

CHAPTER THREE

The Role of Diplomatic Missions in the Protection of Human Rights

1 Introduction

The term diplomatic protection is, as mentioned in chapter 1, used in a dual sense in this thesis - as an institution, and as a function.⁸⁶⁷ As discussed in chapter 2, diplomatic protection is an institution in terms of which states may invoke in protecting their nationals who are injured in other countries. This function is generally performed by states through their diplomatic missions abroad. In this sense, diplomatic missions perform the function of diplomatic protection by protecting the interest of their nationals in the receiving state. This chapter will discuss diplomatic protection as a function of diplomatic missions for the protection of human rights.

Any government which has diplomatic relations with another country does so in its own interest, and in the interest of its nationals living abroad. In order to protect these interests, diplomatic envoys are accredited to those other countries.⁸⁶⁸ Diplomatic envoys are officials who are involved in diplomacy on behalf of their countries.⁸⁶⁹ The term used for a group of diplomats from one country resident in another country, is a diplomatic mission.⁸⁷⁰

The normal functions of diplomatic missions revolve around the protection of life, liberty and property of their nationals, in addition to their primary function of representing the political interests of the sending state.⁸⁷¹ The scope and content of diplomatic protection of citizens by diplomatic missions have undergone significant

⁸⁶⁷ See chs 1 & 2 *supra*.

⁸⁶⁸ The term diplomatic envoys as used in this research includes both diplomatic and consular officers. Thus, diplomatic protection also includes consular protection. See the case of *Kaunda v The President RSA supra* n 686 par 27 where Chaskalson, CJ said *inter alia* "According to the Special Rapporteur's report, diplomatic protection includes, in a broad sense, "consular action, negotiation, mediation" etc.

⁸⁶⁹ Diplomacy is the art and practice of conducting negotiations between states or national governments. See Murty *supra* n 829 1.

⁸⁷⁰ See Silva *supra* n 10 33.

⁸⁷¹ See art 3 of the VCDR. See also Sen *supra* n 52 73.

changes over the years and this has brought great relief to their nationals living abroad.⁸⁷²

2 The origin of diplomatic missions

Historically, the origin of diplomacy and diplomatic missions can be traced to two definite periods of time.⁸⁷³ The first period began in prehistoric times, continued through the middle ages, and terminated in the Renaissance period of the 15th century. This period was characterised by the setting up of non-permanent or *ad-hoc* embassies.⁸⁷⁴ During this period, European princes normally sent envoys on temporary diplomatic missions, which were terminated as soon as the particular mission was accomplished.⁸⁷⁵ The second period began in Italy during the 17th century. It witnessed the setting up of permanent diplomatic missions or legation.⁸⁷⁶ King Louis XI of France is said to have been the first secular prince to establish a regular system of diplomacy.⁸⁷⁷ The establishment of permanent missions contributed greatly to the advancement of international law generally, and the development of diplomatic law in particular.

Under Louis XI of France, and generally during the 17th century, diplomacy meant deceit and trickery.⁸⁷⁸ The task of a diplomat was not so much how to represent the general interests of his own country, as to find out the secrets of the court to which

⁸⁷² Today, in the context of sovereign equality of all nations, the UN Declaration on the Economic Rights and Duties of States, and the Recognition of Sovereignty of States over their Natural Resources, the practical implications of the concept of diplomatic protection would appear to have undergone fundamental changes. However, some commentators maintain that diplomatic protection strictly so-called does not belong to the normal functions of diplomatic missions. See Dembiski *supra* n 12 41 and Geck *supra* n 10 1051.

⁸⁷³ Diplomacy as a method of communication between States or recognised agents is an ancient institution. International legal provisions governing it are the result of centuries of state practice. Rules regulating the various aspects of diplomatic relations therefore constitute one of the earliest expressions of International Law. See e.g Shaw *supra* n 175 668; Sen *supra* n 52 6; and Shearer *supra* n 117 383.

⁸⁷⁴ See Sen *supra* n 52 6; Barker *The Abuse of Diplomatic Privileges and Immunities: A necessary Evil?* (1996) 4. See also "Diplomacy" in: [Http://en.wikipedia.org/wiki/ Diplomatic_relations](http://en.wikipedia.org/wiki/Diplomatic_relations) (2007/09/06).

⁸⁷⁵ *Ibid.*

⁸⁷⁶ See in this regard Sen *supra* n 52 6; Barker *supra* n 872 24; and Murty *supra* n 829 4.

⁸⁷⁷ See e.g Shearer *supra* n 117 383 & Lawrence *Principles of International Law* (1929) 271.

⁸⁷⁸ "An ambassador," said Sir Henry Worton in a punning epigram, "is a person who is sent to lie abroad for the benefit of his country." See Lawrence *supra* n 873 272.

he was accredited.⁸⁷⁹ As the actual contents of diplomatic relations became clearer, attention was focused on a particularly irksome problem of diplomatic protocol, the problem of precedence of diplomatic envoys. This problem was solved at the Congress of Vienna of 1815 . According to the regulation adopted at that Conference, ambassadors take precedence over envoys extraordinary and ministers plenipotentiary, and envoys and ministers take precedence over *charge d' Affaires*. Within their own class, the precedence dates from the time of presentation of their credentials.

As political interests became separated from the private business of the sovereign or Head of State, the activity of the agent began to lose its character of deceit, sharp practice and espionage.⁸⁸⁰ The result was the adoption of a uniform *modus vivendi*, and general rules of negotiation, which has given rise to a perceived measure of equality among States.⁸⁸¹

3 Codification of Diplomatic Law

Developments in diplomatic practice since 1815 rendered necessary the need for new and extensive efforts at codification of diplomatic law and practice.⁸⁸² The early 20th century witnessed what some regard as a revolutionary transformation in diplomatic methodology,⁸⁸³ which climaxed in the codification of diplomatic law and the adoption of the Vienna Convention on Diplomatic Relations (VCDR) at the Conference of Vienna in 1961.⁸⁸⁴

⁸⁷⁹ Louis XI of France is said to have told his ambassadors "if they lie to you, lie still more to them ," and Henry VII of England was praised by Coke, his Attorney General as " a wise and politique King" because he would not suffer ambassadors from other States to remain in his court after their immediate business was over. See Lawrence *supra* n 873 272.

⁸⁸⁰ Ibid.

⁸⁸¹ *Idem* 136.

⁸⁸² Apart from the Vienna Regulations which regulated the ranks and precedence of diplomatic agents, in 1928 14 American States adopted the Havana Convention on Diplomatic Agents. Codification was also attempted by private bodies such as the Institute of International law and the Harvard Law School in 1932. These early attempts led the UN Law Commission (UNILC) to include diplomatic and consular relations among the subjects to be codified during the first session in 1949 as a matter of priority. See Barker *supra* n 872 29-30.

⁸⁸³ On the transformation of diplomacy in modern times, see generally, Nicholson *Diplomacy* (1949) Chs 2&4. See also Silva *supra* n 10 Ch 2 and Barker *supra* n 872 26.

⁸⁸⁴ UN Doc.A/CN4/91. Report on Diplomatic Intercourse and Immunities submitted by Sandstrom Special Rapporteur 11-13.

The Convention codified existing customary law on diplomacy and established new rules.⁸⁸⁵ Questions not expressly regulated by the Convention continue to be governed by the rules of customary international law.⁸⁸⁶

In order to ensure the smooth running of diplomatic functions and to promote same, article 22 of the VCDR clearly stipulates that the mission premises⁸⁸⁷ must not only be respected at all times, but that it must not be violated or desecrated. The same article further provides that the permission of the Head of Mission must be sought and obtained before the agents of the receiving state should enter the Mission premises. A special duty is also imposed on the receiving state by the VCDR to ensure that the mission premises is not only protected from intrusion or damage, but that its dignity is not impaired.⁸⁸⁸

The Convention is noteworthy, not only because of its comprehensive codification of the customary law on diplomatic relations, but also because according to de Silver, it was a “land mark of the highest significance in the codification of international law”.⁸⁸⁹

The VCDR has become a universally accepted Convention and its provisions are regarded as settled law.⁸⁹⁰ The Convention has continued to be used as a point of reference in the development of related areas of international law. Many of its provisions were adopted with appropriate modifications in the VCCR and other international conventions.⁸⁹¹

⁸⁸⁵ See Denza *Diplomatic Law. A Commentary on the Vienna Convention on Diplomatic Relations* (1998) 3.

⁸⁸⁶ See the Preamble.

⁸⁸⁷ This includes all the furnishings and means of transport on the premises.

⁸⁸⁸ See art 22 (2) of the Convention. In the Sun Yat Sen incident of 1896, the court refused to issue a writ of *habeas corpus* with regard to a Chinese refugee held against his will in the Chinese legation in London. See McNair *International Law Opinions* (1956) vol 1 85. The issue was resolved by diplomatic means. See also Shaw *supra* n 175 671 and the case of *Boos v Barry* 99 L.Ed.2d. 333; 345-6 (1988) 121 I L R 551.

⁸⁸⁹ See Silva *supra* n 10 30. See also Denza *supra* n 883 1-2.

⁸⁹⁰ At the time of their adoption, they were clearly marked “progressive development” of custom or unresolved points, where practice conflicted. See Denza *supra* n 883 2 and Silva *supra* n 11 30.

⁸⁹¹ Eg Convention on Special Missions and other International Organisations.

Reciprocity continues to form an integral part of diplomacy and constitutes a sensitising influence ensuring that all the rules of the Convention are obeyed.⁸⁹² Since every state either sends out or receives diplomatic envoys from other states,⁸⁹³ it can be said that the diplomatic representatives of every state abroad are, generally speaking, mere hostages.⁸⁹⁴ This is because no matter how trivial a misunderstanding may be, in matters relating to protocol or privilege in one state, it may trigger a reciprocal adverse reaction in the sending state and even beyond, giving rise to the exercise of diplomatic protection.⁸⁹⁵

3.1 Theoretical basis of diplomatic law and practice

A cardinal concept of diplomatic law and practice is that of diplomatic privilege and immunity. In the 15th and 16th centuries, the leading jurists and text writers of the time sought a comprehensive theory to explain or justify why diplomatic envoys are endowed with privileges and immunity. Various theories were proposed by writers and jurists to justify the practice.⁸⁹⁶ It is intended to briefly deal with these theories here, to highlight their basic differences and their relevance to diplomatic protection.

Of the many theories which emerged as an explanation of the juridical basis of diplomatic privilege and immunity, three have been identified as making the greatest contribution to the subsequent development of diplomatic law. These are the “personal representative” or the “representative character” theory, the “extritoriality” theory, and the “functional necessity” theory.⁸⁹⁷

⁸⁹² Denza *supra* n 883 2. Reciprocity generally involves retaliation. In that sense, it constitutes sanction. Diplomatic protection is retaliatory action taken by a state against another state for injury suffered by its national. See also Ghei “The role of Reciprocity in International Law.” *CILJ* vol 36 (2003/2004) 93.

⁸⁹³ Although these terms are not defined under the Vienna Convention 1961, the “sending State” is the State that accredits the envoy, while the “receiving State” is the state to which the envoy is accredited.

⁸⁹⁴ See Denza *supra* n 883.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ Eg Grotius *De Jure Belli ac Pacis* (Classics of International Law Series, (1925) Scot(ed) Bk II 443; Bynkershoek *De Foro Legatorum*, (Classics of International Law Series) (1964) Scot (ed) 44; Wicquefort *L’Ambassadeur et Les Fonctions* (1681) s XXVII; Vattel *Le Droit Des Gens* (Classics of International Law Series) (1916) Scot (ed) vol III 371.

