

PROTECTION OF DIPLOMATS AGAINST TERRORISM
UNDER INTERNATIONAL LAW.

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A504743791

A Dissertation Submitted To The Faculty Of Law, University Of
Malaya, In Partial Requirement For The Degree Of Master Of Law
(LL.M).

Faculty Of Law
University Of Malaya.

February 1996

DEDICATION

ACKNOWLEDGEMENT

In the first instance, I would like to thank the Almighty Allah, for giving me courage, guidance, by His grace which enabled me to complete this programme.

In Memory of My Father and Mother

Secondly, I wish to express my sincere gratitude to the Government of Malaysia for the award of a scholarship, without which I could not have completed this course.

Thirdly, I am very grateful to my supervisor, Prof. Surya Sharma, for the guidance during this programme and also the Dean and his deputy for all the assistance they rendered.

I am also indebted to Bro. A. Nsubugu whose endeavour to see me achieve further studies ^{was} ~~were~~ unfailing. Further I would also like to acknowledge the help offered by Dr. Jabal M. Duaben during the course of writing this work.

Last but not the least, I would like to thank my family whose ^{program} ~~program~~ *"WHAT WOULD BE THE WORLD IF WE HAD NO COURAGE TO ATTEMPT ANYTHING ?"*

Y M Ingalila Lubowa

Vincent Van Gogh.

ACKNOWLEDGEMENT

In the first instance, I would like to thank the Almighty Allah, for giving me courage, guidance and health which enabled me to complete this programme.

Secondly, I wish to express my sincere gratitude to the Government of Malaysia for the award of a scholarship, without which I could not have completed this course.

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Last but not the least, I would like to thank my family whose love and care I sacrificed to undertake this programme.

Y M Luwalira Lubowa

Synopsis

The duty to honour and protect officials of foreign embassies is of utmost importance and has been given due recognition for centuries. The main legal conventions dealing with the doctrine of the inviolability of foreign officials representing their countries as diplomats among others are The 1961 Vienna Convention On Diplomatic Relations, and The 1973 Convention On The Prevention And Punishment Of Crimes Against Internationally Protected Person^s, Including Diplomatic Agents.

The sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations among the nations all warrant that foreign diplomats should receive good and honoured hospitality in a receiving State.

The privileges, immunities and protection accorded to diplomats are treated as rights rather than mere privileges and therefore cannot be withdrawn without the consent of the sending State. The objective underlying those rights is basically to ensure that diplomats carry out their duties effectively and without any hindrance. The State is under a legal obligation to protect diplomats not only from the wrath of its own agents but also private persons who may seek to attack them. Since the beginning of the second half of this century, there has been a spate of attacks on diplomats by political activists. The dissertation therefore seeks to find out whether the international

measures provided to protect diplomatic agents under the 1973 Convention on The Prevention And Punishment Of Crimes Against Internationally Protected Persons Including Diplomats are adequate. It is emphasised here that the Convention has significant loopholes which need to be taken care of in order for it to serve the purpose for which it was drafted.

1.1	INTRODUCTION	1
1.2	RATIONALE	2
1.3	THE OBJECTIVE	3
1.4	SCOPE	4
1.5	METHODS OF STUDY	6
1.6	ARRANGEMENT OF CHAPTERS	7

CHAPTER 11

HISTORICAL DEVELOPMENT OF DIPLOMATIC IMMUNITY

2.1	INTRODUCTION	10
2.2	PRIMITIVE DIPLOMACY	10
2.3	PHASES OF DIPLOMACY	14
2.4	DIPLOMATIC IMMUNITY	16
2.5	SOURCES OF THE PRIVILEGES AND IMMUNITIES	20
2.6	CONCLUSION	25

CHAPTER 111

CONTENTS

PRIVILEGES

AND

IMMUNITIES

OF

CHAPTER 1

INTRODUCTIONC AGENTS

1.1	INTRODUCTION	21
1.2	RATIONALE	22
1.3	THE OBJECTIVES	23
1.4	SCOPE	24
1.5	METHODS OF STUDY	46
1.6	ARRANGEMENT OF CHAPTERS	57
3.2	DEMONSTRATORS INFRONT OF THE MISSION	68

CHAPTER 11

HISTORICAL DEVELOPMENT OF DIPLOMATIC

CHAPTER 1V.

IMMUNITY

2.1	INTRODUCTION	10
2.2	PRIMITIVE DIPLOMACY	10
2.3	PHASES OF DIPLOMACY	14
2.4	DIPLOMATIC IMMUNITY	16
2.5	SOURCES OF THE PRIVILEGES AND IMMUNITIES	20
2.6	CONCLUSION	25
4.4.2	TERRORISM AGAINST DIPLOMATS BY PRIVATE INDIVIDUALS AND	

CHAPTER 111

RESPONSES TO TERRORISM AGAINST DIPLOMATS

PRIVILEGES AND IMMUNITIES OF

DIPLOMATIC AGENTS

GR

3.1 INTRODUCTION 27

3.2 THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS 28

3.3 THE UNITED STATES DIPLOMATS IN TEHRAN. 33

3.4 THE DUTY TO PREVENT ATTACKS AND ABUSE OF DIPLOMATS .37

3.5 HOSTAGE TAKING OF DIPLOMATS AND NEGOTIATION. . . . 41

3.6 DIPLOMATIC MISSION PREMISES. 57

3.7 DEMONSTRATORS INFRONT OF THE MISSION 68

3.8 LEGAL DUTIES 172

3.9 CONCLUSION. 76

CHAPTER 1V.

