pleaded, or by governments in deciding on whether a member of mission should be recalled or more generally on the level at which they wish to maintain diplomatic relations. Many of the ambiguities in the Convention have over the last thirty years been clarified by decisions of national courts or by systematic state practice. The Convention offers a series of remedies for perceived abuse or violations, and States have made good use of them. Reciprocity remains fundamental to the structure of diplomatic relations, but for the most part retaliation has been used as a threat to secure observance of Convention rules.

The one striking exception to this pattern of settlement was, of course, the *Hostages Case*.[6] A few weeks after the seizure of the US Embassy by student demonstrators in November 1979 the United States instituted proceedings against Iran before the International Court of Justice, basing the jurisdiction of the ICJ on four treaty obligations of which the first was the Vienna Convention on Diplomatic Relations and the Optional Protocol concerning the Compulsory Settlement of Disputes. What distinguished this extraordinary event from other disputes—even from other disputes even more fundamental and violent—was the failure of Iran both before and after the seizure of the embassy to make any use of the remedies provided by the Convention. Neither the Order indicating Provisional Measures nor the ICJ's judgment led to an immediate resolution of the dispute between the United States and Iran. The judgment, however, had a profound effect in helping the United States to mount systematic pressure and, joined by European States and others, economic sanctions against Iran—pressures which ultimately led to a negotiated solution. It also prevented any possibility that the seizure might be perceived by the world community as having a justifiable legal basis. Although Iran did not appear and was not represented in the proceedings, the ICJ made great efforts to consider and assess its point of view so far as was possible from the limited material before it. In a number of areas which have been extensively referred to above—and particularly in regard to the question of the responsibility of a government for the acts of others—the judgment clarified the Convention. This case on its own therefore justified the existence of the Optional Protocol.

Even if in the nature of diplomacy most differences will be resolved by instant countermeasures or by decisions of national courts or of Ministries of Foreign Affairs, wider support for the Protocol—coming closer to the near universal participation in the Convention itself—would be significant. It would show the willingness of States to submit to international arbitration or adjudication their disputes in an area where there is a common interest in clear and generally respected rules.

[6] *United States Diplomatic and Consular Staff in Tehran*, Order on Indication of Provisional Measures, 1979 ICJ Reports 7 and Judgment, 1980 ICJ Reports 3. The text of the judgment and extensive commentary on its significance is in Kaufman Hevener (1986).

APPENDIX 1

Vienna Convention on Diplomatic Relations[1]

Signed at Vienna, April 18, 1961

The States Parties to the present Convention

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;
(b) the 'members of the mission' are the head of the mission and the members of the staff of the mission;
(c) the 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
(d) the 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;
(e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;
(f) the 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission;
(g) the 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission;
(h) a 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
(i) the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

[1] 8500 UNTS 95.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist *inter alia* in:
   (a) representing the sending State in the receiving State;
   (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
   (c) negotiating with the Government of the receiving State;
   (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
   (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the agrément of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving State is not obliged to give reasons to the sending State for a refusal of agrément.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a *chargé d'affaires ad interim* in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.
2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is

persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

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

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
   (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
   (b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
   (c) the arrival and final departure of private servants in the employ of persons referred to in subparagraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
   (d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.
2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a non- discriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.
2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:
   (a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
   (b) that of envoys, ministers and internuncios accredited to Heads of State;
   (c) that of *chargés d'affaires* accredited to Ministers for Foreign Affairs.
2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.
2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
3. This Article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act provisionally as head of the mission. The name of the *chargé d'affaires ad interim* shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23

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

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

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

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
   (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
   (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
   (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
   (a) that they are not nationals of or permanently resident in the receiving State; and
   (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.
3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

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

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;
(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) articles for the official use of the mission;
   (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travel-ling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is

accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure.*

Article 41

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

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, *inter alia:*

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable of the receiving State;
(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
   (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
   (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instruments of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;
(b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE AT VIENNA, this eighteenth day of April one thousand nine hundred and sixty-one.