⁸⁹⁷ However, scholars like De Martens, Viswanatha, and even Oppenheim, were of the view that the privileged position of diplomatic envoys was based on religious grounds. See Barker *supra* n 872 32-35.

The “representative character” theory is the theory which ultimately traces immunity to the sovereign of the state which sends the envoy.⁸⁹⁸ According to Barker, this theory was the most popular theory in the early years of post-permanent diplomatic relations.⁸⁹⁹ Eminent scholars like Grotius, Von Bynkershoek, Wicquefort and Vattel all saw the character of the diplomatic envoy as the representative of an independent sovereign or sovereign body, as being of paramount importance in explaining this phenomenon.⁹⁰⁰ In his famous book *De Jure Belli ac Pacis*, Grotius noted that:

Since the views of those who send ambassadors are generally different from the views of those who receive them, and often directly opposed, ambassadors ... are considered to represent those who send them.⁹⁰¹

The second theory which emerged during this period was the “exterritoriality” theory. The basis of this theory was that the diplomat was considered to be resident outside the jurisdiction of the receiving state.⁹⁰² In terms of the exterritoriality theory, diplomatic premises were also considered to be outside the territory of the receiving state, and within the territory of the sending state.⁹⁰³ This was of course a legal fiction which was rejected by writers of latter days.⁹⁰⁴ The theory has also been rejected by the courts.⁹⁰⁵ Notwithstanding this rejection, the exterritorial theory carried so much weight in its heydays that it was used to explain many diplomatic nuances; why for example, ambassadors who were involved in plots and other heinous crimes against the receiving states were not killed, but rather deported back home.⁹⁰⁶

The third theory employed by writers and jurists to justify the grant of privileges and immunity to diplomats was the “functional necessity theory” of diplomatic law. The

⁸⁹⁸ *Idem* 35.

⁸⁹⁹ *Idem* 38.

⁹⁰⁰ *Ibid.*

⁹⁰¹ Bk II Ch. XVIII 443. Barker has however advocated that the representative character theory should be abandoned because it is no longer relevant. See Barker *supra* n 872 202.

⁹⁰² See Bynkershoek *supra* n 894 27.

⁹⁰³ *Ibid.*

⁹⁰⁴ See Barker *supra* n 872 54.

⁹⁰⁵ See e.g. the case of *R. v Turnbull Ex p. Petroff* (1971) 17 FLR 438.

⁹⁰⁶ These included the cases of Don Guerau de Spes, the Spanish Ambassador in England; the Bishop of Ross case, involving the envoy of Mary Queen of Scots; the case of the Spanish Ambassador Mendoza and that of L'Aubspine, the French Ambassador to England. See Barker *supra* n 872 43.

VCDR of 1961 emphasizes the functional necessity theory of diplomatic law.⁹⁰⁷ Under this theory, diplomatic privileges and immunity⁹⁰⁸ are granted for the efficient conduct of international relations. It also points to the character of the diplomatic mission as representing the State.⁹⁰⁹

The adoption of the “functional necessity” theory of diplomatic law with strong emphasis on the “representative character” theory, points to the fact that the diplomatic mission remains the *alter ego* of the sending state.⁹¹⁰ The competence of the diplomatic mission to afford protection to its nationals in the exercise of the right of its sending state, as entrenched in international law, is now embodied in the VCDR of 1961.⁹¹¹ Apart from the VCDR, this right may also be embodied in bilateral treaties, or may be adhered to under the rules of customary international law.⁹¹² In cases where bilateral treaties are in force, the scope of diplomatic protection would no doubt be governed by the provisions of such treaties. In the absence of any treaty, however, diplomatic protection of nationals is based on the provisions of the VCDR or on customary international law.⁹¹³

4 Functions of diplomatic missions

The functions of diplomatic missions are listed under article 3 of the VCDR.⁹¹⁴ They include, *inter alia*;

- (a) representing the sending State in the receiving State⁹¹⁵
- (b) protecting the interests of the sending State in the receiving State and of its nationals, within the limits permitted by international law;⁹¹⁶

⁹⁰⁷ See the Preamble.

⁹⁰⁸ The word “immunity” is used in more than one sense. First, it is used to describe an exemption from local law or jurisdiction, or to denote a benefit over and above that ordinarily granted to nationals. The word “privilege” has the same connotation, and since there is no uniformity in the use of these terms and there is difficulty in applying them consistently, they are used interchangeably.

⁹⁰⁹ See the Preamble to the VCDR. See also Shaw *supra* n 175 668-688 & 767 *Third Avenue Associates v Permanent Mission of the Republic of Zaire to the United Nations* 988 *Ed. 2d*, 295 (1993) 99 *ILR* 194.

⁹¹⁰ See Silva *supra* n 10 82.

⁹¹¹ See *supra* n 52 322. See art 3 VCDR.

⁹¹² See *Ibid.*

⁹¹³ See the Preamble & ch 2.

⁹¹⁴ UN Doc A / CN 4 / 91.

⁹¹⁵ Art 3 (1)(a).

⁹¹⁶ Art 3(1)(b).

- (c) negotiating with the Government of the receiving State;⁹¹⁷
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;⁹¹⁸ and
- (e) promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.⁹¹⁹

4.1 Protection of human rights

Article 3(b) of the VCDR specifically provides that the functions of diplomatic missions shall include *inter alia* -

protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by International Law⁹²⁰

It must be emphasized that article 3(b) of the VCDR is concerned with both the protection of the interests of the sending state, and those of its nationals. Since this thesis deals with the issue of diplomatic protection of human rights of nationals the question therefore arises whether the term “interests” as used in the Convention⁹²¹ is synonymous with, or includes “human rights,” or is restricted to political, economic and other interests? Another question is the extent and manner in which the protection of these interests are permitted by the Convention.

The dictionary defines “interest” as “concern about something; anything in which one has a share or benefit.”⁹²² Although the term “rights” is chameleon-hued,⁹²³ many

⁹¹⁷ Art 3(1)(c).

⁹¹⁸ Art 3(1)(d).

⁹¹⁹ Art 3(1)(e) of the VCDR. Art 3(2) stipulates that “Nothing in the present Convention shall be construed as preventing the performance of consular functions by the diplomatic mission.”

⁹²⁰ As stated above, the other functions of diplomatic Missions stipulated under art 3 of the VCDR include *inter alia* negotiating with the government of the receiving State; ascertaining by all lawful means conditions and developments in the receiving State and reporting thereon to the government of the sending State, and developing their economic, cultural, and scientific relations.

⁹²¹ I.e Art 3 of the VCDR. The VCDR was the codification of Customary International Law practice .

⁹²² See Garner *supra* n 12 186.

⁹²³ See Hohefeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 *Yale L J* 16. According to Hohefeld, the term “right” is an ambitious term use’d to describe a variety of legal relationships. Sometimes, it is used to mean entitlement, sometimes immunity, sometimes it is used to indicate privilege, while at other times it refers to power to create a legal relationship. Vinnogradoff defines “right” as a claim or demand. See “The Foundation of a Theory of Rights” in *Collected Papers* II 367, while Lundstedt defines a “right” simply as the favourable position enjoyed by a person in law. This view is shared by both Holland and Gray. See Holland *Jurisprudence* 83; & Gray *Jurisprudence* 12 18. See also the case of *Bradford Corporation v*

writers have tried to determine whether “rights” are synonymous with “interests” in everyday life. The most prominent of such writers are Ihering⁹²⁴ and Salmon.⁹²⁵ Both writers maintain that rights are synonymous with interests that accrue to man as a human being. Heck, a disciple of Ihering defines “interest” as

in its widest connotation as embracing all things that man holds dear and all ideas which guide man’s life. ⁹²⁶

Dias⁹²⁷ has warned that “right” may not necessarily be synonymous with “interest”,⁹²⁸ although he concedes that while the “interest” approach is helpful in determining what rights are, it is not universally true. According to him, very frequently, especially in cases of rights that correlate to statutory duties, interest is the determining factor.⁹²⁹ Nevertheless, man’s increasing tendency to speak of what is most important to him or her in terms of “rights” and to frame what is dearest to him or her as fundamental “rights”⁹³⁰ indicate the extent to which rights and interests are inter-related. ⁹³¹

Since it is generally agreed that rights and interests are synonymous in human life, it is submitted that the term “interests” as used in article 3(b) of the VCDR is synonymous with, and incorporates human rights. Article 3(b) of the VCDR, is therefore wide enough to include the protection of human rights of nationals by diplomatic missions. It is further submitted that the right to diplomatic protection is based on and derived from article 3(b) of the VCDR under conventional law. The

Pickles (1895) AC 587. To Kameka, rights are claims that have achieved a special kind of endorsement or success. See Kakema, “Human rights: Peoples rights” in Crawford (ed) *The Rights of Peoples* (1988) 127.

⁹²⁴ See Iherig *Geist des romischen Rechts* III 39.

⁹²⁵ Salmon *Jurisprudence* 217.

⁹²⁶ See Heck “The Jurisprudence Of Interests: An Outline,” in *20th Century Legal Philosophy Series II* 33.

⁹²⁷ Dias *supra* n 669 252.

⁹²⁸ His comments on this theory may be summarized as follows: (a) The right does not necessarily coincide with interest. In the case of a trust, both law and equity recognize the legal right in the trustee, although the interest is admittedly not in him, and the common law gives no right to the beneficiary, who has the interest; (b) not all interests are protected rights. The combined effect of points (a) and (b) is that interests cannot serve as a test of rights, for their recognition is a matter of law.

⁹²⁹ See the cases of *Knapp v Railway Executive* [1949] 2 All E. R. 508 515; & of *Hartley v Mayoh* [1954] 1 Q B 383.

⁹³⁰ See Glendon *RightsTalk* (1999) 3-4.

⁹³¹ *Ibid.*

boundaries or limits of article 3 of the Convention as a whole, however, still have to be considered in the context of a number of other articles.⁹³²

5 Limits of protection

The VCDR expressly provides that the diplomatic mission shall exercise its right of protection “within the limit permitted by international law.”⁹³³ Dembiski asserts that “the terms used here are very general and it is difficult to determine the real content of the provision,”⁹³⁴ because the words “*within the limits permitted by international law*” makes the provision diverse and “varied.”⁹³⁵ He believes that foreign missions may be handicapped by this limitation clause and that any exercise of the function of “protecting” is invariably restricted to the intermediary of the Ministry of Foreign Affairs of the receiving state only. He believes also that such “protection” is limited to mere protest and nothing more.⁹³⁶

It is, however, submitted that article 3 (b) of the VCDR is not limited to protests only, but can go beyond.⁹³⁷ This is because the choice of means for diplomatic protection is often determined by various factors.⁹³⁸ Even in the rare cases where the claimant state has a legal obligation to grant protection under international law, there is much discretion in the choice of means. Thus, if protests are to no avail, the next step open to the mission is to inform the home state who may prefer an international claim on behalf of its aggrieved national.⁹³⁹

⁹³² These include (a) the performance of consular functions by diplomatic missions (b) where a distinction is to be drawn between functions of a mission and personal activities of its members (c) where a distinction is to be drawn between diplomatic functions and commercial activities and (d) where the function in question is a novel one. See e.g. the case of *Propend Finance Property v Sing and The Commissioner of the Australian Federal Police* Judgement of Laws 1996-04-14 (Unreported). See also arts 9 & 41 on proper limits to diplomatic activity.

