HUMAN RIGHTS MEET DIPLOMATIC IMMUNITIES:
PROBLEMS AND POSSIBLE SOLUTIONS

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I. INTRODUCTION

In November 1982, a 23-year-old student shot and seriously wounded a night club bouncer in Washington D.C. When identified as the son of the Brazilian ambassador he was immediately released and left the US. The Brazilian student was charged with assault once before but charges were dropped and he was allowed to remain in Washington on the ground of diplomatic immunity. In 1981, a man linked to at least 15 rapes at knife point in the New York City area was arrested and positively identified by two victims. He was then released because he was the son of Ghana's ambassador to the United Nations. The man spent 45 minutes in custody and was reported as leaving the police station laughing. In January 1987, the British Prime Minister, Margaret Thatcher, told the House of Commons that diplomatic immunity had blocked the prosecution of an American - a husband of a US diplomat - accused of a sexual offense involving a young girl. The son of a diplomat from an Arab country who had beaten, robbed and sexually assaulted a woman in New York, was reported as stopping for a drink at his favorite bar on his way to the airport while his victim recovered from five hours of surgery. When boarding a plane, his final gesture to the police officer who came to see him off, was an obscene one. In April 1984, during a demonstration outside the Libyan People's Bureau (embassy) in London, shots were fired from the windows of the Bureau, killing a young on-duty Police Constable. Upon severance of diplomatic relations between the UK and Libya, the Libyans, including those allegedly responsible for the killing, were allowed to leave the UK. The Paris-based Committee Against Modern Slavery recently reported that it documented 135 cases of exploitation, including violence and rape, in Western capitals, of maids by internationally protected persons over the last two years. Understandably, much anger is caused by such events and, obviously, most people do not understand why they have to put up with such behavior whereas those responsible generally get away with it. It has been argued that such a privileged regime, going beyond the jurisdictional reach of the courts, contrasts with the prevailing
attitudes in modern democratic societies. Immunities from jurisdiction are especially difficult to justify in light of the growing role and status of international human rights.

The argument of the present paper takes the following form. Part I generally describes the history, justifications, substantive rules and abuse of diplomatic immunities. Part II examines the international law of human rights with emphasis on its evolvement into a major force on the international plane. Part III concentrates on instances where there is an apparent clash between these two important sets of international rules. An attempt is made to isolate the areas most affected by that collision and to ask which one, if any, is superior to the other. Theoretical hierarchy is then placed against the very real factor of reciprocity, suggesting that purely hierarchical grading is neither practical nor desirable. Finally, Part IV critically examines a variety of alternative proposals aimed at solving the problem of abuse. It then takes a future-oriented direction and looks at a number of pragmatic solutions that avoid somewhat formalistic hierarchy-oriented approaches. The general approach developed in the discussion that follows is that the occasional abuse of the diplomatic immunity rules is largely offset by the continuing need for them. The actual number and percentage of abuses affecting fundamental human rights is relatively small, therefore a complete wholesale of the rules or even a too-radical reform, is undesirable from a policy point of view. The solutions appear to lie elsewhere: in devising and utilizing suitable dispute settlement and reparation mechanisms. The instruments used should aspire to guarantee the safety of diplomats and their families. At the same time, such instruments should ensure that violation of fundamental human rights is minimal, that violations are not without consequence, and that victims are adequately compensated.

I. DIPLOMATIC IMMUNITY
**A. General**

**Diplomacy**

It has been said of diplomacy that, as of few other human occupations, mankind has never been able to live without it. It has been described as "the management of international relations by negotiation [or] the conduct of business between states by peaceful means." States use a variety of means to conduct diplomacy with each other. To a certain extent each type is governed by a special body of diplomatic law. In particular, permanent missions in the territory of other states have always had an important role in international intercourse, and the law relating to them is well developed. Although the communications revolution and rapid transatlantic travel make representation abroad seem obsolete, this does not to be the case in practice. In addition to their traditional task - analytical assessment of the host state, protection of citizens, and relation building - US diplomats now deal with matters such as peacemaking, environmental issues, nuclear proliferation, anti-narcotics work, and trade promotion.

**Diplomatic Immunity: Basis and History**

Domestic jurisdiction is a manifestation of state sovereignty and the principles of equality of states and non-interference in domestic affairs. In essence, jurisdiction concerns the power of the state to affect people, property and circumstances. Domestic jurisdiction, guarding certain state activities from outside intervention, is widely believed to be based on the territorial principle. That principle means, *inter alia*, that the courts of every country should be able to try offenses committed within its territory. Diplomatic immunity is a well-established exception to that general international law principle of territorial jurisdiction. That exception developed from the concepts of sovereign immunity, the concepts of independence and equality of states, and the existence of a specific rule of international law. It is one of the oldest and most accepted rules of international law dating many centuries back. In its
modern form, diplomatic immunity dates back to the establishment of permanent diplomatic missions in fifteenth century Europe.  

Since the sixteenth century there were three main theories of diplomatic immunity: The first and the oldest is the theory of 'personal representation'. It is essentially based on the notion that the representative should be treated as if the sovereign himself was conducting diplomacy. The two main flaws of this theory are that sovereignty is increasingly vested in the nation rather than a monarch, and it does not seem to cover personal acts of diplomats and low rank officials. The second theory, that of 'extraterritoriality', basically stands for the proposition that diplomats' offices, homes, and persons are to be treated as if they are on the territory of the sending state. Today, contrary to the popular belief, the idea that an embassy is physically a part of the sending country is largely treated as a little more than a fiction. Third, the theory of 'functional necessity', the predominant one at present times, suggests that the theoretical underpinning of diplomatic immunities lies in the simple fact that they are necessary for the performance of the diplomatic functions.

B. Diplomatic Immunities: Modern Law and its Sources

As noted above, state practice concerning diplomatic immunities has a long history. Modern embodiment of that practice in law began in Britain in 1708 with legislation prohibiting prosecution, arrest, and imprisonment of ambassadors and their servants. The US Congress passed similar legislation in 1790. Under that law it was an offense to arrest ambassadors and their servants. Prior to the 1961 Vienna Convention on Diplomatic Relations the law was largely customary with a few attempts at the international level to codify certain rules. The 1961 Convention codified existing customary diplomatic law, resolved points of conflicting state practice, introduced other rules, and acknowledged that customary international law continues to govern areas that were left untouched. With over 170 state parties, the Convention is one of the most successful products of the United Nations ‘legislative process’ and is overwhelmingly accepted as the applicable law. The main reasons for the
Convention’s success are the comprehensive formulation of almost every aspect of diplomatic law to the satisfaction of most states, and the presence of reciprocity: each state is both a sending and a receiving state.43

The general provisions of the Vienna Convention may be summarized as follows: First, there are definitions of some traditional functions of the diplomatic mission such as representation of the sending state in the receiving state.44 Second, certain rights of the receiving state are defined, including the rights not to approve the prospective head of mission,45 to declare, without explanation, any member of the diplomatic staff a persona non grata,46 and to set a limit to the size of the mission.47 Third, the receiving state is under a duty to protect the mission's premises and its communications, including the diplomatic bag, and to provide full facilities for the performance of the mission's functions.50

Turning to privileges and immunities under the 1961 Convention, these may be divided into two categories; First, those immunities providing that the mission's premises and documents are inviolable.41 As illustrated by the restrictive behavior of the British Government during the 1984 Libyan embassy saga (outline below), those immunities are believed to be absolute.53 Second, the immunities of the diplomatic agents, their families, the subordinate staff, and their families.54 The person of the diplomatic agent is inviolable and s/he cannot be arrested or detained.55 The inviolability of the agent is the oldest and most fundamental immunity.56 The diplomatic agent is also immune from the criminal, administrative, and civil (subject to limited exceptions) jurisdictions of the receiving state.57 There seems to be no exception whatsoever to the immunity from criminal jurisdiction.58 An accredited person is not exempt from the obligation to obey local law and is subject to an express duty to respect the domestic laws of the receiving state.60 However, in the absence of a waiver by the sending state,60 the protected violator of a domestic rule will be immune from the local jurisdiction to enforce it.61

C. Abuse of Diplomatic Immunities
Broadly speaking, there are two categories of abuse: deliberate abuse of terrorist or political nature, and abuse of a more personal nature. An incident falling under the first category - abuse of terrorist or political nature - would be the 1984 incident in which a British police constable was allegedly shot to death from the windows of the Libyan embassy. The incident involved at least three types of abuse - abuse of the diplomatic premises, abuse of the diplomatic bag, and abuse of the diplomatic status - all of which seem to have unconditional immunity under the 1961 Vienna Convention. British authorities who entered the premises of the Libyan embassy after its evacuation found weapons and forensic evidence indicating that the shots that killed the police woman actually came from the embassy. Following the severance of diplomatic relations between the UK and Libya, diplomatic bags leaving the embassy with its departing staff were not searched or scanned despite a possible reliance on Libyan reservation to the relevant Article of the Vienna Convention. There is strong reason to believe that the murder weapon was in one of those bags. The diplomatic status played a particular significant role as the Libyans leaving the embassy were not arrested despite the strong probability that one (or more) of them was responsible for the killing. Other examples of abuse of political nature include the 1964 Rome Airport case in which the Italian authorities found a drugged man inside an Egyptian diplomatic mail, and the 1984 “Dikko incident” in which an abducted former Nigerian minister was found inside a crate purported to be "diplomatic" in Stansted Airport. Abuse cases under the second category (that is, abuse of a more personal nature), include serious offenses, driving and parking violations, and relatively small offenses. Relatively recent examples include the "Absinto affair" in which the Papua New Guinea ambassador to the US injured several people while drink-driving, the alleged rape of a 16-year-old Northern Virginia girl by the son of a Saudi Arabian diplomat, the alleged enslavement of a Filipino maid by a Jordanian diplomat and his wife, the slashing by a Nigerian diplomat's wife of her teenage daughter's wrist after learning that she was pregnant, the alleged rape of a Filipino maid by the ambassador of a Balkan state in Kuala Lumpur, and the alleged assault by two Cuban diplomats of NYC police officers during a...
demonstration outside the Cuban Mission to the UN. Many other cases have been reported around the world.

It will be recalled that in the absence of an express waiver of immunity by the sending state, diplomatic law generally prevents enforcement of domestic laws against accredited persons. This state of affairs gives rise to occasional outburst of public anger in receiving states experiencing abuses of diplomatic immunity. One such wave transpired in the UK following the 1984 Libyan embassy incident and the 1985 Dikko affair. Others took place in the US following the 1987 Absinito affair; in 1993, when Senator Jesse Homes launched a crusade against several countries owing millions of dollars in unpaid fines, and following the 1997 killing of Washington's 16-year-old Jovianne Waltrick by a Georgian diplomat driving in a drunken state. Most cases never catch the public eye, but occasional waves of public outrage do occur. Anger is then reflected in, and a result of, extensive media coverage of serious abuse cases. In order to evaluate the gravity of the abuse problem, it is necessary to examine its actual scope. In the beginning of the 1980's about 54 serious offenses a year were allegedly committed by accredited persons in the UK against the figure of 15,000 accredited persons in that country. By 1991, the UK figure dropped to 40 alleged serious offenses most of which involved drunken driving and shoplifting. In 1997, the number of diplomats and their families in the UK grew to 17,000, yet the number of serious offenses allegedly committed by them dropped further to 34, six of which resulted in removal of the alleged offenders from their post. 24 out of the remaining 28 offenses involved drink-driving or shoplifting. In Washington and New York, the combined population of persons entitled to full diplomatic immunities in 1988 exceeded ten thousand. Between August 1982 and 29 February 1988, the total of "Alleged Criminal Cases" committed by accredited persons from missions in Washington D.C. was 147; Of these, 30 involved diplomats, 60 involved their dependents, and 57 involved subordinate staff and their dependents. As to UN missions, over the same period there were 44 such cases. These cases were equally split between diplomats and their dependents. It has been argued that out of 78,855 crimes committed in Washington DC in the year ending 31 May, 1987, only
five "which could be considered serious" were committed by accredited persons. In 1997 there were 18,350 persons with full immunity in the US and only a few of them have ever committed crimes. In 1995, there were 17 cases where diplomats faced charges of felonies or misdemeanors involving violence (six of them ended in expulsions), and 28 alleged offenses of drunken or reckless driving. Illegal parking is a different story, 4.3% of parking fines in Greater London in 1984 have been incurred by diplomats. In fact, diplomatic immunity seems to be most frequently invoked in relation to traffic offenses in general and illegal parking in particular. To be sure, the principle of diplomatic immunity is sometimes pushed to absurdity by being abused and overused. For example, where diplomats and their missions simply refuse to pay their bills. Nevertheless, the rate of offending among diplomats appears to be lower than the rest of the population. In sum, illegal parking aside, the number and percentage of offenses involving accredited persons does not appear to loom large.

**D. Diplomatic Immunity: Summary**

From the discussion above it may be seen that diplomatic law is a well-established area of international law. Its main source is a long-standing custom embodied into a comprehensive and widely accepted international treaty. The regime of privileges and immunities is founded chiefly on practical necessity. In other words, the rules are perceived by states as necessary for the performance of the diplomatic functions. Herein lies the strength of the rules: Since every state is concurrently a sending and a receiving state, reciprocal interests are created. Diplomatic immunities therefore offer noticeable gains. These, in turn, provide an incentive to adequately comply with the provisions of the Vienna Convention. Indeed, it seems that the Convention operates in a satisfactory manner, day in and day out, in the service of all governments. The abuse and overuse of diplomatic immunity leads to infrequent waves of public outrage but the numbers suggest that the percentage of serious crimes allegedly committed by diplomats is actually small both in quantitative (that is, the 'seriousness' of the alleged offenses) and relative (to the rest of the population) terms. It is against this background that the evolving international law of human
rights must be placed. Surely, any conflict with the deeply-rooted diplomatic law presents a big challenge for the relatively new human rights law. It is to the latter to that we now turn.

II. INTERNATIONAL HUMAN RIGHTS LAW

A. General

Jurisprudence

A number of fundamental difficulties lead to the relative confusion surrounding the nature and scope of human rights. For one, there is a jurisprudential controversy as to what is a "right". Further, there is the particularly serious concern regarding enforcement, or rather the lack of it. Finally, the association of human rights with the relative concept of "morality" makes the nature of such rights even more vague. Neither reliance on 'Positive' rights, (those community values reflected in a legal system), nor the Locean 'Natural' rights view (according to which there is a 'higher' law which constitutes a set of universal principles), appear to afford a wholly coherent premise. Said that, the natural rights theory of the seventeenth century certainly contributed to restraining arbitrary state powers and to the emergence of recognized rights of life, liberty, and property. Natural law thinking proved especially useful for the advancement of international human rights in this century. This is largely because, unlike 'positivism', it acknowledges the existence of rights outside the established legal order and is therefore less dependent on subsisting legal rules.

Development

In the nineteenth century, the dominance of positivism, particularly the concepts of state sovereignty and domestic jurisdiction, resulted in little international law concern with human rights issues. The 1919 Covenant of the League of Nations, the peace agreements with Eastern European and Balkan states, and the Treaty of Versailles, marked an important progress in the relationship between
international law and human rights by creating recognized international obligations. The most radical shift in attitudes towards the role of the international system in protecting human rights came about as a result of the widespread realization of the extent of the horrors that took place during World War II. A series of international instruments reflected the change in the international mood. The UN Charter contains several important human rights provisions. However, the wording of those provisions does not seem to define specific legal rights, and domestic jurisdiction is expressly preserved. The advance of the international human rights cause did not stop there. The endorsement by the UN General Assembly of the Universal Declaration of Human Rights in 1948 marked another significant step towards a growing international involvement in human rights issues. The Declaration, though not a legally binding document per se, may well have become binding as a manifestation of customary international law, general principles of law or/and as interpretation of the UN Charter. Indeed, the 1968 Proclamation of Teheran - a product of the UN-sponsored International Conference on Human Rights - referred to the Universal Declaration as "...an obligation for members of the international community." The Universal Declaration was not followed by a comprehensive and binding treaty. Rather, a step by step approach was taken by the UN under which specific conventions were gradually adopted, each having its own implementation mechanism. Those conventions deal, inter alia, with genocide, racial discrimination, social and cultural rights, civil and political rights, torture, and rights of the child. In addition, the UN established a number of specialized agencies dealing with human rights and related issues. A parallel development took place at the regional level. A number of important regional multilateral treaties came into force. Important treaties include the European Convention of Human Rights (ECHR), the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the European Community (EC), the American Convention on Human Rights (ACHR), and the Banjul Charter on Human and People's Rights. Human rights have also achieved eminent role as an integral part of many national legal orders. Even apart from prominent documents the US Constitution and the Canadian Bills of Rights, constitutional recognition of human
rights protection is widespread. For example, a 1993 Council of Europe study covering 27 European States (including former Communist states such as Croatia, Russia and Romania), concluded that "[n]early all States [in the survey] give constitutional recognition to the protection of human rights and fundamental freedoms, and this protection is frequently confirmed by legislation and case law."120

**B. Current State of Human Rights**

Developments since the Second World War, some of which have been outlined above, point to four general trends since the Second World War.121 First, emancipation and liberation gained impetus and led to de-colonization.122 Second, the barriers of exclusive domestic jurisdiction in relation to human rights is gradually eroding.123 Third, the growing number of international institutions and organizations now constitute a sweeping human right movement for the cause of promoting human rights.124 Finally, ignorance and isolation tend to break down thanks to the information revolution.125 It has been argued that the numerous international instruments, notably the Universal Declaration, played a role as a catalyst for the above-mentioned developments.126 They provide yardsticks, models, norms and terms of reference for measuring the international standard as well as tools that can be utilized by groups and individuals on the national and international legal and political plains.127

Law is also created by custom and some commentators assert that, in light of prevalent state practice, the Universal Declaration, or at minimum some basic rights mentioned in it, became a part of customary international human rights law.128 The emergence of the UN Charter, the Universal Declaration and subsequent international instruments, appears to suggest that the universality of human rights is widely endorsed. Arguably, the concept of universality of human rights now applies to states and individuals alike.129 According to one contrary view, the idea of human rights has actually been degraded since the Second World War as it has been "..swept up into the maw of an international bureaucracy [accordingly]..the potential energy of the idea has been dissipated."130 All things considered, there is little doubt that significant progress has been made in the last five decades or so. The existence of
international human rights law had a significant socializing impact on the international community, and the international climate is less willing to tolerate human rights violations. For example, the Security Council established the International Tribunal for Former Yugoslavia in 1993 and the International Tribunal for Rwanda in 1994. International criminal law may also be seen as part of the maturing international human rights regime. According to one analysis, the degree of international acceptance of a given right can be assessed by reference to a five-stage pattern. The 'Enunciative Stage' in which an internationally shared value is identified; The 'Declaratory Stage' in which a declaration of that right is made in general terms in an international instrument; The 'Prescriptive Stage' in which specific articulation and elaboration of the declared right in a binding convention is taking place; The 'Enforcement Stage' where modalities of enforcement are established; Finally, the 'Criminalization Stage' during which specific and legally binding international penal proscriptions are developed. Of particular relevance for the purposes of this paper are crimes against humanity (including murder and enslavement), and the crimes of slavery, rape and terrorism.

C. Hierarchy of Human Rights?

Existing international human rights instruments deal with a wide range of rights and not all of them are of great relevance for the purposes of this paper. In order to identify those rights that are most suitable to form the subject matter of this work, it may be helpful to broadly categorize the various rights. A number of approaches to human rights hierarchy have been put forward. One common view is that non-derogable human rights such as the right to life and physical security are at the peak of the hierarchy. This is because their violations are regarded as particular evil, because of their universal recognition, and because all other rights are dependent on them. Support for this view is found in the principal human rights treaties. For example, a common thread interweaving the ECHR, the ACHR, and the International Convention on Civil and Political Rights, is that the right to life and the prohibition on inhumane treatment, torture and slavery, are generally treated as non-derogable rights.
One may therefore argue that those unlimited\textsuperscript{142} rights sit at the top of the hierarchy. Further, the fact that a right may not be derogated from probably indicates that it is a part of \textit{jus cogens}.\textsuperscript{143} Derogable rights subject to a variety of limitation or clawback clauses are generally perceived as being lower in the hierarchy. Thus, human rights organizations operating in the field tend to steer clear of 'second generation rights' (social and cultural rights), or 'third generation rights (e.g., right to development), and focus instead on 'first generation rights' (civil and political rights) looking at issues such as torture and imprisonment for exercise of freedom of speech and association.\textsuperscript{144} The underlying rationale for this, the argument goes, is that only 'first generation rights' enjoy a broad consensus and infinite opportunities to be expressed.\textsuperscript{145} Plus, lower generation rights are difficult to monitor.\textsuperscript{146}

\textbf{D. Summary}

The status of human rights under international law was significantly enhanced since the Second World War. That development is largely a result of increasing recognition that some rights are outside, and independent of, the established legal order. In result, walls of domestic jurisdiction are eroding. Arguably, some rights, notably those at the top of the hierarchy, are universally seen as non-derogable. On this reading, there is a scope for the argument that these rights are part of \textit{jus cogens}.\textsuperscript{147}

\section{III. HUMAN RIGHTS MEET DIPLOMATIC IMMUNITIES}

\textbf{A. General}

The pervious sections described the dynamism and strength of two basic international law regimes; that of diplomatic immunities and privileges and that of human rights. It has been argued above that diplomatic law has traditionally had a sound position within international law. It was also maintained that the international law of human rights, though not as old as diplomatic law, now holds an important
and expanding role within the international system. The initial question is what situations, if any, give rise to a collision between those two regimes. Assuming such situations exist, the question of priority immediately comes to mind. That is, which international rule should prevail in case of conflict? Since this paper aims to provide a realistic rather than purely theoretical analysis, the discussion does not stop there. The remaining sections will therefore examine and point to a number of alternative approaches that avoid the need to determine a clear priority between the two international law regimes in issue.