APPENDIX 2

Parties to Vienna Convention on Diplomatic Relations

Done at Vienna on 18 April 1961

ENTRY INTO FORCE: 24 April 1964, in accordance with Article 51
REGISTRATION: 24 June 1964, No 7310
TEXT: United Nations Treaty Series vol 500 p 95
STATUS: Signatories: 60. Parties: 190.

Note: The Convention was adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities held at the Neue Hofburg in Vienna, Austria, from 2 March to 14 April 1961. The Conference also adopted the Optional Protocol concerning the Acquisition of Nationality, the Optional Protocol concerning the Compulsory Settlement of Disputes, the Final Act, and four resolutions annexed to that Act. The Convention and two Protocols were deposited with the Secretary-General of the United Nations. The Final Act, by unanimous decision of the Conference, was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria. The text of the Final Act and of the annexed resolutions is published in the United Nations Treaty Series vol 500 p 212. For the proceedings of the Conference, see *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vols I and II (United Nations publication, Sales Nos 61.X.2 and 62.X.1).

Participant	Signature	Ratification, accession (a), succession (d)	
Afghanistan		6 Oct 1965	*A*
Albania	18 Apr 1961	18 Feb 1988	
Algeria		14 Apr 1964	*A*
Andorra		3 Jul 1996	*A*
Angola		9 Aug 1990	*A*
Argentina	8 Apr 1961	10 Oct 1963	
Armenia		23 Jun 1993	*A*
Australia	30 Mar 1962	26 Jan 1968	
Austria	18 Apr 1961	28 Apr 1966	
Azerbaijan		13 Aug 1992	*A*
Bahamas		17 Mar 1977	*D*
Bahrain		2 Nov 1971	*A*
Bangladesh		13 Jan 1978	*D*
Barbados		6 May 1968	*D*
Belarus	18 Apr 1961	14 May 1964	
Belgium	23 Oct 1961	2 May 1968	
Belize		30 Nov 2000	*A*
Benin		27 Mar 1967	*A*
Bhutan		7 Dec 1972	*A*

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Participant	Signature	Ratification, accession (a), succession (d)	
Bolivia		28 Dec 1977	*A*
Bosnia and Herzegovina		1 Sep 1993	*D*
Botswana		11 Apr 1969	*A*
Brazil	18 Apr 1961	25 Mar 1965	
Brunei Darussalam		24 May 2013	*A*
Bulgaria	18 Apr 1961	17 Jan 1968	
Burkina Faso		4 May 1987	*A*
Burundi		1 May 1968	*A*
Cabo Verde		30 Jul 1979	*A*
Cambodia		31 Aug 1965	*A*
Cameroon		4 Mar 1977	*A*
Canada	5 Feb 1962	26 May 1966	
Central African Republic	28 Mar 1962	19 Mar 1973	
Chad		3 Nov 1977	*A*
Chile	18 Apr 1961	9 Jan 1968	
China		25 Nov 1975	*a*
Colombia	18 Apr 1961	5 Apr 1973	
Comoros		27 Sept 2004	*A*
Congo		11 Mar 1963	*a*
Costa Rica	14 Feb 1962	9 Nov 1964	
Côte d'Ivoire		1 Oct 1962	*A*
Croatia		12 Oct 1992	*D*
Cuba	16 Jan 1962	26 Sep 1963	
Cyprus		10 Sep 1968	*A*
Czech Republic		22 Feb 1993	*D*
Democratic People's Republic of Korea		29 Oct 1980	*A*
Democratic Republic of the Congo	18 Apr 1961	19 Jul 1965	
Denmark	18 Apr 1961	2 Oct 1968	
Djibouti		2 Nov 1978	*A*
Dominica		24 Nov 1987	*D*
Dominican Republic	30 Mar 1962	14 Jan 1964	
Ecuador	18 Apr 1961	21 Sep 1964	
Egypt		9 Jun 1964	*A*
El Salvador		9 Dec 1965	*A*
Equatorial Guinea		30 Aug 1976	*A*
Eritrea		14 Jan 1997	*A*
Estonia		21 Oct 1991	*A*
Ethiopia		22 Mar 1979	*A*
Fiji		21 Jun 1971	*D*
Finland	20 Oct 1961	9 Dec 1969	
Former Yugoslav Republic of Macedonia		18 Aug 1993	*D*