⁹³³ Art 3(1) (b).

⁹³⁴ Dembinski *supra* n 12 41.

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*

⁹³⁷ Tiburcio *supra* n 26 43 maintains that diplomatic protection may involve resort to all forms of diplomatic intervention, ranging from negotiation, good offices to the actual use of force. It must be borne in mind that the Mission is part of the Executive arm of government. But Dugard has warned that diplomatic protection must be exercised by lawful and peaceful means only. See the commentary to draft art 1 *Official Record of the GA supra* n 1 par 8 26-27.

⁹³⁸ Art 1 of the ILC Draft speaks of “the invocation by a State through diplomatic protection or other means of peaceful settlement...”.

⁹³⁹ Silva *supra* n 10 62.

Thus the right of diplomatic protection which a state exercises through its mission may go beyond mere protest. As already indicated, the mission is the *alter ego* of the state. Although the mission is part of the executive branch of government, since it operates in a foreign state, it is not in a position *ex hypothesi*, to confront the receiving state directly.⁹⁴⁰ It can nevertheless make an effective representation by liaising with the sending state. A protest is however often the first step in registering objection in diplomatic circles.⁹⁴¹

6 When nationals seek diplomatic protection

The intervention of a diplomatic mission on behalf of its national is often required when the rights of the individual concerned, whether a natural or legal person is violated.⁹⁴² The right violated must be of such a nature that immediate action is required.⁹⁴³ Such instances are innumerable, and include: (a) Cases of arbitrary arrests and detention; (b) cases of denial of justice; (c) cases of infringement of property rights, and (d) cases where the receiving state fails to afford adequate protection against acts of private persons or mob violence.⁹⁴⁴ Instances mentioned above will now be discussed.

(a) *Cases of arbitrary arrest and detention*

The most common examples of situations in which the mission's protection or assistance may be sought are cases of deprivation of personal liberty through arrest or detention by the authorities of the receiving State. Although the alien is subject to the laws of the State in which he or she resides, the general rule of international law is that he or she should be afforded equal protection of the law, and should therefore not be subjected to arbitrary arrest or detention. This is also a violation of the national law of the receiving state. For instance, he or she should not be arrested without being informed of the grounds of his or her arrest, nor should he or she be arrested on flimsy charges without being given the opportunity to defend his or

⁹⁴⁰ *Ibid.*

⁹⁴¹ A protest can either be formal or informal. This may be done by a formal note or informally, in the course of an interview. See *supra* n 52 371-2

⁹⁴² *Ibid.*

⁹⁴³ *Ibid.*

⁹⁴⁴ *Ibid.*

herself.⁹⁴⁵ This certainly would be repugnant to the rules of natural justice, equity, and good conscience and against international law because such an arrest may infringe article 9 of the ICCPR and article 9 of the UDHR..⁹⁴⁶

Whether such arrests are permissible under the laws of the receiving State, or whether the State treats its own nationals in the same manner is immaterial. In *Roberts Claim*,⁹⁴⁷ for instance, Roberts, an American national, was arrested and held, without trial, in Mexico for seven months in a small cell, together with 30 or 40 Mexicans. Ventilation was poor, sanitary and ablution arrangements primitive, food scarce and raw, and exercise denied. When sued by the US for its mistreatment of Roberts after diplomatic efforts to obtain his release had failed, Mexico responded that he was treated in the same way as his fellow Mexican prisoners. In upholding the claim of the US, an international tribunal stated:

Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. The test is broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.⁹⁴⁸

(b) *Cases of deportation and expulsion*

Other situations often requiring the urgent attention of the diplomatic mission are cases of deportation or expulsion of their nationals by the receiving state. It is conceded, however, that a state has unqualified liberty in matters pertaining to the admission of foreigners into its territory. The right to expel or deport a foreigner from

⁹⁴⁵ See ICCPR art 9. See also *Filartiga v Pena-Irala supra* n 136.

⁹⁴⁶ See *supra* n 52 374.

⁹⁴⁷ 4 RIAA 77 (1926); *Asian Agricultural Products Ltd case* (1990) 30 ILM 577 and *Quintanilla Claim (Mexico v US)* 4 RIAA . 101 (1926).

⁹⁴⁸ When certain South African nationals were arrested in the DRC in 2006, it was the diplomatic efforts exerted on their behalf by the South African Ambassador in the DRC that secured their release. See generally *Pinochet's case R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2001] 1 AC 119. See also the *Arrest Warrant case*, where the DRC protested against the arrest warrant issued for the arrest of its Minister for Foreign Affairs by Belgium. *Case Concerning the Arrest Warrant of 11 April 2000 (DRC V Belgium)* ICJ Rep 3 (2002)41 ILM 536. A distinction should however be drawn between the arrest of an ordinary foreigner and a foreigner with a diplomatic status. While the former is permitted, the latter is not.

its territory is also unquestionable. However, it is firmly established that this liberty or discretion should be exercised judiciously by a state.⁹⁴⁹ There are judicial *dicta* to the effect that states must give convincing reasons for expelling an alien.⁹⁵⁰ For example, in the *Boffolo* case⁹⁵¹ which concerned an Italian national expelled from Venezuela, it was held that although states possess a general right of expulsion, it could only be resorted to in extreme circumstances and accomplished in a manner least injurious to the person affected.

Apart from legal considerations, human conscience dictates that when an alien is to be expelled or deported, it should be done in a very humane manner. The process adopted should not only be reasonable, but the expulsion itself should be effected in such way that the pain, suffering and agony associated with it is minimised.⁹⁵² It is necessary to ensure that reasonable time is afforded to a person who has lived in a territory for a certain length of time, and has established either business or professional links there to fold up his or her business.⁹⁵³ Likewise, an alien who is to be expelled or deported should not be humiliated or disgraced before or during the course of such deportation or expulsion.⁹⁵⁴ If this happens, then, the envoy has a right to intervene. Thus, where the means adopted for the expulsion reveals that the alien has been tortured or tormented, the diplomatic envoy of his or her state of nationality reserves the right to question such capricious or unreasonable exercise of power.⁹⁵⁵

(c) *Cases of denial of justice*

Most frequently, claims are laid on the basis of what is termed “denial of justice.”⁹⁵⁶ In a broad sense, the expression covers all injuries inflicted on foreign nationals abroad in violation of international justice whether by judicial, executive or legislative

⁹⁴⁹ See for instance Reg No 72/194 EEC Council Directive of May 18 1972 [1972] OJ L121/32 1972-05-26. See Sen *supra* n 52 366.

⁹⁵⁰ See e.g. *Dr Breger's case* Whiteman *Digest* vol VIII 861.

⁹⁵¹ 10 RIAA (1930) 538.

⁹⁵² Sen *supra* n 52 366.

⁹⁵³ *Idem* 367.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ See Lauterpacht *The Function of law in the International Community*. (1933) 284 & Oppenheim *supra* n 244 Vol 1 691.

⁹⁵⁶ Sen *supra* n 52 376.

organs.⁹⁵⁷ In its narrow and more technical sense, however, it connotes misconduct or inaction on the part of the judicial agencies of the respondent state, denying to the citizens or the claimant state the benefits of due process of law. To constitute a denial of justice in the narrow sense, there must be some abuse of the judicial process or an improper administration of justice.⁹⁵⁸

In *Chattin's Claim*,⁹⁵⁹ for instance, Chattin, a US citizen, was arrested for embezzlement in Mexico. His trial was consolidated with those of several other Americans and Mexicans who had been arrested on similar charges. He was convicted and sentenced to two years' imprisonment and his appeal was rejected. Chattin escaped from jail during an uprising and returned to the US. In asserting Chattin's claim, the US argued that the arrest was illegal, that he was mistreated while in prison, that his trial was unreasonably delayed, and that there were irregularities during the trial. The Claims Commission held that there was denial of justice in the trial, and ordered Mexico to pay damages to the US. Similarly, in the *Cutting Case*,⁹⁶⁰ the US intervened with Mexico in regard to the trial of an American citizen who had been arrested on a charge of criminal libel.⁹⁶¹

Thus, although an alien cannot complain if he or she is punished under local law for an offence he or she has been found to have committed, this principle is subject to two exceptions. The first exception is that it is not applicable where the rules of natural justice are not observed during the trial.⁹⁶² The other concerns where the alien in question is subjected to a sentence which may be regarded as unduly harsh or barbarous according to civilized standards.⁹⁶³ In such instances, the diplomatic mission can intervene.

⁹⁵⁷ E.g. mistreatment in jail, or arbitrary confiscation of property.

⁹⁵⁸ E.g. wrongful arrest and detention, obstructing access to courts, unwarranted delays in procedure, a manifestly unjust judgement of the court, a refusal to hear the defendant, or a grossly unfair trial. See *Sen supra* n 52 378. See also *Harris supra* n 385 736.

⁹⁵⁹ *Supra* n 32 667. See also *Cutting Case* (1880) *Moore's Digest of International Law* (1906) Vol II 228.

⁹⁶⁰ *Moore's Digest of International Law* (1906) Vol II 228. See also *Pope's case* 8 *Whiteman* 709.

⁹⁶¹ A mere error in the judgment of an international tribunal does not amount to a denial of justice: See *Salem case* (1932) *United Nations Reports of International Arbitral Awards* Vol. II 1202.

⁹⁶² Eg *Chattins Claim supra* n 32.

⁹⁶³ E.g. *Neers Claim supra* n 34.

(d) *Infringement of property rights*

Although property rights are not listed as human rights in terms of the ICCPR or the ICESCR, the UDHR clearly identifies property rights as human rights.⁹⁶⁴ It must be recalled that all rights are indivisible and inter-related.⁹⁶⁵ Interestingly, diplomatic missions have been geared more towards the protection of property rights than civil or political rights over the years.⁹⁶⁶

Assistance of the envoy is often sought where the properties are acquired, expropriated or confiscated⁹⁶⁷ by the receiving State. Such assistance is also sought where the properties are damaged, destroyed or where the rights over them are extinguished.⁹⁶⁸ In *Texaco v Libya*,⁹⁶⁹ for instance, in 1973 and 1974 Libya nationalised all the property rights, assets and interests of the two claimants⁹⁷⁰ both of US nationality. It was held that Libya was in breach of the concession agreement and that the appropriate remedy under the circumstance was that of *restitutio in integrum*⁹⁷¹

Again, in his representation to the Mozambican government over the expropriation of British assets in Maputo, the British Ambassador to Mozambique made it abundantly clear to the Mozambican government that his government was entitled to claim prompt, adequate, and effective compensation.⁹⁷² Likewise, the British Ambassador to Sri Lanka also demanded for compensation from the Sri Lankan government over the nationalisation of tea estates in that country.⁹⁷³ This was also the case in Chile when British assets were expropriated in 1981.⁹⁷⁴ It must be stated that the properties or property rights that may be sought to be protected, may be those of nationals of the home state, who are resident in the territory of the receiving state, or

⁹⁶⁴ See UDHR art 17.

⁹⁶⁵ See the Vienna Declaration and Programme of Action par 5 adopted at the Vienna Conference on Human Rights 1993 *supra* n 214.

⁹⁶⁶ See Erasmus & Davidson *supra* n 293 80.