**B. Situations Giving Rise to Conflicts**

**Conflicting Elements: Prevention, Punishment and Remedy**

A legal norm that is a part of a coercive system essentially establishes a legal duty. In its connection to the violated party, the legal norm becomes a legal right. The essence of a legal right is the interested party claim attaching concrete consequence of an unlawful act to a given act. Legal norms (that is, rules) provide for coercive acts as sanctions for violation of legal duties and legal rights. A coercive legal order principally seeks prevention of, and retribution for, one's interference in the sphere of interests of the other; Be it the other's life, property, or other recognized values. To put it more simply, a coercive legal order is an operational system for securing values desired by society. On this reading, international law is not essentially different from domestic legal systems.

Turning to the subject-matter of this paper, human rights may be safeguarded by preventing their violation in the first place, by adequate punishment of violators, and by providing for a satisfactory remedy. The first safeguard is therefore prevention. In the human rights context, prevention primarily relates to removal of structural obstacles that are at the root of patterns of injustice. From this standpoint, identifying structural obstacles to justice is as important as dealing with violations. In short, the full enjoyment of human rights largely depend on structural changes creating suitable conditions. Since diplomatic immunity shields accredited persons against domestic jurisdiction, it practically interferes with the intended operation of the coercive legal order. Accordingly, one
justification for removal, or restrictive application, of diplomatic immunities would be that their presence mean that the essential element of sanction, together with its preventive effect, is to a large extent missing. The presence of immunities also entails a deficit in relation to the second function of sanctions within the coercive legal order: retribution. The idea of retribution - like for like (that is, violation carries a price) - lies at the heart of the social technique called "law" Thus, one way of "fixing" that problem in the context of human rights is to change diplomatic law so that violations will carry sufficient punishment to satisfy the principle of retribution. Another problem arising from the operation of diplomatic immunities is that the wrongdoer cannot be coerced to pay full compensation, or indeed any compensation, to the victim of her unlawful action. The apparent lack of that third safeguard, namely, the adequate remedy for victims of human rights’ violations committed by accredited persons, presents a strong case for reform. To repeat, potential collision between the two set of rules, diplomatic law and human rights, is not restricted to the inability of a host state to punish the protected wrongdoer, but also relates to the lack of effective prevention before the wrong is committed, and to the inability of the receiving state to ensure satisfactory remedy.

**Human Rights vs. Diplomatic Immunities: Some Examples of Collision**

One manifestation of the sometimes inescapable link between human rights and serious abuse of immunities is the relationship between violence and human rights is general. For example, one commentator suggested that "…acts of violence have in common the effect of intimidation. [Such acts] etymologically and tautologically, cause the individual to fear being physical harm and extreme anxiety." Looking at specific human rights principles in the light of past incidents involving alleged abuse of immunity may be indicative of the type of situations in which immunity forcefully and directly clashes with basic human rights:

**Right to life** - the April 1984 killing of a British Police Constable and the wounding of eleven Libyan dissidents outside the Libyan embassy in London, is one example of a clash between right to life
and diplomatic immunities. First, the unidentified person (or persons) who allegedly fired at the victims through the windows of the embassy could not be prosecuted and punished by the British legal system. Likewise, the alleged lawbreaker could not be forced to compensate the victims’ families. Finally, though difficult to assess, the knowledge that diplomatic immunity is available may well have induced the shooter to shoot in the first place. In other words, the Libyans’ entitlement to diplomatic immunities possibly diminished the important element of deterrence. After nine days of negotiations, during which their wives were reported to have made final shopping trips to London's big department stores, the 30 Libyans in the embassy were escorted to the Airport and boarded a Libyan airliner to Tripoli.

Slavery - many instances, including many recent ones, of "diplomatic slaves", have been reported. Some were forced to work "...interminable hours every day, seven days a week, for little or no wages, [made] to sleep on floors and eat table scraps, [and sometimes] beaten or sexually abused. Their passports...withheld by their masters as insurance against escape." In one reported case, a Bolivian servant was kept as a virtual prisoner by an Egyptian diplomat stationed in the US. She was made to work seven days a week and never received a penny. Her passport was kept by the diplomat who denied her medical treatment when she developed a severe disease causing bleeding and infections. In another case, a Filipino maid has accused a Jordanian diplomat and his wife of mistreating her, making her work endlessly for 50 cents an hour, locking at their Virginia home, and hiding her passport and belongings so she could not escape. In contrast, where diplomatic immunity is not available, justice can be done and human rights are respected. This is illustrated by the story of two women kept as slaves in the London home of a Princess from the Kuwaiti Royal family. One of them told the police that she was ‘...whipped, kicked, beaten and starved.’ The Princess then claimed diplomatic immunity to which she was not formally entitled. In February 1985 she was sentenced to six months in prison suspended for two years, and was ordered to pay £2,000 in fines, costs and compensation to the maids.
Security of the person - the victim of the Brazilian ambassador’s son 1982 shooting in a Washington night club never fully recovered from his wounds and underwent psychiatric treatment. He was reported as saying: "People hurt people all the time but they usually pay a price." In another incident, the Mexican ambassador to the UN smashed the window of a car belonging to a New York City man and pointed a gun at his head because the man had parked for five minutes in a space reserved for diplomats. No charges were brought against the ambassador. The victim was reported as saying: "[w]ithout question, I expected to die." In yet another case, a visitor to Georgetown's entertainment district attempted to stop a stranger - later identified as a secretary for the Italian military attaché - from harassing a 16-year-old girl, the stranger then attempted to run him down in a car. The police, intending to charge the man for assault with a deadly weapon, had to release him.

Rights of the child - the Convention on the Rights of the Child demands, inter alia, that all appropriate measures be taken by state parties to protect children from all forms of physical and mental violence. In one case the 9-year-old child of an attaché of the mission of the Republic of Zimbabwe was sent to a foster home after his school officials noticed that he was badly bruised and battered. The child was reported to have been "..hung by the ankles and beaten, then cut down so he fell on his head." The Convention on the Rights of the Child also provides that the best interests of the child shall be a primary consideration in all actions concerning children. In a recent case, a US diplomat in London pleaded diplomatic immunity after whisking his two daughters to the US despite the English High Court ruling that granted custody of the children to his German wife. The diplomat refused to bring the girls, aged 10 and 13, back to Britain. The English Appeal Court, clearly unhappy with the immunity plea, stated: "[i]t seems surprising that a country which is a signatory to the Hague Convention on the wrongful removal of children and child abduction should be to escape the ordinary operation of the convention by claiming immunity."

C. Human Rights vs. Diplomatic Immunity: Which One Prevails?
General

So far, this paper described two of the most fundamental sets of rules of international law, diplomatic immunity and human rights. It also examined a number of situations giving rise to possible conflicts between them. The following sections of the paper consider various approaches for resolving collisions between the two. This section evaluates the most obvious solution: decide which set of rules is superior to the other, and give preference to that "higher" law.

The Notion of Hierarchy of Laws

According to Kelsen, "[t]he legal system is not a system of like-ordered legal norms, standing alongside one another; rather, it is a hierarchical ordering of various strata of legal norms [that can be traced to the ultimate basic rule constituting the ultimate basis of validity]." In consequence, a hierarchical structure is established under which the "basic norm" is presumptive. On this reading, the constitution, in the positive sense, is inferior to the basic norm but governs general law creation. Whether one accepts the natural law approach or not, the idea that some rules are superior to others appears to be widely accepted. Simply put, judges have to apply the law, and in case of inconsistent and conflicting legal principles, the judge, adjudicating the dispute before h/her, must choose and apply the law which has a higher status. For example, the national constitution is superior to the ordinary statutes, and ordinary statutes, in their turn, are superior to subordinate or delegated legislation.

That simple and logic principle is, in effect, embraced by, *inter alia*, the US Supreme Court, the English House of Lords, the French Conseil d' État and Cour de Cassation, and the Japanese Supreme Court. Similarly, the ICJ in the *Tunisia/Libya Continental Shelf Case* and the *Nicaragua Case* accepted that a special rule (in these cases treaty rules between states) prevails over a general rule (in these cases general rules of customary international law). More evidence supporting the existence of hierarchy of principles in international law is the hierarchy of sources. Arguably, Article 38(1) of the UN Charter points to the primacy of custom and treaty law over other sources of international law. As
between custom and treaty law the situation is less clear though some principles have emerged. For
example, there appears to be general agreement that, as between treaty and customary international law,
the latter in time has priority. Perhaps the clearest display of the concept of hierarchy of laws on the
international plain is the natural law-like notion of *jus cogens*. Basically, *jus cogens* is a compelling
law, "...a norm thought to be so fundamental that it invalidates rules consented to by states in treaties or
custom." That concept is not without controversy but can now be found, *inter alia*, in ICJ dicta, the
Vienna Convention on the Law of the Treaties 1969, the International Law Commission (ILC),
the Inter-American Commission on Human Rights, and the Third Restatement of the Foreign Relations
Law of the US. The idea that there are certain overriding principles of international law that form *jus
cogens* is also supported by a number of prominent writers. Generally speaking the idea of *jus cogens*
rests on two grounds. First, a peremptory norm may be seen as having a similar function to a public
order or public policy imperative in domestic legal systems. As such, its structure is expected to offer
stability. Second, the notion of *jus cogens* is a product of natural law thinking. From this
standpoint, some 'external' norms are fundamental enough to invalidate any rule consented to by states.
Arguably, *jus cogens* rules can only be set aside by a subsequent customary rule of contrary effect.
Classification of norms as *jus cogens* is not without problems. The least controversial examples of *jus
cogens* rules appear to be the prohibition of the use of force, the law of genocide, the principle of racial
non-discrimination, crimes against humanity, the prohibitions on slavery and piracy, permanent
sovereignty over natural resources, and the principle of self-determination. However, there appears to
be no general agreement regarding other areas of international law forming *jus cogens*. Several writers
contend that fundamental human rights, including the right to life and the prohibition against torture, are
norms of *jus cogens*. In view of Article 53 of the Vienna Convention on the Law of the Treaties 1969,
the creation of a *jus cogens* rule seems to involve a two stage approach; first, the establishment of
the proposition as a rule of general international law and secondly the acceptance of that rule as a
peremptory norm by the international community of states as a whole.
therefore requires a universal acceptance of the proposition as well as recognition by an overwhelming majority of states, crossing ideological and political divides.  

From the foregoing discussion it may be inferred that there are two interrelated hierarchical considerations. First, a somewhat formalistic hierarchy between sources, notably treaty and custom, generally recognizing that the later in time prevails and that a special rule prevails over a general rule. Second, normative and policy-driven hierarchy according to which the fundamental nature and superior value of certain rules makes them non-derogable and peremptory - *jus cogens*. The relevance of the two for determining priority as between human rights rules and diplomatic immunity is examined in turn.

**Human Rights vs. Diplomatic Immunity: Hierarchy of Sources**

It may be been from the discussion so far that diplomatic immunity is firmly based on long history of supporting state practice. The 1961 Vienna Convention codified existing customary diplomatic law, resolved some points of conflicting state practice, and introduced other rules. As a result, diplomatic law is currently based on a well received multilateral treaty as well as old customary law. International human rights rules offer a different story. Until the beginning of this century, largely as a result of the dominance of positivism - state sovereignty and domestic jurisdiction in particular - international concern with human rights issues was more or less confined to warfare law and slavery. It will be recalled that the radical shift in international attitude to human rights law largely came about following, and as a result of, the Second World War. The adoption of the Universal Declaration, sometimes called the "International Bill of Rights," and a series of follow-up and rights-specific multilateral treaties, rapidly established the prominence of international human rights law. Hence, international human rights law is a relatively new creature underpinned by various treaties signed, for the most part, during the second half of this century. Today, the two sets of rules in question are soundly based on treaty law. The fact that the diplomatic law is a much older set of international rules does not seem to be of great relevance for the purposes of priority determination. First, hierarchy of sources is
usually helpful for determining hierarchy of conflicting rules in the same area, say, continental shelf delimitation, rather than determining priority between distinct areas. Many treaties are expressly intended to codify or replace existing customary rules in a given field. Once the treaty is in force, new custom will emerge perhaps replacing the treaty provisions. In such a situation the conflicting treaty provisions and customary rules are comparable and naturally inter-related as they are meant to cover the same territory. In contrast, conflicting rules belonging to different sets of rules do not necessarily cover the same domain but may, as in the case in question, bump into each other in specific situations. Second, international law, as it stands today, does not appear to give priority to custom over treaty. Thus, the additional element of old custom does not necessarily constitute additional support for priority purposes. Finally, the *lex specialis* rule - a special rule prevails over a general one - probably means that when a diplomatic immunity rule is placed against a human right rule, both will be roughly equal from a hierarchy of sources perspective.

As to the general principle that the later in time has priority: That, too, does not seem very helpful here as both sets of rules can now be found in relatively new treaties with little indication that contemporary practice significantly upsets the status of any of them. On the contrary, both human rights and diplomatic law presently appear to be in "good shape." In sum, the hierarchy of international law sources *per se* does not seem to provide an answer to the question of priority between human rights and diplomatic immunity.

It remains to be examined whether the normative (or "qualitative") analysis hierarchy is useful to that end.

**Human Rights vs. Diplomatic Immunity: Normative Hierarchy**

Both human rights law and diplomatic law have been described as 'fundamental' and 'basic'. If one accepts the notion that some rules are, by their nature, 'higher', 'compelling', 'peremptory', or 'supreme', it logically follows that when clashing with 'lower' rules, the 'higher' rules derive priority from
their compelling nature. The crucial question is whether either human rights or diplomatic law, or both, constitute *jus cogens*;

Diplomatic immunity as *jus cogens* - the idea that diplomatic law is based on a norm of such a fundamental nature as to constitute a *jus cogens* is somewhat unconventional and speculative. Indeed, it is hardly, if ever, mentioned as an example of an existing *jus cogens*. On the one hand, it may be right to say that the 'functional necessity' theory underlying the law of diplomatic immunity is a real obstacle for treating it as *jus cogens*. On the other hand, other functionally-based principles such as *pacta sunt servanda*, have been accepted as constituting *jus cogens*. All told, even if one accepts that functionally-based principles can be *jus cogens*, the fact that the theory underlying diplomatic immunity is almost, if not purely, utility-based, should not be overlooked. Today, the theories of extra-territoriality and personal representation, discussed earlier, are largely treated as archaic, or at least as 'declining' and 'devalued' rationales. To be sure, diplomatic immunity has always been seen as a sort of reciprocity-driven compromise rather than a strongly desirable rule deriving its validity from some 'higher' external 'ultimate source'. Accordingly, diplomatic law seems far removed from the natural law thinking associated with the *jus cogens* notion. It is difficult to see how 'natural' law justifies a law destined to prevent justice from being done by allowing murders, rapists, child abusers, and drug smugglers to retreat behind the sanctuary of their privileged utility-based status. Moreover, as far as state responsibility is concerned, diplomatic immunity creates obligations vis-a-vis another state rather than obligation *erga omnes*. Two contrary arguments may be advanced. First, obligation *erga omnes* and *jus cogens* are not analogous terms. Obligation *erga omnes* is a specific category of state responsibility whereas *jus cogens* is essentially a hierarchical instrument. The fact that a specific obligation is owed to the international community as a whole does not necessarily mean that the rule in question is superior in the qualitative, normative, or policy sense. Second, *jus cogens* is also "...akin to the notions of public policy and public order in domestic legal orders." As such, it is not essentially different from other relatively non-controversial, well recognized and non-derogatory (or "absolute") customary rules, that
can only be set aside by the formation of a subsequent customary rule of contrary effect. Interestingly enough, diplomatic immunity law, strictly speaking, appears to satisfy the two-stage test for creation of a *jus cogens* rule found in Article 53 of the 1969 Vienna Convention on the Law of the Treaties. First, it is universally accepted in form and in practice as a legal rule. Compliance with the diplomatic immunity rules is overwhelming with very few exception far and in between. Second, the recognition by an overwhelming majority of states, crossing ideological and political divides, of some immunities as absolute and non-derogatory, mean that they are widely regarded, in practice, as a peremptory rule. State practice and the 1961 Vienna Convention clearly indicate that some immunity provisions are absolute, providing evidence that the rules are, in fact, regarded as *jus cogens*. If diplomatic immunity rules constitute *jus cogens* and human rights rules do not, then diplomatic immunity should prevail. If both constitute *jus cogens*, then there must be some hierarchy between *jus cogens* rules themselves.

**Human rights as *jus cogens*** - the preceding analysis under which diplomatic immunities may constitute *jus cogens* is somewhat non-conventional, if logical. By contrast, fundamental human rights have been expressly regarded by many as *jus cogens* for quite some time. Assuming that not the entire body of human rights satisfy the conditions for *jus cogens* creation, the question is which fundamental human rights, if any, do constitute *jus cogens*. Perhaps the most powerful evidence for the existence of a rule of 'fundamental' nature constituting *jus cogens* is the fact that the human right rule in question may not be derogated from. It has been shown that the rights falling within that category include the rights to life and security of the person, humane treatment and prohibition of torture, freedom from slavery, and the rights of the child. The fact that these rights are non-derogable under the relevant conventions is evidence of their fundamental nature but does not, on its own, establishes them as *jus cogens*. In order to be regarded as *jus cogens* such rights must be tested against the conditions set in Article 53 of the 1969 Vienna Convention on the Law of the Treaties. To pass the first stage of Article 53, the human right in question must be universally accepted as a legal rule. It seems that the prohibition on torture and slavery have become universally recognized.
as legal rules by way of treaty and state practice evidencing custom. Other fundamental rights such as the rights to life and security of the person, and the rights of the child, have been widely recognized under treaty law and may well constitute obligation *erga omnes*. The fact that the rights in question are treated as non-derogable is an evidence for the purpose of the second requirement, namely that the rule in question be recognized as a *jus cogens* by an overwhelming majority of states, crossing ideological and political divides. The right to life presents a particular difficulty. One may argue that state practice suggests that these rights are actually treated as derogable, whether in time of public emergency or not. For example, capital punishment is still widespread among the state members of the international community including prominent states like the US and China. Indeed, some writers doubt the notion that human rights rules such as the right to life and the prohibition on torture constitute *jus cogens*. Others disagree, contending that these fundamental rights do constitute norms of *jus cogens*. The debate as to which human rights norms are *jus cogens* is likely to continue and no readily available answer is within sight. All the same, the analysis of this paper will continue on the assumption that all 'fundamental', 'basic', or 'inherent' human rights constitute *jus cogens*. This is done in order to show that in the real world, even if one assumes that fundamental human rights constitute *jus cogens*, and whether or not diplomatic immunities constitute *jus cogens*, the utility of theoretical priority determination is, at best, questionable.

**D. Theory Meets Reality: The Reciprocity Factor**

The principal problem flowing from automatic preference of 'fundamental' or 'basic' human rights' protection over diplomatic protection very much narrows down to one word: reciprocity. It has been explained above that the prevalent theory underlying diplomatic immunity is functional necessity. In summary, it is widely believed that the reason diplomatic immunity exists, and the reason why it is well established and well complied with, is that every state is both a sending and a receiving state. It is in the mutual interest of all states to respect diplomatic protection rules. If a state does not respect
diplomatic law, the immediate as well as long term consequences may be grave. In 1708, the Imperial Russian ambassador to the British court was pulled out of his coach and arrested in the streets of London by bailiffs acting for his creditors. "Tzar Peter the Great was so furious he demanded that those who had arrested his representative be punished by death, and there was mutterings that revenge might be taken against the British ambassador to the Russian court." The British ambassador was then "...commissioned to convey to the Czar at a public audience Queen Anne's regret for the insult to his ambassador." That was not enough to appease the Tzar's anger, so a law, known as the Act of Queen Anne 1708, protecting ambassadors and their servants from arrest or imprison was enacted. The threat of execution aside, things do not seem to have changed much since 1708. In 1986, following the arrest for spying by FBI agents in New York of a soviet citizen employed at the UN not protected by diplomatic immunity, Moscow retaliated by taking an American reporter hostage. The reporter, a respected U.S. News & World Report correspondent, then experienced what has been described as "...the waking nightmare that haunts every American reporter in Moscow." A soviet acquaintance edgily pressed into his hands an envelope containing "newspaper clippings" and hurried off. The American reporter was at once surrounded by eight KGB agents who opened the envelope and announced that it contained "top secret" photographs and maps. He was then handcuffed, interrogated and sent to Lefortovo, Moscow's infamous maximum-security prison. Those practices did not disappear with the celebrated end of the Cold War: in 1997, "[t]wo weeks after two diplomats from Russia and Belarus complained of being "roughed-up" by New York police following a parking ticket dispute, the Moscow traffic police launched an exercise in reciprocity straight from the old Soviet textbook." A two-day blitz against cars registered to foreigners had led to more than 200 offenses being recorded; "American drivers were found to be the worst offenders." In the 1850s, two messengers were sent by Egypt to the tribal ruler of what is now Uganda with a note. The ruler, who was not pleased with the content of the message, had them executed forthwith. Diplomats face serious perils in their lives in foreign countries. The danger of false charges, on top of the usual dangers faced by diplomats, would make diplomatic service in many
countries practically impossible. Thus, following the 1997 motor accident in which a drunken Georgian diplomat killed 16-year-old Jovian Waltrick, the State Department spokesman stated: "We couldn't in good conscience send our diplomats to places, police states, where we know they wouldn't receive a fair trial if a government wanted to bring trump-up charges against them." Diplomatic immunity cuts all ways; 18 months before the Georgian diplomat incident, a US diplomat in Moscow was reported to have struck and kill a Russian Woman and child with his car. The diplomat left Russia without admitting guilt and was posted elsewhere.