France	30 Mar 1962	31 Dec 1970	
Gabon		2 Apr 1964	*A*
Gambia		28 Mar 2013	*A*
Georgia		12 Jul 1993	*A*
Germany	18 Apr 1961	11 Nov 1964	
Ghana	18 Apr 1961	28 Jun 1962	
Greece	29 Mar 1962	16 Jul 1970	
Grenada		2 Sep 1992	*a*
Guatemala	18 Apr 1961	1 Oct 1963	
Guinea		10 Jan 1968	*A*
Guinea-Bissau		11 Aug 1993	*a*
Guyana		28 Dec 1972	*A*
Haiti		2 Feb 1978	*A*
Holy See	18 Apr 1961	17 Apr 1964	
Honduras		13 Feb 1968	*A*
Hungary	18 Apr 1961	24 Sep 1965	
Iceland		18 May 1971	*A*
India		15 Oct 1965	*A*
Indonesia		4 Jun 1982	*A*
Iran (Islamic Republic of)	27 May 1961	3 Feb 1965	
Iraq	20 Feb 1962	15 Oct 1963	
Ireland	18 Apr 1961	10 May 1967	
Israel	18 Apr 1961	11 Aug 1970	
Italy	13 Mar 1962	25 Jun 1969	
Jamaica		5 Jun 1963	*A*
Japan	26 Mar 1962	8 Jun 1964	
Jordan		29 Jul 1971	*A*
Kazakhstan		5 Jan 1994	*A*
Kenya		1 Jul 1965	*A*
Kiribati		2 Apr 1982	*D*
Kuwait		23 Jul 1969	*A*
Kyrgyzstan		7 Oct 1994	*A*
Lao People's Democratic Republic		3 Dec 1962	*A*
Latvia		13 Feb 1992	*A*
Lebanon	18 Apr 1961	16 Mar 1971	
Lesotho		26 Nov 1969	*A*
Liberia	18 Apr 1961	15 May 1962	
Libya		7 Jun 1977	*A*
Liechtenstein	18 Apr 1961	8 May 1964	
Lithuania		15 Jan 1992	*A*
Luxembourg	2 Feb 1962	17 Aug 1966	
Madagascar		31 Jul 1963	*A*
Malawi		19 May 1965	*A*
Malaysia		9 Nov 1965	*A*
Maldives		2 Oct 2007	*A*

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Continued

Participant	Signature	Ratification, accession (a), succession (d)	
Mali		28 Mar 1968	*A*
Malta		7 Mar 1967	*D*
Marshall Islands		9 Aug 1991	*A*
Mauritania		16 Jul 1962	*A*
Mauritius		18 Jul 1969	*D*
Mexico	18 Apr 1961	16 Jun 1965	
Micronesia (Federated States of)		29 Apr 1991	*A*
Monaco		4 Oct 2005	*A*
Mongolia		5 Jan 1967	*A*
Montenegro		23 Oct 2006	*D*
Morocco		19 Jun 1968	*A*
Mozambique		18 Nov 1981	*A*
Myanmar		7 Mar 1980	*A*
Namibia		14 Sep 1992	*A*
Nauru		5 May 1978	*D*
Nepal		28 Sep 1965	*A*
Netherlands		7 Sep 1984	*A*
New Zealand	28 Mar 1962	23 Sep 1970	
Nicaragua		31 Oct 1975	*A*
Niger		5 Dec 1962	*A*
Nigeria	31 Mar 1962	19 Jun 1967	
Norway	18 Apr 1961	24 Oct 1967	
Oman		31 May 1974	*A*
Pakistan	29 Mar 1962	29 Mar 1962	
Panama	18 Apr 1961	4 Dec 1963	
Papua New Guinea		4 Dec 1975	*D*
Paraguay		23 Dec 1969	*A*
Peru		18 Dec 1968	*A*
Philippines	20 Oct 1961	15 Nov 1965	
Poland	18 Apr 1961	19 Apr 1965	
Portugal		11 Sep 1968	*A*
Qatar		6 Jun 1986	*A*
Republic of Korea	28 Mar 1962	28 Dec 1970	
Republic of Moldova		26 Jan 1993	*A*
Romania	18 Apr 1961	15 Nov 1968	
Russian Federation	18 Apr 1961	25 Mar 1964	
Rwanda		15 Apr 1964	*A*
Saint Lucia		27 Aug 1986	*D*
Saint Vincent and the Grenadines		27 Apr 1999	*D*
Samoa		26 Oct 1987	*A*
San Marino	25 Oct 1961	8 Sep 1965	
Sao Tome and Principe		3 May 1983	*A*
Saudi Arabia		10 Feb 1981	*A*