⁹⁶⁷ See the cases of *Certain German Interests in Polish Upper Silesia* PCIJ Rep ser A No 7 (1929) 22; *Amoco International Finance Corp. v Iran* *supra* n 33; *Liamco case* *supra* n 33; *Aminoil case Kuwait v American Independent Oil Co.* 21 ILM 976 (1978) etc.

⁹⁶⁸ See *Sen* *supra* n 52 381.

⁹⁶⁹ (1977) 53 ILR 389; (1978) 17 ILM 1.

⁹⁷⁰ *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Libya*.

⁹⁷¹ Par 91.

⁹⁷² *Sen* *supra* n 52 385.

⁹⁷³ *Ibid.*

⁹⁷⁴ *BYIL* Vol LII (1981) 498.

those of non-resident nationals or companies incorporated in the home state of the envoy.⁹⁷⁵

(e) *Injury at the hands of private persons*

A foreign national may be injured through the act of a private individual. Those class of cases will be discussed forthwith. No doubt, a foreign national may sustain severe bodily harm as a result of being assaulted by a private individual. Such a person may also be injured in a riot or may be mobbed during an uprising. In the same vein, the person may lose his or her home, business or property as a result of looting or demolition. It is not uncommon that a person may become a victim as a result of his or her race or nationality.⁹⁷⁶

The general rule of international law in relation to state responsibility is that a State is not responsible for acts committed by one of its citizens against a foreigner where the wrongful act is not imputable to the State.⁹⁷⁷ The individual may of course be liable for criminal prosecution in the municipal courts, and indeed, the government concerned may be held internationally responsible if it fails to discharge its duty of “diligently prosecuting and properly punishing” the offender.⁹⁷⁸

Nevertheless, in cases of riot or civil commotion, the diplomatic envoy will be well within his or her rights to ask the government of the receiving state to take adequate measures to protect the lives and properties of the envoy’s nationals, and to protest to the government if it fails to do so. It is to be expected that the authorities of the receiving State shall afford the foreigner adequate protection in respect of his or her life and property. Failure to do so may trigger diplomatic intervention.⁹⁷⁹

(f) *Refusal of entry visa*

Normally, states refrain from laying complaints on the bases that their national is being denied entry into another state, because, the granting or refusal of entry visa under international law is strictly within the exclusive domestic jurisdiction of the

⁹⁷⁵ E.g. *Barcelona Traction case supra* n 26.

⁹⁷⁶ The xenophobic attack on foreigners in South Africa in May 2008 is a good example *Ibid.*

⁹⁷⁷ Provided that the person involved is not a policeman or a government official.

⁹⁷⁸ See *Noyes Claim* 6 RIAA, 308 311 (1933); & *Neer Claim supra* n 34 60.

⁹⁷⁹ See *Sen supra* n 52 42.

receiving state. As a result, such complaints or protests are rarely made the basis for the exercise of diplomatic protection.⁹⁸⁰

However, cases of refusal of entry visas by the receiving state may be handled by the diplomatic envoy. In this connection, the plight which the individual concerned is facing, coupled with the suffering which may be visited upon him or her as a result of the refusal of entry visa, may be brought to the attention of the government of the receiving state by the envoy, for reconsideration.⁹⁸¹ In order to safeguard the rights of their nationals and ensure their entry into the territory of other states, states have sometimes entered into treaties of friendship and commerce in advance, wherein the right of entry to each other's nationals is guaranteed.⁹⁸²

(g) *Protection of interests of nationals by a mission of a third State*

Article 45 of the VCDR provides that if diplomatic relations are broken off between states, or if a mission is permanently or temporarily recalled, the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.⁹⁸³ Article 46 provides that a sending state may, with the prior consent of a receiving state, and at the request of a third state not represented in the receiving State, undertake the temporary protection of the interests of the third State and its nationals. It can be seen that the protection of the rights or interests of nationals in discharge of its protecting function falls squarely on the mission.⁹⁸⁴

It is important, however, for the envoy to know in what type of case he or she would be justified in intervening on behalf of his or her nationals and the appropriate

⁹⁸⁰ Sen *supra* n 52 346.

⁹⁸¹ If for instance a foreign student who had been studying for a higher degree in the receiving State suddenly discovers, after a brief absence from the country that his or her entry into the receiving State has been blocked as a result of refusal of entry visa, thereby foreclosing his or her chances of graduating, the envoy may lodge a complaint against the policy adopted by the receiving state and plead on behalf of the stranded student. See Sen *supra* n 52 346.

⁹⁸² In some countries, the law and practice allows free entry and right of residence to nationals of certain groups of states. For instance, in the past, citizens of Commonwealth countries were allowed to enter Britain and reside there without restriction. Sen *supra* n 52 324.

⁹⁸³ Eg when the Libyan Embassy was closed after the Yvonne Fletcher shooting incident, the embassy and interests of Libyans living in Britain were protected by Saudi Arabia. See Barker *supra* n 870 4.

⁹⁸⁴ Particularly under art 3(1) (b) of the VCDR.

occasions for such representation.⁹⁸⁵ This will necessarily depend on whether the right infringed is a fundamental right which an alien is entitled to enjoy in the receiving state under municipal and international law.⁹⁸⁶

7 Ways of effecting diplomatic protection of human rights by diplomatic missions

Diplomatic envoys protect the human rights or interests of their nationals in practical ways.⁹⁸⁷ Situations in which diplomatic envoys are normally expected to intervene in order to protect the human rights or interests of their nationals have been highlighted. The more formal manner of approach is by means of lodging a protest when the rights of foreigners are violated. Protests are usually lodged where, in the opinion of the sending state, the attitude of the receiving state towards a particular individual, or towards the nationals of the sending state in general is outrageous, falls below expectation and is not consistent with the tenets of international law.⁹⁸⁸ A protest exposes the deep disagreement with the negative policies of the government of the receiving state and highlights its negligence of duty towards the sending state in international law.⁹⁸⁹

Approaches to such matters are first made informally in the shape of seeking information and requesting relief, an exercise in persuasion, rather than confrontation.⁹⁹⁰ If no redress is forthcoming by such informal approaches, a formal protest may be lodged.⁹⁹¹ Ultimately, in certain circumstances, other measures may be invoked if no relief is obtained even after exhausting such local remedies as may be available under the municipal laws.⁹⁹² The exercise of diplomatic protection as already emphasized, however, may involve resort to both amicable and non-amicable ways of conflict resolution. These may range from diplomatic negotiations,

⁹⁸⁵ *Sen supra* n 52 323.

⁹⁸⁶ *Ibid.*

⁹⁸⁷ *Ibid.*

⁹⁸⁸ E.g. when the receiving State expropriates property without paying compensation, when it is responsible for denial of justice, or fails in its duty of affording protection to aliens.

⁹⁸⁹ *Sen supra* n 52 388.

⁹⁹⁰ *Ibid.*

⁹⁹¹ *Ibid.*

⁹⁹² *Idem* 389.

good offices, resort to international tribunals and, finally, to the threat or actual use of force.⁹⁹³

Occasions which may call for protests include situations where the receiving state repeatedly ignores previous complaints made by the sending state, where foreigners are treated in such a way as to constitute a flagrant disregard of the principles of international law, or where there is a clear case of a rape of justice, calling for prompt and instant protest.⁹⁹⁴ Thus, situations such as an unjustified arrest, or the confiscation of alien property against the rules of natural justice and the fundamental human rights of their owners, could constitute the platform for the lodging of protests.⁹⁹⁵ Under such circumstances, a representation may be made in respect of the interests of the nationals of his or her country generally, or in respect of a particular individual.⁹⁹⁶

8 Preferment of claims

In practice, a foreigner whose rights have been violated by the receiving state takes the matter up with the embassy of his or her own country or nationality. The embassy may try to assist the person by making representations on behalf of the injured individual. If the embassy is unable to solve the problem, or if there is a denial of justice, the embassy may refer the matter to the Ministry of Foreign Affairs of the sending state which may, in turn, refer the matter to the executive arm of government.

If the government believes that there has been a violation of international law and that the rights of its citizen which have been infringed, are under international law or treaty “protected right,” it may then take the matter up through diplomatic channels with the foreign office of the defaulting/receiving state. If no settlement is reached at

⁹⁹³ See Tiburcio *supra* n 26 43.

⁹⁹⁴ Sen *supra* n 52 389.

⁹⁹⁵ *Ibid.*

⁹⁹⁶ In situations where the interests of nationals are generally affected, the occasion for representation may arise when the government of the receiving state has introduced, or is contemplating the promulgation of any law which is likely to affect the interest of all its nationals in that state, such as nationalisation decrees, taxation laws, or laws relating to business or profession. Sen *ibid.*

this stage, it may institute an international claim in an international court or tribunal.⁹⁹⁷

The sending state is deemed to be injured through its subjects or to be asserting its right to ensure respect for the rules of international law *vis-à-vis* its nationals.⁹⁹⁸ Once the intervention is made or the claim laid, the matter becomes one that concerns the two states alone.⁹⁹⁹ In *Mavromatis Palestine Concession Case*¹⁰⁰⁰ for instance, the PCIJ observed that

Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is sole claimant.

The claim may be for damages for breach of contract, restitution in kind for property wrongfully taken, specific performance of an obligation which the receiving state has wrongfully failed to discharge, or for a restraint from further wrongful conduct.¹⁰⁰¹ In such a claim, the reparation sought or demanded is designed to re-establish the situation which would have prevailed if the wrongful act or omission had not occurred.¹⁰⁰²

Where restitution is not possible, payment of damages is the only remedy that can be claimed.¹⁰⁰³ In some cases, damages are claimed in addition to restitution. Damages are meant to restore the injured alien or his or her legal representatives to as good a position in financial terms, as that in which the person would have been, if the wrongful act had not taken place. It may also aim at providing satisfaction for the wrong or injury suffered by him or her due to the conduct of the receiving state.¹⁰⁰⁴

⁹⁹⁷ *Idem* 390.

⁹⁹⁸ This is the famous *Mavromatis* principle which is said to be a fiction. See the *Official Record of the GA supra* n 1 25.

⁹⁹⁹ See also the case of *Panevezys-Salutiskis Rly Case, supra* n 81. Some writers such as Weis *supra* n 52 38 and Borchard *supra* n 1 358 hold the view that since the right of diplomatic protection belongs to the State, even if the injured national waives his or her right for compensation, the State of his or her nationality can nonetheless proceed to prosecute the claim. See Tiburcio *supra* n 26 59.

¹⁰⁰⁰ *Supra* n 36 12.

¹⁰⁰¹ *Sen supra* n 52 389-390.

¹⁰⁰² This is known as *restitutio in integrum* See the case of *Texaco v Libya supra* n 986 par 93.

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ E.g. the nationalisation of assets belonging to American oil co. by Libya. See *Texaco v Libya, supra* n 968.

It is very likely that the receiving state may settle with the sending state once the claim is preferred. However, in cases where the receiving state proves to be adamant, the claim could be pursued through the usual means for settlement of international claims between states,¹⁰⁰⁵ such as by having recourse to the ICJ¹⁰⁰⁶ or by resorting to an international arbitration¹⁰⁰⁷ or, in rare cases to war. As was held in the *Saldutiskis Railways Case*¹⁰⁰⁸

The right of every sovereign state to protect its subjects who have been injured by acts contrary to international law on the part of other states and who have been unable to obtain satisfaction by remedies under municipal law, is an unabridged right

9 Scope or extent of diplomatic protection of human rights by diplomatic missions

Certain basic factors must be taken into consideration whenever a diplomatic mission is contemplating the dimension to which it may go in procuring protection for nationals of its home state. These factors include state practice, the policy of the sending state towards diplomatic protection, instructions from Head Office, as well as judicial and arbitral decisions.¹⁰⁰⁹ Article 3(b) of the VCDR, however, expressly provides that diplomatic missions should protect the interests of their State and nationals “within the limits permitted by international law.”