In 1987, the President of the American foreign Service Association, stated that '...spouses and children could be subject to legal and political systems sharply at variance with ours and are controlled by states that could use them to harass and intimidate us.' Domestic laws in certain countries prescribe death by stoning for adultery and flogging for public drunkenness. In 1997, the State Department reported a 1996 incident in which a young American diplomat, "...was kicked out of Cuba by the Cuban Government. They say that she violated Cuban law. We say that she was unfortunately living, fortunately for her, in an authoritarian police state and was subject to capricious and unfair laws. Fortunately for her, She did not have to face the Cuban judicial system [and thanks to diplomatic immunity] was allowed to return to the US." One day after the raid of the Nicaraguan ambassador's residence in Panama City during operation "Just Cause", and despite admission of "screw up" and apologies by US officials, Nicaragua retaliated by expelling twenty US diplomats from Managua. The danger for diplomats and their families is very real. In July 1987, following a French demand to question an Iranian suspected terrorist (accused of the 1986 killing of seven people and injuring 161 others in Paris), who had taken refuge in Iran's Paris embassy, a "war of embassies" erupted between France and Iran. When France broke off diplomatic relations, Teheran quickly followed suit and within hours warnings were received in Western news agencies in Beirut that two French hostages being held by pro-Iranian Islamic terrorist would be killed. Responding to the French demand and the surrounding of the Iranian embassy by French police forces, Iran's Interior Minister announced that the French embassy in Teheran had been cordoned off and
that some of its officials would be arrested for spying. The Iranian Minister claimed that the French diplomats "...acted as a connecting bridge to help counterrevolutionaries escape abroad and also to help link splinter groups outside Iran." French officials insisted that the allegations were made in order to create circumstances analogous to the Paris stand-off.

In May 1987, an Iranian consular official in Manchester, England, was arrested on charges of shoplifting, reckless driving, and assaulting an officer. As a consular officer he was only entitled to immunity for official acts. The following day, a high-ranking British diplomat in Teheran was beaten by a unit of the Iranian Revolutionary Guards and "arrested" for 24 hours on unspecified charges. The decision of the Thatcher government not to take action against the Libyan embassy following the Libyan embassy shooting illustrates the kind of dilemmas faced by host states whatever the degree of the public's anger, emotion, and frustration involved. The UK government had been concerned about the safety of the estimated 8,500 Britons in Libya if an action would be taken against the gunman. Throughout the incident the Libyan press warned that any "humiliation" of Libyan or Arab citizens in Britain will lead to "...tenfold humiliation for Britons staying in Libya and the rest of the Arab homeland." It has been argued that "[f]or large Western states, the problems presented by reciprocity are often magnified by the presence abroad of large expatriate communities." In retaliation for British permission to American bombers to take off from British bases to attack Libya in 1986, two British teachers and an American librarian were murdered in the Moslem part of Beirut. Host governments are therefore responsible not only for diplomats but also for the safety and welfare of the expatriate community as a whole. Indeed, the public should not, and presumably is not, unsympathetic to this logic.

E. Human Rights vs. Diplomatic Immunity: Overview

The most obvious solution in cases of conflict between human rights and diplomatic immunities would be to determine which one should prevail from (a somewhat formal) hierarchy perspective. As international law stands, it is difficult to reach a definite answer as to priority of one over the other.
Nevertheless, the preceding analysis continued on the assumption that, under a normative analysis of hierarchy, human rights prevail over diplomatic immunities. For one, to the extent that the general trend international law can be detected, human rights is "in" and immunities (diplomatic or others) are "out." Also, the assumption that human rights law prevails provides the necessary conditions for evaluating the simple hierarchy-oriented solution to conflicts in light of real world dilemmas revolving around the reciprocity factor. That evaluation has shown that simple hierarchy of laws approach is not likely to provide a sound solution to conflicts. First, because immunity is seen as vital for conducting diplomacy. Second, the essentially reciprocal nature of diplomatic immunity indicates that, in the real world, overwhelming support for strict adherence to diplomatic immunity rules, at almost any price, is likely to continue.

IV. HUMAN RIGHTS AND DIPLOMATIC IMMUNITIES: ALTERNATIVES TO HIERARCHICAL APPROACHES

A. Some Existing Views

The occasional abuse of diplomatic immunity led some writers to propose several reforms aimed at preventing or minimizing future abuse. These proposals will be briefly considered here.

Certain Acts Can Never Be Considered as Part of the Diplomatic Function

This approach takes a narrow view of diplomatic immunity. Since the underlying theory for diplomatic immunity is functional necessity, goes the argument, any given act for which immunity is claimed should be necessary for conducting the diplomatic function. It is further asserted that violations of human rights cannot, by any standard, "...be considered as a part of the diplomatic or consular function, and thus neither can be considered an official act." That idea has been clearly expressed in the British Foreign Affairs Committee Report that followed the Libyan and Dikko affairs. It was stated that "...it goes without saying [that] terrorism or other criminal activities can never be
justified by reference to these [diplomatic] functions. Accordingly, an argument can be made that "...when diplomats act in fact as terrorists, they are not diplomats at all, and thus must lose the benefit of those immunities that diplomats are entitled to. That approach has three main difficulties: First, it is by no means clear that the 'functional necessity' theory relates to specific acts of protected persons in the host country rather than to their general ability to be there at all. As discussed above, the diplomatic community views immunity as a pre-condition for effective conduct of diplomacy in certain countries. Without it, they say, diplomats and their families are vulnerable to all sorts of improper pressures in countries where the political and legal systems are sharply in variant with Western notions of due process and justice. The logic of the limited 'functional immunity' approach inevitably leads to the suggestion that the immunity of family members cannot be seen as necessary for the exercise of diplomatic functions. Does that mean that protection of family members should be abandoned altogether? In the past, the similar conceptions (that diplomatic immunity should be accorded only to "important" missions and that "functional differences" should be taken into account), failed because it would be impossible to distinguish between those diplomats who need immunities and those who don't. The second difficulty with the narrow 'functional immunity' view of diplomatic immunity is that it ignores the continued presence of the personal representation theory. Finally, and most importantly, the narrow 'functional immunity' view does not address the very linchpin of diplomatic immunity: reciprocity and mutuality. True, terrorism, for instance, can never be regarded as a diplomatic function, but would such an approach be of any help to, say, the 8,500 Britons that found themselves at the mercy of Colonel Qadhafi in 1984?

**Immunities as a Mere Expression of Sovereignty**

That argument is a straightforward one: Since it is a "perfectly established" law that sovereignty or domestic jurisdiction cannot bar the requirement that no state can stand above the obligation to protect fundamental human rights, and since immunities are just an expression of such sovereignty, it logically follows that they, too, cannot impede the protection of human rights. This approach, unlike the
'functional immunity' view discussed above, essentially addresses the representation theory: Even a state's borders cannot affect its human rights' obligations, so why should its representatives in foreign lands be immune? Whether this humanitarian-intervention-like approach comes on its own, or combined with the narrow 'functional immunity' approach considered above, it is susceptible to criticism: First, it appears to underestimate the continuing strength of domestic jurisdiction. Second, it, too, neglects to seriously consider the reciprocity factor. Even if one accepts the claimed "well established" principle that domestic jurisdiction "...can no longer be a bar against the protection of human rights," there is still the very real threat of initiation of intimidation practices by the sending state as well as the threat of retaliation when a sending state's diplomat faces legal charges. In short, that approach tends to overlook functional necessity for immunities in the general sense rather than in the act-specific sense.

**Legal Reforms: Re-negotiation of the 1961 Vienna Convention**

A typical and understandable reaction to flagrant abuses of diplomatic immunity is to argue that re-negotiation of the Vienna Convention "...seems to most logical step [to prevent future abuse]. A number of reforms have been proposed:

Limiting the entitlement and scope of immunities - some proposed amendments focus on limiting diplomatic immunity to all or some accredited persons so that it will apply only to 'official acts' or other limited categories of conducts. The personal immunities of administrative and technical staff, and perhaps those of families, would be restricted to official acts just like the immunity accorded to corresponding categories under the 1963 Vienna Convention on Consular Relations. The appeal of this proposal lies in the fact that a very high percentage of crimes committed by protected persons is attributed to low ranking officials and dependents. The difference between this approach and the 'functional immunity' approach (that is, immunity for official acts only) discussed above, is that it recognizes that some immunities are currently absolute whatever the act performed by the protected person. This position gives rise to a number of problems. First, experience accumulated in respect to
consular immunities suggests that an amendment of this kind will allow, in certain cases, the arrest, detention, and prosecution of diplomatic agents and their families. The overwhelming majority of accredited persons do not abuse their position. They are nonetheless strongly affected by the reciprocal nature of the immunities. Hence, the very real threat of political harassment including phony lawsuits and fake criminal charges remains in place. In shorthand, the issue of reciprocity is not fully addressed, if at all. Second, the reason why the degree of consular immunities is limited is that consular political functions are few. Arguably, that makes them less exposed to political pressures from the host state. It is true that they, too, are potential hostages and intimidation targets, but shouldn't the line be drawn somewhere?

Problem-specific amendments - one specific amendment proposal concerns the inviolability of the diplomatic bag. Following the Libyan embassy and Dikko incidents, the British considered an amendment that would provide for compulsory opening of the diplomatic bag upon request following reasonable suspicion, or return of the bag to its point of origin. Indeed, the existence of weapons of mass destruction - nuclear, chemical or biological - does raise serious concerns about state terrorism and possible abuse of the diplomatic bag. However, both the British government and the House of Commons Committee clearly rejected the amendment as a solution due to 'practical difficulties.' It was thought that securing amendments to the Vienna Convention in accordance with proposals of the UK and like-minded countries would be virtually impossible and doubtfully desirable. The Foreign Affairs Committee concluded:

[I]t is even doubtful whether, from the UK's point of view, amendment is even desirable. In respect of all these matters we were constantly reminded of the importance of reciprocity -- namely, that the privileges and immunities operate to provide a very real protection for our diplomats and their families overseas, and that action should not be taken which would expose them to personal danger or make the carrying out of their diplomatic tasks more difficult or even impossible. The UK maintains a substantial number of diplomatic posts overseas and there is little doubt that, in many of these posts, the protections afforded by the Convention are necessary for the affective and safe performance of their function.

Similarly, the proposed introduction of routine scanning of suspected diplomatic bags was generally rejected as it could lead to 'adverse reciprocal consequences.' Other proposed amendments include the
removal of personal immunity after participation in acts of state terrorism, and withdrawal of the inviolability of the diplomatic premises if used for acts of state terrorism. Like the bag search proposal, and for similar reasons, all these ideas have been strongly rejected on both sides of the Atlantic.  

**Unilateral Domestic Measures**

Abuse of diplomatic immunity sometimes lead to loss of faith in the international system as a whole and to calls for unilateral measures in the form of domestic legal reforms to tackle abuse. In 1987, Republican Senator Jesse Helms has proposed amendment to US domestic legislation requiring, *inter alia*, the investigation and prosecution - subject to certain conditions - of diplomats for serious criminal acts, including "any crime of violence", "drug trafficking," and reckless and drunken driving, and the altering of the definitions of the family member and diplomatic bag. Later, a more modified proposal was introduced entitled "Diplomatic Immunity Abuse Prevention Act." The bill has been approved by the Senate but rejected by the House of Representatives. The final proposal eventually advanced was even weaker. It generally strengthened existing practices by, *inter alia*, calling for immediate waiver of immunity and immediate expulsion for diplomats committing serious crimes, and by requiring liability insurance for foreign missions. A bill passed in Congress in 1998 following the 1997 Georgian diplomat incident, and awaiting the President’s signature, merely requires the State Department to prepare an annual list of diplomats accused of committing crimes and asserting diplomatic immunity. The general failure of attempts to introduce restrictive unilateral domestic measures that weaken the application of the Vienna Convention, confirm that the risks in so doing, as well as the possibility that the domestic law at issue be contrary to international obligations, are well understood. Radical proposals, both in the UK following the Libyan embassy and Dikko incidents, and in the US following the Absinito affair, were firmly rejected. Domestic Courts occasionally face the problem of immunities' conflict with domestic law, including the Constitution. For example, the US Constitution provides for the principles of equal protection under the law and guarantees that private property shall
Despite that, a diplomat can decide to sue an American citizen and do so but not *vice versa* (unless immunity is waived). Similarly, any immunity, diplomatic or other, mean that some persons would be prosecuted while others, committing the same offense, would not. Despite these constitutional problems, diplomatic immunity law is, in effect, almost always, given priority by domestic courts. One commentator concludes that "[d]iplomatic immunity has fulfilled its purpose solely because it is an absolute principle insofar as the criminal jurisdiction of the receiving state is concerned. The effectiveness of the immunity rule in facilitating diplomacy rests largely on its simplicity and clarity." Furthermore, "...the restrictive view of immunity undermines longer-term U.S. interests, replacing a rule that provides maximum protection of diplomats with one more subject to manipulation and misuse, [and] in the long run the United States would be ill-advised to embark on a course of unilateral action that would undermine the integrity of the Vienna Convention and the principle of *pacta sunt servanda*. At any rate, more recent initiatives are more or less confined to requiring the State Department to monitor and report the number of accredited persons and the number of abuse cases.

**Overview**

Evidence from American and British government sources clearly opposes any significant, or indeed any, domestic or international modification of the Vienna Convention. As one writer puts it:

"...the carefully considered attitudes of the United States and British governments [that] the Vienna Conventions in their present form are adequate and any amendment process would be likely either to fail or to have results adverse to the interests of such relatively law-abiding states as themselves."
B. Function-Based Immunities Call for 'Functional Remedies': How to Preserve Immunities, Minimize Violations, and Maximize Prevention, Punishment and Reparation

The Rationale for the 'Functional Remedies' Approach

It has been argued that "...sometimes it may be convenient for a government to let it be supposed, in exercising political judgment, that its hands are tied by the requirements of international law." For instance, at the time of the Libyan embassy saga the press wrongly assumed that the British decision not to search or scan the diplomatic bags leaving the embassy arose from an obligation under the Vienna convention. In fact, the British could, but chose not to, lawfully require the opening of bags leaving the Libyan embassy in reliance on a Libyan reservation to the Vienna Convention. The British government decision not to open the bags was political and not legal and the Foreign Affairs Committee investigating the incident did not dissent from it. More generally, the whole situation was not considered "intolerable" and the persona non grata remedy was available under the Convention.

Others concluded that:

The number of crimes committed by immune foreign diplomatic and consular personnel in the United States is statistically insignificant and these offenses are, for the most part, misdemeanors. In the rare instance that an immune alien commits a serious crime, adequate remedies exist under domestic and international law. A strict application of the existing remedies should effectively address the problem of "diplomatic crime" and serve as a potent deterrent.

Herein lies the key to solving the conflict between protection of human rights and protection of diplomats. The fundamental problem with the above mentioned all-embracing solutions in their various forms (formal determination of theoretical legal priority; radical amendments to the Vienna Convention, and excessive unilateral measures), is that they underestimate, if not ignore altogether, the reciprocal nature of diplomatic immunities and the risk of ultimately harm to a greater number of innocent victims. Moreover, there is little indication that the international community really wishes to adopt any such measures. At the end of the day, in the unlikely event that these radical proposals will be adopted, well-
drawn clauses are of little value if not matched by political will to use them. As stated by one commentator: "...terrorist abuse of diplomatic status [cannot be controlled] by trying to amend the Vienna Convention." Use and abuse are important means of legal development yet changes may be incremental and not necessarily conventional. Said that, inaction and passivity do not provide any solution for prospective victims of human rights violations committed by protected persons. It is unthinkable that, at a time when the role and status of human rights protection is generally on the rise, no action would be taken to stop violations of fundamental human rights or at least mitigate their effect.

It is submitted here that the available tools against abuse of diplomatic immunity should be analyzed in light of the elements of prevention, punishment and remedy. Such a methodological analysis can expose the real deficiencies of the existing system. Where such deficiencies exist, and where an international agreement may be reached, a moderate amendment of the Vienna Convention may be required in order to supplement the existing rules. That 'functional remedies' approach - aiming at prevention, punishment, and remedies - is premised on three basic assumptions. First, the vast majority of protected persons do not abuse their position. Even where abuse occur it almost always takes the form of minor offenses such as illegal parking, and shoplifting. Minor offenses should not be disregarded but their negative effect on fundamental human rights is minimal. The second assumption is that preserving diplomatic immunities as formulated in the Vienna Convention is in the mutual interest of all states and will continue to be so. Finally, the link, if any, between immunities and the number of serious crimes committed by protected persons is by no means clear. The percentage of offenses among accredited persons seems small relative to the population as a whole. One explanation may be the typical social background of accredited persons in their respective countries, but who is to say that it is the availability of immunity which leads to the crimes that are committed? Is it unreasonable to assume that in a population of about 18,000 persons with full immunity in the US, a small number of serious crimes would be committed regardless of diplomatic immunity? Bearing those assumptions in mind it is possible to turn to element-specific analysis of possible solutions.
Abuse of Immunity and Violation of Human Rights: Prevention

A number of mechanisms are available in order to prevent abuse of immunity and violation of human rights by accredited persons. For example, in 1985 the British government decided to adopt a firmer application of the rules of the Vienna Convention and preventive measures were taken. These measures included stricter appointment notification procedures as to prospective staff of diplomatic missions, limiting the size of missions, scanning and weighting the diplomatic bag, limiting the extent of mission premises, and announcement of greater readiness to declare an accredited person a persona non grata even in cases of serious civil claims and persistent unpaid parking tickets. Logic dictates that even the potential threat of persona non grata declaration contributes towards prevention of abuse. The trend towards restrictive interpretation of the scope of immunities is by no means exclusive to the UK. France, Germany, and Italy have all expelled Libyan diplomats suspected of fostering criminal activities. There is evidence, based on the reduced number of offenses allegedly committed by accredited persons, that preventive measures adopted in the UK and US during the 1980s have been successful despite the recognition of many new independent states and the resulting increase in the number of missions and diplomats.

The ultimate sanction and prevention measure available for governments is the severance of diplomatic relations. The US shut down the Libyan People's Bureau in Washington in 1981 in order to put a stop to the danger of terrorism emanating from that mission. In 1986, three Syrian diplomats suspected of involvement in an attempt to smuggle a bomb aboard an Israeli civilian jet at Heathrow airport, were expelled by Britain. The next day Syria expelled three British envoys. These expulsions, together with further evidence of Syrian diplomats' involvement in terrorism, led the UK to sever its diplomatic relations with Syria in 1986. In the same year, the government of Mauritius practically threw the Libyan ambassador out of the country within half an hour of notification, and the Member States of the European Community agreed to limit the Libyan representation on their territory to minimum and restrict the movement of the remaining diplomats and consuls. Such preventive measures do not seem
incompatible with international law and may be seen as a genuine attempt to reduce the risk of abuse. Once a disturbing pattern of behavior, individual or collective, has been identified, the receiving state is far from being powerless under international law.