Senegal	18 Apr 1961	12 Oct 1972	
Serbia		12 Mar 2001	*D*
Seychelles		29 May 1979	*A*
Sierra Leone		13 Aug 1962	*A*
Singapore		1 Apr 2005	*A*
Slovakia		28 May 1993	*D*
Slovenia		6 Jul 1992	*D*
Somalia		29 Mar 1968	*A*
South Africa	28 Mar 1962	21 Aug 1989	
Spain		21 Nov 1967	*A*
Sri Lanka	18 Apr 1961	2 Jun 1978	
State of Palestine		2 Apr 2014	*A*
Sudan		13 Apr 1981	*A*
Suriname		28 Oct 1992	*A*
Swaziland		25 Apr 1969	*A*
Sweden	18 Apr 1961	21 Mar 1967	
Switzerland	18 Apr 1961	30 Oct 1963	
Syrian Arab Republic		4 Aug 1978	*A*
Tajikistan		6 May 1996	*A*
Thailand	30 Oct 1961	23 Jan 1985	
Timor Leste		30 Jan 2004	*A*
Togo		27 Nov 1970	*A*
Tonga		31 Jan 1973	*D*
Trinidad and Tobago		19 Oct 1965	*D*
Tunisia		24 Jan 1968	*A*
Turkey		6 Mar 1985	*A*
Turkmenistan		25 Sep 1996	*A*
Tuvalu		15 Sep 1982	*D*
Uganda		15 Apr 1965	*A*
Ukraine	18 Apr 1961	12 Jun 1964	
United Arab Emirates		24 Feb 1977	*A*
United Kingdom	11 Dec 1961	1 Sep 1964	
United Republic of Tanzania	27 Feb 1962	5 Nov 1962	
United States of America	29 Jun 1961	13 Nov 1972	
Uruguay	18 Apr 1961	10 Mar 1970	
Uzbekistan		2 Mar 1992	*A*
Venezuela	18 Apr 1961	16 Mar 1965	
Viet Nam		26 Aug 1980	*A*
Yemen		24 Nov 1976	*A*
Zambia		16 Jun 1975	*D*
Zimbabwe		13 May 1991	*A*

Parties to Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality

Done at Vienna on 18 April 1961

ENTRY INTO FORCE: 24 April 1964, in accordance with Article VI
REGISTRATION: 24 June 1964, No 7311
TEXT: United Nations Treaty Series vol 500 p 223
STATUS: Signatories: 19, Parties: 51