The question, however, is the legal effect of the words “within the limits permitted by international law” in article 3 (b) of the VCDR, on the exercise of diplomatic protection by diplomatic missions. Has it watered down the power of diplomatic missions to effectively protect their nationals abroad?

Denza has thrown some light on the origin of the provision in the text of the VCDR.¹⁰¹⁰ According to her, there was prolonged debate at the Vienna Conference

¹⁰⁰⁵ See *supra* n 52 390.

¹⁰⁰⁶ E.g. cases such as *Barcelona Traction case supra* n 26; *Mavrommatis Palestine Concession case supra* n 36 or *Saldutiskis Railways case supra* n 81 etc.

¹⁰⁰⁷ For other diplomatic ways of protecting personal or property rights, see ch 2.

¹⁰⁰⁸ *Supra* n 81 16.

¹⁰⁰⁹ See *Sen supra* n 52 323.

¹⁰¹⁰ See *Denza supra* n 883 30.

as to whether the function of “protecting in the receiving state the interests of the sending state and of its nationals” should be qualified by some reference to the rules of international law. The demand for such a reference came from states which had more frequently been defendants to diplomatic claims, and wished for political reasons, to circumscribe the right to diplomatic protection. The ILC had earlier addressed the point by inserting, in its commentary, a paragraph stating that, the inclusion of the function of protection did not prejudice the latter provision prohibiting interference in the internal affairs of the receiving State, or the International Law rule requiring the exhaustion of local remedies.¹⁰¹¹

Denza goes further to explain that

“India, Mexico and Ceylon¹⁰¹² proposed to the conference an express qualification in the text, referring to the rules of international law. Other states doubted the need for amendment on the grounds that all the functions of the mission could only be exercised within the limits permitted by international law, and that the entire convention operated within the framework of customary international law rules, unless they were expressly altered. The insertion of such a *proviso* in one sub-paragraph of a single article, some delegates felt, would be open to misconstruction. Ultimately, however, most delegates accepted the need for reassurance in this particular context and the words “*within the limits permitted by international law*” were added to the draft of the ILC by the Conference”.¹⁰¹³

Has this provision watered down the power of diplomatic missions to effectively protect their nationals abroad? It is submitted that it has not. This is because the provision has not subtracted from or otherwise circumscribed the limits of diplomatic protection by diplomatic missions under customary international law.¹⁰¹⁴ As already said, there is practically no limit for the exercise of diplomatic protection.¹⁰¹⁵

¹⁰¹¹ *Ibid.*

¹⁰¹² Now Myanmar (Burma).

¹⁰¹³ Denza *supra* n 883 31.

¹⁰¹⁴ See Silva *supra* n 10 66. This was the general concensus at the Vienna Conference of 1961 See Denza *ibid.*

¹⁰¹⁵ See Tiburcio *supra* n 26 43. For a contrary view however, see the commentary to par 8 Draft Articles 1 on Diplomatic Protection 2006 *Official Records of the GA supra* n 1 27 which states *inter alia*: “The use of force prohibited by art 2 par 4 of the Charter of the UN is not a permissible method for the enforcement of the right of diplomatic protection.” See also *supra* n 935.

In cases where bilateral treaties are in force, however, the scope of diplomatic protection will no doubt be governed by the provisions of such treaties.¹⁰¹⁶ Such cases are however, still very rare, and the mission would most often need to fall back on customary and conventional rules.¹⁰¹⁷

10 Consular protection of nationals abroad

As already mentioned, diplomatic protection includes consular protection.¹⁰¹⁸ Although diplomatic protection was traditionally conducted through the medium of ambassadors and their staff, the growth of trade and commercial intercourse necessitated the establishment of the consular office, which was expanded to incorporate the function of protection of nationals abroad. Consuls are agents of a state in a foreign country. Although they are not diplomatic agents, the protection they afford is generally regarded as diplomatic protection.¹⁰¹⁹

The primary duty of a consul, therefore, goes beyond the protection of the commercial interests of his or her appointed state to the protection of the interests of the consul's nationals as well.¹⁰²⁰ The role played by the consul in safeguarding the interests of nationals of his or her home state abroad has been highly acclaimed. It has been published in many books, affirmed by many commentators and confirmed by state practice.¹⁰²¹ In his commentary on the role of consuls in safeguarding the interest of their nationals abroad, Pradier-Fodere said:

“It is a consul's duty to see that his national's rights are respected in a foreign land and to take all measures which he deems necessary and useful to accomplish this end; it is through its consuls that the state extends its protecting arm over the entire surface of the globe”.¹⁰²²

¹⁰¹⁶ *Sen supra* n 52 323.

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ *See* n 866 *supra*.

¹⁰¹⁹ *Ibid.* *See also supra* n 15.

¹⁰²⁰ *Ibid.* *See also* art 5(a) of the VCCR.

¹⁰²¹ *Lee supra* n 760 124.

¹⁰²² *See Pradier-Fodere Traite de droit international Public* (8vols, 1888) IV 555 (translation by Stuart 372).

According to Lee,¹⁰²³ Commander Ribeiro dos Santos referred to the consul's right to protect as the most "sacred and noble attribute of consuls".¹⁰²⁴ while Oppenheim called it "a very important task" of consuls.¹⁰²⁵

A consul's right to protect nationals of his or her country is often embodied in bilateral treaties between the States concerned. In the absence of a treaty, however, a consul's right to protect nationals of his or her country may be based on customary international law,¹⁰²⁶ or on the assistance often contained in the "most-favoured – nation" treatment clause in instructions other than treaties.¹⁰²⁷

It is not clear whether or not a national of a consul's home state can compel the consul to render the required protection to him or her as of right.¹⁰²⁸ There are, however, two schools of thought on this issue. While some commentators argue that nationals have no right to demand protection from consuls, others argue to the contrary.¹⁰²⁹ The US, Brazil, Hungary, and the UK practice discussed below, for example, seem to indicate that it is the duty of a consul to provide the necessary assistance to his or her countrymen even without any formal request.¹⁰³⁰

In order to ensure that no US citizen is denied protection, US consular instructions provide that if there is any doubt as to the identity of any individual or the facts in issue, such cases should be referred to the US government for decision. Otherwise temporary relief should be given to the affected individual while instructions from headquarters is being awaited.¹⁰³¹ However, US consuls are duty-bound to protect once the identity of the individual as a US citizen is firmly established.¹⁰³² To ensure that US citizens, arrested or imprisoned abroad, are given due protection, the

¹⁰²³ *Supra* n 760 124.

¹⁰²⁴ See de Cussy *Reglements consulaires* (1920) 20.

¹⁰²⁵ Lee *supra* n 760 124.

¹⁰²⁶ See Preamble to VCCR.

¹⁰²⁷ Lee *supra* n 758 124.

¹⁰²⁸ *Ibid*

¹⁰²⁹ *Ibid*.

¹⁰³⁰ *Ibid*

¹⁰³¹ *Ibid*

¹⁰³² *Ibid*. See s 253 1 of 7 FAM 1100 Appendix E. which reads "generally the establishment of the claim to United States nationality also establishes the right to receive the protection of this government abroad."

Department of State in 1980 sent complete instructions regarding consular services and functions relating to their protection to all Foreign Service posts.¹⁰³³

Brazilians residing abroad are empowered by Brazilian law to demand protection from their consular officials as of right.¹⁰³⁴ Consular officials are also conferred with both the right and the obligation not only to assist and protect Brazilian citizens abroad, but to ensure that their rights under treaties, custom and international law are safeguarded and preserved.¹⁰³⁵

Instructions given to British consular officials are more comprehensive and far reaching.¹⁰³⁶ In their protective capacity, British consular officials are *inter alia* expected not only to advise, but to help their nationals in their transactions with local authorities; to keep them abreast of all laws which may affect them personally or their business interests; to place a list of lawyers at the disposal of those who may be in need of legal advice or assistance; to safeguard their interests as entrenched in treaties, international customs, norms and usages, so that their welfare is not compromised or placed at a disadvantage *vis-à-vis* nationals of the receiving state; to refer doubtful cases to diplomatic personnel for advice and to inform them of any inability to obtain local remedies. They are to intervene in judicial proceedings where (a) a clear case of miscarriage of justice is established (b) all local remedies have been exhausted and (c) an appeal to a higher court would clearly be a waste of time.¹⁰³⁷

¹⁰³³ These were subsequently published in ch 400 Vol 7 "Overseas Citizens Services" of the *Foreign Affairs Manual* and the Dept of State *Digest* 1980 360-76 now revised. The list of matters covered is very comprehensive and includes issues such as notification of arrests, the provisions of the VCCR relating to arrests, bilateral consular treaties, relations with local authorities, access to detained persons and provision of legal services, personal visits to arrested persons within 48 hours of notification, telephone contacts where possible, visit by volunteers or consular agents where available, list of attorneys, providing Instructional materials on Judicial procedures, on confiscation of prisoner's personal property, on the condition of the prisoner and the environment i.e prison conditions, on the health of the prisoners, nutrition, medical and dental care, morale, etc.

¹⁰³⁴ Brazil, *Consolidation of the laws, Decrees, Circulars and Decisions referring to the Exercise of the Brazilian Consular Functions*. (Decree No.360 of Oct 1953). This has been updated.

¹⁰³⁵ Art 69 of the Hungarian Constitution provides "Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary during his/her legal staying abroad." Even before the UK ratified the VCCR, its *Foreign Service Instructions* provided (VIII-9) "It is the duty of a foreign service officer to watch over and take all proper steps to safeguard the interests of British subjects and British protected persons within his district".

¹⁰³⁶ See Lee *supra* n 760 125.-126.

¹⁰³⁷ *Ibid.*

Nigeria has in principle adopted the provisions of article 5 of the VCCR and does not issue any special guidelines to its consular offices with regard to the protection of her nationals abroad. However, what South African consular officers can do for South Africans detained or arrested abroad is clearly spelt out.¹⁰³⁸ They include:

- To establish contact with the detainee as soon as possible after verifying South African citizenship;
- Provide general information about the legal system of the country of arrest;
- Maintain contact with the arrested South African citizens abroad, with due observance of the laws and regulations of the arresting state;
- Undertake prison visits. The frequency of prison visits depends on current policy, the location, culture and laws of the arresting state, the prevailing security situation in the country and/or the prison and subject to the mission's operational circumstances;
- Contact family or friends, to a maximum of three, only if authorised to do so by the detainee / prisoner in writing;
- Assist with the transfer of funds;¹⁰³⁹ and
- Ensure that medical problems are brought to the attention of the prison authorities.¹⁰⁴⁰

11 Consular functions

Consular functions are listed under article 5 of the VCCR 1963.¹⁰⁴¹ They include:

¹⁰³⁸ See *Advice to South African Citizens in the event a South African is arrested or jailed abroad* <http://O-www.dfa.gov.za.innopac.up.ac.za/consular/arrest.htm> 20009/02/09 1-2.

¹⁰³⁹ A maximum amount of R2,000.00 per month per detainee / prisoner may be deposited by designated family members / friends. See *supra* n 1033 2.

