

**ABUSE OF DIPLOMATIC IMMUNITY IN BILATERAL RELATIONS: A
CRITIQUE ON THE VIENNA CONVENTION ON DIPLOMATIC
RELATIONS, 1961.**

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DISSERTATION DECLARATION FORM

This is to certify that this research project is my original work and has not been presented for a degree award in any other university or institution of higher Learning. Information from other sources have been duly acknowledged.

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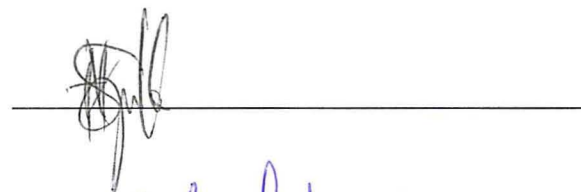
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ABSTRACT

This study examines the abuse of diplomatic immunity and privileges. This study further gives an analysis of the Vienna Convention on Diplomatic Relations which has been ratified by many states. The Convention is established to govern the diplomatic relations.

The study establishes the fact that diplomacy has been in existence before the adoption of the VCDR. The study notes the fact that the provisions in the VCDR has contributed to the abuse of diplomatic immunity and privileges. The hierarchy of norms is also brought into the lime light as to whether the immunity granted to diplomatic agent should be giving paramount interest to human rights of the citizens of the host state.

The study notes that there have been challenges in implementing the VCDR due to the contradiction in the provisions in the Convention. The underlying theory which is the theory of functional necessity is stipulated in the preamble as the fundamental basis of the immunity granted to diplomats, it has been noted in this study that this theory has not been upheld in practice. In establishing the weaknesses attributed to the Convention as well as establishing the fact that an abuse has happened, the theory of functional necessity was used as a guide. Various case studies were used to highlight the abuse of diplomatic immunity as well as the challenges in implementing the Vienna convention. The paper further notes the fact that the persona non grata and the waiver of immunity provided in the VCDR do not serve as a form of deterrence to other abuses, hence a need to include other stringent provisions to deter the abuse of diplomatic immunity.

The study concludes by upholding the theory of functional necessity and provides a recommendation on the need to reform and review the Convention.

The dissertation relies mostly on secondary data and hence a qualitative analysis. The study is narrowed down mainly to the Convention for the purpose of analysis.

LIST OF ABBREVIATIONS

ICJ-International Court of Justice

VCDR-Vienna Convention on Diplomatic Relations

ILC-International Law Commission

LIST OF CASES

Third Avenue Associates v permanent mission of the republic of Zaire to the United Nations 988 F.2d 295; 99 ILR, P.194(1993)

Arrest Warrant Case (Democratic Republic of Congo v. Belgium) ICJ Reports (2002)

Fatemi v United States, 192 A.2d 535, (1963)

United States, diplomatic and consular staff in Tehran, United States of America v. Iran, (1980)

Tietz v People's Republic of Bulgaria 28 ILR (1959)

Third Avenue Associates v Permanent Mission of Zaire to the UN, 988 F.2d 295 (2nd Cir, 1993)

Aziz v Aziz; HM The sultan of Brunei intervening (2008) 2 All ER 501.

Libyan Peoples Bureau Case HC Deb 25 April 1984 vol 58 cc739-52

Germany v Italy: Greece Intervening ICJ Reports (2012)

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 Background of Study

Diplomatic law is a significant part of public international law as it constitutes the earliest form of expressions of diplomacy.¹The special immunities and privileges granted to diplomats has grown as a consequence of sovereign immunity due to the fact that these persons represent their state in various ways as well as the independence and equality among states and partly as an essential requirement of an international system.²

The rules governing the relations between diplomats are stipulated in the Vienna Convention on Diplomatic Relations 1961. It should be noted however that the notion of diplomatic immunity was established before this framework was established and can be traced back as far as the ancient civilization of china and Egypt³.

The immunity granted to diplomats from civil and criminal jurisdiction has been established as a fundamental of customary diplomatic law,⁴ which constitutes one of international law most successful and enduring rules with 185 states as at 2010 recognizing these rules.⁵

The 1961 Vienna Convention provides for immunity of diplomats, which prevents their subjection to arrest and detainment⁶ this immunity extends also to their private residence as well as the premises of the mission⁷ and makes them immune from civil as well as criminal jurisdiction.⁸

¹Vark R, 'Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes', *Juridica International, Law Review*, 2003, 110-119.

²Shaw M, *International law*, 7ed , Cambridge University press, Cambridge (2008), 751.

³Sen B, *Diplomats Handbook of International Law and Practice* , MartinusNjihoff publishers,Leiden (1965), 291.

⁴Pierrot Eirwen-Jane: Escaping Diplomatic Impunity: The Case for Diplomatic Law Reform, (2010), http://www.barcouncil.org.uk/media/61895/eirwen-jane_pierrot_42_.pdf on 7 January 2016.

⁵Pierrot Eirwen-Jane: Escaping Diplomatic Impunity: The Case for Diplomatic Law Reform, (2010), http://www.barcouncil.org.uk/media/61895/eirwen-jane_pierrot_42_.pdf on 7 January 2016.

⁶ Article 29, *Vienna Convention on Diplomatic Relations*, 14 April 1961,596 UNTS 261.

⁷ Article 30, *Vienna Convention on Diplomatic Relations*.

⁸ Article 31, *Vienna Convention on Diplomatic Relations*.

It should be noted that the immunity granted to the diplomat also extends to his house hold.⁹

It should be noted that immunity has long standing roots in international practices, which is due to the fact that interaction between sovereign entities had required open much needed channels of communication between states of different ideologies¹⁰ in order to facilitate relations between governments.¹¹

This proves that the purpose of diplomatic immunity is not for the arbitrary empowerment of the diplomats but to aid communication between the states without interference in carrying out their function. Hence, when the purpose of diplomatic immunity has not been recognized and respected by diplomats it should be considered an abuse of such immunity.

1.2 Problem Statement

Some actions of diplomats indicate that both states and diplomatic agent have problems interpreting the relevant provisions of the Vienna Convention as regards diplomatic relations.¹² This has led to the abuse of the privileges and immunity granted to the diplomats.

Most times such abuses are still tolerable by the receiving state on the basis that it is securing the effective performance of diplomatic functions. However, some states have brought diplomats who were guilty of abusing the immunity to justice by stating that their actions which has led to the abuse thereof was not necessary for their function, and have occasionally suggested that diplomatic agents should enjoy immunity only in exercising their diplomatic function.¹³

There has been several controversies on this notion as the Vienna Convention stipulates that diplomats are meant to respect the laws of the receiving state and on the other hand, states that the diplomats should not be subject to the civil or the criminal jurisdiction in order to allow them perform their duty without interference from the receiving state. The Vienna

⁹ Article 37, *Vienna Convention on Diplomatic Relations*.

¹⁰McLanahan C, *Diplomatic Immunity: Principles, Practices & Problems*, St. Martin's Press, New York,(1989)165.

¹¹ Congressional Research Service Report RS21672, *Diplomatic Immunity: History and Overview*, (2003).

¹²United Nations Treaty Series, 1964, vol. 500, 95.

¹³Wright S, 'Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts', *Boston University International Law Journal*, (1987), 177–211.

Convention has failed to distinguish crimes based on their gravity¹⁴ especially crimes which go against the general human rights principles.

The interest of the receiving state in governing its affairs has been overlooked in the Vienna Convention. It is well known that the paramount interest of any receiving state is to uphold legal order but when a diplomat's abuse of diplomatic immunity challenges the purpose of upholding a legal order, the order is challenged.

In cases where the Constitution of the receiving state upholds human rights, the interpretation of the Vienna Convention on Diplomatic Relations prevents the receiving state from protecting the rights of its citizens, due to the fact that such a diplomat cannot be subject to the jurisdiction of the receiving state. A contradiction in the Vienna Convention however arises as it requires the diplomat in article 41 of the Vienna Convention and has failed to stipulate a deterring mechanism in the convention if the diplomat fails to obey the laws of the receiving state.

Irrespective of the fact that to some extent the Vienna Convention has provided for immunity of diplomats, it has failed to limit this right by providing deterring measures in situations where diplomats abuse this immunity. Hence, as a result of the broad immunity stipulated in the Vienna Convention, receiving states only have a limited number of options in dealing with a diplomat's impropriety.¹⁵

The Vienna Convention also provides that diplomats can waive their right in order to face trial and also gives an option for diplomats to be recalled by the sending state. In most cases when diplomats are recalled by the sending state, there are no actions which have been taken against them. This suggests that very little enthusiasm has been shown by the sending state in convicting its diplomats abroad.¹⁶

¹⁴Vark R, 'Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes', 110-119

¹⁵Congressional Research Service, Report RS21672, Diplomatic Immunity: History and Overview, November 19 2003, 4-5.

¹⁶Congressional Research Service, Report RS21672, Diplomatic Immunity: History and Overview, November 19 2003, 4-5.

These actions of diplomats as well as those of the sending states again contradicts the fundamental principles of law which is the “Rule of Law” which was laid down by A.V. Dicey by stating that no one is above the law which means everyone is equal before the law.

However, there have been cases where grave crimes have not been considered to be consistent with their official function as seen in the case of the Japanese ambassador to Belgium General Oshima, who was sentenced by a military tribunal for war crimes during the second world war irrespective of his diplomatic status.¹⁷

1.3 Research Objectives

- 1) To check the extent to which the Vienna convention regulate diplomatic Immunity.
- 2) To interrogate the extent to which the provisions of the Vienna convention have been effective in curbing the abuse of diplomatic immunity.
- 3) To investigate and provide solution to limit abuse of diplomatic immunity.

1.4 Research Questions

- 1) What is the legal framework on diplomatic immunity?
- 2) To what extent should one be granted immunity from the receiving state’s jurisdiction?
- 3) How effective are the laws in curbing the abuse of diplomatic immunity?

1.5 Hypothesis

This research test the fact that the framework which governs diplomatic immunity has not been sufficient in curbing the abuse of diplomatic immunity, which is as a result of the lack of clarity and misunderstandings which have developed over the years.

¹⁷Crawford J, Brownlie’s *Principles of public international law*, 8ed, Oxford University Press, Oxford, 2012,10.

1.6 Theoretical Framework

This study will adopt 2 theoretical frameworks in order to justify the essence of diplomatic immunity. These are the theory of extraterritoriality and the theory of functional necessity.