The powers of receiving states to prevent human rights abuse do not stop here. The doctrines of self-defense and self-preservation are also available. In 1717, the English government ordered the arrest of the Swedish ambassador for conspiring to invade England and dethrone the king. Likewise, the physical search of the Libyans leaving the London embassy following the 1984 shooting incident was declared to be "...justified by reference to self-defense in domestic and international law." In the old case of United States v. Benner the defendant constable executed an arrest warrant against a Danish diplomat and "a scuffle ensued and blows were exchanged" as a assault of which charges were brought against the constable. The Court stated that "...if a minister assaults another, he may [even] be killed in self-defense, though not by way of punishment." Thus, self-defense is confined to removal of the "...immediate threat posed by the diplomat." Based on the belief that "...diplomats do not have a right to endanger public safety," the State Department's Guidelines now provide that police officers can stop protected persons driving "...under the influence of alcohol or disregarding the rules of the road." It is evident that states do not hesitate to rely on somewhat 'shaky' legal justifications, stretch the limits of legality under Vienna Convention, or even disregard it, where too much is at stake. At a time when non-conventional weapons endanger the entire human race, states do not like to take risks. In July 1984, a nine-ton Soviet Mercedes tractor-trailer claimed to be "diplomatic bag" was sent into Switzerland. Following the Dikko incident, the British government stated that any decision whether or not to open a diplomatic bag takes "...fully into account the overriding duty to preserve and protect human life." On this reading, there may well be an implied exception to the inviolability of the diplomatic bag based on respect for human life and dignity. There is little doubt that during the Libyan embassy saga, had more lives been put at jeopardy as a result of continuing shooting from the Libyan embassy, British forces would have entered the
That intervention could probably be justified by the principle of self-defense, or by the Libyan fundamental breach of a treaty - using its embassy premises for terrorism - thus relieving the UK of its obligations *vis-a-vis* Libya. Indeed, it was stated that "...self defense applies not only to action taken directly against a state but also to action directed against members of that state." The British, however, did not believe that the Libyan embassy events satisfied the self-defense requirements in this case. States undoubtfully prefer to take self-preservation measures and face the legal and political consequences rather than expose the lives of individuals or the security of the state to potential dangers. In such cases there is a clear need for a dispute settlement mechanism to adjudicate the disputes that will result from such action. Pacific means of dispute resolution, as objective forums trusted by both the sending and receiving states, can deal with violations of the Vienna Convention arising from "self-defense," as well as cases of abuse, harassment, and intimidation by the receiving state. Referring such disputes to the principal judicial organ of the UN - the ICJ - is one option. The general principle is that ICJ jurisdiction depends on consent given either by special reference or by treaty obligations. The "optional clause" provides for possible compulsory jurisdiction over legal disputes for states recognizing compulsory jurisdiction of the ICJ in specified situations covering almost any possible dispute. Speaking generally, a number of problems are associated with reference to the ICJ of disputes arising out of violations of the 1961 Vienna Convention. First, the Convention does not provided for compulsory reference of disputes concerning its provisions to the ICJ. Therefore, in most cases special consent will be needed before reference is made. Second, in the unlikely event that a consent has been given by both states sometimes in the past, there is still the problem of possible non-appearance. For example, the ICJ was of little or no help for the American hostages in Iran because the Iranians refused to recognize its jurisdiction. The hostages incident, during which the Soviets vetoed any useful sanction against Iran, also demonstrated the shortcomings of Security Council reference the success of which ultimately depends on the random composition of the Council at the time of the reference, or on complex relations among the permanent members. All said, reference to the ICJ should not be precluded altogether.
Contrary to some popular beliefs, the compliance record, assuming consent was given, with ICJ final judgments is impressive and there have been only five serious non-compliance cases so far, the last of them in the early 1980s. In recent years the ICJ has successfully adjudicated some highly tensed cases and the Court currently deals with a case arising out of the 1963 Vienna Convention on Consular Relations. There is no principled reason why, provided consent is given, disputes concerning diplomatic law should not be referred to the World Court. Another possibility of dealing with violations based on "self-defense" or similar measures taken by receiving states, could be legal action, in the courts of the receiving state, against that state, for violation of its domestic diplomatic protection law. The main problems are that such action is likely to be expensive, involves divergent rules, and likely to be tainted with distrust on the part of the sending state as well as possible hostile attitude in the receiving state.

Abuse of Immunity and Violations of Human Rights: Punishment

It has been argued above that states are by no means powerless in preventing abuse of diplomatic immunity and violation of human rights. Nevertheless, violations will continue to occur as it is unreasonable to expect that the whole world-wide diplomatic population, consisting of - for good or ill - many thousands of normal human beings, will remain flawless. Upon the occurrence of abuse, whether or not a human right violation, receiving states have several options. First, it is possible to conclude, in advance, a bilateral, or regional treaty providing for compulsory waiver of immunity, or compulsory prosecution in the sending state. Second, the receiving state can request waiver of immunity from the sending state. The lifting of immunity is not frequent but can be seen in a number of recent cases, including the 1997 Georgian diplomat case. Interestingly, the change in the international mood in the last few years could lead to a change in the US Congress' attitude towards waiving the immunity of US diplomats abroad. A third option is "post-immunity prosecution," that is, prosecuting the alleged offender after h/er assignment has been terminated. Fourth, the declaration of persona non grata in
itself, though not a perfect punishment for human rights violation, is not without punitive value. Fifth, abuse of diplomatic immunity involving a violation of fundamental human right may be seen as an international crime suitable for trial by an international criminal tribunal. However, there are various obstacles to such a solution, including the "...diversity and international crimes and their various levels of receptivity." It may also require the amendment of the Vienna Convention to that effect. Perhaps the most promising approach for peacefully resolving disputes where none of the above mentioned mechanisms has worked (that is in cases of continuing disagreement), is amendment of the Vienna Convention to require compulsory arbitration. That alternative will be discussed below.

Abuse of Immunity and Violation of Human Rights: Remedies for Victims

It has been argued that amendment of the Vienna Convention to permit civil liability is less likely to obstruct the performance of a diplomat's duties, does not generally limit the diplomat's freedom of movement, and would not trigger retaliation by the sending state. Such an approach has its merits, particularly the deterrence and restitution it may bring with it. However, allowing civil lawsuits against protected persons might be perceived by the sending state as a host-state-supported obstruction of diplomats' functions. Consequently, it might lead to some measures of retaliation. It must be remembered that the Vienna Convention does not protect administrative staff and their families acting outside their official duties from civil and administrative proceedings. Thus, suits may be brought by victims against these people, and diplomatic immunity is not a bar to such action.

Self help - following the 1997 Georgian diplomat motor accident in which a 16-year-old American girl was killed, it has been proposed that foreign aid to Georgia be cut unless the immunity of the suspect be lifted by that country. It is difficult to estimate the impact of that threat on Georgia's president upon his decision to lift the diplomat's immunity. To serve US national interests and the interests of private US citizens, the US has relied on self-help in the past. For example, the US froze Iranian assets in an (arguably successful) attempt to press the Iranian to release the Teheran hostages in accordance with the
ICJ judgment in the *Hostages case*, and in order to speed up the settlement of claims arising from the events that followed the 1978 revolution. The UK adopted similar measures in response to Albania's refusal to comply with the ICJ judgment in the *Corfu Channel case* and in response to Iran's refusal to comply with the interim measures ordered by the ICJ in the *Anglo Iranian Oil Co. case*. Unilateral sanctions of that kind may be an effective tool to coerce a sending state to settle the dispute, prosecute the violator, and adequately compensate the victims.

**Special compensation fund** is the idea of an "international fund designed to compensate the victim of diplomatic wrongdoing" is an attractive one, but its administration will require much international cooperation as well as admittance of fault on the part of the sending state. Furthermore, to make payment from an international fund, some fault would have to be found by an international mediator. A domestic fund created for the same purposes by receiving states would suffer from the hazard of "prohibitively high" costs and lack of enthusiasm on the part of foreign ministries. Despite that, it has its appeal: The actual number of fundamental human right violations is relatively small and it is the duty of the receiving state to ensure that adequate reparations are made when its citizens are suffering the consequence of laws adopted for the larger good. This notion is somewhat akin to the French administrative law concept of égalité devant les charges publiques. Some states already follow that path. For example, innocent victims of diplomatic immunities’ violations in the UK have access to Criminal Injuries Compensation Board.

**Compulsory insurance** - the *Diplomatic Relations Act of 1978* requires each diplomatic mission in the US, its members, and their families to have insurance coverage. The Director of the Office of Foreign Missions in the State Department must "...establish (compulsory for missions to the US) liability insurance requirements which can reasonably be expected to afford adequate compensation to victims." Another provision facilitates collection by victims by providing the right of direct action against insurers of diplomatic missions, thus making immunity defense claim generally irrelevant. Insurance schemes of that kind are certainly welcome. The victims can directly assert
their rights because the insurance company is liable and appears in place of the diplomat, and the immunity defense is circumvented. At the same time, there is no need for international agreement and diplomats remain protected. True, enforcement of the requirement itself is subject to immunity; But there should not be a special difficulty in adopting a hard line approach similar to that of tackling other abuses, including expulsion, upon non-compliance. Sending states might require similar insurance from US missions but that, in itself, does not seem to create a serious difficulty and may even be desirable. Financial consequences for US diplomat as a result of retaliatory measure of this kind are not equivalent to reciprocal measures risking their well-being. At bottom, establishment of compensatory mechanisms of that type constitutes a risk worth taking.

Arbitration - inter-state arbitration has been defined by the ILC as "a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntary accepted." The idea of compulsory arbitration has been suggested by some members of the ILC during the Vienna Convention draft preparations but was not included in the Convention or the Optional Protocol on Dispute Settlement. Although amendment of the Vienna Convention is a difficult task, arbitration offers a number of advantages to all states. First, it is impartial, final and binding. Second, procedure is flexible. Third, once a compromis (arbitral agreement) has been reached, there are generally no preliminary stages but only one phase: merits. Fourth, arbitration allows for appointment of specialist in the disputed field, in this case experts on diplomatic law and human rights. Fifth, arbitration can be effective where a large number of claims must be settled, preferably in a confidential manner. For example, where abuse of diplomatic immunity violated the human rights of numerous persons. Six, unlike the ICJ, private persons or corporations can be parties in international arbitration if its terms provide so. Arbitration can therefore accommodate the possible wish of victims to be directly involved in their claim. Seven, since parties to arbitration retain more control over various matters (e.g., composition of tribunal, formulation of the question to be submitted to arbitration, the law to be applied etc.), it reduces the uncertainty surrounding every prospective international case. This is a
crucial issue because governments generally feel ill at ease when facing the prospect of a third party adjudication, especially one given outside their jurisdiction. Even more so when internal opposition exists as in the *Taba* arbitration between Israel and Egypt. Compromissary clauses in international agreements further reduce the fear of the unknown by providing a suitable form of settling whole classes of disputes or potential disputes. Indeed, compromissary clauses have an important role in international treaty practice. Eight, arbitration offers, at least to some extent, protection against loss of face as well as the possibility of using the third party, the arbitrator, as a scapegoat. Nine, arbitration is usually faster than the procedure before the ICJ. Ten, perhaps most important, arbitration gives the parties time to reflect on the dispute and its consequences. It provides some distance from enraged, sometimes manipulated, public opinion, and therefore 'cools things down'. Eleven, arbitral solutions can generally produce in the parties a sense of being treated fairly where a too-strict application of the law would be less practical, less pragmatic, and less persuasive.

It may be inferred from the ILC's "Model Rules on Arbitral Procedures" that the consistent difficulty associated with arbitration is the various ways in which a party can frustrate the arbitration process. The number of inter-state arbitration has declined significantly since the 19th century but recent years have seen re-employment of this mode of dispute settlement in some important cases. Arbitration has some inherent weaknesses. First, as stated above, states are generally reluctant to commit themselves to third party settlement. Particularly so where they face a 'stronger' opponent and where their resources, legal and others, are presumed by them to be inferior to the resources of the other party. Since the parties' consent may be required in agreeing to the terms of the *compromis*, that general reluctance can be a significant hurdle. Second, just like any other mode of peaceful dispute settlement, enforcement of the arbitral award depends on responsible behavior of the participating governments. Third, a government with a weak case may simply be afraid to lose. Fourth, some international rules are vague and therefore decisions might be unpredictable. Fifth, the creation of an *ad hoc* tribunal is associated with delay and expenses. Six, the judicial-like form of modern arbitrations has been generally developed in the West by
states that share close cultural and legal norms and is not necessarily liked in other quarters. Sev en, arbitration has become somewhat formalistic and one of several other procedures for dispute settlement on the basis of law.

Turning to remedies, customary international law does not seem to provide clear principles regarding remedies in arbitral practice more detailed than the principle of full compensation. It is assumed that the remedies generally available under international law are also available in arbitrations. Remedies other than damages are quite rare. As a general rule, the power of the tribunal to award particular specific remedies depends on its mandate under the *compromis*. If it is silent in regard to remedies, the power to give remedies other than damages is unclear. The following remedies have been awarded in the past: negative injunction, *restituto in integrum*, declaratory judgments, and satisfaction. Certainly the most common remedy found in arbitral practice is damages. A fairly consistent set of rules on state responsibility for injury to foreign nationals have been built. In general, full compensation is sought.

Arbitral awards are binding but not necessarily final because the parties may take further proceedings to interpret, revise, rectify, appeal from, or nullify the decision. Those options make arbitration more flexible and less alarming for prospective parties. Thanks to the consensual nature of arbitration from its very initiation, refusal to execute the award is relatively rare. Institutional forms of arbitration that are relevant here include mixed commission or a collegiate body consisting of uneven number of persons empowered to take a majority decision. The latter is the most common type of arbitration found in modern practice. Also available, though barely active, is the Permanent Court of Arbitration (PCA). Arbitration of disputes arising from alleged breach of the Vienna Convention, alleged abuse of diplomatic immunity, and alleged violation of human rights, may be referred to an *ad hoc* tribunal just like any other dispute. However, had this possibility been feasible it would probably be utilized already. Disputes arising from abuse of diplomatic immunity tend to be highly sensitive probably making ad hoc tribunal unsuitable where much good will on the part of the receiving and sending states is required. In
such cases there is a clear advantage to a system under which the arbitral agreement has already been formulated at more relaxed times. Reference to a specialized tribunal modeled on the Law of the Sea tribunal or reference to a revived PCA are therefore more realistic. There is no indication that insertion of a compromissary clause in the Vienna Convention providing for such reference upon the evolvement of a dispute, will present any great difficulty. To the contrary, states may consider the advantages offered to them by the arbitration mechanism as sufficiently attractive to justify the amendment of the 1961 Convention. Consequently, they may well wish to support such an initiative. After all, the alternative may be much worse: expulsion of diplomats, severance of relations entailing negative economic and other implications, possible harm to their citizens, and political embarrassment. It has been argued during the ILC deliberations preparing the draft for the Vienna Convention, that compulsory recourse to arbitration over disputes arising from diplomatic immunities is appropriate since it is an area where it was very common for points to arise that had to be juridically determined, and the substantive law is "...largely non-political in nature." However, doubts were then expressed as to the propriety of including compulsory jurisdiction provisions in a convention meant to codify existing customary law. Hence, no vote was taken on the compulsory arbitration proposal. It is possible that inclusion of compulsory arbitration in the Vienna Convention would have led to a greater number of states being subject to compulsory dispute settlement "...since states which are insufficiently committed to take the positive step of acceptance of an Optional Protocol would in many cases be reluctant to enter a specific reservation in respect of an Article which is an integral part of a Convention." Moreover, inclusion of compulsory arbitration would have an important value as precedent making it "...easier to secure the adaptation at later conferences of provisions for compulsory arbitration or adjudication in treaties raising issues of greater national interest." All told, no device, arbitration or other, can completely guarantee satisfactory remedies for victims of human rights violations by accredited persons. But the arbitration mechanism, if adopted, may well improve their position.
V. CONCLUSION

From the points raised above it may be concluded that two sets of international rules, human rights and diplomatic immunities, sometimes conflict. Contemporary international law does not seem to provide a clear answer as to the question of priority between them. Even if one assumes that, at least theoretically, human rights law prevails, that assumption quickly runs into trouble when it encounters the very real reciprocity factor underlying the whole body of diplomatic law. In the past, a number of radical solutions have been proposed. These proposals included introduction of amendments to the Vienna Convention and amendments to domestic laws amounting to a unilateral measure challenging the international legal order. Such radical proposals suffer from serious defects, particularly partial or complete neglect to consider the reciprocity factor and the true wish of the vast majority of states. The abuse of functionally based immunities calls for functionally based remedies. In reality, the vast majority of accredited persons, carrying out important and sometimes risky tasks, do not abuse their status. When they do, that abuse is almost always of minor character. States are not powerless in face of occasional more serious abuses. Means of prevention range from firmer application of existing rules - including expulsion and severance of diplomatic relations - to the ultimate act of self defense. There is evidence suggesting that the latter will be used to protect fundamental human rights in extreme cases. Similarly, states are not powerless in their attempts to punish human rights violators protected by immunities. There is some evidence pointing to a possible change of attitude towards greater readiness, on the part of sending states, to waive immunities. Other routes, including post-immunity prosecution and prosecution in the sending state, may also available. Compensation of victims does not seem to be a large scale problem. First, because the foreign ministry of the receiving state can help negotiate a settlement or because of effective self-help measures by strong receiving states. Second, it is possible to introduce compulsory liability insurance for foreign missions as was done in the US. Thirdly, a compensation fund can be established domestically partly based on the recognition that victims of diplomatic immunity abuse suffer as a result
of considerations of national interest. On a more general level, introduction of compulsory arbitration provision into the Vienna Convention should be considered. Although amendment of the Convention is difficult to achieve, the advantages of arbitration may appeal to most, if not all, states. A permanent forum for arbitration, perhaps modeled on the Law of the Sea tribunal, or providing for reference to the PCA, seems the most suitable mechanism to settle disputes arising from human rights violations by accredited persons. All in all, no legal system is perfect and there will always be cases destined to lead to deterioration of relations between the receiving and the sending state. But even in such cases victims need not find themselves without adequate remedy.
Notes

1 See, Chuck Ashman & Pamela Trescott, Outrage: The Abuse of Diplomatic Immunity 127-134 (1986). The victim, Kenneth Skeen, was reported as saying: "I was just wondering if someone could explain how somebody can walk away from attempted murder." See, St. Petersburg Times, August 6, 1987, at 9A. Ashman & Trescott's book (Trescott herself is a victim of abuse of immunity) is quite one-sided but it was described as "...an articulate, and moving piece of journalism." See, Philippe Van Rjndt, Criminals Who Never Face Trial, Toronto Star (Book Review), Sep. 20, 1987, available in 1987 WestLaw 5000279. Ms. Trescott, Ashman's co-author has been presented with the highest civilian honor by the American Federation of Police for her work. See, Joseph N. Bell, Santa Ana Lawyer has Writing on Her Personal Docket, Los Angeles Times, Feb. 19, 1988, at 9.


4 Id.


6 Ashman & Trescott, supra note 1, at "Forward".

7 Id.


9 See, Higgins, "The Abuse", id.

10 See, The Disgraceful Diplomats, Foreign Rep., Aug. 20, 1998, available on 1998 WL 7895540. According to that article the UN’s Geneva-based Commission on Human Rights presented with details of several cases in March 1998; Smuggling, assault, slavery, kidnapping and other crimes committed by persons enjoying diplomatic immunity have all been reported. See e.g., Grant V. McClanahan, Diplomatic Immunity 170-171 (1989), Tables 1-2; See also, Ashman & Trescott, supra note 1, passim; The development of smuggling via the diplomatic bag is of particular interest: smuggling luxuries into Russia in the 1930s, import of liquor into the US during the Prohibition, more recent smuggling of valuable antiquities from Turkey, Ecuador and Peru as well as illegal wildlife trade in the 1990s, and "more serious" smuggling including drugs, firearms, bombs, and even human beings. See, Gregory L. Stangle, When Diplomacy Meets Illegality: Reevaluating the Need for the Diplomatic Bag, 3 Digest Int'l L. 51 (1995-1996), passim.

11 This paper focuses on the international regime of diplomatic immunities rather than on consular or international organizations' immunities. It does, however, interchangeably refers to these two regimes in dealing with various cases of abuse of immunity. Even though the scope of these immunities is more limited, they present similar dilemmas. For recent illustrations see, Peter Hartlaub, DUI Case Signals Shift for Diplomatic Immunity, Los Angeles Daily News, July 12, 1998, at N1 (describing the events following the April 1997 drunk driving accident involving Guatemala's Consul General in Los Angeles), and Jeff Leeds, Consular Official in L.A. May Face Assault Charges, Los Angeles Times, Aug. 22, 1998, at B1, available on 1998 WL 2456935 (South African consular official in Los Angeles allegedly involved in domestic violence incident). Consular immunities and privileges are governed by the 1963 Vienna Convention on Consular Relations, and there are conventions providing for certain immunities to the UN and its senior officials (Convention on Privileges and Immunities of the United Nations, I UNTS 15) , and specialized agencies (33 UNTS 261). On the status of other international organizations under customary international law, see generally, Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994), pp. 90-94.


15 E.g., ad-hoc or regular visits by officials, special missions, constant communications among heads of states, etc. See generally, Higgins, supra note 11, at 86; Murty, id., pp. 1-17.
Thus, there are immunities for states, for heads of states, etc. See generally, CHARLES J. LEWIS, STATE AND DIPLOMATIC IMMUNITY (3rd., 1990).


See, HIGGINS, supra note 11, at 86.

The Institute for the Study of Diplomacy at Georgetown University published a study (June, 1997) entitles "Who Needs Embassies? How U.S. Embassies Help Shape the World." In that Study, five experienced diplomats argue that the demands on US embassies have actually increased since the end of the Cold War. See, Yost & Locke, supra note 17; See also, McCLANAHAN, supra note 10, pp. 141-142: the world-wide number of diplomats and their dependents appear to be growing largely as a result of the recognition of new states.

See, Yost & Locke, supra note 17, noting in particular that the expanding number of democracies presents a complex challenge. They argue that in the new democracies it is no longer possible to conduct business with a narrow leadership group. Accordingly, "[d]iversity cannot be accessed by fax,... CNN's coverage cannot track political forces in Guatemala or South Korea or South Africa, [and] [s]upport for important decisions in such world bodies as the UN or the WTO cannot be built by e-mail."


See, id., citing, inter alia, M. Akehurst, Jurisdiction in International Law, 46 BYIL 145 (1972-3).


See, e.g., Chief Justice Marshall in the English case of Schooner Exchange v. McFaddon (7 Cranch) 116, 136 (1812): 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.'