¹⁰⁴⁰ What Consular officers cannot do for South Africans detained / arrested abroad include: (1) Institute or intervene in court proceedings or judicial process (2) obtain or give legal advice (3) organise a release from prison or bail (4) travel to dangerous areas or prisons for prison visits (5) Investigate crimes (6) instruct next of kin or friends to transfer money. See *supra* n 1035 3.

¹⁰⁴¹ Until the adoption of the VCCR in 1963, consular relations were governed by rules of Customary International Law. Often they were regulated by conflicting bilateral treaties and occasionally by regional treaties. Like the VCCR, the adoption of the VCCR was undoubtedly the single most important event in the history of consular institution. Today, consular relations are governed by the VCCR. This instrument constitutes a general framework which can be supplemented by bilateral or multilateral conventions or agreements. The process for codification was the same as that of the VCCR. The ILC started work in 1955. The final draft was submitted to the UNGA in 1961, while the Convention was convened and adopted in 1963. See Lee *supra* n 760 241.

- (a) protecting the interests of the sending State and of its nationals, both individuals and body corporate in the receiving State within the limits permitted under International Law;
- (b) furthering the development of commercial, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention; and
- (c) ascertaining, by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State
- (d) reporting thereon to the government of the sending State and giving information to interested persons.¹⁰⁴²

Other consular functions include issuing passports and travelling documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State

- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state.¹⁰⁴³

This list is more elaborate than its counterpart in the VCDR.¹⁰⁴⁴ This is easily explained by the fact that consuls have more limited but more technical functions than diplomats.¹⁰⁴⁵ In connection with the function of protection of nationals abroad, article 5(a) of the VCCR specifically empowers the consul to protect *inter alia*:

in the receiving state, the interest of the sending State and of its nationals both individual and corporate bodies within the limit permitted by international law.

Article 5(e) provides that the consul's function shall also consist of:

helping and assisting nationals, both individuals and bodies corporate of the sending State.

¹⁰⁴² These are similar to s 3 of the VCDR.

¹⁰⁴³ See Art 5(f) – (m) for other consular functions under the VCCR.

¹⁰⁴⁴ While art 3 of the VCDR contains 5 functions (a – e) art 5 of the VCCR contains 13 functions (a – m).

¹⁰⁴⁵ Harris *supra* n 385 362.

This function of protection was reemphasized in the *Case Concerning U.S Diplomatic and Consular Staff in Tehran*,¹⁰⁴⁶ where the ICJ forcefully stressed the importance of the function of diplomatic and consular missions in protecting nationals of the sending State. In connection with the two private American citizens detained with the staff of the embassy, the court noted that:

The seizure and detention of these individuals in the circumstances alleged by the US, clearly falls within the scope of the provision of Article 5 of the VCCR 1963 expressly providing that consular functions include protecting, assisting, and safeguarding the interest of nationals and whereas, the purpose of these functions is precisely to enable the sending State through its consulates, to ensure that its nationals are accorded the treatment due to them under general law, as aliens within the territory of the foreign state.¹⁰⁴⁷

The mandate under article 5(a) of the VCCR to protect is similar to the mandate under the provisions of article 3(b) of the VCDR. In other words, the provisions of article 5(a) of the VCCR is similar to the provisions of article 3(b) of the VCDR.¹⁰⁴⁸ It is submitted that the “interests” of nationals referred to in article 5 of the VCCR also incorporates and includes human rights as is the case under article 3(b) of the VCDR.¹⁰⁴⁹ Specific aspects of consular functions of protection will now be discussed.

11.1 Communication and contact with nationals

A major protective function of consuls is to communicate with and contact nationals of the sending state freely and to have access to them.¹⁰⁵⁰ Failure to do so is a breach of duty and has resulted in action being initiated before the ICJ by Germany and Paraguay against the US. In *Paraguay v US*¹⁰⁵¹ and in *Germany v US*¹⁰⁵² the ICJ held that the US was in breach of its obligations under the provisions of article

¹⁰⁴⁶ *Supra* n 242.

¹⁰⁴⁷ Order of (1979) 12 15 ICJ Rep 1979 par 19.

¹⁰⁴⁸ Both deal with the protection of the interest of the sending State and their nationals within the limit permitted by International Law.

¹⁰⁴⁹ See the argument in support of this point pp 129 - 131 *supra*.

¹⁰⁵⁰ The VCCR art 36.

¹⁰⁵¹ (1998) ICJ 248.

¹⁰⁵² (*La Grande case*) 40 ILM 1069 (2001) *supra* n 398.

36(1) of the VCCR in that it had not informed the La Grand brothers of their rights under article 36(1) ‘without delay.’¹⁰⁵³

The term “freedom of communication”¹⁰⁵⁴ with nationals may be defined as the freedom from interference with, and censorship of communications.¹⁰⁵⁵ In consular usage, such freedom is founded upon the same principles which underlie the inviolability of consular correspondence and archives.¹⁰⁵⁶ Freedom of communication between consuls and their co-nationals may be regarded as so essential to the consular exercise of functions that its absence would render the establishment of consular relations meaningless. Thus, even in the absence of a treaty, the right of consuls to communicate with nationals of their State in peace time is implicit in consular office.¹⁰⁵⁷

This function has assumed growing importance as more and more people travel abroad – aided by reduced barriers to movement, relatively cheaper transport, and the tourists and package –travel industry.¹⁰⁵⁸ As the number of tourists and travellers soar, so does the number of those who infringe the law and get arrested.¹⁰⁵⁹ The causes of arrests and detention of foreign nationals range from drunken brawling, to drug, and espionage charges.¹⁰⁶⁰ As already indicated, essential to the fulfilment of a consul’s protective functions are his right to be informed immediately of a detention of a national of the sending state.¹⁰⁶¹ His duty includes visits to them in prison, and assistance rendered to them in legal and other matters.¹⁰⁶²

In the case of Lawrence Simpson, a US citizen and a seaman, who was arrested on board the US steamship *Manhattan* upon arrival in Hamburg in June 1935 and charged with high crimes, the US Consul General in Hamburg was given permission

¹⁰⁵³ Art 36(1)(b) provides *inter alia* that “the said authorities shall inform the person concerned without delay of his rights under this sub – paragraph.” See also *Avena* (Mexico v US) *supra* n 398.

¹⁰⁵⁴ See art 35 VCCR.

¹⁰⁵⁵ Lee *supra* n 760 133.

¹⁰⁵⁶ See the Harvard Research *Draft* p 306. See Lee *supra* n 760 133.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ See *supra* n 991.

¹⁰⁶² Article 36(1)(c).

to see him at a concentration camp.¹⁰⁶³ The Consul General was assured that Mr Simpson could communicate with him in writing and could be visited by other representatives of the consulate if necessary. Simpson was sentenced to three years in the penitentiary, after admitting that he had imported communist propaganda material into Germany. His sentence was later commuted due to the energetic efforts on his behalf by the US Consular General. In yet another incident, upon the complaint of the Mexican Embassy in 1934 that officials in California had refused to permit the Mexican consul to visit a Mexican citizen in jail, the Department of State wrote to the Governor of California and the Mexican consul was subsequently allowed to visit the prisoner.¹⁰⁶⁴

11.2 Espionage cases

A frequent exception to the consular right to protect nationals and visit them in prison is in cases of spying and espionage.¹⁰⁶⁵ Before the VCCR came into force, no consular protection was afforded to persons who were accused of espionage¹⁰⁶⁶ In one of the most mysterious and intriguing cases in espionage history, Adolph Arnold Rubens, also called Donald Louis Robinson, and not known to be an American citizen,¹⁰⁶⁷ obtained a fraudulent US passport for himself, his wife, and two deceased children and entered Russia *via* France, with valid visas.

Their disappearance and subsequent imprisonment *incommunicado* in Moscow, pending trial for espionage charges prompted the American Secretary of State to instruct the US *Charge d' Affaires* in Moscow, to call Soviet attention to a letter, written by Maxim Litvino,¹⁰⁶⁸ dated November 16 1933, to the US President. In this letter the Soviet Union assured President Roosevelt of the US that American nationals would be granted rights with regards to legal protection which would not be

¹⁰⁶³ Lee *supra* n 760 136

¹⁰⁶⁴ *Idem* 135.

¹⁰⁶⁵ *Idem* 151.

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ It may be of interest to note that the US Secretary of State, in 1862 Steward, was of the view that the US Consul should be allowed to visit any prisoner *claiming* American citizenship, so that should his citizenship be verified, the consul could lend his good offices or bring the case before the US government. See Lee *supra* n 760 135.

¹⁰⁶⁸ Soviet People's Commissar for Foreign Affairs.

less favourable than those enjoyed in the Soviet Union by nationals of the nation the most favoured in this respect.

Subsequently, the US consul in Moscow was allowed to interview Mrs Rubens.¹⁰⁶⁹

Another case of espionage was that of Colonel Rudolf Ivanovich Abel, a Soviet spy who was convicted of espionage and sentenced to thirty years imprisonment in the United States. A fine of \$3,000,¹⁰⁷⁰ was also imposed on him. He was denied the right of visitation. Since the adoption of the Vienna Convention, however, like those accused of any other crime,¹⁰⁷¹ no exception is made in cases of those detained or imprisoned for espionage related offences as consular protection and visits are extended to all.

11.3 Prisoners exchange programme

Another area where consular influence is felt by nationals living abroad is in the international prisoners exchange program of the UN which is coordinated and implemented by consuls. The exchange programme was achieved in 1995 at the fifth session of the UN Congress on Prevention of Crime and Treatment of Offenders.¹⁰⁷² The programme was adopted to improve the quality of life of prisoners. Imprisonment is never a happy experience. Imprisonment in foreign countries is worse because of language barriers, an unfamiliar judicial system and cultural, social, and educational disparities. Unaccustomed dietary and sanitary standards, differing rehabilitatory training, recreational facilities and approaches, and last but not least, separation from close friends and relatives whose regular visits, frequently

¹⁰⁶⁹ For the report of the interview see Dept. of State *Press Release* of 1938- 02 -12) 260. As a footnote to this long and tortuous case, Mrs. Rubens was released from the Moscow prison on 1939- 06 -10. She visited the US Embassy on 1939-06-19 and on three other occasions, but declined to accept a passport for return to the US. She became a Soviet citizen on 1939-10 -10. See Lee n 760 136.

¹⁰⁷⁰ *Ibid.* 151 When three Americans Robert Vogeler, Israel Jacobson and Edger Sanders allegedly confessed to espionage activities as charged by the Hungarian authorities, they were held in prison *incommunicado*. In the case of William Oates, who was charged with spying, the Czechoslovakian authorities did not permit any US officials to visit him for months. *Idem* 152.

¹⁰⁷¹ *Idem* 153.

¹⁰⁷² *Idem* 174.

provide the only source of comfort for prisoners, are other problems associated with imprisonment in a foreign land.¹⁰⁷³

The need, therefore, arose for an arrangement under which each country agreed to assume responsibility by enabling its nationals to serve out their sentences at home. Such an arrangement is beneficial to both the prisoners involved and consuls by freeing consuls to perform other duties.