1.6.1 Theory of Extraterritoriality

This doctrine was established by the French jurist Pierre Araut. This theory was however not used till the end the 18th century. The legal theory which emerged stated that the diplomatic premises as well as those persons who occupy it were not within the territory of the sovereign state where they actually reside.¹⁸

The rationale is the fact that the diplomat resides on the soil of the sending state; hence the foreign envoy should not be subject to the law of the receiving due to a lack of local residence.¹⁹ However there have been many controversies as well as lack of clarity of this doctrine which has led to the exaggeration of the diplomatic immunity and privilege granted to diplomats. The notion was understood by most persons even those who were not part of the diplomatic mission to mean that once anything is done in such premises with diplomats the law of the receiving state should not apply and that of the sending state will be what should favor them.²⁰

Although this theory was adopted by many theorists in the 19th century, it has been discarded by many modern jurists because in their opinion, it has led to a broad construction of diplomatic immunity²¹, broad construction in the sense that the theory could imply that one could use the theory to express the immunities and privileges accorded to diplomatic personnel or the premises or it could mean that the actions of the diplomatic were governed by the law of the sending state.²²

¹⁸Ogdon M, *Juridical Bases of Diplomatic Immunity*, John Byrne & Co. Washington DC (1936) 10-30.

¹⁹Ogdon M, *Juridical Bases of Diplomatic Immunity*, 10-30.

²⁰Ogdon, on page 90 illustrates this with the Munir C. Aristarchi-Bey, Tribunal Civil Seine (1909).

²¹Wright S, Diplomatic Immunity: 'A proposal for Amending the Vienna Convention to Deter Violent Criminal Acts', *Boston University International Law Journal*, (1987), 177-211.

²²Wilson C, *Diplomatic privileges and immunities*, University of Arizona press, Tucson (1967) 14.

Although the theory provides a mechanism for the protection of diplomatic premises and personnel during political upheavals there has been however been misconceptions as well as controversy surrounding this issue.

By using the theory of extraterritoriality it will be possible to understand the rational for the granting of immunity to diplomats in the territory of the receiving state which is to allow diplomats perform their functions without interference. This theory will also help in ascertaining and investigating whether the provisions upholding the theory of extraterritoriality in the Vienna convention has contradicted the rational for which the theory was established, by giving unlimited immunity to the premises of the sending state irrespective of the fact that actions which the diplomats might be involved in may not be accorded as the function of the sending state.

1.6.2 Functional Necessity

This theory goes back to the 18th century when the English Chancellor, in the *Barbuitts* case in the year 1737 stated and observed that the diplomatic privileges stem from the “the necessity of the thing, that the nations may have intercourse with one another”.²³ The theory in itself states that the diplomat should not be subject to the jurisdiction of the local courts of the receiving states because this would obstruct their functions,²⁴ Thus, this theory tries to justify the immunity of the diplomat in order for them to carry out their business. According to this theory the rational for the diplomat’s privilege and immunities is the fact that they are necessary to enable him to perform his diplomatic function.²⁵

It should be noted that the essence of diplomatic immunity is to protect the relation between nation states. This is provided for in the preamble of the Vienna Convention which stipulates that the purpose of the Convention is not to benefit individuals but to ensure the efficient performance of their function.²⁶ The immunity provided for in this theory is not to be

²³Wilson C, *Diplomatic Privileges Immunity*, 19.

²⁴Mitchell S, ‘Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities’, *American University International Review* 4, (1989) 175.

²⁵McLanahan C, *Diplomatic Immunity: Principles, Practices & Problems*, St. Martin’s Press, New York, (1989) 33.

²⁶Preamble, Vienna Convention on Diplomatic Relations.

extended to the protection of the diplomat for actions taken on their individual accord; this however has not been the case practically.

A question arises as to whether diplomatic immunity should apply in cases where diplomats act outside their international relations.²⁷

The current framework which governs diplomatic relations stipulates that diplomats should not be subject criminal jurisdiction as well as civil and administrative jurisdiction,²⁸ except in the case of real action relating to private immovable property situated in the receiving state; an action relating to succession in which the diplomatic agent is involved as an executor or an administrator or an action relating to any professional or commercial activity executed by the diplomatic agent in the receiving state.²⁹

This provision does not provide for human rights scenarios which may be infringed upon by diplomats in their term in office.

Therefore, the current framework providing immunity to the individual rather than the diplomatic process is inconsistent with the theoretical basis that accords protection only to the diplomatic process.³⁰ If the focus of diplomatic immunity should be that diplomats can act in such a way as they wish without being subject to the law of the receiving state it then defeats the purpose of the Vienna convention, If however one decides to go by that notion it therefore means that there is a lee way for diplomats to break the laws of the receiving state.³¹ This notion will therefore go against the provision stipulated in the Vienna convention which requires that the diplomat should respect the laws of the receiving state.³²

A problem recognized with this is that as much as a diplomat is required to obey the laws of the receiving state, there are no immediate actions which will be taken against the diplomats

²⁷Farhangi L, 'Insuring Against Abuse of Diplomatic Immunity', *Stanford Law Review*, 38 (1986) 1517, 1521-1522.

²⁸Article 31, *Vienna convention on Diplomatic Relations*.

²⁹Article 31, *Vienna convention on Diplomatic Relations*.

³⁰Mitchell S, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities', *American University International Review* 4, (1989), 179-180.

³¹Oneil A, 'A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978' *Tulane Law Review*, (1980), 667-672.

³²Article 41, *Vienna Convention on Diplomatic Relations*.

due to the fact that they are not meant to be subject to the criminal or civil jurisdiction of the receiving state.

Due to a contradiction in the Vienna Convention on Diplomatic Relations as well as the lack of clarity there has been room for various interpretations as some judges use the positivist theory in understanding the law and others try to look into the purpose for which the law was meant to be, which acknowledges the fact diplomatic immunity should be granted to diplomats only in the course of the diplomatic process.

In most cases the justification of a dismissal is not merited due to the fact that the court do not go an extra mile in upholding the aim for which the Vienna Convention was intended, by finding out whether it was in the course of their duty as diplomats or not.

In essence immunity granted to diplomats is to enable them perform their duty in efficient manner, this paper tends to critically analyze this notion by stating that such immunity should not be abused and diplomats who fault in participating in activities which affect the legal order in the receiving state should be penalized when such acts are not related to the functions of the diplomat.

By using the functional necessity theory it will be possible to interrogate the rational for which the framework which govern diplomatic immunity was established and also to interrogate whether the provision which has been set out in the Vienna Convention tries to uphold and protect this notion, and finally to understand and decipher where an abuse of diplomatic immunity has occurred.

In conclusion one may state that functional necessity has always been the juridical basis for the inviolability of the diplomat. Therefore functional necessity has provided a theoretical justification for granting of diplomatic immunities and privileges.³³

³³Hayatullah K, 'Diplomatic Immunities and privileges: The continuing Relevance of the Functional Necessity Theory', *Criterion Quarterly*,(2012).

1.7 Literature Review

There has been much contention as to the meaning of diplomatic immunity as well as the extent to which such immunity should be applied, however, There has been movement from the literal understanding of what has been stipulated in the Vienna convention though not clear, to trying to understand the mischief for which the law was established which should be based on the theory of functional necessity. However there has been much misinterpretation amongst the diplomats themselves as well as the receiving state, as they tolerate diplomatic missions for the sake of international relations. The provisions which have been stipulated in the Vienna Convention can be stated to be to some extent contradictory making it difficult for the true meaning or essence for which the law put in place to be understood.

There has been different understanding and views of the meaning of diplomatic immunity, the essence of diplomatic immunity as well as the questionable provisions of the Vienna Convention which will be discussed in this paper.

The scope of personal inviolability has become more and more absolute regardless of the offence which has been committed.³⁴ Article 29 of the Vienna convention posits that “a diplomat shall not be liable to any form of arrest or detention and 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.”³⁵

1.7.1 René Värk has stated that the framework which governs diplomatic immunity has not clarified the extent to which the immunity should apply as well as the extent of the concept of inviolability.³⁶ He further notes the fact that there are no exception in the Vienna Convention even for cases which deal with emergency, which in his opinion implies personal inviolability as a personal privilege and not diplomatic immunity from criminal jurisdiction.

In cases dealing with the inviolability of the diplomatic agent may not be detained and arrested at any point.³⁷ Vark suggest that the principle of diplomatic immunity is not self-

³⁴Vark, R, ‘Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes’, 110- 120.

³⁵ Article 29, *Vienna convention on Diplomatic Relations*.

³⁶Vark R, ‘Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes’, 111-112.

³⁷Vark R, ‘Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes’, 110-120.

evident he however acknowledges the fact that some authors who believe in the immunity of diplomats as stated in the Vienna Convention without any exception whereas there others who oppose the immunity accepting certain exception.³⁸

Vark tries to justify his rational for opposing the immunity to some extent with certain exception, with reference to the preamble which states that the purpose of the immunity and privilege granted to diplomat is not necessarily to benefit individuals but to enhance efficient performance of which is driven by the theory of functional necessity. Vark suggest that there has been an established link set out in the preamble of the Vienna Convention and the theory of functional necessity, he states that in circumstances where such link is missing there should be a form of control, thus implying that diplomatic immunity is not absolute hence, has some exceptions.³⁹

Vark states that diplomatic immunity is unqualified and absolute based on the provisions stipulated in the Vienna Convention such as article 31(1).⁴⁰ He further stipulates that the unlimited immunity granted to diplomats cuts across minor offences as well as grave crimes.⁴¹

Vark concludes by stating that difficulty in prosecuting diplomats which has been clearly noted from practice, and suggest a better relationship between the sending state and the receiving state which will curb the abuse if diplomatic immunity.⁴² Vark in his account fails to tackle the real effect of diplomatic immunity on the receiving state which will be considered in this paper.

1.7.2 Nathaniel states that the blanket of diplomatic immunity shields most serious crimes including espionage which has led to the abuse thereof with diplomats invoking immunity when such acts have been carried out.

³⁸ I.L.C yearbook, 1958, Vol II, 94-95 The commission was guided by the theory of functional necessity on which practice gave no clear pointers.

³⁹ Vark R, 'Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes', 113.

⁴⁰ Article 31(1), *Vienna convention on Diplomatic Relations*.

⁴¹ Vark R, 'Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes', 113.

⁴² Vark R, 'Personal Inviolability of Diplomatic Immunity in Respect of Serious Crimes', 119.

He further states that all diplomatic privileges are subject to abuse. He suggests that certain acts are not within the functions of the diplomat and in instances when acts which are detrimental to the interest of the receiving state are carried out immunity should not be imposed to protect the interest of the diplomat. According to Nathaniel in instances where a diplomat has not acted within his function, the receiving state has a right to initiate protective measures to protect the state by eliminating such immunity.