See, Preamble to the Vienna Convention on Diplomatic Relations 1961, U.N. Doc. A/Conf.20/13: "Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents"; McCLANAHAN, supra note 10, pp. 18-27, surveys the relevant literature and finds that "ancient times" may extend as far back as 12,000 to 10,000 B.C. (p. 18). Immunity for envoys was a recognized customary rule in ancient Greece, Rome, and India. (pp. 21-25); EBBAN, supra note 13, at 335, states that "...there is a great deal of political and military diplomacy in the biblical narrative;" Similarly, M. Cheriff Bassion, Protection of Diplomats Under Islamic Law, 74 A.J.I.L. 609, 610 (1980), notes that "[t]he Koran contains several references to the concept of Aman, or safe conduct, which is in part the basis of diplomatic immunity"; See also, Judge Tarazi dissent in the Hostages case, supra note 25.

See, McCLANAHAN, supra note 10, pp. 25-27.

A comprehensive discussion is found in M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY (1936) passim; See also, CLIFTON E. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 1 (1967); MURTI, supra note 14, 336-346.

MCCLANAHAN, supra note 10, at 29; See also, Chief Justice Marshall in the Schooner case supra note 24, pp. 138-139.

MCCLANAHAN, Id.

Id.

See, WILSON, supra note 28, pp. 5-16.


See, e.g., Khan v. Khan, 27 I.L. Rep.253 (1959) where the Canadian Supreme Court rejected the notion of extraterritoriality. Likewise, in Fatemi et al v. United States, noted in 36 I.L.R. 148 (1967), the Court of Appeals (D.C. Circuit) held that an embassy is not a part of the territory of the sending state, therefore persons without diplomatic immunity committing crimes therein may be prosecuted; See also, Persinger v. Islamic Republic of Iran, 729 F. 2d. 835, U.S. D.C. Cir., March 13, 1984, 78 A.J.I.L. 900 (1984), where the Court rejected the contention that a tort committed in the US embassy in Iran has been committed in the US for the purposes of the 1976 Foreign Sovereign Immunities Act.

See, the English case of Magdalena Steam Navigation Co. v. Martin (1859) 2 E & E 94, 111 (Q.B.) per Lord Campbell C.J.: "[the ambassador] is to be left at liberty to devote himself body and soul to the business of his embassy"; The Preamble of the 1961 Vienna Convention refers to the purpose of immunities as ensuring "...the efficient performance of the functions of diplomatic missions as representing states";  DENZA, EILEEN, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION OF DIPLOMATIC RELATIONS 7-10 (1976), describes the International Law Commission (hereinafter ILC) deliberations on the draft articles of the 1961 Convention in which clear preference was given to the 'functional necessity' theory; See also, the ILC

36 Statute of Queen Anne c. 12 of 1708.

37 I Stat. 117 (1790); For a detailed discussion of evidence of state practice confirming the existence of customary international law of diplomatic immunities see, MURTY, supra note 14, pp. 346-359.

38 See supra note 26.


41 1961 Convention, Preamble.

42 See generally, DENZA, supra note 35, at 1; The provisions of the 1961 Vienna Convention are codified as US law by The Diplomatic Relations Act 1978. The Diplomatic Privileges Act of 1964 gives the Convention a force of law in the UK.

43 See, DENZA, supra note 35, pp. 2-3, arguing that none of the earlier attempts at multilateral regulation had covered the field so thoroughly.

44 Article 3.

45 Article 4.


47 Article 11.

48 Article 22.

49 Article 27.

50 Article 25.

51 Articles 22 and 25 respectively.

52 That is, without exception. See, DENZA, supra note 35, pp. 84, 110; See also, 767 Third Avenue Associates case, supra note 35, at 194; The US appeared to have violated the premises inviolability rule twice during operation "Just Cause" in Panama. US troops in pursuit of General Nuriega who have taken refuge in the Vatican's embassy in Panama City, "surrounded the embassy, sealed of the neighborhood, shot out the street lights, searched automobiles that entered and exited the premises, and bombard the building with rock music." US troops also "raided and searched the Nicaraguan ambassador's purported residence in Panama City, turning up a chache of weapons. United States officials subsequently admitted that the raid violated international law and offered an apology to Nicaragua." See, John Embry Parkerson Jr., United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause, 133 MILITARY L. REV. 31 (1991).

53 Provided they form part of the agent's household and are not nationals or permanent residents of the host state (Article 37).

54 Provided they form part of the junior staff member's household and are not nationals or permanent residents of the host state. Immunity of subordinate staff from civil and administrative jurisdiction is limited to official acts, Article 37.

55 Article 29.

56 See, DENZA, supra note 35, pp. 135-136.

57 Article 31.

58 See, e.g., the old English case of Bishop of Ross case (1571) (no prosecution even for treason), SATOW'S GUIDE, supra note 40, at 124; See also, the English case of Dickinson v. Del Solar [1930] 1 KB 376, 5 ILR 299.

59 Article 41.

60 Article 32 provides that the sending state may waive (expressly only) the immunity from accredited persons. A recent and somewhat unusual example is the lifting by Georgia President Eduard Shevardnadze of immunity of a Georgian diplomat suspected of the Jan. 3, 1997 killing of 16-year-old Jovianne Waltrick in Washington D.C. while drunken driving. See, Waiving of Diplomat's Immunity Welcome, Proper in View of Offense (Editorial), SUN-SENTINEL FT. LAUDERDALE, FLA., Feb. 20, 1997, at 18A; The Georgian diplomat was then tried and sentenced to 21 years in prison. See, This Foreign Diplomat Goes to a US Prison (Editorial), GREENSBORO NEWS & REC., Dec. 29, 1997, at A4; McCLANAHAN, supra note 10, at 157, cites another unusual case in Feb. 1985, where Zambia swiftly waived the immunity of an official in London suspected of drugs offenses; In 1989, after the US agreed not to seek the death penalty, Belgium waived diplomatic immunity for an embassy staffer in Washington who admitted killing two men in Florida. The man was sentenced to 25 years in prison. See, Katz, L. M., Diplomacy's Barrier to Justice Girl's Death Stirs Outrage Over Immunity, USA TODAY, Jan. 7, 1997, at 9A, Available on 1997 WL 6990696; In yet another case, Ireland's consul general in San Francisco hit into two cars and injured six people
while driving drunk. His immunity was waived in 1994 and he received to three years of probation; however, waiver of immunity by the sending state is certainly not the norm. For example, the US general policy is not to waive the diplomatic immunity of its agents (that policy may be changing as discussed below).


64 The Italians responded by declaring one Egyptian official a persona non grata and expelled two others. See, SHAW, supra note 21, at 529, footnote 240.

65 The crate was accompanied by a person claiming diplomatic immunity. See, "First Report," supra note 63, pp. 33-34; See also, Higgins, "The Abuse," supra note 8, at 646.

66 See generally, ASHMAN & TRESCHOTT, supra note 1, passim.


68 See, Eric Pianin, Bounds of Diplomatic Immunities: Victims to testify in support of Helm's Bill Limiting Exemptions, WASH. POST, Aug. 5, 1987..


73 See, Blomquist, supra note 70.

74 As noted above, a somewhat rare waiver of immunity has been granted in that case by the Georgian President, Eduard Shevardnaze: in Paris, thousands of people took to the streets in November 1996 to protest against the handling of a motor accident case in which the Zairian ambassador to France killed two boys. Despite that display of public anger, the Zairian Government refused to lift his immunity. See, Laura Myers, Teen's Car Death Puts Heat on Diplomatic Immunity, PITTS. POST-GAZETTE, Jan. 7, 1997, at A3, available in 1997 WL 4498630; Another recent outburst of public anger occurred in Israel following the alleged cover-up by the Israeli Government of a diplomatic scandal involving sexual assault allegations made against Egypt's Ambassador in Tel Aviv. See, Christopher Walker, Cover-up in Arab Envoy Case Denied, TIMES (London), Oct. 18, 1997, at 14.

75 For example, there was clearly a sharp rise in the number of newspapers' articles relating to diplomatic immunities in 1987 and 1997 following the Absinto and Georgian diplomat affairs; New York's Mayor Rudolph Giuliani was reported to have "exploded verbally" when two UN diplomats from Russia and Belarus allegedly attacked police officers trying to ticket their car. See, Rowan, C. T., Diplomatic Immunity a Necessary Shield, HOUST. CHRON. Jan. 10, 1997, at 36, available in 1997 WL 6534175; John Omincinski, Diplomatic Scofflaws Spark Outrage, THE COURIER-J. (Louisville, Ky.), Jan. 11, 1997, at 3A, available in 1997 WL 6630472: "What may be a new breed of "diplobrat" from former Soviet republics - flouting U.S. laws with immunity and impunity - has sparked outrage in the nation's major diplomatic centers of New York and Washington."

76 In the UK "serious" offenses are those carrying a potential sentence of six months imprisonment or greater. See, "First Report," supra note 63, at para. 5.

77 Id., paras. 40-41.


80 Id.


82 Grouped into categories such as "assault," "burglary," "drug-related," "sex," and "weapons," shoplifting etc. See, McCLANAHAN, supra note 10, at 170, Table 1.

83 McCLANAHAN, supra note 10, at 171, Table 1.

84 McCLANAHAN, supra note 10, at 171, Table 2.

The major exceptions being slavery and warfare law.

Davidson et al., Diplomatic Law, 35 BYIL 688 (1992).

(British) Home Office Memorandum, BYIL 483 (1984); See also, Elliot, supra note 79; "Diplomatic Immunity May Be Waived," supra note 88.

See, Blomquist, supra note 70; Russian officials, for example, have been reported to have racked up 14,437 unpaid parking tickets during the first six months of 1996. See, Katz, supra note 60; See also, Lee Myers, supra note 80. Myers reports a case in the 1970s where a Barbados delegate to the UN tried to extend diplomatic immunity to his dog, a German shepherd accused of biting his neighbors.

See, e.g., Elliot, supra note 79, citing Baroness Symons in the House of Lords: A sample group of 17,000 people in England and Wales committed 109 offenses in 1996 (in Northern Ireland the same size sample committed 73 offenses). This was compared with the 34 alleged serious offenses in the same categories by diplomats and their families in those territories.


This led some writers to argue that general non-compliance reflects the existence of state practice contradicting the alleged existence of customary international law of human rights. See, Shaw, supra note 21, at 197 footnote 5, citing, inter alia, J.S. Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, Univ. Illinois Law Forum 609 (1979); But cf: Thomas Buergenthal, The Human Rights Revolution, 23 St. Mary's L.J. 3 (1991), pointing to a more modern rationale for compliance with human rights laws partly based on economic and political calculations by offending states.


The major exceptions being slavery and warfare law. See, Shaw, supra note 21, pp. 200-201.

The Covenant included two important Articles: Articles 22 (mandate system in ex-enemy colonies) and 23 (just treatment for native populations in ex-enemy colonies). The peace agreements with Eastern European and Balkan states included provisions for the protection of minorities and introduced an international mechanism for the supervision of those rights in which the League's Council and PCJI played an important role. See e.g., Minority Schools in Albania case, PCII, Series A/B, 1935, no. 64, at 17. The Treaty of Versailles sought, inter alia, to promote the right of association and better standard of working conditions through the creation of the International Labor Organization (ILO). See, Shaw, supra note 21, at 201.

In particular Article 1 (promotion of respect for human rights, fundamental freedoms and non-discrimination is one of the purposes of the UN), Article 13 (1) (the General Assembly shall initiate studies and make recommendation in the human rights area), Articles 55-56 (respectively provide for the promotion by the UN of universal observance of human rights, and that the UN members "pledge" to participate in the achievement of that end), and Articles 73 and 76 (obligation to respect human rights and the well-being of inhabitants as one of the purposes of the trusteeship system). The latter have been expressly endorsed by the ICJ in the Namibia case ICJ Rep. 1971 pp. 16, 57; 49 ILR 3.


UN Charter, Article 2 (7); "Nothing contained in the present charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state."

G.A. Res. 217A, U.N. Doc. A/810 (1948). The Preamble of the Universal Declaration states that its objective is "...a common standard of achievement for all peoples and nations." Important provisions include: Article 3 (liberty and security of the person), Article 7 (equality before the law), Article 5 (prohibition of torture), Article 8 (right to effective remedies), Articles 9-10 (right to due process), Article 12 (privacy), Article 13 (freedom of movement), Article 14 (asylum), Article 18 (freedom of conscience and religion), Article 19 (freedom of expression), Article 20 (freedom of assembly), Article 23 (right to work and equal pay), and Article 25 (right to social security), Article 26 (right to education). See generally, Humphrey, The
The ECHR was signed in 1950 and came into force in 1953. It covers the right to life (Article 2), the rights to liberty and security of the person (Article 5), the right to property (Protocol I), and other rights broadly corresponding to those in the Universal Declaration. The Convention also prohibits torture and slavery (Articles 3 and 4 respectively). The ECHR created a detailed enforcement mechanism including a European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers. The European Court of Human Rights has dealt with many cases. For example, in Ireland v. UK, 25 Eur. Ct. H.R. (Series A) (1978), 58 ILR, at 188, the Court held that various techniques of interrogation used by UK forces in Northern Ireland violated Article 3 (prohibition on degrading and inhuman treatment). The contribution of the ECHR to international law is believed to be considerable. See generally, MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE ECHR (1988).

Signed in 1987, in force 1989, like the ECHR, the Convention established a Committee to supervise its implementation. See, SHAW, supra note 21, at 275.

The ACHR came into force in 1978 and has a system of supervision over its implementation that is roughly similar to that of the ECHR. The Inter-American Court of Human Rights delivered a number of interesting opinions. For example, in the Habeas Corpus case, 9 HRLJ 94 (1988), the Court interpreted the ACHR to mean that habeas corpus writ is a safeguard for the protection of human rights from which there is no derogation. Broadly speaking, the ACHR contains similar provisions to those found in the ECHR including the right to life (Article 4) and prohibition on torture and inhuman or degrading treatment (Article 5). It would be beyond the scope of this paper to discuss the differences between the ACHR and the ECHR but it is worth mentioning that some important differences do exist. See generally, Jochen A. Frowein, Bielefeld, The European and American Conventions on Human Rights - A Comparison, 1 HRLJ 44 (1980).


The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987. See e.g., Khan v. Canada CAT/C/13/D/15/1994, where the Committee against Torture held that the return of a person to his state, where he might be tortured, constitutes a violation of the Convention.


Higgins, for example, argues that: "[t]he special body of international law characterised as human-rights law is strikingly different from the rest of international law, in that it stipulates that obligations are owed directly to individuals (and not to the national government of an individual); and it provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantee of those obligations. Once it has been recognized that obligations are owed to individuals (because they have rights), then there is no reason of logic why the obligation should be owed only to foreign individuals, and
not to nationals. It becomes unsustainable to regard the treatment of one's own nationals as matters falling within domestic jurisdiction, and thus unreviewable by the international community." See, HIGGINS, supra note 11, pp. 95-96.

124 Van Boven, supra note 121, at 11-4.

125 Id.

126 Id.

127 Id., at 11-5.

128 Id.; See generally, T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); See also, Customary International Human Rights Law (special issue), 25 GEOGRAPHIA L INT'L. L (1995-96).


131 Buergenthal, supra note 96, argues that the intensity of the 'human rights revolution' lies in the fact that the "...so-called political realism, which discounts all but military and economic power, has no monopoly of political wisdom nor is it all that realistic. We may need bread to live, but we are sustained as human beings by our dreams and our hopes for a better tomorrow: for freedom, for human dignity. That, ultimately, is what the human rights revolution is all about and why it is succeeding."

132 See, Buergenthal, supra note 96, noting that the human rights violations in one country are sometimes debated in the national parliaments of other countries; In fact, human rights violations are increasingly attached to a political and a economic price. See, e.g., US sanctions against Burma enacted by Congress on Sep. 30, 1966, and included in the Omnibus consolidated Appropriations Act of 1997, Pub. L. No. 104-108, section 570, 110 Stat. 3009-166, 3000-167. An interesting development is the adoption of local sanctions. See, e.g., Massachusetts Burma's selective purchasing law, (June 25, 1996), Massss. Gen. Laws, ch. 7, § 22 (G) - (M); The IJC jurisprudence shows a clear commitment to the safeguard of human rights: in the Corfu Channel case, (1949), supra note 105, the Court referred to "...the elementary considerations of humanity, even more exacting in peace than in war." In the Reservations to the Genocide Convention case, IJC Rep. 1951, the Court strongly condemned genocide as 'supremely unlawful' under customary as well as conventional international law. In the South West Africa opinion, IJC Rep. 1950, the Court held that individuals, not only states, are invested by an international instrument with international right. In the Asylum case, IJC Rep. 1950, it was stated that asylum cannot principally be opposed to the operation of justice. The Peace Treaties Opinion (1950) support the view that, in view of the UN Charter human rights-related purposes, interpretation of human rights provisions in a treaty cannot be regarded as a wholly domestic matter. In Barcelona Traction, IJC Rep. 1970, the Court declared that the obligations arising from human rights rules run erga omnes - towards all states - thus there is no unlawful intervention when one state protests against the violation of its citizens' basic human rights by another state. In the Hostages case, supra note 25, the detention of hostages was held to amount to wrongful deprivation of freedom of human beings. Moreover, subjecting them to physical constraint under hardship conditions was in itself manifestly incompatible with the UN Charter and the Universal Declaration. In the Nicaragua case, IJC Rep. 1986, the Court confirmed that mine-laying without notice is a breach of humanitarian law principles and went on to hold that certain war manuals produced by US officials for the Contras rebels failed to ensure respect for the 1949 Geneva Conventions. In the ELSI case (Eletronica Sicula SpA), IJC Rep. 1989, the Court allowed a state to take over an alleged violation of its nationals' property rights. Application of the Genocide Conventions case, IJC Rep. 1993 (alleged 'ethnic cleansing practices) essentially dealt with gross violations of human rights.


134 Id., at 227.

135 Id., arguing that the ultima ratio modality of enforcing internationally protected human rights are the international criminal proscriptions.

136 See generally, id., pp. 228-232.

137 E.g., it is difficult to imagine that rights such as those of self determination, participation in government, and freedom of assembly would be of much relevance here. Note, however, that diplomatic immunity cases sometimes raise surprising issues. For instance, in the Colonia Dignidad cases, the Supreme Court of Chile and lower courts looked at an apparent clash between the right to privacy, honor, and freedom of conscience under the Chilean Constitution of 1980 (Constitution of 21 Oct. 1980, as amended by the Law 18.825 of 17 Aug. 1989, Art. 20) on the one hand, and consular and diplomatic immunities on the other. See generally, Orrego Vicuna, supra note 12; See also, Francisco Orrego Vicuna, Book Review, 84 A.J.I.L. 793 (1990) (Reviewing JOHN A. DETZNER, TRUBUNALES CHILENOS Y DERECHO INTERNACIONAL DE DERECHOS HUMANOS: LA RECEPCIÓN
DEL DERECHO INTERNACIONAL DE DERECHOS HUMANOS EN EL DERECHO INTERNO CHILENO (1988)), discussing various cases in which the Chilean Courts have dealt with international human rights law.


139 Farer, Id., at 206.

See, Farer, Id. Farer notes that subsistence rights (or basic needs) are treated by some as equally important. For example, people must eat in order to live etc. He cites HENRI SHUE, BASIC RIGHTS (1980), for the proposition that both subsistence and physical security are basic rights under which all the particular liberties (upon which, in turn, security and substance depend) are placed. Another approach, championed by the Reagan administration, emphasized participation in fair elections (pp. 206-207).

140 See, id., at 206.

141 Farer, supra note 138, at 206, referring to Amnesty International and Human Rights Watch.

142 See, supra note 11.

143 See, supra note 21, at 204. These rights may not generally be derogated from even in times of war or national emergency. Note however that the right to life is effectively qualified by lawful acts of war.

144 See, supra note 21, at 204.

145 See, supra note 121, at 11-8.

146 See, supra note 121, at 11-9.

147 The notion of jus cogens - a "compelling law" - is discussed below.

148 Danielko, G. M., The Relevance of Humanitarian and Diplomatic Law to the Conflict in the Gulf, DUKE J. COMP. & INT'L L. 125 (1991), refers to "...the fact that both humanitarian and diplomatic law reflect deeply held community values." Interestingly, Danielko suggests that there is a correlation between violation of the two. A country, in that case Iraq, that violates one value is also likely to violate the other. There appears to be some evidence supporting such an assumption, particularly in relation to Iran, Syria, Libya and several other countries allegedly involved in diplomatic immunity and human rights abuse. The ICJ in the Hostages Case, supra note 25, at 42, referred to both by stating that wrongful deprivation of freedom and subjection to physical constraints in conditions of hardship is "manifestly incompatible" with the "...fundamental principles enunciated in the Universal Declaration, and by referring (p. 20) to the "imperative character of the legal obligations incumbent upon the Iranian government."

149 See, supra note 97, at 43.

150 See, id., at 44.

151 See, id., at 45.

152 See, supra note 21.

153 See, supra note 11.

154 See, supra note 21.

155 See, supra note 121, at 11-8.

156 See, supra note 121, at 11-9.

157 Though not necessarily against legal or other consequences in the sending state.

158 See, e.g., Higgins, supra note 11, at 1: "If a legal order works well, then disputes are in large part avoided."

159 See, supra note 152, at 15.


For a detailed account of the incident and the circumstance surrounding it, see William E. Smith, "we want them out!" a Killer Goes Free as an Angry Britain Sends Libya's "Diplomats" Packing, 42 TIME MAG., May 7, 1984, available in 1984 WL 2060761.