11.4 Group protection

While consular protective functions are usually performed on behalf of individual nationals of the sending state, occasionally, such functions may also be required in group situations. An example is the xenophobic attacks on foreigners which occurred in SA in May 2008, when many foreigners were attacked and killed by black South African youths.¹⁰⁷⁴ During that incident the Nigerian consulate in Johannesburg played a crucial role in saving the lives of Nigerian nationals.¹⁰⁷⁵ Another example was the mass expulsion of foreigners in Nigeria in 1983.¹⁰⁷⁶ In that incident, all aliens without valid papers were given two weeks to normalize their papers or leave the country.¹⁰⁷⁷ Those who could not were subsequently expelled.¹⁰⁷⁸ Again, when people of Asian origin were expelled from Uganda in 1972, by Idi Amin, British and Asian consuls played a crucial role in their protection and rehabilitation.¹⁰⁷⁹

11.5 Cases of death of nationals abroad

The phenomenal growth of international trade and travel in recent decades has resulted in the death of many people outside their own countries whether or not due

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ See "Violence Against Nigerians continue in South Africa" *The Punch* 2008-05-19 10; "Immigrants Flee South Africa's Wave of Violence" *PM News* 2008-05-23 8; "Attacks on Foreigners spread in South Africa." *The Punch* 2008-05-22) 53.

¹⁰⁷⁵ *Ibid.*

¹⁰⁷⁶ See Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure* (1996) 140.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ Another example was the Jamestown incident in Guyana in which more than 900 Americans perished in a "mass suicide" in 1978. See Lee *supra* n 760 180.

¹⁰⁷⁹ See Tiburcio *supra* n 26 150.

to natural causes.¹⁰⁸⁰ Such deaths have entailed extra responsibilities for consuls. Such responsibilities include the notification of the next of kin, arrangement for autopsies where circumstances allow, preparation for local burial, encasement or cremation of the bodies, repatriation of the remains with appropriate documents, taking custody of personal effects of the deceased, and the filling of reports to appropriate officers.¹⁰⁸¹

12 Other consular functions

It is perhaps trite to state that consular treaties and regulations always reflect the changing needs of the time and the particular conditions and requirements of different countries. Thus, while treaties and regulations do recognise consular functions which are time honoured, and universally accepted, they may assign other uncommon duties to consuls. An example - is the UK–Italian Consular Convention of 1954¹⁰⁸² which required consuls “to aid and advise nationals of the sending state in regard to their rights under the social security legislation of the receiving state,” or to “further the development of the political, economic and cultural relations between the two states.”¹⁰⁸³

13 Amalgamation of diplomatic and consular functions: Effect on diplomatic protection

Diplomatic and consular functions have to a large extent been amalgamated. The relevant provisions stipulate that diplomats can exercise consular functions and *vice versa*.¹⁰⁸⁴

Article 3 of the VCCR provides that

¹⁰⁸⁰ See Lee *supra* n 760 184.

¹⁰⁸¹ The American Consular Instructions contains elaborate instructions on what to do in case of the death of an American national abroad. It is however not settled whether an inquest can be conducted when a diplomat dies. See “Overseas Citizens Services” of the *Foreign Affairs Manual* and the Department of State *Digest* (1980) 360-76. See Lee *supra* n 760 184.

¹⁰⁸² Art 21.

¹⁰⁸³ See art 5(m) of the VCCR which provide *inter alia* “performing any other functions entrusted to the consular post by the sending state.”

¹⁰⁸⁴ See the VCCR art 3(2) & the VCCR.art 70(1).

Consular functions are exercised by Consular Posts. They are also exercised by diplomatic missions in accordance with the provisions of this convention.

Article 3 (2) of the VCDR states that

Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 70 (1) of the VCCR also provides that

the provisions of the present Convention apply also so far as the context permits, to the exercise of consular functions by diplomatic missions.

Therefore, to the extent that a member of a diplomatic mission performs specifically consular functions, he or she does so in accordance with the terms of the Consular rather than the Diplomatic Convention.¹⁰⁸⁵ However, in determining the legal rules applicable to members of a diplomatic mission exercising consular functions, it must be borne in mind that there are no clear dividing lines between consular and diplomatic functions.¹⁰⁸⁶

Many of the detailed functions listed in article 5 of the VCCR could be regarded as aspects of “protecting” the interests of the sending state and its nationals in the receiving state. The key factor is usually not so much the nature of the function, but how it is performed.¹⁰⁸⁷ However, despite the amalgamation, political, economic and social factors have affected the consular institution negatively in recent years.¹⁰⁸⁸

¹⁰⁸⁵ *Ibid.*

¹⁰⁸⁶ See the commentary to art 1 of the Draft Arts on Diplomatic Protection *official Records of the GA supra* n 1 27 which states *inter alia* that “Diplomatic protection....differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general International Law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interest of the individual , acting in terms of the VCCR.”

¹⁰⁸⁷ The commentary to art 1 of the Draft Arts on Diplomatic Protection “Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult.” See Denza *supra* n 883 2.

¹⁰⁸⁸ On the positive side, the amalgamation has introduced the interchangeability and rotation system for the personnel of these two services. This has the effect of putting a consul on par with diplomatic personnel who used to enjoy a higher prestige than a consul. Moreover, the system has infused new blood and talent into the consular world. On the negative side however, chief among the factors that have adversely affected the consular institution in recent years are the fundamental conflict between nations, which are political as well as economic in nature. Politically, the consular institution has, more than ever before, become a pawn in the game of international politics. Political differences between states have led to actions and reactions,

Economically, in countries where economic life is regulated by a rigorous central planning board, and where the export-import trade is a government monopoly, consular functions have lost much of their original purpose and usefulness.¹⁰⁸⁹ The exchange of trade delegations and trade agencies for purposes of purchasing, selling, or bartering goods or overseeing commercial relations between states, have also declined somewhat.¹⁰⁹⁰

14 Diplomatic and consular privileges and immunity

To protect diplomats and consuls from intimidation or harassment in the course of their assignments or functions, including the exercise of diplomatic protection, diplomats and consuls are endowed with certain privileges and immunities.¹⁰⁹¹ These diplomatic and consular privileges and immunity have been in existence from time immemorial.¹⁰⁹²

culminating in the closure of many consulates the world over and the expulsion of consuls for political reasons. In addition to these factors, consular offices and personnel have become favourable targets of mob violence. Often consular officials receive less rigorous training than diplomats.

¹⁰⁸⁹ *Sen supra* n 52 318.

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of the local courts and other authorities for both official and, to a large extent, their personal activities. See *What is diplomatic immunity?* http://www.calea.org/Online/newsletter/No73/what_is_diplomatic_immunity.htm 2007/09/06.

¹⁰⁹¹ According to Satow, in general, a privilege denotes some substantive exemption from laws and regulations such as those relating to social security, whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement process of the receiving state. See *Satow's Guide to Diplomatic Practice* (1979) 120.

¹⁰⁹² For the *rationale* for Diplomatic privileges and immunity, see "Theoretical Basis of Diplomatic Law and Practice," 126-128 *supra*. Since diplomatic missions represent the states that send them, they are granted privileges and immunity as a mark of recognition, respect and honour accorded the sovereign or head of state that sent them. Besides diplomatic missions are expected to function efficiently in the conduct of international relations. Privileges and immunity are therefore granted them for the efficient performance of their duties. Moreover, the need to arrest the increasing number of serious crimes against diplomatic envoys and diplomatic missions such as murder and kidnapping of envoys, and attacks directed against the premises of legations, have made immunity and privileges inevitable. Furthermore, it must be borne in mind that real world negotiations are very different from intellectual debates in a university where an issue is decided on the merits of the arguments and negotiators make a deal by splitting the difference. Though diplomatic agreements can sometimes be reached among liberal democratic nations by appealing to higher principles, most world diplomacy has traditionally been heavily influenced by hard power. Therefore diplomats need protection.

Article 22 of the VCDR specifically declares that the premises of the mission are inviolable and that agents of the receiving state may not enter them without the permission of the Head of Mission. This provision seeks to facilitate the operations of normal diplomatic activities in the receiving state. The receiving state is also under a duty to protect the person of the diplomat, because the person of the diplomat is also inviolable.¹⁰⁹³ Hence, he or she shall not be liable to any form of arrest or detention. The receiving state shall treat him or her with due respect and shall take all appropriate steps to prevent any attack on his or her person, freedom or dignity.¹⁰⁹⁴

Similarly, subject to certain qualifications, consuls are entitled to the same privileges and immunities as diplomats under the VCCR.¹⁰⁹⁵ Article 31 of the VCCR for instance, emphasizes that consular premises are inviolable and may not be entered by the authorities of the receiving State without consent. Like diplomatic premises, they must be protected against intrusion and impairment of dignity.¹⁰⁹⁶

The principal difference between diplomats and consuls is that whereas, in the absence of any special agreement, consuls are immune from arrest, detention and the criminal process only in respect of acts and omissions done in the performance of their official functions, diplomats are immune from the jurisdiction of the receiving state whether they are carrying out their official functions or not.¹⁰⁹⁷

¹⁰⁹³ Art. 29 VCDR. See Denza *supra* n 883 210-211.

¹⁰⁹⁴ Art 29. Art 30 provides for the inviolability of the residence and property of a diplomatic agent, while art 31 endows the diplomatic agent with immunity from the jurisdiction of the receiving state. This immunity covers the diplomatic agent from giving evidence in court, and prevents the execution of any court process on him or her. The only caveat is that the immunity does not exempt him or her from the jurisdiction of the sending state. Arts 34 & 36 of the VCDR provide that diplomatic agents are exempt from all dues and taxes other than certain taxes and charges set out in art 34 and also from custom duties. The latter exemption was formerly a matter of comity or reciprocity.

¹⁰⁹⁵ Arts. 49 & 50.

¹⁰⁹⁶ Art 31(3). The Kasenkina incident of 1948 and the resultant development have led to the adoption of a new and uniform policy by Britain, US, and France. In a dispute over the alleged kidnapping and forced custody of Mrs. Oksana Stepanova Kasenkina in the Soviet Consulate in New York, the Soviet Union accused the US of violating international law by among other things dispatching the police to enter the Soviet Consulate in New York and there making investigation of Mrs Kasenkina's "suicide" attempt. Note also the Security Council Res 11993 (1998) condemning the Taliban authorities in Afghanistan for the capture of the Iranian Consular-General.

¹⁰⁹⁷ Art 29.

These diplomatic privileges and immunity have however often been abused.¹⁰⁹⁸ Such abuses have impacted negatively on the institution of diplomatic protection itself. In the Iranian hostage incident, during a demonstration on November 4 1979, several hundred armed individuals overran the US embassy compound in Tehran. Fifty two American nationals were taken as hostages. Iranian security personnel failed to counter the attack, and in the subsequent case before the ICJ for diplomatic protection, the lack of protection afforded to the mission was held to be directly attributable to the Iranian government.¹⁰⁹⁹ The ICJ therefore declared that under the 1961 Convention

Iran was placed under the most categorical obligation as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates and their staff.¹¹⁰⁰

The court stressed in particular the seriousness of Iran's behaviour and the conflict between its conduct, and its obligations under

the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm.¹¹⁰¹

In another incident, during a peaceful demonstration outside the Libyan Embassy in London, on 17 April 1984, shots were fired from the Embassy which killed a police woman.¹¹⁰² When the embassy was searched later, in the presence of the Saudi Arabian diplomat and after the Libyan diplomats had left, weapons and other relevant forensic evidence were found.¹¹⁰³ In yet another incident, on May 8 1999,

¹⁰⁹⁸ Mostly by diplomats and the receiving States. See Barker *The abuse of Diplomatic Privileges and Immunities: A necessary Evil?* *Supra* n 872 1-7. See eg the Iran Hostage case *supra* n 242, the shooting of WPC Yvonne Fletcher at St James Square in London on April 17 1984, and the Umaru Dikko incident which occurred in London in the same year. These incidents are discussed *infra*.