Nathaniel is of the notion that the purpose of diplomatic immunity is to enable the sending state perform its functions and thus the notion of diplomatic immunity will only prevail if such act were performed within the official functions. Nathaniel further states that for cases of espionage if diplomatic immunity is granted it contradicts its purpose.⁴³

He states that If espionage is not recognized as a function of the mission in the host country the sending state then has violated its treaty term deliberately, in situation when such acts are unannounced function of the sending state it then injures the receiving state and damages its national security.⁴⁴

A question is posed by the author where he states that in situation where the national laws have declared such acts to be a crime which cannot be an official function of any mission and asks whether the claim of diplomatic immunity would make such an act as espionage an official function.⁴⁵ The Vienna Convention on Diplomatic Relations requires that the sending state will obey the laws and regulations of the receiving state, hence conducting espionage operation may be construed as a violation of this requirement.

He concludes by stating that in circumstances where the receiving state does not consent to a proposition which is adverse and injurious then the receiving state is justified in modifying its position as relating to domestic and treaty law.⁴⁶

⁴³Nathaniel P, 'Espionage and the forfeiture of diplomatic immunity'. *International lawyer*, II No. 4 (1977) 664.

⁴⁴ Nathaniel P, 'Espionage and the forfeiture of diplomatic immunity', 665.

⁴⁵ Nathaniel P, 'Espionage and the forfeiture of diplomatic immunity', 666.

⁴⁶Nathaniel P, 'Espionage and the forfeiture of diplomatic immunity', 667.

It should be noted that a problem with the account of Nathaniel is the fact that he limits his work to espionage and not all acts which are capable of being abused by diplomats.

1.7.3 McClanahan suggests that diplomatic immunity is a vital protection given on a reciprocal basis and that no diplomat can function without it.

In his book reference was made to the 1984 commons committee report which stated that it would be wrong to regard amendment of the Vienna convention as a solution to the abuse of diplomatic immunity. However in April 1985 the government responded to this in its report, 'Diplomatic Immunity and Privileges (command paper 1947) which dealt with possible changes in the Vienna Convention, it was noted that article 41 of the Vienna Convention on Diplomatic Relations suggest that the sending state should respect the laws of the receiving state.

In interpreting this provision McClanahan states that any change which strengthens this notion should be upheld, he further suggest that the provision could also mean that the immunity granted to the personal as well the facilities of the sending state should be reduced, he concludes by stating that such will lead to unjustified harassment.

As much as diplomats try to take their responsibility so seriously the author states that such use of diplomatic immunity becomes questionable in exceptional cases. An example can be cited from the shooting of the British constable Yvonne Fletcher by two Libyans who claimed immunity under the Vienna Convention on Diplomatic Relations.⁴⁷ The home secretary, Mr. Leon Brittan, had stated that the British police had been prevented under the terms of the Vienna Convention on Diplomatic Relations from apprehending the killers and to bring them to justice⁴⁸, which was due to the fact that the murderers premises the bags which have been use to carry the weapons were also immune according to the Vienna Convention.⁴⁹

⁴⁷Nordheimer, Gunmen in London in Libyan Embassy Fire into Crowd, N.Y. Times, Apr. 18, 1984, at A1, col. 6

⁴⁸ N.Y. Times, Apr. 23, 1984, at A10, col 1.

⁴⁹ N.Y. Times, Apr. 23, 1984, at A10, col 1.

The hearing on the Helms Bill (S.1437) had suggested the notion that the immunity granted to diplomats and their families should be restricted.

McClanahan in his paper tries to uphold the concept that every act by the receiving state should be aimed at benefiting the receiving state and hence the immunity should be restricted. McClanahan in his work fails to clearly state the beneficial effect that such limitation will have on the receiving state.

The major problems with these accounts is the fact that they fail to state practical steps to be taken to curb the situation where the sending state fails to adhere to the provision stated in the Convention. The accounts also fail to suggest and recognize the insufficiency and lack of clarity of the Vienna Convention in curtailing the abuse of diplomatic immunity.

This paper seeks to examine the extent to which the framework which governs diplomatic relation protect the interest of the receiving state as well as uphold the notion of obeying the laws of the receiving state and protecting the rights of the citizens of the receiving state. One of the fundamental purpose for laws is the fact that they have an effect on deterring persons from specific acts, hence this paper seeks look at the deterring effect which the Vienna convention has had on diplomats.

1.8 Research Methodology

This research will be carried out using the following methods, secondary research and the use of specific case studies.

The secondary sources will consist of literature written by scholars with respect to various conflicts that have arisen with regards to the interpretation of the Vienna convention, the extent to which diplomatic immunity should be applied and also scholarly opinion on such remedy to curb this problem. These will include convention, books, journal articles as well as reliable newspaper articles.

Specific case studies will be used in carrying out this study, to understand the extent to which the provision of the Vienna convention on diplomatic immunity has been interpreted, how it applies in practice and to analyze whether the provision which have been provided in the convention is sufficient in limiting the abuse of diplomatic immunity.

1.9 Limitation of Study

The study will only focus on the Vienna convention on diplomatic relation and not consular relation.

1.10 Chapter Breakdown

The study will be divided into five chapters

Chapter one gives an introduction by stating the background of the study, the research problem and further states the objective of the research the research question, the hypothesis, literature, theoretical framework and the methodology that will be used in carrying out the research.

Chapter two discusses the principle of diplomatic immunity as provided in the Vienna convention as well as states the essence of the immunity granted to diplomats.

Chapter three will further go ahead to discuss the abuse of diplomatic immunity and the effect it has on the receiving state the use of case study will be used to expand on this notion.

Chapter four discusses the measures which have been put in place to curb diplomatic abuse and examine whether the framework or measures which have been established are sufficient in curbing the abuse.

Chapter five summarizes the findings of the research and gives a conclusion by answering the research questions and giving solution and recommendation from the problem which have been recognized in the problem statement.

1.11 Research Timeline

July-August: collection of literature finish paper on chapter one, meeting with supervisor on a way forward, incorporate changes made in chapter 1.

September - October: Research and write chapter 2 and 3, meeting with supervisor weekly on progress made.

October - January: incorporate final changes from chapter 2 and 3, writing of conclusion and recommendations, final meetings with supervisor, proof reading and submission.

CHAPTER TWO

BRIEF BACKGROUND OF DIPLOMATIC IMMUNITY

2.0 Introduction

The previous chapter introduced the topic of study by giving the background, the problem statement, hypotheses, literature review and the methodology of the research.

This chapter however tries to explain the doctrine of diplomatic immunity and the essence of such immunity granted to diplomats. The author will not only highlight the essence of diplomatic immunity but will also stipulate the various interpretations regarding the extent to which diplomatic immunity apply.

2.1 Diplomatic Immunity

Diplomatic immunity can be defined as the immunity granted to diplomats in the course of their duty in a receiving state for the necessity of performing their official function.⁵⁰ It should be noted that the definition of diplomatic immunity is however different from that of diplomatic protection.

Diplomatic protection can be defined as a mechanism of international law which is employed by states to secure just treatments of their nationals abroad.⁵¹

2.2 History of Diplomatic Immunity

The immunities granted to diplomats grew as a result of sovereign immunity, the independence, the equality of states and partially as a result of the essential requirement of an international system.⁵² It should be noted that the purpose of diplomatic immunity is to enable diplomatic staff to represent their home state effectively.

⁵⁰767 Third Avenue Associates v Permanent Mission of the Republic of Zaire to the United Nations 988 F.2d 295(1993);99ILR..194

⁵¹ John Dugard, Audio visual library of international law, 2006, <http://legal.un.org/avl/ha/adp/adp.html> the rationale behind this principle is the fact that an injury to a national is deemed to be an injury to a state. See Draft Articles on Diplomatic Protection with Commentaries, 9 August 2006 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9/8/2006.pdf> on 6 November 2015.

⁵² Shaw M, *International Law*, 7ed. Cambridge University Press, England, 2014, 546.

The basis of the immunity granted is functional, which is clearly stipulated in the preamble of the Vienna Convention on Diplomatic Relations, 1961.

Most provisions stipulated in the Vienna Convention on Diplomatic Relations are to a large extent declaratory of customary law or have turned to general law.⁵³

2.2.1 The Roman Empire

The law of diplomatic immunity was significantly developed by the Romans.⁵⁴ The main focus of granting diplomacy was to ensure personal safety of the diplomat as well as to promote his freedom to travel in order to promote relations and communication⁵⁵ with other kingdoms, tribes and clans.⁵⁶ In promoting communication, the clans used this mechanism during war in order to send information about the injury of a warrior who needed to be attended to and a warrior who had died and needed to be buried.⁵⁷ It was evident that the information would have been hampered if obstructed by a member of a different clan.⁵⁸ In order to protect these clans, a customary agreement was reached to grant negotiations and privileges to a member of a clan.

In the middle ages, ambassadors were treated courteously by Saracens and Christians, who gave them a hospitable and honorary reception. The reception also extended to a herald who brought a declaration of war.⁵⁹

In the 12th and 16th century, the Roman law stipulated that ambassadors were inviolable based on the canonical codes and surviving fragments of the Roman law.⁶⁰

⁵³ Cassese A, *International law*, 2ed . Oxford University Press, England, 2005, 114

⁵⁴ ‘EillenDenza : Vienna Convention on Diplomatic Relations, Vienna 18 April 1961 introductory note’, 2006, <http://legal.un.org/avl/ha/vcdr/vcdr.html> on 6 November 2015.

⁵⁵ Nicolson H, *Diplomacy*, 2ed , Oxford University Press, Oxford (1950)27.

⁵⁶ Hanrahan, N, *A History of Diplomatic Immunity and the Development of International Organization Immunity*, CAIO, 2005. 2.

⁵⁷ Nicolson H, *Diplomacy*, 57.

⁵⁸ Nicolson H, *Diplomacy*, 57.

⁵⁹ Walker Thomas A, *A history of the law of nations*. Cambridge University Press. England, 1899,1,114-115.

⁶⁰ Walker , *A history of the law of nations*, 114-115

In the Renaissance period, it was argued that natural law offered sound argument for diplomatic immunity based on the necessity of protecting envoys in the performance of their official function.⁶¹

The history of diplomatic immunity gave rise to the codification of the Vienna Convention on Diplomatic Relations which upheld the principles used in ancient times in protecting Diplomats.

2.2.2 History that Informed the Vienna Convention

The Vienna Convention acknowledges the fact that people of ancient times accepted the status of diplomatic agents. This simply means that the basis of the Vienna convention is to uphold the ancient notion of protecting diplomats.