Participant	Signature	Ratification, accession (a), succession (d)	
Argentina	25 Oct 1961	10 Oct 1963	
Belgium		2 May 1968	*a*
Bosnia and Herzegovina		12 Jan 1994	*d*
Botswana		11 Apr 1969	*a*
Cambodia		31 Aug 1965	*a*
Central African Republic	28 Mar 1962	19 Mar 1973	
Democratic Republic of the Congo		15 Jul 1976	*a*
Denmark	18 Apr 1961	2 Oct 1968	
Dominican Republic	30 Mar 1962	14 Jan 1964	
Egypt		9 Jun 1964	*a*
Estonia		21 Oct 1991	*a*
Finland	20 Oct 1961	19 Dec 1969	
Former Yugoslav Republic of Macedonia		18 Aug 1993	*d*
Gabon		2 Apr 1964	*a*
Germany	28 Mar 1962	11 Nov 1964	
Guinea		10 Jan 1968	*a*
Iceland		18 May 1971	*a*
India		15 Oct 1965	*a*
Indonesia		4 Jun 1982	*a*
Iran (Islamic Republic of)	27 May 1961	3 Feb 1965	
Iraq	20 Feb 1962	15 Oct 1963	
Italy	13 Mar 1962	25 Jun 1969	
Kenya		1 Jul 1965	*a*
Lao People's Democratic Republic		3 Dec 1962	*a*
Liberia		16 Sep 2005	*a*
Libya		7 Jun 1977	*a*
Madagascar		31 Jul 1963	*a*
Malawi		29 Apr 1980	*a*
Malaysia		9 Nov 1965	*a*
Montenegro		23 Oct 2006	*d*
Morocco		23 Feb 1977	*A*
Myanmar		7 Mar 1980	*A*
Nepal		8 Sep 1965	*A*
Netherlands		7 Sep 1984	*A*
New Zealand		5 Sept 2003	*A*

Nicaragua		9 Jan 1990	*A*
Niger		28 Mar 1966	*A*
Norway	18 Apr 1961	24 Oct 1967	
Oman		31 May 1974	*A*
Panama		4 Dec 1963	*A*
Paraguay		23 Dec 1969	*A*
Philippines	20 Oct 1961	15 Nov 1965	
Republic of Korea	30 Mar 1962	7 Mar 1977	
Serbia		12 Mar 2001	*D*
Sri Lanka		31 July 1978	*A*
Suriname		28 Oct 1992	*A*
Sweden	18 Apr 1961	21 Mar 1967	
Switzerland		12 Jun 1992	
Thailand	30 Oct 1961	23 Jan 1985	
Tunisia		24 Jan 1968	*a*
United Republic of Tanzania	27 Feb 1962	5 Nov 1962	

Parties to Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes

Done at Vienna on 18 April 1961

ENTRY INTO FORCE: 24 April 1964, in accordance with Article VIII
REGISTRATION: 24 June 1964, No 7312
TEXT: United Nations Treaty Series vol 500 p 241
STATUS: Signatories: 30, Parties: 70

Participant	Signature	Ratification, accession (a), succession (d)	
Australia		26 Jan 1968	*a*
Austria	18 Apr 1961	28 Apr 1966	
Bahamas		17 Mar 1977	*d*
Belgium	23 Oct 1961	2 May 1968	
Bosnia and Herzegovina		1 Sep 1993	*d*
Botswana		11 Apr 1969	*a*
Bulgaria		6 Jun 1989	*a*
Cambodia		31 Aug 1965	*a*
Central African Republic	28 Mar 1962	19 Mar 1973	
Costa Rica		9 Nov 1964	*a*
Democratic Republic of the Congo		19 Jul 1965	*a*
Denmark	18 Apr 1961	2 Oct 1968	

(continued)