¹⁰⁹⁹ At 30.

¹¹⁰⁰ See case *Concerning US Diplomatic and Consular Staff in Tehran* 1980 (Judgment) *supra* n 242 par 61.

¹¹⁰¹ At 568 of the judgment. This incident is a good illustration of the impunity with which diplomatic and consular privileges may be violated by a receiving State

¹¹⁰² See Barker *supra* n 872 1. The incident involved the shooting of Yvonne Fletcher.

¹¹⁰³ *Idem* 2. In res 53/97 of Jan 1999 for instance, the UNGA strongly condemned acts of violence against diplomatic and consular missions and representatives, while the Security Council issued a presidential statement condemning the murder of nine Iranian diplomats in Afghanistan.

during the Kosovo campaign, the Chinese Embassy in Belgrade was bombed by the US. The US declared that it was a mistake and apologised.¹¹⁰⁴

Furthermore, although all states recognise that the protection of diplomats is of mutual interest to all,¹¹⁰⁵ some states have often violated the inviolability rule against diplomats and consuls.¹¹⁰⁶ For instance, the US took some steps towards the indictment of an Ambassador prior to the termination of his official accreditation in 1987 following an accident involving two US nationals, one of whom was seriously injured. At the time of the incident, the ambassador was said to be drunk.¹¹⁰⁷

Ambassador Abisinito, Papua New Guinea's Extraordinary and Plenipotentiary to the US, was charged at the District Court of Columbia by the police for "failing to pay full time and attention to driving" in the citation. Ambassador Abisinito was however recalled by his State on February 17, 1987 and his accreditation to the US ceased as of February 24, 1987.¹¹⁰⁸

Apart from the violation of diplomatic and consular privileges and immunity by the receiving States, these privileges and immunity are often abused by diplomats and consuls themselves. In 1973, for instance, the Pakistan Ministry of Foreign Affairs informed the Iraqi Ambassador of evidence that arms were being brought into

¹¹⁰⁴ See Shaw *supra* n 175 673 and Harris *supra* n 385 367. In Dec 1999, the US and China signed an agreement providing for compensation of \$28m to be paid to the latter by the former. At the same time China agreed to pay \$2.87m to the US to settle claims arising out of rioting and attacks on the US Embassy in Beijing, the residence of the US consulate in Chengdu and the consulate in Guangzhou. Shaw *ibid*.

¹¹⁰⁵ This is based on functional necessity and reciprocity. See the conclusions of both the British and US investigations into "Diplomatic Immunities and Privileges" of 1984. See eg "Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations. Reply to "The Abuse of Diplomatic Immunities and Privileges." Cmnd 9497 (1985) (Government Report). See also Higgins "UK Foreign Affairs Report on Abuse of Diplomatic Immunities and Privileges: Government Response and Report." 80 *AJIL* 35 (1986).

¹¹⁰⁶ The Iran Hostage Case *supra* n 242 is a typical example.

¹¹⁰⁷ In the summer of 1991, one of Thailand's embassy staff in London was apprehended by customs officers at the Heathrow Airport for allegedly possessing and attempting to illegally import heroine. In 1997 a diplomat from the state of Georgia was held responsible for the death of a 16-year old American girl in a car accident.

¹¹⁰⁸ See Barker *supra* n 872 7 and *Washington Post*, Feb. 14-15, 1987 2. See also *Columbia Journal of Law* 1988; Larschan "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity" 26 *CJTL* 283 & Pecoraro "Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity." (1988) 29 *HIJL* 533. The purpose of these privileges and immunities however, is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States. See the Preamble to the VCDR.

Pakistan under diplomatic immunity and stored at the Embassy of Iraq in Islamabad.¹¹⁰⁹

When the Ambassador refused permission for a search, a raid by armed police took place and huge consignment of arms – apparently destined for rebel tribes in Baluchistan – were found stored in crates.¹¹¹⁰ The Pakistan government sent a strong protest to the Iraqi government, declared the ambassador *persona non grata*, and recalled their own ambassador.¹¹¹¹

Yet another such incident was the infamous Umaru Dikko Affair which occurred in London in July 1984.¹¹¹² This involved an attempted abduction and kidnapping of Alhaji Umaru Dikko, a former Nigerian Minister, who was abducted from his London home and was later found drugged and bound in a wooden crate to be flown to Nigeria on a Nigerian Airways flight.¹¹¹³

In the US, apart from the Abisinio incident, other incidents of abuse of diplomatic and consular privileges have occurred. One such incident was the shooting of Kenneth W. Skeen, a US national, in Washington DC by the grandson of the Brazilian Ambassador to the United States.¹¹¹⁴

15 Abuse of diplomatic and consular privileges and immunity: Effect on diplomatic protection

The abuse of diplomatic and consular privileges and immunity has given cause for concern as far as diplomatic protection is concerned.¹¹¹⁵ It has prompted states to reassess their obligations under the existing law on diplomatic relations and provoked a serious attempt to review the Vienna Conventions in an attempt to determine whether the privileges and immunity granted to diplomats should be

¹¹⁰⁹ See Denza *supra* n 883 354 & Harris *supra* n 385 365.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.*

¹¹¹² See Barker *supra* n 872 4.

¹¹¹³ *Ibid.*

¹¹¹⁴ *Idem* 6.

¹¹¹⁵ These abuses have given rise to a review of the provisions of the VCDR. See Barker *supra* n 872 650.

curtailed.¹¹¹⁶ This exercise was embarked upon by both the British Parliament and the United States Congress.¹¹¹⁷

In their investigations, both the US and British governments were too aware of the overall need for protection of their diplomats and missions abroad against terrorism, mob violence and intrusive harassment from unfriendly states, to dispense with the special armour provided by the Vienna Convention.¹¹¹⁸ Therefore, after a comprehensive review of the provisions of the Convention, they decided not to interfere with them.¹¹¹⁹

The British and US responses were rather to tighten administrative controls and supervision of foreign missions, to use the remedies already provided in the Convention more vigorously, to invoke counter measures on a basis of reciprocity, and to build up coalitions in order to apply pressure to States flouting normal rules of international conduct.¹¹²⁰ Though the Convention was left in tact, it was strengthened by the systematic re-examination it had undergone. Nevertheless, these incidents of abuse definitely put some constraints on the relationship between the states concerned and the institution of diplomatic protection itself. In the Iran Hostage case, for instance, the US, apart from instituting an action at the ICJ, also made a failed attempt to rescue the 52 hostages in Iran.

16 Conclusion

The incidents highlighted above have had tragic consequences for diplomatic protection. First of all, they have destroyed the confidence in the institution built over

¹¹¹⁶ I.e the VCDR of 1961 and the VCCR of 1963.

¹¹¹⁷ The Fletcher incident led to the instigation of an investigation by the House of Commons Foreign Affairs Committee in Britain into "Diplomatic Immunities and Privilege." The Umaru Dikko incident provoked further public interest on the subject. In the US on the other hand, the Skeen incident, and yet another incident - the "Abisinio Affair" also provoked a serious attempt to review the Vienna Convention of 1961 by the US Congress, to determine the adequacy or otherwise of diplomatic privileges and immunities. See the Helm's and Solaz Amendment Bills of 1984 which were Congressional attempts to amend the Diplomatic Privileges and Immunities Act of 1976.

¹¹¹⁸ See n 1114 *supra*.

¹¹¹⁹ See Barker *supra* n 872 12.

¹¹²⁰ *Ibid.*

many centuries which is so fundamental in the interrelationship of states and their continued peace and security.¹¹²¹ As the ICJ said in the *Iran Hostage Case*.¹¹²²

Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day.¹¹²³

The court also said that:¹¹²⁴

The Institution of diplomacy....has proved to be an instrument essential for enabling states, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means

The question, however, is the extent to which diplomats and consuls have protected the human rights of their nationals abroad? Sen maintains that:

To the person who is resident abroad, the diplomatic agent of his country is his friend in need, and it is to the envoy that he has to turn when he suffers harm or his interests are adversely affected either by reason of some action of the government or government agencies or in the hands of private persons¹¹²⁵

According to McClanahan;

All diplomats and their families and indirectly the citizens of each country living abroad should be thankful for the well established Institution of diplomatic [protection], and for the Vienna Conventions of 1961 and 1963 in particular, which have done so much to promote the Human rights and fundamental freedoms of foreigners.¹¹²⁶

¹¹²¹ As a result of their investigations, both the UK & US Governments came to the conclusion that stricter application of the enforcement regime of the 1961 Convention was the key to dealing with problems of abuse of diplomatic privileges and immunity. See *supra* n 1102 & 1114 respectively.

¹¹²² *Supra* n 242.

¹¹²³ At par 92.

¹¹²⁴ At 40.

¹¹²⁵ See Sen *supra* n 52 77.

¹¹²⁶ McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 184.

In the 21st century, the global society has witnessed an ever increasing need to cope with the by-product of the “Information Age”. The telephone, the television, the computer, and the internet in particular, have brought about a structural revolution in the practice of diplomacy and diplomatic protection.¹¹²⁷

Such structural revolution has created a global village and has: enhanced the sense of global involvement in world affairs; (2) created an increased awareness of humanitarian needs and concern for the environment, and (3) created a new sense of diplomacy and public relations for the diplomat.¹¹²⁸ This communications revolution has helped to internationalize science and technology as well as business activities through the medium of the television and the Internet. The Internet, in particular, has created a global sense of political awareness.¹¹²⁹

This development has also stimulated the creation of special diplomatic missions, designed to be sent to particular areas for specific purposes.¹¹³⁰ This has not however diminished the utility of the permanent diplomatic mission. Contrary to popular belief that the coming of the Information Age¹¹³¹ has diminished the traditional importance of diplomatic personnel, the reverse is the case.¹¹³² Rather than diminish, modern communication systems have contributed to the efficiency and effectiveness of diplomats by improving and strengthening their *modus operandi*, particularly in connection with the practice of diplomatic protection.¹¹³³

Diplomats and consuls thus retain their usefulness in the protection of their nationals abroad. The rise of terrorism, the adverse relationship between the world’s resources and population, the threat to the global environment, the ease and speed of the

¹¹²⁷ See Feltham *Diplomatic Handbook* (1998) 1. See also Clerk *Corps Diplomatique* (1973) 24.

¹¹²⁸ Feltham *Ibid.*

¹¹²⁹ *Ibid.*

¹¹³⁰ Clerk *supra* n 1124 24.

¹¹³¹ I.e establishment of the telephone, telegraph, telex, fax and Internet services.

¹¹³² Shaw *supra* n 175 669. See also Hevener (ed) *Diplomacy in a Dangerous World: Protection for Diplomats under International Law* (1986) 54.

¹¹³³ Apart from creating more means of communication, modern communication gadgets have made communication easier. In exercise of diplomatic protection, a diplomat can use the telephone, email, telex or other means of communication in order to communicate faster. See Clerk *supra* n 1124 26.

proliferation of weapons of mass destruction in this century, have, however, ushered in strange new dimensions to diplomatic law and diplomatic protection.¹¹³⁴

¹¹³⁴ Other destabilizing features of the 21st century as far as diplomatic protection is concerned include the problem of identifying nationality with large scale immigrations. See Hevener *supra* n 1087 55.