At the negotiation stage, some issues were raised which informed the complete framework of the Vienna Convention. The success of the conference was attributed to the fact that the rules regulating diplomatic relations had been stable for over 200 years.⁶² Some issues which were raised include;

Whether sending states were entitled to install and use a wireless transmitter. Some states expressed concern by stating that the transmitters might be used for broadcasting legal propaganda and the fact that the wireless transmitters were situated in inviolable premises which is beyond the control of the receiving state. It was concluded that transmitters are inviolable.⁶³

The second issue which raised was whether the receiving state could search the diplomatic bag if the bag is suspected to have material goods other than those permitted under customary practice, it was decided that the bag could not be opened under any circumstance.⁶⁴

Thirdly, the extent to which the immunities and privileges should apply to the administrative and technical staff of the mission was another issue which was considered at the negotiation stage. It was proposed by the International Law Commission that such persons should be

⁶¹ Walker, *A history of the law of nations*, 114-115

⁶² Eilendenza: Vienna Convention on Diplomatic Relations, Vienna 18 April 1961 introductory note', 2006, <http://legal.un.org/avl/ha/vcdr/vcdr.html> on 6 November 2015.

⁶³ Eilendenza: Vienna Convention on Diplomatic Relations, Vienna 18 April 1961 introductory note', 2006, <http://legal.un.org/avl/ha/vcdr/vcdr.html> on 6 November 2015.

⁶⁴ Eilendenza: Vienna Convention on Diplomatic Relations, Vienna 18 April 1961 introductory note', 2006, <http://legal.un.org/avl/ha/vcdr/vcdr.html> on 6 November 2015.

granted diplomatic immunity; however such immunities should not extend to civil and administrative proceedings for acts performed outside the course of their duties and exemption from custom duties.⁶⁵

The VCDR came as a result of the UN Convention and Diplomatic Intercourse in 1961 which was based on a series of draft articles prepared by the International Law Commission.⁶⁶ The Convention has become one of the most widely ratified International Conventions.⁶⁷

One can deduce from the articles of the Vienna Convention that, diplomatic immunity is granted for the performance of the duty of the diplomats and not to benefit the individual interest of diplomats. The interpretation of this view was upheld in the *Arrest Warrant Case*.⁶⁸

On the 11th of April 2000, a Belgian magistrate issued an arrest warrant on the then minister of foreign affairs of Congo who was subject to immunity for inciting racial hatred which constituted crimes against humanity.⁶⁹ The court established the fact that arrest of the foreign affairs minister prevents his ability to exercise his official function and also noted the fact that the transit of the minister based on the warrant given may expose him to legal proceedings which are capable of deterring him from performing his official duty.⁷⁰ The court further acknowledged the fact that diplomatic immunity does not protect the diplomat against criminal liability.⁷¹

The court held that there was no exception in customary international law on the absolute immunity granted to ministers of foreign affairs. The court further held that the issuance of the arrest warrant violated Belgium's obligations to Congo.⁷²

The decision of the court can be stated to be a form of contradiction of the preamble of the Vienna convention which establishes the fact that diplomatic immunity is not granted to

⁶⁵EiellenDenza: Vienna Convention on Diplomatic Relations, Vienna 18 April 1961 introductory note', 2006, <http://legal.un.org/avl/ha/vcdr/vcdr.html> on 6 November 2015.

⁶⁶ Dixon M, *Textbook on International Law*. 7ed, Oxford University press, England, 2013. 209

⁶⁷Malcolm E, *International Law*, 4ed, Oxford University Press, Oxford, 2014, 384.

⁶⁸*Arrest Warrant Case (Democratic Republic of Congo v. Belgium)* ICJ Reports 2002, 3. The issue before the court was whether Belgium violated customary international law concerning the absolute inviolability and immunity from criminal process of ministers of foreign affairs.

⁶⁹*Arrest Warrant Case*, 3.

⁷⁰*Arrest Warrant Case*, 71.

⁷¹*Arrest Warrant Case*, 60.

⁷²*Arrest Warrant Case*, 70.

benefit the individual but to ensure performance of his official duty. This is due to the fact that in this case scenario the Minister of foreign affairs action of inciting hatred did not fall within the official mandate of the Minister, hence, diplomatic immunity should be waived. It should be noted that diplomatic immunity does not immune one from his responsibility after his tenure in office. The problem however comes about when victims of certain crimes caused by diplomatic agents require immediate just action against crimes which have been committed. This missing gap goes ahead in disregarding the laws of some countries which provide for the right to a fair trial.

The court in this case upheld the notion of absolute immunity granted to diplomatic agent. The preamble of the VCDR however provides immunity for the performance of the official function of the diplomat. The VCDR further makes absolute provision for the inviolability of the diplomatic agents. The contradicting provisions in the VCDR are what have given room for various interpretations.

2.3 Extent of Diplomatic Immunity

2.3.1 Personal and Familial Immunity

Article 29 of the Vienna Convention on Diplomatic Relations stipulates the fact that the person of a diplomatic agent⁷³ is inviolable. It should be noted that immunities granted to diplomats are personal because they are enjoyed by individuals rather than by the state itself.⁷⁴ The immunity and privilege granted to diplomatic agent is not meant to benefit the individual but to enable the diplomat carry out his designated function.⁷⁵

The immunities and privileges granted to the diplomatic agents are extended to members of their families with an exception that such persons are not nationals of the receiving state⁷⁶*ratione personae*, by virtue of their office, however, diplomatic agents representing the

⁷³Defined in article 1(e) as the head of the mission or a member of the Diplomatic staff of the mission

⁷⁴ Dixon M, *Textbook on International Law*. 208.

⁷⁵ Preamble, *Vienna Convention on Diplomatic Relations*, 24 April 1964. 1-7310

⁷⁶Article 37, *Vienna Convention on Diplomatic Relations*.

sending state who are nationals or permanent residents of the receiving state also enjoy immunity *rationemateriae* in respect of their official act.⁷⁷

Some of the immunities granted to the diplomatic agents and family are protected in the Vienna convention on diplomatic relation which include;

Absolute immunity from criminal jurisdiction,⁷⁸ this encompasses the fact that such persons are free from arrest and detention.⁷⁹ The only available remedy to the receiving state in such situations where this privilege is abused is the doctrine *persona non grata*, which is a means by which the receiving state is able to inform the sending state that such diplomatic agent is not acceptable, in which case the sending state recalls the diplomatic agent. It should be noted that the receiving state has no obligation to explain its decision of *persona non grata*.⁸⁰

The prosecution of diplomatic agents after their tenure in office has proved abortive in many situations in the sending state, this problem can be alluded to the missing gap noted in the Vienna Convention in providing viable means and mechanisms in which such persons Can be prosecuted.

It should be noted that although the immunities stipulated in the Vienna Convention prohibits the prosecution of diplomatic agents from the jurisdiction of the receiving state this should not be rendered as immunity from liability of the diplomat,⁸¹ this is due to the fact that diplomatic agents can be prosecuted when their period of service is over in the receiving state and also situations where such persons have been recalled by the sending state. This subject will be expanded upon in chapter 4.

Secondly, Immunity from civil and administrative jurisdiction,⁸² diplomatic agents are immune from actions in which a person or business files a complaint in most cases seeking monetary damages against another individual in the administrative authority of the receiving state.⁸³

⁷⁷Article 38 (1), *Vienna Convention on Diplomatic Relations*.

⁷⁸Article 31, *Vienna Convention on Diplomatic Relations*.

⁷⁹Article 29, *Vienna Convention on Diplomatic Relations*.

⁸⁰ Article 9 (1) *Vienna Convention on Diplomatic Relations*.

⁸¹Article 9 (4) *Vienna Convention on Diplomatic Relations*.

⁸²Article 31, *Vienna Convention on Diplomatic Relations*.

⁸³<http://www.state.gov/documents/organization/162963.pdf> on 11 November 2015

Article 5 of the VCDR stipulates the fact that the diplomatic agent is under an obligation to respect the law of the receiving state, hence when immunity is waived; the local court may enjoy the jurisdiction over the diplomatic agent ⁸⁴in accordance with international law.⁸⁵This immunity however will not be granted to the diplomatic agent or members of his family in the following instances:

A real action relating to immovable property situated in the territory of the receiving state with an exception that he holds such property on behalf of the sending state for the purpose of the mission, an action relating to the succession in which the diplomatic agent is involved as an executor, administrator, heir, or legatee as a private person and not on behalf of the sending state, an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

In order to enjoy privileges and immunities, members of diplomatic missions owe certain duties laid down in article 41 & 42 of the convention towards the receiving state which include; the duty to respect the laws and regulations of the receiving state, the duty not to interfere in the internal affairs of the receiving state, the fact that the premises of the mission must not be used in a manner which is incompatible with the function of the mission and the fact that a diplomatic agent must not carry out any professional or commercial activity for personal profit in the receiving state.

2.3.2 Diplomatic Immunity to Administrative and Technical Staff

As earlier stated, diplomatic immunity is granted to both administrative and technical staff although not all privileges and immunities which are granted to diplomatic officers are enjoyed by administrative and technical staff.

Administrative and technical personnel's are members of staff of the mission employed in the administrative and technical service of the mission.⁸⁶

The immunities enjoyed by administrative and technical staff and their families, who are not nationals or permanent residents, are limited to the immunity enjoyed from criminal

⁸⁴Article 32, *Vienna Convention on Diplomatic Relations*.

⁸⁵Malcolm E, *International Law*,388.

⁸⁶Article 1(f), *Vienna Convention on Diplomatic Relations*.

jurisdiction. The immunity however enjoyed in civil jurisdiction is limited to acts performed in the course of their duties.⁸⁷

2.3.3 Diplomatic Bag Immunity

Article 27 of the VCDR, provides for the inviolability of the official correspondence of the mission and also states that the diplomatic bag shall not be opened or detained. The article also provides for the protection from interference of diplomatic couriers.

Recently, the sanctity of the diplomatic bag has become a thing of concern in many states which is due to the fact that the bag has been used for criminal activities such as to smuggle drugs, weapons, art treasures and even individuals into or out of the receiving state.⁸⁸

An example can be seen in the case of Umaru Dikko on the 5th of July 1984, Umaru was a former Nigerian Government official who was wanted based on charges levied against him on the embezzlement of Government funds, he was put in a crate which was accompanied by the diplomats of the Nigerian High Commission in London which was enroute to Nigeria. The officer at the airport opened the crate and justified his actions by stating that although the crate was sent by diplomats from the commission, the bag did not appear as diplomatic bag as it lacked visible external marks, of which provision is contained in article 27(3) of the Vienna Convention.⁸⁹ One can note the extent of the abuse of diplomatic bag as it has been used to smuggle even individuals.