161 Id.; See also, Murder Clues; Secrets of the Libyan Embassy, 45 TIME MAG., May 14, 1984, available in 1984 WL 2060817. A subsequent search of the Libyan Embassy premises revealed the spent cartridge case in a corner overlooking St. James' Square (where Yvonne Fletcher was shot); ASHMAN & TRESCOTT, supra note 1, pp. 7-34.

162 See, supra note 10. See also: ASHMAN & TRESCOTT, supra note 1, pp. 169-188.

163 See, id., at 169-170: "This arbitrary contempt for human rights [i.e., "diplomatic slaves"] is a world-wide problem." ASHMAN & TRESCOTT quote (pp. 172-173) Peter Davis, Secretary of the Anti-Slavery Society, the world's oldest human rights organization, and others involved in social services and human rights, who report on diplomats in the US, UK and Switzerland, who keep slaves.
The introduction of an immigration lawyer, the State Department, the Bolivian embassy, and the Egyptian ambassador resulted in payment of $1,200 dollars in back wages ($100 a month) and the return of her passport and personal effects.

Many other incidents have been reported: see e.g., Emanuel & Abdullah, supra note 71, reporting two cases from Malaysia. The first involved a Filipino maid who accused the ambassador of a Balkan state of molesting and raping her on four occasions in 1996. The second case, in 1989, concerned a woman who claimed that she was attacked by a diplomat from a Middle East country during a New Year countdown at a hotel discotheque and sustained 22 stitches on her face as a result. The man was not charged in court, but was recalled by his government. As of Oct. 1996, no diplomat has been charged for a criminal offense in Malaysia; See also, Editorial, Why Are Diplomats Above the Law?, THE EDMON. J., May 15, 1995, at A6: in Feb. 1995, a South African cleaning woman alleged that she was raped by a foreigner who turned out to be a well-known American banker, a senior World Bank official possessing full diplomatic immunity.

The US government supported the child's return to Zimbabwe for fear of an international incident and retaliation against US diplomat, but also secured an assurance from the government of Zimbabwe that the child be shielded from his father upon his return (Shapiro, at 289); See also, Blomquist, supra note 70, reporting the case of a Nigerian diplomat's wife in the US who was protected from criminal prosecution after confessing to slashing her 17-year-old daughter and stabbing another daughter, 15, who tried to intervene. As in the case of the Zimbabwe diplomat's son (above), social workers believed that they could act to protect the girl by removing her if she is at risk in her environment: "[i]n such cases, diplomatic immunity isn't a factor because we don't press criminal charges" (per Renee Ensor, assistant director of the Prince George's County Dept. of Social Services).

A conflict between two sets of international law or even between two sets of immunities under international law can occur in a number of situations. See e.g., Martha Ruth Vardiman, Case Note: The Foreign Sovereign Immunities Act of 1976 Does
Not Preclude U.S. Courts from Exercising Jurisdiction over the USSR for Soviet Violations of Diplomatic Immunity, Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C 1985), 55 UNIV. CIN. L. REV. 923 (1987); Jose E. Alvarez, *Judging the Security Council*, 90 AJIL 1 (1996), examines the apparent conflict between the Security Council role under the UN Charter and the alleged power of the ICJ to judicially review the Security Council resolutions. The discussion (pp. 24-34) contains important comparative aspects of national approaches to judicial review, including human rights considerations; Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L. J. 1 (1993), advocates "limited judicial review" of Security Council. In doing so, Watson, in fact, acknowledges that some hierarchy of laws does exist in the international legal order as evidenced by the ICJ jurisprudence on judicial review, pointing to similarities with the landmark US Supreme Court decision of *Marbury v. Madison*. Orrego Vicuna, *supra* note 12, reviews a number of Chilean cases dealing with an apparent clash between the right to privacy (guarded under the 1980 Chilean Constitution) and diplomatic immunities. Orrego Vicuna asks the following question (p. 35): should diplomatic immunities prevail where violation of human rights have been established? He concludes (p. 48) that "[t]he foregoing discussion clearly points towards the amendment of the Vienna Conventions on Diplomatic and Consular Relations in the not too distant future in order to cater for, among other aspects, the concern for human rights and related issues."; Many other similar conflicts exist under international law. See, e.g., the discussion on sovereign immunities and civil claims against individuals based on human rights violations, in Fitzpatrick, *J. The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violation*, 15 WHITTIER L. REV. 465 (1994); See also, Haffke, C. W., *The Torture Victim Protection Act: More Symbol than Substance*, 43 EMORY L. L. 1467, 1497-1505 (1994).

Kelsen, *supra* note 97, at 64.

Id.

Though such rules are not necessarily "supreme" in the sense that they are of "preemptive nature" in the naturalist sense. See the discussion of *jus cogens* below.


See, id.


(Tunisia v. Libya) 1982 I.C.J. Rep. 18, 38; ILR 4, 31


lex specialis derogat legi gnerali (a special rule prevails over a general rule), see, Shaw, *supra* note 21, at 96.

See, Shaw, *supra* note 21, at 96.


Janis, in D'Amato (ed.), *id.*, at 115.

See, D'Amato, "It's a Bird", *supra* note 200, pp. 116-119

In the *Barcelona Traction case* (Second Phase), 1970 ICJ Rep. 3, 32; 46 ILR 178, 206, the majority of the ICJ distinguished between obligations vis-à-vis another state and obligations erga omnes - towards the international community as a whole. The World Court stated that examples of such obligations include the prohibition on acts of aggression, genocide, "...and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

Article 53 of the Convention provides that peremptory norm of international law is "...a norm accepted and recognized by the international community of states a whole as a norm from which no derogation is permitted and which can be modified only
by a subsequent norm of general international law having the same character.”; Article 64 of the Convention provides that a
new preemptory norm of general international law makes any existing treaty in conflict with that emerging norm void.
206 Case of Roach and Pinkerton, Decision of March 27, 1969 (OAS General Secretariat), cited in BROWNLIE, at 513,
footnote 30.
208 See, e.g., BROWNLINE, supra note 23, at 513, footnote 27, referring to Lauterpacht, 27 BYIL 397-398(1950), and
Fitzmaurice, 30 BYIL 30 (1953).
209 See, Christenson, supra note 200, at 116; See also, SHAW, supra note 21, at 97.
210 Christenson, id.
211 See, SHAW, supra note 21, at 97.
212 See e.g., JANIS, supra note 200, at 115 arguing that "jus cogens is a sort of international law that, once enunciated, cannot be
replaced by states either in their treaties or in their practice. (It) functions rather like a natural law that is so fundamental
that states, at least for the time being, cannot avoid its force." But CF, D’Amato, "It’s a Bird", supra note 200, pp. 116-119,
"...a critic may object that jus cogens has no substantive content, it is merely an insubstantial image of a norm, lacking flesh and
blood. [It enables] any writer to christen any ordinary norm of his or her choice." D’Amato concludes (pp. 118-119) that three
basic questions must be satisfactorily answered before jus cogens is accepted: first, what is its utility, apart from its rhetorical
value?; second, how does a purported jus cogens norm arise?; finally, once it arises, how can international law change it or get
rid of it?; Paust, supra note 188, pp. 119, responds to these questions: first, the utility of jus cogens lies in the simple fact that
it preempts lesser norms; second, the ultimate source of a jus cogens norm is the touchstone of validity of any norm as
recognized by D’Amato himself; third, since jus cogens is a form of customary international law (that may be reflected in
treaties), it is subject to birth, growth, other change, and death, depending upon dynamic patterns of social expectations of
behavior.
213 BROWNLINE, supra note 23, at 513.
214 As any other norm, jus cogens is a relative and subjective concept. See, e.g., D’Amato, "It’s a Bird," supra note 23,
claiming that there appears to be no limit to the number of norms that may promoted to the status of supernorm, and that the
World Court in the Nicaragua case "...found it just as easy to promote an ordinary norm into an imperative norm as to create
out of thin air an ordinary norm."
215 See, BROWNLINE, supra note 23, at 513; Case Concerning Military an Paramilitary Activities in and against Nicaragua
217 See, BROWNLINE, supra note 23, at 513,
218 See, BROWNLINE, supra note 23, pp. 514-515: "...more authority exists for the category of jus cogens than exists for its
particular content, and rules do not develop in customary law which readily correspond to the new categories."
219 See e.g., Karen Parker & Lyn Beth Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 HASTINGS INTL &
COMP. L. REV. 411 (1989); In Barcelona Traction (Second Phase), 1970 ICJ Rep. 3, 32, the ICJ stated that the "...rules
concerning the basic rights of the human person, including the protection from slavery and racial discrimination [are obligations
erga omnes. That is, towards the international community as a whole]."; See also, THIRD RESTATEMENT, supra note 207, §
702: any international agreement that violates the peremptory norms of prohibition against genocide, slavery, murder, torture,
inhuman or degrading punishment, prolonged arbitrary detention and systematic racial discrimination, is void; JANIS, supra
note 200, at 115.
220 See, SHAW, supra note 21, at 97.
221 Id.
222 Id.
223 See e.g., Tunisia/Libya Continental Shelf case, 1982, ICJ Rep. 18, 38; 67 ILR 4, 31.
224 See generally, H. VILLAGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985); M. Akehurst, The Hierarchy of the
225 It may, however, provide evidential support for the status of the rules.
226 A discussion coming close to that idea is found in Danielko, supra note 148, at 131, contending that the language used in
international obligations which strike at the root of the conduct of international relations"), although not expressly affirming that
norms attaching to diplomatic immunity are principles of jus cogens, nevertheless affirms that violations of these principles are
regarded as affecting the interests of the entire international community.
227 That is, the principle that international agreement are binding. See, JANIS, supra note 200.
The personal representation theory appears to have survived the 1961 Vienna Convention but certainly is not the main justification for diplomatic immunities. The extraterritoriality theory was expressly rejected by the ILC during its pre-Vienna deliberations. See, McCLANAHAN, supra note 10, at 28-34;  See also, DENZA, supra note 35, pp. 7-8.

A distinction has been drawn between the two by the ICJ in the Barcelona Traction case, 1970, ICJ Rep. 3, 32; 46 ILR 178, 206. See, SHAW, supra note 21, at 545.

Note also that the distinction made in Barcelona Traction, id., related to the questions of legal interest and standing not to the hierarchy of the rules in question. See, SHAW, supra note 21, at 545.

See, SHAW, supra note 21, at 97;  See also, Christenson, supra note 200, at 116: "A peremptory norm is like a public-order imperative in municipal systems. It is used to override other less powerful norms by an external public authority, and it may not be changed except by a norm having the same quality. A jus cogens norm must have a great staying power. When used in service of world public order, its structure ought to offer stability, at least theoretically. By structuring a justification from the presence of a superior norm to nullify or invalidate ordinary treaty or customary norms in conflict with it, the jus cogens category is useful to a public authority in maintaining a stable order."

See generally, BROWNLEI, supra note 23, at 513, noting that "[t]he main distinguishing feature of such [jus cogens] rules is their relative indelibility";  It is important to note that jus cogens is seen by some simply as a customary law which happens to be well established and therefore generally non-derogatory. Thus, Paust, supra note 188, asserts that "[a]s one form of custom, jus cogens norms have, of course, at least the full power and authority of any customary norm, and when identifying or clarifying a norm of jus cogens one should consider the degree and intensity of general acceptance of patterns of expectations and how intensely held or demanded a particular norm is within the community."

See, Natalie Kaufman Hevener, Reflections on the Interpretation and Application of the Law of Diplomatic Protection, in NATALIE KAUFMAN HEVENER (ed.), DIPLOMACY IN A DANGEROUS WORLD 45 (1986): "Of all formal international legal obligations, those related to the law of diplomatic relations are the most likely to find universal approval and compliance." A striking example provided by Hevener is the support, during the hostages crisis, for the US hostages in Iran and the criticism of Iran coming even from governments normally critical of the US on many issues;  The ICJ in the Hostages case, para. 86 refers to the "...fundamental character of the principle of inviolability [of diplomatic persons and missions]." The Court continued by stating (para. 61) that "Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection [of the US embassy and Consulates and their staff]."

See generally, KAUFMAN HEVENER (ed.), id. The books deals with protection of diplomats under international law and reviews several incidents. Almost all violations of diplomatic law by states (notably the entry into the US embassy in Teheran and the taking of American diplomats as hostages following the 1979 revolution in Iran) involved political disputes between the sending and receiving states as well as violation of other international rules by the receiving states, rather than prosecution or detention of diplomats for alleged criminal activity as such:  Other relatively recent examples of violations arising out of political disputes include the removal and detention of French nationals from the French and Dutch embassies in Kuwait by Iraqi forces during the Gulf War, and possibly the destruction of the Venezuelan embassy in Tripoli in 1992. See, Debousse, L., European Political Co-operation, 3 EJIL 206 (1992);  Meron, Prisoners of War, Civilians and Diplomats in the Gulf Crisis, 85 AJIL 108 (1991), and 87 AJIL 310 (1993).

See generally, Van Boven, supra note 121, pp. 11-4 to 11-6;  See also, Haffke, supra note 184, at 1501, discussing torture as an exception to the Foreign Sovereign Immunity Act (FSIA). Haffke concludes that jus cogens supersedes inconsistent statutes. Haffke cites Siderman, 695 F.2d, pp. 715-718. In that case, the Ninth Circuit recognized that jus cogens "...enjoy(s) the highest status within international law." Haffke argues that since sovereign immunity is a doctrine of international law the "...jus cogens norm prohibiting official torture should superseded the [sovereign] immunity provided to states."

See, Orrego Vicuna, supra note 12, at 48: "There will always be of course the need to distinguish between the infringement of fundamental human rights, such as the right to life and physical integrity, and human rights of a different nature, but this is a problem which is not unique to the situation as it relates to diplomatic or consular immunities, but rather a general one which will require a necessary degree of flexibility in finding the appropriate and balanced response under international and domestic law."

See, BROWNLEI, supra note 23, at 513: "The major distinguishing feature of [jus cogens] rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." Article 53 of the Vienna Convention on the Law of the Treaties 1969 (UN Doc. A/CONF.39/27 (1969);  63 AJIL. 875 (1969)) expressly provides that a peremptory norm is "...a norm from which no derogation is permitted."

The non-derogatory nature of those rights is evidenced by the wording of various multilateral human rights treaties and the ICJ cases mentioned earlier;  Note also that the ICJ in Barcelona Traction, supra note 229, stated that "...the rules concerning the basic rights of the human person, including protection from slavery and racial discrimination," create obligation towards the
international community as a whole. As noted above, this in itself does not mean that the rules are necessarily *jus cogens*, but it does seem to indicate that the 12 judges majority of the World Court consider such rules to have, at minimum, a special status.

On Article 53, *see*, Shaw, supra note 21, at 97.

Certainly, the prohibition on genocide and the principle of non-discrimination are universally accepted as legal rules, though they are not highly relevant for the purposes of this paper.

See, e.g., the treaties mentioned in Chapter II, above.

242 *See*, e.g., Article 4 of the International Covenant on Civil and Political Rights under which no derogation whatsoever, including at time of public emergency threatening the life of the nation, is permitted in respect to certain human rights; As to hierarchy and non-derogation, *see*, Farer, *supra* note 138; Bassiouni, *supra* note 133, pp. 227 - 229, argues that "...the degree to which a given right has attained intentional acceptance can be assessed by considering [a given] pattern" (*see*, Chapter II, above). According to Bassiouni, when placed against that pattern, it becomes apparent that certain rules have reached a high degree of acceptance. The highest degree of acceptance is evidenced by international criminalisation. The international crimes protecting life, liberty, and personal security include, *inter alia*, crimes against humanity (including murder, enslavement, and "...other inhuman acts done against any civilian population."), slavery and slave-related practices and torture; On creation of *jus cogens*, *see* Shaw, *supra* note 21, at 97, footnote 189, citing I. Sinclaire, *The Vienna Convention on the Law of the Treaties*, 203 (2nd ed. 1984).

243 *See*, D‘Amato, "It’s a Bird," *supra* note 200, pp. 116-117.

244 *See*, Parker & Neylon, *supra* 219.

245 There is general agreement that the prohibitions on genocide, apartheid, racial discrimination, and slavery, as well as the right of self-determination are *jus cogens* but those norms are not particularly relevant to this paper; *see*, Brownlie, pp. 512-515: "...more authority exists for the category of *jus cogens* than exists for its particular content, and rules do not develop in customary law which readily correspond to the new categories." *See* e.g., Georg Schwarzenberger, *International Jus Cogens?*, 43 Texas L. Rev. 455,478 (1965); Note that the increasing tendency of the UN, primarily via the Security Council to authorize military intervention for humanitarian ends (including intervention against repression of the Kurds in Iraq, and the intervention in Somalia, Rwanda, Liberia and Bosnia), is not based on a coherent and settled theory. Rather, it is of haphazard character and largely depends on political circumstances enabling such intervention; particularly alleged collapse of authority in the country in question. *See generally*, David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUMAN RIGHTS L. REV. 435, 460-478 (1996); *But cf.* Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKK J. COMP. & INT'L L. 329 (1955).

246 To be sure, reciprocity is not confined to diplomatic immunity incidents. *See* e.g., Anne-Marie Slaughter, *On a Foreign Death Row*, WASH. POST. April 14, 1998, at A15, available in 1998 WL 2478856: “Many Americans are particularly vulnerable to foreign arrest, sometimes for crimes they commit and sometimes for the crime of being American. To hold other countries to honor their obligation [to notify the American consulate when an American citizen is arrested and faces trial in their territory], the United States must demonstrate that it is prepared to offer the same treatment to their nationals; More specifically in relation to diplomatic immunity, *see* Christopher Bellami, *The Law*, INDEPENDENT (London), Jan. 10, 1997, at 14: "...the main reason to treat other people's diplomats with respect is that if you do not your own are placed in jeopardy."

247 Higgins, *supra* note 8, at 641, argues that "[i]t has frequently been observed that there is generally good compliance with the law of diplomatic immunity because here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest."

248 For example, the US State Dept., backing legislation protecting foreign diplomats in the US, stated: "it was recognized long ago that relations with other countries were enhanced by granting special immunities and protection to foreign envos. Modern nations have found it to their mutual advantage to continue this practice." *See*, Jim Anderson & Arthur Herman, *Britain Put 8,500 Lives Ahead of Punishing Libyan Killer*, SAN DIEGO UNION-TRIBUNE, April 29, 1984. Available in 1984 WL 2289187. According to the state Dept. background paper "[t]he immunities and safeguards provided in the Vienna Convention are precious to the US in terms of shielding its own diplomats serving abroad from prosecution by local authorities operating under judicial systems with minimal due process safeguards." Further, "[f]amily members could also be subject to false charges and other nefarious activities. Without such protection, it would be difficult, if not impossible, to staff our posts abroad." Anderson and Herman argue that "[t]he key to diplomatic immunity is the word "mutual." In effect, all diplomats of every country are hostages to their own country's treatment of foreign diplomats." When a receiving state-sponsored attack on diplomats does occur, as in 1979 in Teheran, reference to the ICJ or SC proved of little or no practical use.

249 The incident is described in detail by McC LANAHAN, *supra* note 10, at 34.

Anderson & Herman, *supra* note 248.

250 McC LANAHAN, *supra* note 10, at 34.
The feeling of exasperation in London may be summarized with the words of a high-ranking British official who said: "We want them out, out, out!" See, William E. Smith, "We Want Them Out!", TIME MAG., May 7, 1984, at 42; See also, Anderson & Herman, supra note 248: "There has been thirst in Britain for revenge, or at least justice [but there were] 8,500 possible hostages and a situation similar to that suffered by U.S. diplomats in Iran at the hands of Ayatollah Ruhollah Khomeini's followers in 1979-80 could not be ruled out [moreover] many of the Britons in Libya are attached to remote oil fields [so they could not be told to leave]." Thatcher's government felt that it had no other choice but to expel the Libyans inside the embassy and give them safe conduct. This was summarized by one insider as 'an infuriating but sensible piece of realism.' 'Britain decided to cut its losses rather than risk more lives.'

The British Diplomatic Service and their families were evacuated from Libya safely while the Libyans diplomats and their families left the UK on their way to Libya. See, Smith id; In the ensuing House of Commons deliberations several memorandums have been submitted: the Memorandum by the (British) Diplomatic Service Wives Association, 19 June 1984, makes clear the rationale for its support for untouched immunity rules (para. 7): "The effect of these immunities in practice is to ensure that in States where difficult conditions or tense or hostile relations prevail, families are protected from being used as a means of indirect pressure or intimidation of either individual diplomats or the British government." Further: immunities can help "...make life tolerable in countries where difficult physical, economic or political conditions prevail." See, McClanahan, supra note 10, pp. 256-259; The Memorandum by the Trade Union Side of the (British) Diplomatic Service, Diplomatic Immunities and Privileges (DIP 10), plainly stated that "[i]minutes provide a very real protection for our diplomats and their families overseas." See, "First Report," supra note 63, at para. 56; In 1987, facing the
Helm's proposal to remove diplomatic immunity from staff and family members of foreign officials in the US, Perry Shankle, President of the American Foreign Service Association, wrote: "Immunity serves the same function for the US diplomatic employee and family member as does a policeman's bullet-proof vest: It allows a vital public service to be performed in areas of great risk. Without it the U.S. wouldn't be able to send representative to places where it most needs them. Without it what is to prevent an unfriendly country from imprisoning a communicates employee and forcing him or her to reveal the last few week's worth of top-secret cable traffic? What is to prevent that country from arresting and imprisoning the spouse of an official who delivers a diplomatic rebuke? Must we return to the days when the messenger who brought unpleasant news had his head sent back on a plate?" In like manner, responding to Helm's proposal, William W. Struck, a US foreign service officer wrote: "Look again at the list of countries where my wife and daughters have served with me, the diplomat [Costa Rica, Ghana, Nigeria, Nicaragua, Ethiopia, Indonesia and Cuba]. Ask yourself, should you be honored to serve as an official American representative to any of them if you would take your family without immunity? Not me. We've been there."