Continued

Participant	Signature	Ratification, accession (a), succession (d)	
Dominica		24 Mar 2006	*a*
Dominican Republic	30 Mar 1962	13 Feb 1964	
Ecuador	18 Apr 1961	21 Sep 1964	
Equatorial Guinea		4 Nov 2014	
Estonia		21 Oct 1991	*A*
Fiji		21 Jun 1971	*D*
Finland	20 Oct 1961	9 Dec 1969	
Former Yugoslav Republic of Macedonia		18 Aug 1993	*D*
France	30 Mar 1962	31 Dec 1970	
Gabon		2 Apr 1964	*A*
Germany	18 Apr 1961	11 Nov 1964	
Guinea		10 Jan 1968	*A*
Hungary		8 Dec 1989	*A*
Iceland		18 May 1971	*A*
India		15 Oct 1965	*a*
Iran (Islamic Republic of)	27 May 1961	3 Feb 1965	
Iraq	20 Feb 1962	15 Oct 1963	
Italy	13 Mar 1962	25 Jun 1969	
Japan	26 Mar 1962	8 Jun 1964	
Kenya		1 Jul 1965	*A*
Kuwait		21 Feb 1991	*A*
Lao People's Democratic Republic		3 Dec 1962	*A*
Liberia		16 Sep 2005	*A*
Liechtenstein	18 Apr 1961	8 May 1964	
Lithuania		26 Sep 2012	*a*
Luxembourg	2 Feb 1962	17 Aug 1966	
Madagascar		31 Jul 1963	*A*
Malawi		29 Apr 1980	*A*
Malaysia		9 Nov 1965	*A*
Malta		7 Mar 1967	*D*
Mauritius		18 Jul 1969	*D*
Montenegro		23 Oct 2006	*d*
Nauru		14 Dec 2012	*a*
Nepal		28 Sep 1965	*A*
Netherlands		7 Sep 1984	*A*
New Zealand	28 Mar 1962	23 Sep 1970	
Nicaragua		9 Jan 1990	*A*
Niger		26 Apr 1966	*A*
Norway	18 Apr 1961	24 Oct 1967	
Oman		31 May 1974	*A*
Pakistan		29 Mar 1976	*A*
Panama		4 Dec 1963	*A*

Paraguay		23 Dec 1969	*A*
Philippines	20 Oct 1961	15 Nov 1965	
Republic of Korea	30 Mar 1962	25 Jan 1977	
Romania		19 Sep 2007	*A*
Serbia		12 Mar 2001	*D*
Seychelles		29 May 1979	*A*
Slovakia		27 Apr 1999	*A*
Slovenia		6 Jul 1992	*D*
Spain		21 Sep 2011	*A*
Sri Lanka		31 Jul 1978	*A*
Suriname		28 Oct 1992	*A*
Sweden	18 Apr 1961	21 Mar 1967	
Switzerland	18 Apr 1961	22 Nov 1963	
United Kingdom	11 Dec 1961	1 Sep 1964	
United Republic of Tanzania	27 Feb 1962	5 Nov 1962	
United States of America	29 Jun 1961	13 Nov 1972	

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The 1961 Vienna Convention on Diplomatic Relations has for over 50 years been central to diplomacy and applied to all forms of relations among sovereign States. Participation is almost universal. The rules giving special protection to ambassadors are the oldest established in international law and the Convention is respected almost everywhere. But understanding it as a living instrument requires knowledge of its background in customary international law, of the negotiating history which clarifies many of its terms and the subsequent practice of states and decisions of national courts which have resolved other ambiguities. Diplomatic Law provides this in-depth Commentary. The book is an essential guide to changing methods of modern diplomacy and shows how challenges to its regime of special protection for embassies and diplomats have been met and resolved. It is used by ministries of foreign affairs and cited by domestic courts world-wide.

The book analyzes the reasons for the widespread observance of the Convention rules and why in the special case of communications—where there is flagrant violation of their special status—these reasons do not apply. It describes how abuse has been controlled and how the immunities in the Convention have survived onslaught by those claiming that they should give way to conflicting entitlements to access to justice and the desire to punish violators of human rights. It describes how the duty of diplomats not to interfere in the internal affairs of the host State is being narrowed in the face of the communal international responsibility to monitor and uphold human rights.

Eileen Denza is a former Legal Counsellor in the Foreign and Commonwealth Office. She was a Visiting Professor at University College London from 1997 to 2008. She was the Legal Adviser to the UK Representation to the European Communities from 1980 to 1983, and was Counsel to the EC Committee in the House of Lords from 1987 to 1995.

'This book is an erudite and impressive statement of what diplomatic law actually is and what, presumably, it may become, bearing in mind such ongoing controversies as the tension between the principle of non-interference in the affairs of a particular country—and the duty to promote and champion the basic tenets of human rights.'

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ISBN 978-0-19-882565-4