Reservation to Article 27 with regards to the inspection of the bag has not been generally accepted.⁹⁰ Due to the agitation by many states over the misuse of the diplomatic bag, the International Law Commission completed a thorough examination of the law on diplomatic correspondence. A set of draft laws have now been produced on the diplomatic courier and the diplomatic bags which are intended to lay down a comprehensive scheme which may form the basis of a multilateral treaty.⁹¹ After much debate at the ILC as to whether absolute

⁸⁷Article 37(2), *Vienna Convention on Diplomatic Relations*.

⁸⁸Dixon M, *Textbook on International Law*, 211.

⁸⁹Edwin E, Peter S, *The politics of International Law and International Justice*, Edinburgh University Press, Scotland 2013, 235.

⁹⁰Dixon M, *Textbook on International Law*, 211-212.

⁹¹Dixon M, *Textbook on International Law*, 212.

inviolability approach should be used or the return approach, the ILC however maintained the notion that absolute inviolability of the bag should be maintained. It should be noted that the draft articles do not address the issue of abuse, hence, unclear as to whether the absolute approach is acceptable to states.⁹²

2.3.5 Diplomatic Property Immunity

Article 22 of the Vienna Convention on Diplomatic Relations stipulates the fact that the premises of the mission are inviolable; this consequently means that state officials of the local country may not enter without the consent of the head of mission⁹³. The area where the foreign mission is located is not subject to the territory of the foreign state, although, the law enforcement agencies of this state are not allowed exercising their powers in that area except with expressed authorized permission by the head of the foreign mission. This is why Grotius stated that foreign diplomatic missions are *quasi extra territorium* which simply means that they are located on a territory not subject to the territory of the host state.⁹⁴

Article 45 of the Convention states that the immunities and the obligation to protect the mission⁹⁵ continue even if diplomatic relations is broken off or armed conflict occurs. This immunity does not extend towards such premises if the premises cease to be used for diplomatic purposes. This provision of the Vienna Convention does not consider the exception to the inviolability principle in cases of emergencies⁹⁶ and hence tends to make this provision an absolute rule.⁹⁷ In the *Libyans people Bureau incident*⁹⁸ a question was posed as to whether the search of the Libyan embassy was permissible. The action was justified by the defense raised by the British Government as an act of self defense.

⁹²Dixon M, *Textbook on International Law*,212.

⁹³Shaw M, *International law*,548.

⁹⁴Grotius ,“*De jure belli ac paus libritres*” in classics of international law Oxford, 1925 1ed, 1625, II, IV,XVIII and IX

⁹⁵Article 22, *Vienna Convention on Diplomatic Relations*.

⁹⁶Denza E, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*,3ed, Oxford University Press, Oxford, 2008,162-165, Roberts I, Satow’s *Diplomatic Practice*, 6ed Oxford University Press, Oxford,2009,122-12, *Fatemi v United States*,192 A.2d 535(1963).

⁹⁷*Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations* 988 F.2d 295 (1993); 99 ILR,194

⁹⁸HC Deb 25 April 1984 vol 58 cc739-52

One should note that the private residence of a diplomatic agent enjoys the same inviolability and protection as the premises of the mission.⁹⁹The inviolability principle further extends to the furnishings and other property as well as the means of transport, which are immune from search, requisition, attachment or execution.¹⁰⁰ Article 24 of the VCDR states that the archives and the documents of the mission are inviolable at any time.

The term archives has however not been defined in the convention. Article 1(1) k of the Vienna Convention on consular relations provides that the term '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'.¹⁰¹ It is right then to deduce that the term used in the Diplomatic Relations Convention cannot be less than this.¹⁰²

According to Article 22(2) of the convention, the receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against all intrusion, and to prevent disturbances to the peace of the mission or impairment of its dignity. This notion was upheld in the *United States of America v Iran*,¹⁰³ where Muslim students, followers of the Imam's policy in Iran held US diplomatic staff and consular staff in Tehran hostage. The court stated that Iran was under an obligation to take appropriate steps to protect the United States embassy, but the Iranian state did nothing to prevent the attack hence, the court found a serious violation of the Iran obligation to the United states. It was stated that Tehran had violated the person of diplomats and the premises of the mission.¹⁰⁴

The court ordered the release of the United States Nationals and also ordered the placing of the premises of the embassy in the laws of the protecting power

The immunity granted as seen from the historical perspective was for the purpose of allowing

⁹⁹Article 30(1), *Vienna Convention on Diplomatic Relations*.

¹⁰⁰Article 22(3), *Vienna Convention on Diplomatic Relations*.

¹⁰¹ Article 1(1) k *Vienna Convention on Diplomatic Relations*.

¹⁰²Denza E. *Diplomatic Law, commentaries on the Vienna convention on Diplomatic Relations*, 195.

¹⁰³ *United States, diplomatic and consular staff in Tehran. United States of America v. Iran*, 1980, 11-32.

¹⁰⁴*United States diplomatic and consular staff in Tehran*, 90-92.

2.6 Conclusion

The diplomatic agent carry out his/her function without any form of interference, and to enhance communication among different states, which promoted relationship between the states. The VCDR acknowledges the foundation of the doctrine of diplomatic immunity as one which is ancient in order to uphold this the preamble of the VCDR which has been established to govern diplomacy, has stated that the diplomatic immunity is granted to promote friendly relations between states as well as allow diplomatic agent carry out their functions without interference.

The immunity stipulated in the VCDR that protects the individual diplomat, his family, administrative staff, the diplomatic mission as well as the diplomatic bag, diplomatic property is intended to be based on the historical perspective of diplomatic immunity as well as the provisions of the VCDR which is to promote the functional necessity theory as well as promote friendly relations between states.

CHAPTER 3

ANALYSIS OF THE ABUSE OF DIPLOMATIC IMMUNITY

3.0 Introduction

The abuse of diplomatic immunity has become a major theme in recent years. Although the theme of diplomatic immunity has become something of concern, states such as the United Kingdom, do not intend to limit the immunity and inviolability privilege granted to diplomat. This action by states is most times subject to the value which is placed on diplomatic agents in order to protect their missions abroad from any form of interference in relation to their functions.¹⁰⁵

According to the Back Laws Dictionary¹⁰⁶, abuse has been considered to be a misuse of anything. Abuse of rights on the other hand was stated in the case of *Germany v Italy: Greece intervening*¹⁰⁷ as one which nobody can take advantage of his own misdeeds. Diplomatic immunity is in itself not a right but a privilege. The distinction which arises between a right and a privilege is the fact that the former is irrevocable, and the latter is revocable,¹⁰⁸ although this distinction exists, it is possible to deduce from this when an abuse with regards to privileges has occurred. From the definition provided in the Dictionary, the misuse of anything with regards to diplomatic immunity is the beneficial interest gained by diplomats from the exemption of the jurisdiction of the receiving state even for acts not done in their official capacity.

The immunity granted to diplomatic agents are meant to only apply in the course of their duty, hence any action carried out outside this duty should not be privileged, hence, an abuse

¹⁰⁵Vark R, 'personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes' *Juridica International*, 3 (2003), 111.

¹⁰⁶ Black's Law Dictionary Free Online Legal Dictionary 2nd Ed, thelawdictionary.org/search2/?cx=partner-pub-222548241720854%3A5634069718&cof=FORID%3A11&ie=UTF-8&q=abuse&x=0&y=0 on 23 March 2016

¹⁰⁷ *Germany v Italy: Greece Intervening*, ICJ Reports.2012 ,32

¹⁰⁸ Doug Ross, Cynthia Kimmel, 29 June 2012, http://www.nwitimes.com/news/opinion/mailbag/understand-the-difference-between-rights-and-privileges/article_33cdb9ab-7b0d-5301-894f-2968a6db8687.html on 22 March 2016

occurs when such actions which do not fall within the official duty of diplomat becomes privileged.

The variation from a particular meaning can be considered to be an abuse.¹⁰⁹ A right on the other hand may be abused when such principle has its limitation and are disregarded by its actor.¹¹⁰ With regards to the abuse of diplomatic immunity, a limitation arises in the preamble where it has been clearly stated that the immunity is for the purpose of functional necessity. Hence derogation from the functional necessity principle will be deemed to be an abuse when immunity is granted in such instances.

3.1 Abuse of Diplomatic Immunity

Diplomatic immunity as earlier stated in the previous chapter is granted in order to enable diplomat carry out their duty without interference, diplomatic immunity is however not granted to benefit the individual. One can deduce from this fact that an abuse then occurs in situation where diplomatic agents carry out activities to benefit themselves, and take action which falls outside their official duty.

The principle of diplomatic immunity in the Vienna convention such as the principle of inviolability of the premises of the mission as well as the person of the diplomat has given rise to certain abuses.¹¹¹ The Vienna convention also fails to take into account the interest of the receiving state by setting aside stringent laws.¹¹² The reason for the tolerance given to abuse of diplomatic immunity in a host state is mainly due to the fact that the host country expects reciprocal treatment to its diplomats abroad.¹¹³

¹⁰⁹ Andras S, *Abuse the Dark Side of Fundamental Rights* eleven international publishing, Netherlands, 2006. 72

¹¹⁰ Andras S, *Abuse: the Dark Side of Fundamental Rights*, 73

¹¹¹ Herdegen M, 'The Abuse of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations: Some Observations in the Light of Recent British Experience'. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. 46 (1986). 738.

¹¹² Herdegen M, 'The abuse of diplomatic privileges and countermeasures not covered by the Vienna Convention on Diplomatic Relations, some observations in light of the recent British experience' 735.

¹¹³ Higgins R, 'The Abuse of Diplomatic Privileges and Immunities, Recent United Kingdom Experience' *American Journal of International Law*, (1985), 64.

Many problems have developed through the years as diplomatic means which are also subject to inviolability such as the diplomatic bags have been subject to abuse as they have been used to carry out activities which do not fall within the mandate of their official duty.

3.2 Instances of Abuse of Diplomatic Immunity in Kenya

3.2.1 Guinea's Diplomat in Kenya

In October 2015, a Diplomat from Guinea, Alphonse Kambu working at the United Nations was accused of battering his wife. The wife Ruth Gakii stated that she had made several reports to diplomatic police on the recurrence of domestic violence on her. The wife stated that no action was carried against him. After the incidence which occurred in October, Mrs Ruth was given a restraining order, Alphonse however disregarded the order and storms into her apartment anytime he wants. The wife states that Alphonse has used the immunity granted to him in the cause of his duty to disobey the law. Although the Director of public prosecution has stated that immunity can be waived when an accused diplomat has gone against a court order¹¹⁴, no practical step has been taken against Alphonse to bring him to justice.