See, Letters to the Editor, WALL ST. J. Oct. 15, 1987. Available in 1987 WL-WSJ 300370; George Thompson, a retired Foreign Service Officer wrote: "U.S. diplomats often must persuade, cajole or browbeat host-country bureaucrats, police or the military just to carry out activities we consider routine. More often than not, the foreign concept of law and justice is not ours, however slowly we may grind the wheels. How effective can a U.S. diplomat in any one of a dozen "Yankee-go-home" countries be in improving relation if his immunity from prosecution can be lifted at will - only because we lifted theirs here? Fiddling with the immunity of a diplomat here - for whatever crime or reason - could easily find U.S. diplomats there being jailed for everything from parking illegality to committing a felony. They could even be executed for simply talking to the opposition. It's a bad idea whose time is not now, not ever."


278 Beaumont, id., at 400; See also, Slaughter, supra note 246.
280 See, Higgins, supra note 8, at 645: "It became clear that diplomatic law is not only about the balancing of legitimate interests between the sending state and the receiving state. There is another factor often at play: the presence abroad, in the territory of the sending state, of an expatriate community of the receiving state.... That is something that the balanced text of the Vienna Convention cannot provide against---and by the same token, any amendment of that text or withdrawal from its obligations would not change that reality." See also, Patrick Best, External Affairs Guides Police in Dealing with Foreign Envoys, THE OTTAWA CITIZEN, Feb. 2, 1989, available in 1989 WL 5136357, the (Canadian) Guide for Law Enforcement Officers (on diplomatic immunities) reminds the Canadian police that failure to follow the accepted procedures could produce dire results as a result (that is, "...reciprocal mistreatment of Canadian representatives abroad.")
281 See, McClANAHAN, supra note 10, at 146: "In the last twenty-five years, diplomats have been in greater physical danger than ever before. The public has often envied their privileges and immunities and deeply resented the abuses of their status by a few. However, the public has also lately become aware through the media that a diplomat's lot with respect to personal securities is not a happy one."
282 For a balanced assessment of that trend, see, David Wippman, Change and Continuity in Legal Justification for Military Intervention in Internal Conflict, 27 COLUM. HUM. RTS. L. REV. 435 (1996), concluding (p. 485) that changes in the international legal regime will "remain incremental."
284 See, id., at 47, citing Curtis J. Milhaupt (The Scope of Consular Immunity under the Vienna Convention on Consular Relations: Towards a Principl ed Interpretation, COL. L.R. 841 (1988)), for the proposition that functional immunity relates to specific acts. That is, every act must be functionally necessary for the performance of the diplomatic job.
285 Orrego Vicuna, supra note 12, at 47.
286 See, "First Report", supra note 63.
287 Id.
288 See e.g., the English Barbuit's case (1737) 25 E.R. 777, where the Lord Chancellor stated that diplomatic privileges stem from "...the necessity of things, that nation may have intercourse with one another." See, McClANAHAN, supra note 10, at 33; See also, Higgins, "The Abuse", supra note 8, at 649. The House of Commons Foreign Affairs Committee reported (para. 42) that "...it is not correct that when a diplomat violates [the duty to respect the host country laws] he loses his immunity. Such a reading is inconsistent with the immunities given, which operate precisely in respect of such alleged violations, and which, in the case of diplomatic agents, apply even to unofficial acts. An argument can be made that when diplomats act in fact as terrorists, they are not diplomats at all, and thus must lose the benefit of those immunities that diplomats are entitled to. But the right view seems to be that a person remains an accredited diplomat until the receiving State requires him to be withdrawn."
Higgins, who acted as a specialist adviser to the Committee maintains that "this view would seem to accord with the general ethos of the Convention that there should be no exceptions to its terms."

298 For a comparison of the two Diplomatic and Consular Conventions see, Wright, proposing to amend the Convention in order to restrict immunity of protected persons for violent acts, states (at 207): "The main weakness of the Vienna Convention is its failure to provide deterrence against violent conduct. This arises from the overbroad scope of immunity the Vienna Convention created through its erroneous application of the theory of functional necessity. Diplomatic immunity is overbroad because the Convention states immunity in terms of individuals and, thus, shields from jurisdiction more activities than is necessary to the diplomatic process." See also, End Abuse of Diplomatic Immunity, Disallow for DUI, Parking Tickets, (Editorial) SUN- SENTINEL (Fl. Lauderdale Fla.), Jan. 13, 1997, at 12A: "Several reforms make sense (including) limited immunity, specifically not to include drunken driving (a common diplomatic crime), parking tickets (ditto), sex or drug offenses or the injury or killing of a human being."

291 See, Orrego Vicuna, supra note 12, at 48, citing Louis Henkin (Human Rights and 'Domestic Jurisdiction', in T. BUERGENTHAL (ed.), HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21-23 (1977)), for the proposition that sovereignty or domestic jurisdiction can "...no longer be invoked as a bar against the requirement that state protect fundamental human rights."

292 Orrego Vicuna, id., at 48.


293 That claim is, at minimum, controversial. Taken to its logical consequence, it justifies international or even unilateral humanitarian intervention in previously domestic business. Arguably, this cannot be universally applied and therefore seems impractical and doubtfully desirable. Even if one is able to delineate certain fundamental human rights that do justify cross-border applications of some requirements, is the occasional, if not rare, violation of human rights by diplomats comparable to wide-scale internal genocide by an evil regime? Even so, shouldn't the potentially heavy price to be paid (possibly in human lives) for ignoring reciprocity be at least considered? At the time punishment is sought there are victims already, why should we risk the well being of more innocent people only because they happen to be in the wrong place (the territory of the sending state) at the wrong time? To repeat, shouldn't we attempt to 'cut the losses'?


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296 For example, practices aimed at pressuring the diplomat, h/er family and the sending statebave.

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300 See e.g., Stephan L. Wright, Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts, 5 BOSTON UNIV. INT'L J. 177 (1987). Wright, proposing to amend the Convention in order to restrict immunity of protected persons for violent acts, states (at 207): "The main weakness of the Vienna Convention is its failure to provide deterrence against violent conduct. This arises from the overbroad scope of immunity the Vienna Convention created through its erroneous application of the theory of functional necessity. Diplomatic immunity is overbroad because the Convention states immunity in terms of individuals and, thus, shields from jurisdiction more activities than is necessary to the diplomatic process."; See also, End Abuse of Diplomatic Immunity, Disallow for DUI, Parking Tickets, (Editorial) SUN- SENTINEL (Fl. Lauderdale Fla.), Jan. 13, 1997, at 12A: "Several reforms make sense (including) limited immunity, specifically not to include drunken driving (a common diplomatic crime), parking tickets (ditto), sex or drug offenses or the injury or killing of a human being."

301 For a comparison of the two Diplomatic and Consular Conventions see, C.A. Whomersley, Some Reflections on the Immunity of Individuals for Official Acts, 41 ICLQ 848, 852-855 (1992). Article 43 of the 1963 Convention on Consular Relations provides that consular officers and consular employees receive immunity (from civil and criminal jurisdiction) only in respect of acts performed "...in the exercise of their consular functions." Article 41 provides that Consular officers may only be arrested or detained in the case of a grave crime and only when the detention is authorized by the competent judge. No such express provision is found in the 1961 relations in respect of diplomatic agents. Note, however, that 'official act' has been broadly interpreted in some national courts. For example, in the Italian case of Hesse v. Perfect of Trieste (1977) 77 I.L.R. 610 (noted by Whomersley, at 856), it was stated that consular immunities extend to cover "...all those acts and activities which even though they are not in themselves of an official nature, are nevertheless instrumentally or ethically connected with the accomplishment of official acts and, through the medium of the person from which they stem, can be traced to the foreign State in its governmental capacity." Thus, a consular officer charged with a motor traffic offense may enjoy immunity. A similar approach was taken in Germany in the Yugoslav Consul Immunity case (1973) 73 I.L.R. 689, and in the Massachusetts case of
301 all 6 alleged drug-trafficking offenses over the same period involved low rank officials. dependents. involving diplomatic missions in Washington D.C. were allegedly committed by low rank officials and dependents. Likewise, 351-352 (1990).

311 note 1, at 240. supra Providing for neutral international measures to deter abuse of the safeguard”; permitting a receiving state to deny inspection and recall the untouched bag. An enforcement provision should also be added. contracting parties should pursue multilateral agreements to amend article 27 of the Convention to include a provision

304  Immunity is a controversial enough concept without extending absolute immunities to new categories of foreign nationals. Twenty-nine cases involving diplomatic missions in Washington D.C. were allegedly committed by low rank officials and dependents. Likewise, all 6 alleged drug-trafficking offenses over the same period involved low rank officials. dependents.

305 The consular functions largely focus on administrative matters such as issuing visas and passports and representing national commercial interests. See, Shaw, supra note 21, at 537. 300 Immunity is a controversial enough concept without extending absolute immunities to new categories of foreign nationals. 303 It has been suggested that "[t]here would be little significance to diplomatic immunity if diplomats could be hauled into local courts for everything they did in their day-to-day lives.” Per Earl F. Glock (an attorney representing the Muftis, a Jordanian diplomat family sued for breaching the provisions of the Fair Labor Standards Act), see, Seigel, supra note 69.

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309 See, McCLANAHAN, supra note 10, at 170: for example, 20 out of 24 assaults between August 1, 1980, and Feb. 29, 1988 involving diplomatic missions in Washington D.C. were allegedly committed by low rank officials and dependents. Likewise, all 6 alleged drug-trafficking offenses over the same period involved low rank officials. dependents.


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See, Higgins, "The Abuse," supra note 8, at 649. 307 See, Higgins, "The Abuse," supra note 8, at 650; See also, "First Report", supra note 63, paras. 56 and 115: The Government Response to the Committee Report concludes (para. 85): "The Government agree with the Committee that it would be wrong to regard amendment of the Vienna Convention as the solution to the problem of abuse of diplomatic immunities in view of the difficulties of achieving any restrictive amendment and the doubtful net benefit to the UK of so doing."; The inability of the International Law Commission (ILC) to achieve an agreement over changes and introduction of new provisions in the Vienna Convention as to the status of the diplomatic courier and bag, illustrate the obstacles facing any state wishing to introduce a new provision or amend an existing one. See, Stephan C. McCaffrey, Current Development: The Thirty-Eighth Session of the International Law Commission, 81 AJIL 668, 677(1987):"The Commission was unable to arrive at a generally acceptable resolution of these issues."

306 Though electronic scanning on "specific occasions if the need arises" would take place. See, Higgins, "Government Response and Report," supra note 8, at 135; See also, Higgins, "The Abuse," supra note 8, pp. 647-648. Note that it is not entirely clear whether scanning or other technologies avoiding the physical opening of diplomatic bags, would constitute a violation of the Vienna Convention which requires that the bag not be "opened or detained" (Article 27). Sir John Freeland, the Legal Adviser to the Foreign and Commonwealth Office thought that electronic scanning is not unlawful (p. 647).

See the discussion of unilateral state measures below.

310 During the 1980s, parliamentary efforts to restrict diplomatic immunity to officials and to exclude low rank persons and family members took place in the UK, Germany, Netherlands, US, Canada, Japan, and Australia. See, ASHMAN & TRSCOTT, supra note 1, at 240.

countries that are the worst offenders. How much do we have to fear from retaliation by Ghana or Mexico or Brazil?"

We cannot be paralyzed to act because of what some unnamed country is likely to do in the future [and] its the Third World have to be lenient to foreign diplomats here so that our people will not be subject to harassment overseas will not hold water.

 legislation is well presented by the words of Tom Boney, an aide to Senator Helms: "The State Department claims that we

pain and sorrow of the relative of the dead girl in Washington, but it ought to stop some pundits and politicians from leaping

will. Did the laws of diplomatic immunity protect our people in Teheran when the Iranians seized them? Of course not. Other countries don't play by the rules. Only the good guys do. It is a neat little game: They have immunity and we're diplomatic about it. It's an honor system. We have the honor. And they have the system." See, Roger Simon, Envoys Get Free Rein for mayhem, CHIC. TRIB. Feb. 22, 1987, at 5, available on 1987 WL 2932951; CF: Rowan, supra note 75: "A lot of Americans wonder why we can't just haul these foreigners into court and give them a dose of American Justice. The quick answer is that we have more diplomats abroad than perhaps any other nation, and we don't want angry mobs and politicians in Tbilisi, Jakarta or Neirobi subjecting them to "local justice". Diplomatic immunity is a means of ensuring that even unfriendly nations can maintain constant communications and relationships without having to lurch to the brink of war to protect "honor" every time some representative gets drunk, causes an accidental death or even commits rape or murder. This explanation won't ease the pain and sorrow of the relative of the dead girl in Washington, but it ought to stop some pundits and politicians from leaping into gratuitous outrage."

See, Hickey & Fisch, supra note 311. Hickey & Fisch examine in detail the theory, policy, custom, treaty, and factual basis for unilateral removal of criminal jurisdiction immunity under international and US law and conclude (p. 381) that "...existing international and domestic law is adequate and is effective to address the criminal behavior of foreign diplomatic and consular personnel. That law should not be tampered with lightly."; Higgins, supra note 11. pp. 89-90 concludes: "It is not in the community interest that states should fail to avail themselves firmly of available remedies against abuse, but should instead seek to undercut the immunities, which are needed to protect the bona-fide work of diplomats and would become unavailable as an effective protection if immunities could be withdrawn by the receiving state upon its unilateral determination of an action as 'abusive'."


See, e.g., Schwartz, R. E., "And Tomorrow?" The Torture Victim Protection Act, 11 ARIZ. J. INTL & COMP. L. 271 (1994), discussing the relationship between the Torture Victim Protection Act (TVPA) and head of state and diplomatic immunities (pp. 305-307) she notes (p. 305) that the TVPA's "legislative history makes it plain that it does not override protections afforded to diplomatic and head of state immunities."

On the relationship between international and domestic law, see generally, Economides, supra note 120. It would be beyond the scope to discuss the relationship between domestic and international law but it must be noted that conflicts between national constitutional provisions and diplomatic immunity embodied in domestic law do occur, sometimes paralleling the human rights - immunity discussion that is the subject matter of this paper; See, Chilean Sky, Chilean Land, ECONOMIST, Apr. 22, 1995. The Chilean Supreme Court and lower Courts have struggled with those issues in a number of cases dealing with land disputes. The Chilean Supreme Court declined to deal with immunity issues until the land dispute over the European Southern Observatory was settled.; See also, Orrego Vicuna, supra note 12, for the Constitutional right to privacy dealt with in the Colonia Dignidad cases; Orrego Vicuna, Book Review: Tribunales Chilenos y Derecho Internacional de Derechos Humanos: La Recepcion del Derecho Internacional de Derechos Humanos en el Derecho Interno Chileno (By John A. Detzner), 84 AJIL 793 (1990): "The central argument of the book is that in refusing to apply the international law of human rights, Chilean courts have violated both international or domestic law, and broken with a long-standing judicial tradition on the role of international law (pp. 7-8)...When a rule of international law conflicts with the Constitution, courts will generally approach the question with added caution, Chilean Courts being no exception." In one case (Decision of the Constitutional Tribunal, Dec. 21, 1987, paras. 25-30, El Mercurio, Dec. 23, 1987, at C11), the Constitutional Tribunal held that constitutional clauses prevailed over the Covenant on Civil and Political Rights, Orrego Vicuna argues "...that from the viewpoint of international law, such an argument would not stand; but from the point of view of a constitutional court, the Constitution would probably be upheld unless its very clauses provided for the supremacy of international rule." He concludes that "[i]t follows from the above that treaties on human rights have now, in Chile, a ranking above statutes and at least equal to the..."
The Diplomatic and Consular Premises Act 1987 now requires states wishing to use land as diplomatic or consular 
premises to obtain the consent of the Secretary of State. The consent, if given, may be withdrawn at any time. See, Shaw, supra note 21, at 527. In the Cambodian Embassy Case (noted 38 ICLQ 965 (1989)), the Secretary of State relied on the Act to vest the land of the deserted Cambodian Embassy (by then occupied by squatters) in himself. Upon challenge from the squatters, the English court upheld the compatibility of the Secretary's action with the Vienna Convention and its legality under the 1987 Act. Appeal was dismissed by the Court of Appeal. See, Shaw, supra note 21, 528.

Subsequently, a Syrian diplomat who refused to obey a court order to vacate his flat was notified that he would be required to leave the UK if he continues to do so. The Syrian embassy then sent the offending diplomat home. See, Higgins, "Government Response," supra note 8, at 136; Note also the adaptation of stringent measures with regard to traffic breaches, including illegal parking.

Article 10 of the Vienna Convention requires the sending state to notify the Ministry of Foreign Affairs of the receiving 
State of the appointment, arrival and departure of members of the mission. Note that the receiving state can reject proposed 
candidates for diplomat positions before they take their position. Article 9 of the Vienna Convention provides: "A person may 
be declared non grata or not acceptable before arriving in the territory of the receiving state." If the sending state refuses to 
comply the receiving state may then "refuse to recognize the person concerned as a member of the mission." Note also that 
Article 4 of the Convention requires prior agrément of the receiving state for the person it proposes to accredit as the Head of Mission and that there is no obligation to give reasons for refusal. Similarly, Article 7 of the Convention allows a receiving 
state to require the submittal for approval of the names of the proposed military attachés; See, Higgins, "Government Response", supra note 8, at 138: "Where visa requirement exists for certain countries, it is easier for prior checking to be 
carried out on those expecting to take up appointments in diplomatic and consular missions in the United Kingdom." The Government Response provides (para. 22): "...the visa requirement effectively provides advance notice in case where it is most 
likely to be needed." The British government also expressed its intention to make use of various sources of information, 
including exchange of information within the European Community as to appointed diplomats.

Article 11 of the Vienna Convention provides that "[i]n the absence of specific agreement as to the size of the mission, the 
receiving State may require that the size of the mission be kept within limits considered by it to be reasonable and normal, (and) 
it/the receiving State may... refuse to accept officials of a particular category."; For example, in 1971, following the expulsion 
of 105 Soviet officials for "inadmissible activities," a ceiling was placed on the size of the Soviet Embassy. Following the 
Libyan embassy fiasco , by late 1985, the overall Soviet representation was lowered from 234 to 205. See, Higgins, 
"Government Response", supra note 8, at 138;

"Government Response", supra note 8, at 136: "Prompt and firm action will be taken where the evidence is 
good that the contents of a bag might endanger national security or the personal safety of the public or of individuals. 
Administrative measures on identification and handling of bags have been tightened. "The government took the view that 
scanning and recording of weight and size are not unlawful and will be used where national security and personal safety might 
be in danger, "...but not as a matter of routine."

The Diplomatic and Consular Premises Act 1987 now requires states wishing to use land as diplomatic or consular 
premises to obtain the consent of the Secretary of State. The consent, if given, may be withdrawn at any time. See, Shaw, supra note 21, at 527. In the Cambodian Embassy Case (noted 38 ICLQ 965 (1989)), the Secretary of State relied on the Act to vest the land of the deserted Cambodian Embassy (by then occupied by squatters) in himself. Upon challenge from the squatters, the English court upheld the compatibility of the Secretary's action with the Vienna Convention and its legality under the 1987 Act. Appeal was dismissed by the Court of Appeal. See, Shaw, supra note 21, 528.

Subsequently, a Syrian diplomat who refused to obey a court order to vacate his flat was notified that he would be 
required to leave the UK if he continues to do so. The Syrian embassy then sent the offending diplomat home. See, Higgins, 
"Government Response," supra note 8, at 136; Note also the adaptation of stringent measures with regard to traffic breaches, 
including illegal parking.
...does not exclude either self-defense or, in exceptional circumstances, measures to prevent the diplomatic agent from
committing crimes or offenses." The Swiss delegation to the UN conference convened to draft the Vienna Convention insisted that the principle of personal inviolability
preventing similar acts, he may be arrested for the time being, although he must in due time be safely sent home.; See, DE STANDAARD, April 6, 1998.

See the statistics cited in Chapter II, above. But note that the number of serious offenses committed by accredited persons is anyway small thus it is difficult to prove the connection, if any, between the measures and the reduction in the number of abuses. All the same, if unpaid traffic violations is any indication, their number significantly dropped in the US and the UK following the adoption of various administrative measures. See, McCLANAHAN, supra note 10, at 14.