The FIDA Director Christine Ochieng who shared her concern on the issue stated *"Nobody has immunity against being charged for domestic violence. You cannot commit such a crime and then expect the law to be lenient on you."*¹¹⁵

This statement encompasses the thought of a reasonable man on the limits of diplomatic immunity. This has not been the case as the VCDR has been left vague, with so many interpretations by states as well as diplomatic agents.

3.2.2 Nigeria's Ambassador to Kenya

On May 2011, the Nigerian ambassador to Kenya Chijoke Wigwe was alleged to have battered his wife which almost made her paralyzed. The Kenya Police Commissioner wrote

¹¹⁴ Woman's Abuse at the hands of UN employee, *Standard Digital Media*, 22 October 2015 http://www.standardmedia.co.ke/m/story.php?articleID=2000180356&story_title=Woman-s-abuse-at-the-hands-of-UN-employee on 22 November 2015

¹¹⁵ Woman's Abuse at the hands of UN employee, *Standard Digital Media*, 22 October 2015 http://www.standardmedia.co.ke/m/story.php?articleID=2000180356&story_title=Woman-s-abuse-at-the-hands-of-UN-employee on 22 November 2015

to the Nigerian government through the ministry of foreign affairs to waive the immunity of the ambassador. The wife to the ambassador also sought the arrest of her husband for the assault¹¹⁶ but no step was taken on that note. Although Wigwe was recalled, no action has been taken against him for the assault.¹¹⁷

3.2.3 American Diplomat to Kenya

On the 11th of July 2013 an American Diplomat, Joshua Walde, who was said to have been speeding collided with a Matatu (Van) which killed Haji Lukindo and left about 8 others injured. Soon after the incidence, the American Diplomat registered a statement in the police station and started making arrangements to leave the country. The police could not take any action against him because of diplomatic immunity. The family of the deceased has been left stranded as no form of compensation was granted to any of the victims. A condolence was sent to the deceased person and a note of quick recovery was sent to the victims of the accident.

One can deduce from the abuses which have been stipulated above that the immunity which have been granted to diplomats to enable them perform their duty have been used to break the laws of the host countries which eventually results in grave effects in the host nation.¹¹⁸

The VCDR states that the immunity granted to diplomatic agent is to enable them perform their official duty,¹¹⁹ also article 41 of the Vienna convention states that it is the duty of persons enjoying immunity to respect the laws of the receiving state. The VCDR has clearly stipulated some of the laws of the receiving state which diplomatic agents could be exempted from. An example of such law stated in the VCDR includes exemption from taxation and exemption from custom duties for the mission¹²⁰, personal services, public services, (i.e. jury

¹¹⁶<http://saharareporters.com/2011/05/27/kenya-police-writes-nigerian-government-over-wife-batterer-ambassador/> on 22 November 2015.

¹¹⁷ Diplomatic Immunity or Diplomatic Impunity, *standard Digital Media*, 4 August 2012 http://www.standardmedia.co.ke/?articleID=2000063330&story_title=diplomatic-immunity-or-diplomatic-impunity&pageNo=1 on 29 November 2015.

¹¹⁸ Diplomatic Immunity accused of creating Army of crooks, *Daily Nation*, 12 September 2013, <http://www.nation.co.ke/life+style/DN2/Diplomatic+immunity+accused+of+creating+army+of+crooks/-/957860/1990334/-/j78ssv/-/index.html> on 29 November 2015.

¹¹⁹ Preamble, *Vienna Convention on Diplomatic Relations*.

¹²⁰ Article 34, *Vienna Convention on Diplomatic Relations*.

service), military obligations,¹²¹ social security provisions,¹²² and giving of evidence as witnesses¹²³ and diplomatic agents and their families.¹²⁴ Actions taken by diplomatic agents which do not fall within the exempted laws of the receiving state will therefore be classified as an abuse.

The question which arises is whether immunity should still be granted in cases where there has been an insistence by the diplomatic agent to do that which is within their preclusions. From the previous chapter, we were able to see the rationale for diplomatic immunity as well as understand the principle of diplomatic immunity. Hence, with such understanding an abuse then occurs in instances where the rationale for diplomatic immunity is not adhered to and when diplomatic agents take actions outside their diplomatic functions and still obtain immunity from such actions.

Article 31 of the VCDR exempts diplomatic agents from criminal, civil and administrative jurisdiction of the receiving state. This exemption is granted to ensure proper functioning of the mission as well as ensure the effective discharge of the diplomat's duties. It is quite unclear in the Vienna Convention as to whether the immunity granted to the diplomatic agent will be limited in cases where the action performed by the diplomat does not fall within his official duty.

3.3 Abuse of Diplomatic Immunity and its Effect on Human Rights

Crawford alludes to the fact that the definition of official act is not self evidence,¹²⁵ although in cases where there is doubt as to the definition of official act, the assertion by the sending state is what should be alluded to.¹²⁶

The fact that abuse of diplomatic immunity may be defined by what is stipulated in the VCDR, the question then becomes whether an official duty which has an effect on the rights

¹²¹ Article 35, *Vienna Convention on Diplomatic Relations*.

¹²² Article 33, *Vienna Convention on Diplomatic Relations*.

¹²³ Article 33, *Vienna Convention on Diplomatic Relations*.

¹²⁴ Article 36, *Vienna Convention on Diplomatic Relations*.

¹²⁵ Crawford J, *Brownlie's Principles of Public International Law*, 8ed, Oxford University Press, Oxford, 2012, 408.

¹²⁶ Denza E, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, 3ed, Oxford University Press, Oxford, 2008, 439-443.

of the citizens of the receiving state should be tolerated in the receiving state, also in consideration to international human rights.

International human rights grew as a result of World War 2, which upheld the fact that human right is inherent in every human being ¹²⁷which are so important and hence have been referred to as non-derogable rights. These rights cannot be taken away from a human being such rights include right to life, freedom from slavery, freedom from torture e.t.c.¹²⁸ Diplomatic agents have been guilty of infringing on some rights of this nature which should not be the case. The fact that these rights are inherent in a person the protection of such rights should be given more priority rather than protecting diplomatic agents who carry out actions which infringe on these rights in the receiving nations. The privilege of immunity from the jurisdiction of the receiving state should be exempt even if such actions fall within the official function of the diplomatic agent when human rights of citizens have been infringed upon. This notion should be upheld because it is the duty of persons enjoying such privilege and immunities to respect the laws and regulations of the receiving state, the infringement of human rights on the citizens interferes with the internal affairs of the receiving state which contradicts article 41 of the VCDR.

The fact that diplomatic immunity shields diplomatic agents from domestic jurisdiction interferes with the legal order of the society.¹²⁹ One of the essence of a legal order of any society is to protect the rights of every citizen. It should be noted that diplomatic immunity as well as international human rights play a significant role in international law.¹³⁰ The state has a role in the prevention of human right abuses, this role is rendered useless as action cannot be taken against the diplomats before any human right abuse occurs which is due to the fact that that any action initially taken by the diplomat will be assumed to be in the course

¹²⁷<https://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/images/header2.gif> on 2 December 2015.

¹²⁸<http://untterm.un.org/dgaacs/untterm.nsf/8fa942046ff7601c85256983007ca4d8/d4dbb9694e5b40da8525751b0077e882?OpenDocument> on 2 December 2015

¹²⁹ 'SangeethMguntha : Diplomatic Immunity in the Context of International Human Rights' *Legal Service India*, <http://www.legalserviceindia.com/articles/dhuman.htm> on 1 December 2015.

¹³⁰ 'SangeethMguntha : Diplomatic Immunity in the Context of International Human Rights' *Legal Service India*, <http://www.legalserviceindia.com/articles/dhuman.htm> on 1 December 2015.

of his official duty, or completely immune regardless of whether it falls within their official duties or not.¹³¹

The problem with the actions carried out by diplomatic agents who infringe on the rights of the citizens of the state is the fact that inadequate remedy will be rendered in favor of such persons whose right has been infringed upon.¹³²

The trial of such diplomatic agents always proves abortive due to the fact that it is impossible for such person to be brought to justice. This inability is caused by the fact that in most circumstances where gross human rights abuse have occurred such agents are recalled back by the sending state, and lack of evidence from the receiving state as well as the likelihood of the non-appearance of witnesses from the receiving state. Jurisdiction also plays a great role in the limitation of the trial of diplomatic agents as the sending may lack the jurisdiction to try the diplomat who has been recalled.¹³³

3.4 Conclusion

Abuse of diplomatic immunity occurs in circumstances where diplomatic agents have taken actions which do not fall within their official mandate. The abuse of diplomatic immunity has grown due to the lack of clarity provided in the VCDR. Due to this lack of clarity as to when abuse arises and stringent provisions in the VCDR to curb abuse, the VCDR has been used as a form of defense by diplomatic agent based on the inviolability principle. The provisions in the VCDR need to be reviewed to stipulate clearly when an abuse has occurred as well as stipulate punitive provisions in the Convention in order to curb diplomatic abuse as well as to deter other diplomats from carry actions which do not fall within the realm of their functions which will make other diplomatic agents aware of their actions and further make them aware of the fact that they are not above the law, hence, upholding the notion of rule of law.

¹³¹Sangeeth Mguntha : Diplomatic Immunity in the Context of International Human Rights' *Legal Service India*, <http://www.legalserviceindia.com/articles/dhuman.htm> on 1December 2015.

¹³² Sangeeth Mguntha : Diplomatic Immunity in the Context of International Human Rights' *Legal Service India*, <http://www.legalserviceindia.com/articles/dhuman.htm> on 1December 2015.

¹³³Wanyela C, 'Diplomatic privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Convention on Diplomatic Relations 1961' Unpublished LLM Thesis, University of Nairobi, September 2014.77.

CHAPTER 4

THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS; ABUSE ARISING THEREOF

4.1 Introduction

The Vienna Convention on Diplomatic Relation was adopted at the United Nations Conference on Diplomatic intercourse and immunities in Vienna 1961.¹³⁴ The importance of the Vienna Convention was stated in the case of *U.S v Iran*, where the court observed that *'the obligations of the Iranian Government here in question are not merely contractual... but also obligations under general international law.'*¹³⁵

The Treaty of Amity forms a basis as well as antecedent to the VCDR, as some of its provisions has been adopted in the VCDR and has led to the immunity granted to diplomats as well as one of the rationales for granting immunity to diplomats which is to encourage mutual beneficial trade as well as reciprocal equality of treatment.

Article 4 of the Treaty of Amity¹³⁶ provides for the protection of the property, premises as well as the individuals of the high contracting state, this has also been provided for in article 29, 30 and 31 of the VCDR, which provides for the inviolability of the diplomat, the inviolability of the private residence as well as the inviolability if the mission. Article 6 of the treaty exempts either members of the high contracting party from the payment of taxes, fees or charges in the jurisdiction of the other high contracting party. Article 34 and 36 of the VCDR also upholds this notion.