Id. McCLANAHAN, supra note 10, citing various newspapers articles, writes that following the 1969 Qadhafi coup in Libya the Libyans "...have abused and exploited diplomatic immunities, stashing terrorist weapons in their inviolable premises and communicating plots of terrorist murders against Qadhafi's opponents through their diplomatic coded messages and their sealed diplomatic pouches."; See also, Simon, supra note 312: "[embassies are not] just sanctuaries for the random criminal. Some are staging centers for terrorism. After an American serviceman was blown up in a West Berlin nightclub, the U.S. found out the attack had been planned by the Libyan embassy in Berlin."

See Beaumont, supra note 277, at 401, footnotes 32-34, citing various newspaper articles.

Id.
Id.
Id.
Id.

See generally, Beaumont, supra note 277. Beaumont cites L. OPPENHEIM, INTERNATIONAL LAW § 388 (Vol. 1, 1912): "[there is one exception to diplomatic immunity] ifor if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, he may be arrested for the time being, although he must in due time be safe sent home.; The Swiss delegation to the UN conference convened to draft the Vienna Convention insisted that the principle of personal inviolability "...does not exclude either self-defense or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offenses." See, WRIGHT, supra 297, at 209; See also, The Caroline case (1837), 29 Brit. Foreign & St. Papers 1137-38, (184041), in HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 848 (4th. ed. 1991). The case provided the classical conditions for self-defense. The necessity of self defense must be "...instant, overwhelming, leaving no choice of means and moment for deliberation." See also, Brown J., DIplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations, 37 ICLQ 54, 86 (1988); The Hostages case, supra note 25, at para. 86.


See, Beaumont, id.

Id. Beaumont also cites HUGO GROTIIUS, De Jure ac Pacis Liberis Tres 444 : "all human laws have been so adjusted that in case of dire necessity they are not binding; and so the same rule will hold in regard to the law of the inviolability of ambassadors. Therefore, that an immediately threatening peril may be met, if there is no other proper recourse, ambassadors can be detained and questioned. But if an ambassador should attempt armed force he can indeed be killed, not by way of penalty, but in natural defence."


Id.
deterioration or disruption in official relation with a foreign government. That will often be accompanied or followed by the loss of trade and other commercial opportunities. Where it is necessary to consider such action, it is vital to minimise the risk to the personal safety of Britons abroad as well as to our material interests. When considering action in any particular case, it would be the height of folly not to make the most careful assessment of the implications for the full range of Britain's interests."

352 Id.
353 "First Report," supra note 63, at 50.
354 See, Shaw, supra note 21, at 530.
355 See, Sir John Freeland testimony before the Foreign Affairs Committee, "First Report," supra note 63, at para. 49. Higgins, "The Abuse," supra note 8, at 649, writes that "[t]he Foreign Affairs Committee considering the Libyan embassy incident felt that there was not an "intolerable situation" and that the Convention provided a remedy in the ability of the receiving state to declare a diplomat persona non grata."
356 See, Higgins, id, at 646. However, Higgins argues that "...the drafting history of the Vienna Convention seems to make the operation of this principle inappropriate. This conclusion is buttressed by the fact that the Vienna Convention provides for its own remedies in case it is violated --- the severing of diplomatic relations is available as a response to what one could term 'a fundamental breach'."; On the concept of "fundamental" or "material" breach see generally, Shabtai Rosenne, Breach of Treaty (1985). Another possibility is reliance on "fundamental change of circumstances," see generally, Shaw, supra note 21, pp. 670-671.
357 See, "First Report," supra note 63, at para 94, per Sir John Freeland, Legal Adviser to the Foreign and Commonwealth Office; A similar view was taken by Sir Francis Vallett, see, Beaumont, "Self-Defence," at 394; Thus, "...forcible entry of embassy premises might be justified by self-defense." See, Higgins, "The Abuse," supra note 8, pp. 646-647. Higgins nevertheless questions the applicability of the concept of self-defense to violent acts in such situations.
358 See, Higgins, id. The requirements have been formulated in the Caroline case, op. cit.; But CF: the memorandum submitted to the Foreign Affairs Committee by Colonel Professor G.I.A.D. Draper suggesting that immediate response to the shooting from the Libyan embassy windows could legitimately take the form of counter fire and forced entry. See, Beaumont, supra note 277, at 395.
359 UN Charter, Art.1 declares that the ICJ is the principal judicial organ of the UN; On this possibility, see, Alistair Brett, Giving the Diplomatic Rules Some Teeth, The Times (London), April 28, 1984, at 8; The 1961 Vienna Convention Optional Protocol Concerning the Compulsory Settlement of Disputes, U.N. Doc., A/Conf.20/12, provides for compulsory jurisdiction to the ICJ for signatory states "...in respect of any dispute arising out of interpretation or application of the Convention" (Preamble). Alternatively, Articles 2-3 of the Optional Protocol provides that the parties may agree to refer disputes to an arbitral tribunal or a conciliation procedure before resorting to the ICJ. See generally, Denza, supra note 35, pp. 302-305.
360 Statute of the ICJ, Art. 36.
361 Statute of the ICJ, Art. 36(2).
362 Declarations under Art. 36(2), id., are few and most of them are anyway conditional on many reservations.
363 See, the Hostages Case, supra note 25.
367 However, far-reached proposals such as giving the ICJ the authority to administer the Vienna Convention provisions to the extent of empowering it to suspend a non-complying state from the UN and requiring countries to post monetary bonds with the court to help insure good diplomatic behavior (Brett, "Giving the Diplomatic Rules Some Teeth, Times (London), April 28, 1984, at 8, cited by Shapiro, supra note 179, at 298), do not seem to be very practical in relation to enforcement and expected compliance. Nor do they seem proportional to the scope of the problem. It is difficult to see what good will come out of adopting such measures.
368 That is, laws incorporating the Vienna Convention.
369 Mistrust is also a problem in relation to prosecution at the sending state as demonstrated by the events that followed the Lockerbie incident; To be more specific, in the Libyan embassy incident Libya offered to prosecute the suspected criminals. See, Wright, supra note 297, at 36, citing Feder, British Break Off Libyan Relations Over London Siege, N.Y. Times, Apr. 23, 1984, at A1. Wright argues that the UK's decline to accept that offer and instead to prefer discontinuing diplomatic relations with Libya is "...an example of disruption in the dialogue between states which is likely to occur in such situations."
370 That is, laws incorporating the Vienna Convention.
problem with Wright's argument is that it ignores the realities of the Libyan "People's Bureaus" of the 1980s. It seems that the UK simply wanted the Libyans out as soon as possible. This wish was not based on a single incident but on a pattern of terrorist behavior associated with Libya's missions in the UK and in other countries since the Qadhafi revolution. Indeed, as discussed above, the conscious political decision to expel the Libyan mission is not unique to the UK.

372 But note the problems discussed above, infra note 371: See e.g., Leslie Shirin Farhangi, Insuring Against Abuse of Diplomatic Immunity, 38 STAN. L. REV. 1517, 1532 (1986), noting that the high cost of such suits and the cultural and political climate in the sending state would constitute serious obstacles in some cases. For example, proposing that Mr. Dikko, in exile in London and a wanted man in Nigeria, would bring a suit in Nigeria "...is absurd. Relying on suits in the sending country to compensate victims would effectively rob Mr. Dikko and others like him of any legal recourse."; However, that is not always the case. In cases of abuse by diplomats from more like-minded countries (say, the US and an EC Member State) such a suit is possible. Note also that a recent proposals suggests that governments hold their diplomats accountable by prosecuting them in their own courts. See, Trugman, supra note 263.

373 See, supra note 60; See also, Stangle, supra note 10. In 1993 Costa Rica stripped its Ambassador to Poland of his immunity and duties after he was caught with twelve kilos of heroin in his diplomatic bag. Diplomatic immunity was also lifted in 1994 by Brazil when the son of the Peruvian embassy attaché and Rear Admiral Javier Bravo, smuggled cocaine into the US and conspired to sell it to undercover police. Waiving immunity is sometimes seen as the honorable thing to do but - unfortunately - it is still "the exception rather than the rule."; Note, that the US policy is not to waive the immunities of American diplomat when asked to do so. Perhaps the only recent exception was the waiver of the immunity of a civilian employee in Bolivia with the U.S. anti-drug program who was suspected of stealing large sums from the program's funds. See, Ved Nanda, Immunity Shields all Nations, DENY POST. Jan. 23, 1997, at B7, available on 1997 WL 6063071; See also, Kempster, N. & Jackson, R. L., Immunity May End for Envoy in Fatal Crash, L.A. TIMES, Jan.11, 1997, at A1, available in 1997 WL 2171926: "As a general rule, the United States never waives immunity for its diplomats overseas."; Daniel McGregor, US Embassy Seek Immunity From Sex Victimisation Claim, THE TIMES (London), Jan. 27, 1997, at 5, available in 1997 WL 9184946: "The American Government has a reputation for being reluctant to allow its diplomats abroad to face harmful or embarrassing prosecution and will invoke immunity to avoid it. But in Washington the State Department is vociferous in its criticism when foreign diplomats serving in the Unites States avoid prosecution by claiming immunity."

374 See e.g., Trugman, supra note 263: "Organizers of yesterday's announcement (of new US bill on immunity) said U.S. diplomats also need to be held accountable for crimes."

375 See, Larschan, supra note 319, at 292. Article 39, Vienna Convention 1961 provides that upon termination of a protected person's functions, immunities cease when that person leaves the Country "...or on expiry of reasonable period in which to do so." Larschan, Absinito's attorney, essentially opposes the theory of post-immunity prosecution; See also, Marian Nash Leich, Prosecution of Former Diplomats for Nonofficial Acts, 81 AJIL 937 (1987); Joan E. Donoghue, Perpetual Immunity for Former Diplomats? A Response to "The Absinito Affair: A Restrictive Theory of Diplomatic Immunity?", 27 COLUM. J. TRANSNAT'L L. 615 (1989), citing (in footnote 1) United States v. Guinand, 688 F. Supp. 774 (D.D.C. 1988) where a motion to dismiss a case on the basis of diplomatic immunity was rejected as the defendant's duties had been terminated and he was no longer a member of the mission. Donoghue convincingly supports post-immunity prosecution on the basis of the Vienna Convention as well as customary international law.

376 For an interesting and detailed proposal of a "Permanent International Diplomatic Criminal Court," see, Wright, supra note 297.

377 See, Shapiro, supra note 179, at 297, citing Bassiouni.

378 See, Wright, supra note 297, at 186: "The Court's organic statute would take the form of amendment of the Vienna Convention." As discussed above, amendment of the Vienna Convention is perceived in the US and the UK as difficult task.

379 See, Shapiro, supra note 179, at 295, citing, Comment, A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978, 54 TUL. L. REV. 661, 671: "Harassment cannot fairly be implied from the initiation of a lawsuit by some person other than the receiving state."


381 See e.g., the English Case of Empson v. Smith, supra note 61, in which the Court of Appeal confirmed that members of the administrative staff of foreign embassies are not protected against civil and administrative proceedings for acts performed outside their official function.

382 E.g., Senator Judd Gregg demanded that up to $30 million in US aid to Georgia be suspended unless immunity is waived. See, Diplomatic Immunity may be Waived, supra note 82; See also, Blomqvist, supra note 70: In 1995, Senator Jesse Helms was reported as saying that if the Russians would not pay their unpaid parking tickets as required by legislation, the money - running into millions of dollars - would come out of their foreign aid (of about $2.5 Billions).
Diplomatic immunity is functionally-based. It aims to serve diplomacy among nations by securing the well-being of diplomats. Every state remains responsible for the consequences of such laws adopted in the general national interest. It follows that domestic legislation requiring the receiving state to adequately remedy the victims of diplomatic immunity abuse is a reasonable measure; Thierry S. Renoux and André Roux, *The Rights of Victims and Liability of the State*, in *TERRORISM AND INTERNATIONAL LAW 251* (Rosalyn Higgins & Maurice Flory eds., 1997), write that "[o]ver the last few years, there has been an increased tendency towards 'socialization of risks', and the law has established specific regimes of indemnification for damages sustained by certain categories of victims who are deemed particularly worthy of interest...Thus, indemnification is more and more frequently dissociated from liability. It has been accepted for a long time that indemnification can operate without clear liability needing to be established." After examining the laws of a number of European States, they conclude (p. 256) that systems of guarantee, based on the principle of solidarity, and providing for indemnification of the victims of violent acts, "...has become the norm over recent years in most European States which have been victims of internal or international terrorism." Some types of diplomatic immunity abuse certainly fall within the "international terrorism" category. Moreover, the principle of solidarity-based guarantee appears to apply to any victim of diplomatic immunity abuse who is in danger of being "sacrificed" or "compromised" for the larger good.

Similar practice exist in Canada. See McLanahan, supra note 10, at 172, citing the *U.S. Department of State, Study and Report Concerning the Status of Individuals with Diplomatic Immunities in the United States*, prepared in pursuance of Foreign Relations Act, Fiscal Years 1988 and 1989, P.L. 100-204, presented March 1988, pp. 57-60. The State Dept. supported the Solarz bill that proposed that victims of diplomatic immunity abuse be added to the list of persons eligible to receive compensation through the Victims of Crime Act of 1984: "The beneficiary of diplomatic immunity is fundamentally the United States Government because the United States diplomatic personnel abroad could not function without diplomatic immunity. It therefore appears reasonable to spread the cost... among U.S. taxpayers...rather than let it fall on the injured individuals. The funding required ... should be viewed as the necessary cost of (the) conduct of foreign relations." But cf: Hicky & Fisch, supra note 311, at 381: "...there is no need for a specialized compensation or insurance fund for victims of "diplomatic crime" because this might reduce the sense of individual responsibility of a foreign diplomatic personnel, and because the few seriously harmed victims of diplomatic crime presently receive expeditious and generous compensation as a matter of practice by foreign missions with the encouragement of the State Department." In addition, "Payment of insurance premiums by foreign missions might reduce the sense of responsibility for the behavior of individual foreign diplomatic or consular personnel" (p. 378); The Dep't of Justice stated that the Dep't. "...works with the injured parties and the foreign government to secure restitution in those case where criminal incidents have resulted in injuries to individuals." See, "Fact Sheet", supra note 350.


Diplomatic Relations Act, *id.*, at § 254e(b). In one case, before insurance requirement was adopted, an American physician, Halla Brown, was rendered quadriplegic in an accident in which a Panamanian diplomat having no insurance was at fault. Because of the immunity, Brown's attempts to press a settlement was difficult. She was finally awarded money from Panama and the US government. See, Farrar, supra note 177; Mr. Skeen, the victim of the Brazilian diplomat's son shooting in Washington nightclub, encountered similar difficulties when his law suit against Brazil was rejected in court. See, Simon, supra note 312.

It is worth noting that arbitration, unlike ICJ reference, eliminates the fear of someone "breaking into the litigation" (that is, intervention by third party). The idea of entrusting an impartial authority with finding a legally based solution to international disputes is an old one going back to ancient Greece. The modern history is traced back to the 1794 Jay Treaty Arbitrations between the US and Britain. The *Alabama Claims Arbitration* (1871 United States/Great Britain, Moore, 495), introduced the new mixed commission mode of international arbitration. The main shortcoming of such an approach, at least as long as no international norm encompassing tortious liability of diplomats, is its unilateral character that seems bound to alienate sending states and invite retaliation on their part.

The concept of compulsory nature of arbitration is also possible under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982) whereby individuals and foreign states are responsible for tortuous actions injuring US citizens. *see, Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) where a D.C. District Court permitted a relative of Raoul Wallenberg, a Swedish diplomat who saved thousands of Jewish lives during the 2nd World War and an honorary US citizen, to bring suit against the Soviet Union for violating Wallenberg's immunity. The main shortcoming of such an approach, at least as long as no international norm encompassing tortious liability of diplomats, is its unilateral character that seems bound to alienate sending states and invite retaliation on their part.

The fact that the arbitral award is binding is a significant advantage over variety of diplomatic means of negotiating a dispute with third party help.

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The fact that the arbitral award is binding is a significant advantage over variety of diplomatic means of negotiating a dispute with third party help.

This is a significant advantage over reference to the ICJ.

*See, e.g., Argentina/Chile*, 38 ILR 10 (1966).

*See, e.g., Iran/US Claims Tribunal.*

*E.g., the Libyan embassy incident left one person dead and a number of others injured. Similarly, the Absinoto affair, left a number of potential claimants.*

*It is worth noting that arbitration, unlike ICJ reference, eliminates the fear of someone "breaking into the litigation" (that is, intervention by third party). *See, Nicaragua's intervention in the Land, Island and Maritime Frontier Dispute (Honduras/El-Salvador), ICJ Rep., 92 (1990); 97 ILR 112 (1990).*

*Such clauses usually provide for compulsory arbitration and its terms of reference.*

*There is no principled reason why such compromissory clauses should not serve similar function - namely improve the application of the Convention's provisions - if inserted into the 1961 Vienna Convention.*

*However, that is not always an advantage. Sometimes the main contribution of adjudication is that it 'cools things down'. *It seems that equity is now accepted in international law therefore a tribunal may apply it. However, a tribunal cannot disregard the applicable law without a mandate to do so. The potential creativity of solutions that may be devised in arbitrations was demonstrated by the establishment of security account (from Iranian assets frozen in the US following the hostages crisis) to ensure payment of awards by the Iran/US Claims Tribunal.*

*Endorsed by the UN General Assembly in 1958.*

*See e.g., Taba Arbitration, Iran/US Claims Tribunals, International Tribunal for the law of the Sea.*

*That, generally speaking, does not seem to be the case in relation to most of the Vienna Convention provisions. Nonetheless, as shown by this very paper, many legal issues are not entirely clear.*

*But note that some change of attitude among developing states may be detected in recent years.*


*See, id.: Of 435 arbitral awards listed by Stuyt between 1794 and 1972, at least 261 were claims for damages, almost all of which dealt with injury to foreign nationals. Almost all the rest were charged with interpretations of international law and giving a declaratory judgment, rather than awarding other remedies for its violation. Almost all of those declarations concerned territorial disputes.*

*GREY, id.*
422 Trail Smelter case (United states v. Canada, 1938, 3 RIAA 1905). See also, Central American Court of Justice in the El Salvador/Nicaragua case (11 AJIL 674 (1917)).

423 Restitution requires the re-establishment of situation which would in all probability have existed if the illegal act had not been committed. See, Chorzow Factory case (Germany/Poland, 1928, PCIJ Rep. Series A. No. 17, p. 46). See also, Rhodope Forests case (Greece/Bulgaria, 1931, 3 RIAA 1389).

424 Declaratory judgments do not, in the awards of arbitral tribunals, approach the same level of importance as in the ICJ judgments. Old cases such as the Brower's case (1910, Great Britain/US) in which nominal damages have been awarded may be seen as a form of declaratory judgments.

425 An appropriate remedy to public, as opposed to private or economic, injury to a state's dignity calls for a remedy which will repair the moral injury to the state. The most common types of satisfaction are apologies, punishment of the guilty, assurances as to future behavior, and pecuniary satisfaction. There seems to be little guidance as to the type of satisfaction to be awarded in a given case. See e.g., Carthago and Manouba cases (France/Italy, 1913, II RIAA 449 and 463)(declaration adequate satisfaction for violation of state sovereignty), I'm Alone case (Canada v. Unites States, 1933, 3 RIAA 1609; 29 AJIL 326 (1935)) (apology and pecuniary satisfaction appropriate for unlawful sinking by the US of a Canadian ship).

426 Full compensation has no sound fixed meaning. See, Jane's Claim (1923, US/Mexico) ($12,000 awarded for injury caused by Mexico's failure to punish the murderer of an American citizen. The basis of the measure was compensation to individual grief, lack of opportunity to subjecting the murderer to a civil suit, and the reasonable redress for the mistrust and lack of safety resulting from the attitude of the Mexican government. Such an approach appears particularly suitable for diplomatic immunity abuse cases in which the alleged wrongdoer returns to his home state without standing trial. In the Mecham's case (1923, US/Mexico), the Mexican government was liable to pay damages for not attempting to capture and punish rubbers of property belonging to an American citizen. Arbitral tribunals have calculated the damages on the basis of loss caused by the original injury even if the state is not, strictly speaking, responsible for it. Similar to municipal law cases, the tribunals aim to put the victim in the position he would have been in but for the violation.

427 Usually consisting of equal number of national arbitrators (i.e., from each state party) and a neutral member (umpire) from a disinterested party to whom cases are referred in in case of disagreement.

428 Note that other possibilities include the appointment of a specially qualified individual (e.g., Rainbow Warrior, New Zealand/France, 1980), and regional conventions mechanisms (e.g., American Peace Committee composed of 5 members of the Organization of American States).

429 Sir Gerald Fitzmaurice, see, DENZA, supra note 35, at 303.

430 See, Denza, id.


432 DENZA, supra note 35, at 304.

433 Id. However, Denza adds that "[t]he real sanction that ensures the observance of the rules by governments is reciprocity." Further, "[a]s pointed out in the [ILC] debate, diplomatic privileges and immunities is not a subject which gives rise to important conflicts of national interest. The issues which tend to come into dispute are not usually of sufficient gravity to justify settlement by reference to international arbitration or to the International Court." This view can hardly be reconciled with the events surrounding the Teheran Hostages and the Libyan Embassy incidents. In addition, as international law currently stands, the issue of appropriate remedies to victims of human rights violations, and the more general issue achieving a peaceful settlement avoiding deterioration of relations as well as more innocent victims, may well be of "sufficient gravity."