These provisions have been provided in the VCDR as measures to uphold the inviolability of diplomatic agents as well as their premises and that of the mission. The essence of the treaty was to uphold the friendly relations which had been in existence between the USA and Iran, in order to benefit from the reciprocal, equality of treatment, therefore, the

¹³⁴Conference Records, *U.N. Conference on Diplomatic Intercourse and Immunities, Vienna, March 2-April 15, 1961. Official Records, Vols I and II.1962, UN Docs. A/CONF.20/14 Add. 1.*

¹³⁵*United States Diplomatic and Consular staff in Tehran (US v. Iran), ICJ Reports 1980, 3,31.33.41.*

¹³⁶ Article 4, *Treaty of Amity*, 1955,284 U.N.T.S 93.

provisions of the VCDR are meant to achieve this purpose. Indeed it can be stated that the treaty of Amity formed the basis of the VCDR based on the similarity of the provisions.

4.2 Theories in the Vienna Convention on Diplomatic Relations

One of the rationales for the immunities and privileges granted to diplomats was the fact that diplomatic agents as well as the mission premises were 'extraterritorial' which simply means that it was the territorial jurisdiction of the sending state.¹³⁷ This explanation has now been discredited. The diplomatic system has however been compatible with the representative theory which emphasizes the fact that the diplomat is an agent of the sending state and the functional theory¹³⁸ which emphasizes the practical necessity of the diplomatic function.¹³⁹ The immunity exists also to ensure the efficient performance of functions in order to preserve international order as well as to maintain the communication between states.¹⁴⁰

4.3 Notable Gaps in the Vienna Convention on Diplomatic Relations

Due to the rising abuse of diplomatic immunity and privileges as well as the lack of provision to address the issue of abuse, there has been a growing debate in relation to the flaws noted in the VCDR as well as a rising need to review and reform the VCDR.¹⁴¹

The preamble of the VCDR stipulates the fact that the immunity granted is not to benefit the person of the diplomat but to ensure the efficient performance of their duty. Article 21 provides for the inviolability of the diplomatic mission. The article further states the fact that

¹³⁷E.g. Grotius, *De Iure Belli ac pacis* (1695), ed. Tuck 2005) II, xviii. IV.5: 'yet that an Exception should be made in favour of Ambassadors, who, as they are by the same kind of fiction be imagined to be out of the territories of the *Potentate*, to whom they are sent'.

¹³⁸Fox H, *The Law of State Immunity*, 2ed, Oxford University Press, Oxford, 2008, 701.

¹³⁹ILC Year book 1958/ii, 94; *Tietz v People's Republic of Bulgaria* (1959) 28 ILR 369; *Yugoslav Military Mission* (1969) 65 ILR 108; *Parking Privileges* (1971) 70 ILR 396; *Smith v Office National de l'Emploi* (1971) 69 ILR 276; *Private Servant* (1971) 71 ILR 546; *Third Avenue Associates v Permanent Mission of Zaire to the UN*, 988 F.2d 295 (2nd Cir, 1993); *Aziz v Aziz*; *HM The Sultan of Brunei intervening* (2008) 2 All ER 501.

¹⁴⁰Ivor R, *Satow's Diplomatic Practice*, 6ed, Oxford University Press, Oxford, 2009, 98; Fox H, *The Law of State Immunity*, 2ed, Oxford University Press, Oxford, 2008, 701.

¹⁴¹Wanyela C, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' Unpublished LL.M thesis, University of Nairobi, September 2014, 62.

the receiving state has a duty to protect the premises against any intrusion or damage. Article 29 of the Convention provides for the inviolability in which case the diplomat should not be liable to any form of arrest or detention. Article 31 of the Convention grants immunity to the diplomatic agent from the criminal jurisdiction of the receiving state as well as immunity from the local civil and administrative jurisdiction. Article 41 of the Convention stipulates the fact that the diplomatic agent has a duty to respect the laws of the receiving state and also the fact that the mission should not be used in a manner that is incompatible with the functions of the mission.

These provisions have been used as defense when abuse has occurred. This is subject to the absolute approach used in defining the immunities granted to the diplomat. The principle which should govern the actions of the diplomat is the fact that immunity should only be rendered for actions done within his official mandate.¹⁴² Crawford however notes that the definition of official acts is not self evident and states that in cases of doubt reference should be made to the acts which were ordered by the sending state.¹⁴³ Although the Vienna Convention provides that immunities be granted to diplomatic agents so as to carry out their official act, the rigid nature of the Convention goes against this notion in some of the articles stated above. Example can be seen especially in cases which have to do with inviolability of the individual, the mission as well as the diplomatic bag. The Convention provides for the inviolability of the diplomatic agent, the mission as well as the diplomatic bag.

Exceptions are not clearly made reference to in relation to the provisions of inviolability, the fact that they cannot be subject to the jurisdiction of the receiving state has also given rise to abuse. Diplomatic immunity law can be regarded as a combination of codification and progressive development.¹⁴⁴

As earlier stated in the previous chapter abuse of diplomatic immunity and privileges will be deemed to have occurred when the actions which have been taken by the diplomatic agent do not fall within his official function.

¹⁴²Herdegen M, 'The Abuse of Diplomatic Privileges and countermeasures not covered by the Vienna Convention on Diplomatic Relation: Some observations in the light of recent British experience' *American journal of international law*, 1986, 735.

¹⁴³Crawford J, '*Brownlie's Principles of Public International Law*', 408.

¹⁴⁴ Harris D, *Cases and Materials on International Law*, 7ed, Sweet & Maxwell, London, 201, 301.

Another problem which arises as to the broad provisions as regards to immunity of the diplomat is the interest of the receiving state, which entails the inviolability of the premises of the mission and the residence of the diplomat, the Convention expressly states that they are inviolable, which has an effect of putting the interest of the receiving state at risk as well as its citizens, whereas it should be noted that the diplomatic agent has a duty to respect of the receiving state. The Foreign Affairs Committee of the house of commons in its report on the 'Abuse of Diplomatic immunities and Privileges' suggest that regardless of the guarantees of inviolability of the diplomatic premises and diplomatic bag stipulated in the Vienna Convention, in certain circumstance the committee suggest that a case can be made for the measures limiting those guarantees, on the basis of self defense or on the grounds of the priority granted to human life. This point of view was upheld in the *Libyan People's Bureau Incident* where the British Government had relied on self defense in carrying out a search for weapons and explosives which was deemed to be for the benefit of the police officers carrying out the evacuation. Sir John Freeland, the Legal Adviser to the British Foreign Office stated;

*" I certainly would not exclude the possibility of its being justifiable in a case where, for example there is continued firing of weapons from the premises of an embassy, where every other method has been tried and has failed to stop that, for it then to be lawful to go into the embassy to stop it... "*¹⁴⁵

With regards to the inviolability of the diplomatic bag, the case of *Umaru Dikko* who was found drugged in a crate and was awaiting shipment to Nigeria. The bag was labeled "diplomatic baggage" but lacked the "visible external marks" required by article 27(4) of the VCDR. Although there was no breach of article 2, when the bag was opened it was however stated by the United Kingdom Foreign Secretary that even if the crate was a diplomatic bag, "the overriding duty to preserve human life" would overrule in certain circumstances.¹⁴⁶ However this has not been the case in practice, in the case of *Germany v Italy: Greece intervening*,¹⁴⁷ Germany filed an application against Italy stating that Italy had disregarded its jurisdictional immunity as a sovereign state which violated international law.

¹⁴⁶ Foreign Affairs Committee Report, 358

¹⁴⁷ *Germany v Italy: Greece intervening*,79

On the other hand Italy claimed that Germany's underlying acts were against the principle of jus cogens¹⁴⁸ which gave it the right to strip Germany of its immunity. The court rejected Italy's claim stating that state immunity forms of customary international law and the fact that the underlying acts of Germany did not deprive it from jurisdictional immunity. One can note from these facts that state immunity has been upheld even in instances where the principle of jus cogens have been disregarded.

In essence the Foreign Affairs Committee acknowledges the fact that other factors need to be considered in determining when the inviolability principle should be upheld.¹⁴⁹ The question this interpretation poses is the consistency with the absolute inviolability rule stipulated in article 22 of the VCDR, and whether the non exclusivity of self defense in the Convention makes it available.¹⁵⁰ It should be noted however that before the adoption of the VCDR, the International Law Commission (ILC) noted that the doctrine of personal inviolability does not exclude self defense or other measures to prevent the commission of a crime or an offence,¹⁵¹ article 29 of the VCDR does not clarify this notion by providing exception to the principle of inviolability.

Ogdon poses a question as to whether diplomatic immunity should be granted in cases where the diplomat acts outside his official duties. He states that the administrative and judicial construction of diplomatic immunity allows for immunity from prosecution even in cases of tortious liability and criminal acts outside their prescribed functions.¹⁵² The approach embraced in the VCDR which is that of functional necessity also grants exclusive jurisdiction to the sending state and fails to consider the fact that diplomatic agents have

¹⁴⁸ Principle of international laws from which no derogation is permitted example include crimes against humanity, see, https://www.law.cornell.edu/wex/jus_cogens on 22 March 2016

¹⁴⁹Herdegen M, 'The Abuse of Diplomatic Privileges and Countermeasures not covered by the Vienna Convention on Diplomatic Relations; Some observation in the light of Recent British Experience' *American journal of international law*, 1986, 738.

¹⁵⁰ Colonel Draper's memorandum, *Diplomatic Immunities and Privileges 71-7*. Neither Sir John Freeland nor Colonel Draper considered self defense was available on the facts of the *Libyan People's Bureau Incident* because there was only one round of firing. The persons who left the bureau on evacuation were searched on the grounds of self defense in case they were armed: p:xxxii. As cited by Sweet & Maxwell citation number 243, 306.

¹⁵¹ International Law Commission Yearbook, 1 (1957), 209-10, International Law Commission Yearbook, 2 (1957), 138, International Law Commission Yearbook, 2 (1958), 97

¹⁵²Ogdon, M, 'The Growth of Purpose in the Law of Diplomatic Immunity,' *The American Journal of International Law*, 31.3 (1937) 449-465.

interactions with citizens as well as Government official of the host state which may sometimes lead to conflict.¹⁵³

Barker, alludes to the fact that the drafters of the VCDR watered down the notion of functional necessity which has led to the abuse thereof.¹⁵⁴Bradlow acknowledges the essence of immunity, he however states that such immunity should be considered based on the responsible actions carried out by diplomats, which in this case could mean upholding the functional necessity theory.¹⁵⁵

Based on the contradiction as well as the lack of measures to curb the abuse of diplomatic immunity and privilege the House of Commons Foreign Affairs Committee prepared a review of the VCDR where it was concluded that it was undesirable for protected person to respect the laws of the receiving, the committee instead advocated for the rigorous application of the VCDR, such as persona non grata¹⁵⁶ and limitation of the mission size.¹⁵⁷ The question then becomes whether these measures are sufficient in curbing diplomatic immunity.

4.4 Remedial Actions in the Vienna Convention on Diplomatic Relations

4.4.1 Waiver of Immunity

Article 32 of the Vienna Convention states that immunity may be waived by the sending state the article further states that the 'waiver must always be express'. Article 32(3) states that the initiation of proceeding by a diplomatic agent prohibits such person from invoking immunity with regards to any counter claim directly connected with the principal claim. Article 32(4) states that the waiver from civil or administrative jurisdiction differs from the waiver granted in respect of the execution of the judgment. The Convention does not provide for the waiver of immunity in criminal jurisdiction. The waiver of immunity has been

¹⁵³Wanyela C, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' Unpublished LLM thesis, University of Nairobi, September 2014, 64.

¹⁵⁴Barker J, *International Law and International Relations* Continuum, London, 2000.

¹⁵⁵Bradlow,D., 'The Accountability of International Organizations to Non-State Actors,' *American Society of International Law Proceedings*, (1998) 92, 359.

¹⁵⁶Article 9, *Vienna Convention on Diplomatic Relations*.

¹⁵⁷Article 11, *Vienna Convention on Diplomatic Relations*.

unusual in criminal cases¹⁵⁸ this may be due to the absence of such provision in the VCDR. The waiver for criminal jurisdiction is however 'routinely sought and occasionally granted'.¹⁵⁹

It should be noted that the waiver can only be granted by the sending state expressly this is because immunity belongs to the state and hence are the only ones who can grant another the authority to waive such immunity.¹⁶⁰

4.4.2 *Persona non grata*¹⁶¹

The receiving state has the power to notify the sending state that the head of mission or any member of the diplomatic staff is *persona non grata*; in such instances the sending state has the mandate to either recall the diplomatic agent or terminate his functions with the mission. It should be noted that the action by the receiving state rendering the diplomatic agent *persona non grata* is not subject to any explanation. The principle of *persona non grata* has been said to be the most efficient means stipulated in the Vienna Convention to curb abuse of diplomatic immunity in a manner not acceptable to the Government of the receiving state.¹⁶² Some instances which may warrant the declaration of a diplomat *persona non grata* include; if the diplomat has acted inappropriately and has violated antisocial norms or has used his immunity for criminal offences,¹⁶³ where the diplomat has acted in a manner to jeopardize the security of the state,¹⁶⁴ where the state declares a diplomat *persona non grata* for the purpose of retaliation to put pressure on the sending state to negotiate.¹⁶⁵ The declaration of *persona non grata* implies that the diplomatic agent is not recognized by the

¹⁵⁸ McClanahan C, *Diplomatic Immunity: Principles, Practices and Problems*, St, Martins Press, New York, 1989, 137.

¹⁵⁹ Shaw M, *International Law*, 7ed, Cambridge University Press, Cambridge, 2014, 560.

¹⁶⁰ Ivor R, *Satow's Diplomatic Practice*, 135-136

¹⁶¹ Article 9, *Vienna Convention on Diplomatic Relations*.

¹⁶² Denza E, *Diplomatic Law – Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford, 2008, 62.

¹⁶³ Feltham R, *Diplomatic handbook*, 7ed Longman, London, 1998, 8.

¹⁶⁴ Feltham R, *Diplomatic Handbook*, 8; Denza E, *Diplomatic Law-Commentary on the Vienna Convention on Diplomatic Relations*, 63.

¹⁶⁵ Feltham R, *Diplomatic Handbook*, 8

receiving state and hence is no longer immune from the jurisdiction of the host state and seizes to have the privileges granted to diplomats.¹⁶⁶

The question which the remedial actions stipulated in the VCDR poses is in relation to the sufficiency of these actions taken against diplomatic agents in curbing diplomatic immunity abuse and further bringing those guilty of such actions to justice. Charney notes the fact that the Vienna Convention has failed to provide deterring mechanisms against violent conduct which has eventually led to the abuse of the immunity granted to the diplomatic agent as well as the abuse of the functional necessity theory.¹⁶⁷

4.5 Conclusion

One may think that granting immunity on the basis of functional necessity will serve as a deterrence to any form of abuse, due to the fact that immunity will not be granted to the diplomat when an abuse has occurred, this is however not the case as the Vienna Convention has stated absolute provisions which in most times are used to the benefit of the diplomatic agent and serves as a defense in circumstances when abuse occurs. This is partially due to the fact that the VCDR does not really clarify the position of diplomatic immunity in cases when abuses occur.¹⁶⁸

¹⁶⁶Denza E, *Diplomatic Law-Commentary on the Vienna Convention on Diplomatic Relations*, 63.

¹⁶⁷Charney, J., I., 'The Impact of the International Legal System of the Growth of International Courts and Tribunals' (1998-1999), 31 *New York University Journal of International Law & Politics* 697.

¹⁶⁸Wanyela C, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' Unpublished LLM thesis, University of Nairobi, September 2014, 64- 65.

CHAPTER 5

SUMMARY, CONCLUSION, AND RECOMMENDATIONS

5.1 Summary

This research has tried to answer the questions regarding the problem which was earlier established.

It has been established that the diplomatic immunity has been in existence even before the establishment of the Vienna Convention, it has also been stated that the purpose of the immunity was to protect the diplomatic agents in carrying out their official function as well as promote friendly relations between states. The purpose of diplomatic immunity which was established in ancient times was further upheld in the Vienna Convention on Diplomatic Relations which is the convention which governs the diplomatic relations.

This research has tried to provide an insight on the notion of diplomatic immunity. This paper further tries to deduce from the notion of diplomatic immunity when an abuse has occurred. Diplomatic immunity has been stated by the governing instrument as one which is granted not to benefit the diplomatic agent but to promote the efficiency of the official functions of the diplomatic agent.

This research further tries to establish the fact that although the VCDR governs diplomatic relations it has not been sufficient in curbing abuse of diplomatic immunity and privileges as diplomatic agents use the inviolability principle provided in the VCDR as a form of justification in instances of abuse. This study further notes that the interpretation of the inviolability principle of absolute inviolability tends to affect the human rights of citizens of the host states, the paper further questions the hierarchy of laws on whether the VCDR should take precedent over human rights or vice versa.

The reason why the receiving state has tolerated such abuse is because of reciprocity in order to protect their diplomats serving abroad to promote diplomatic relations. This paper with the help of case studies of diplomats tried to establish some of the interpretation on immunity as well to establish the fact that no action in most circumstances is taken against the diplomatic agent to bring them to justice.

The diplomatic agent as stipulated in the VCDR has a duty to obey the laws of the receiving state. In instances when diplomatic agents abuse their immunities this goes against this duty and in most circumstances affect the citizens of the receiving state. The fact that a state has responsibility towards its citizens, the receiving state should be able to protect its citizens and bring diplomats who are guilty of depriving the human rights of the citizens in the host state to justice.

5.2 Recommendations

The VCDR has been used as an instrument of defense and shield from jurisdiction from the receiving state based on the principle of inviolability. The Vienna Convention also provides for absolute immunity although it has been stated in the preamble that the immunity granted to diplomats is to enable them carry out their official function efficiently. The VCDR should be reviewed and changed. This change should include the fact that certain actions carried out by diplomatic agents should not be subject to the immunity granted to diplomatic agents. These changes may include the fact that any actions which do not fall within the official mandate of the diplomatic agent and most especially when such actions carried out by diplomatic agent impede on the rights of the citizens in the host country. This simply means that the immunities granted to diplomats should be limited only to the official duties.

Deterrence measures have to be put in place to prevent diplomatic agents from carrying out actions which do not fall within their official capacity and go against certain laws of the receiving state. This is to say more stringent measures need to be provided in the VCDR to deter diplomats from taking certain actions.

In cases where diplomatic agents have been recalled back to the sending states the VCDR should provide for measures whereby the receiving state or any party that will be elected for the purpose of making sure that such diplomatic agents who have abused the immunity and privilege given to them are supervised and brought to justice in the sending state even if not subject to the jurisdiction of the receiving state. In instances when prosecution may prove abortive in the sending state due to lack of evidence, the receiving state should have a right to prosecute such diplomat. The diplomatic agent should be subject to the jurisdiction of the receiving state in instances when such actions have contravened fundamental norms of the receiving state and when such actions do not fall within the official function of the receiving state.

The immunity of the mission and the diplomatic bag should not be given absolute inviolability. Exceptions should be provided for in VCDR in cases where the premises as well as the diplomatic bag are used as a means to carry out criminal activities which may have effect on the receiving state.

Diplomatic police should be given more powers to instigate proceedings against diplomatic agent who are guilty of carrying out criminal activities as well as deliberately carrying out functions which do not fall within their official functions which disrespects the laws of the receiving state which have no effect on the official function of the diplomatic agent. The diplomatic police should also be given the mandate to carry out investigation in cases of abuse of diplomatic immunity. These roles should be provided for in the VCDR. The diplomatic agent should be treated with respect and dignity during the process of instigation and investigation.

The fact that diplomacy is a branch of international law and one of the purpose of diplomacy is to represent states, in some instances the receiving state may want to instigate proceedings against a diplomatic agent maliciously which may affect the relationship between states. An ad hoc tribunal should be set up to decide independently on cases of abuse of immunity which are criminal in nature. The adhoc tribunal should be established for the purpose of determining criminal actions which are grave in nature as what may be considered as grave in the receiving state may be considered minor in which case the diplomat should be recalled back, this is to prevent malicious prosecution. The tribunal should also be able to review the functions of diplomat, those which are criminal in nature should be penalized as well as those which infringe on the rights of the citizens of the receiving state.

The provision in the current VCDR provides for *persona non grata* and waiver of diplomatic immunity. These measures in curbing diplomatic abuse should be applied strictly in cases of abuse.

These recommendations will serve as a means of curbing diplomatic immunity as it will serve as deterrence to other diplomats serving in the host nations.

5.3 Conclusion

In conclusion, it has been established in this paper that abuse of diplomatic immunity occurs and the VCDR as an instrument which governs diplomacy has not been sufficient in curbing diplomatic immunity, hence, a need to reform the Convention.

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