AGAINST
TERRORISM AND DIPLOMATS

4.1 INTRODUCTION 178

4.2 CAUSES OF TERRORISM 79

4.3 DEFINITION 81

4.4 VIOLATION OF DIPLOMATIC IMMUNITY AND PRIVILEGES . . 86

4.4.1 VIOLATION OF DIPLOMATIC IMMUNITY BY GOVERNMENT AGENT 86

4.4.2 TERRORISM AGAINST DIPLOMATS BY PRIVATE INDIVIDUALS AND

4.5	REASONS FOR TERRORISM AGAINST DIPLOMATS	91
4.6	RESPONSES TO TERRORISM AGAINST DIPLOMATS	94
4.7	CONCLUSION	97
5.9	UNILATERAL ACTION	168
5.10	ASYLUM FOR PERPETRATORS OF CRIMES AGAINST	

CHAPTER V.

5.11	DISPUTE RESOLUTIONS	184
5.12	INTERPRETATION OF THE 1973 CONVENTION	185
5.13	APPREHENSION, PROSECUTION AND PUNISHMENT OF OFFENDERS.	

5.1	INTRODUCTION.	98
5.2	THE OBJECTIVE OF THE 1973 CONVENTION	99
5.3	CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS	103
5.4	THE MOTIVE OF THE CRIME	105
5.4.1	JUDICIAL DECISIONS	107
4.5	EXTRATERRITORIAL JURISDICTION	109
5.6	PREVENTION OF CRIMES AGAINST DIPLOMATS.	115
5.6.1	THE DUTY TO APPREHEND AND PROSECUTE OFFENDERS OF	120
5.6.1	CRIMES AGAINST DIPLOMATS	121
5.7.2	DISSEMINATION OF INFORMATION ABOUT TERRORISTS	122
5.8	APPREHENSION OF PERPETRATORS OF CRIMES AGAINST DIPLOMATS.	129
5.8.1	PROSECUTION OR EXTRADITION	132
5.8.2	PROBLEMS OF EXTRADITION	137
5.8.3	CONSTITUTIONAL PROVISIONS AND THE 1973 CONVENTION.	151

5.8.4	ALL OFFENCES IN THE 1973 CONVENTION ARE EXTRADITABLE	161
5.8.5	EXTRATERRITORIAL JURISDICTION FOR EXTRADITION . . .	163
5.9	UNILATERAL ACTION	168
5.10	ASYLUM FOR PERPETRATORS OF CRIMES AGAINST DIPLOMATS	178
5.11	DISPUTE RESOLUTIONS	184
5.12	INTERPRETATION OF THE 1973 CONVENTION	185
5.13	CONCLUSION	

CHAPTER VI

MEASURES

OTHER METHODS ADOPTED TO ENHANCE THE PROTECTION OF DIPLOMATS

6.1	INTRODUCTION	188
6.2	INTERNATIONAL MEASURES	188
6.3	REGIONAL RESPONSE TO TERRORISM	190
6.3.1	INTRODUCTION	190
6.3.2	THE 1971 OAS CONVENTION	190
6.4	THE 1977 EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM	195
6.4.1	INTRODUCTION	195
6.5	THE PROVISION OF THE 1977 EUROPEAN CONVENTION . . .	197
6.6	CONCLUSION	198

CHAPTER

VI

VII

(F)

CONCLUSIONS AND SUGGESTIONS.

200

BIBLIOGRAPHY

216

A.J.I.L.	American Journal Of International Law & Policy	
A.J.I.L. & P.	British Yearbook of International Law	
B.Y.B.I.L.	Cornell Law Review	
C.S.T.L.	International Comparative Law Quarterly	
C.S.T.L.	Indian Law Journal	
C.S.T.L.	International Legal Material	
C.S.T.L.	Michigan Law Review	
C.S.T.L.	New York University Law Review	
C.S.T.L.	Yearbook Of International Law	
C.S.T.L.	Yearbook Of International Law Commission	
C.S.T.L.	Yearbook Of The United Nations	

ABBREVIATIONS

A.J.I.L.	American Journal of International Law
A.J.I.L. & P	American Journal Of International Law & Policy
B.Y.B.I.L	British Yearbook of International Law
C.J.T.L	Columbia Journal Of Transactional Law
C.L.R.	Cornell Law Review
I.C.L.Q.	International Comparative Law Quarterly
I.L.J	Indian Law Journal
I.L.M.	International Legal Material
M.L.R	Michigan Law Review
N.Y.U.L.R.	New York University Law Review
Y.B.I.L.	Yearbook Of International Law
Y.B.I.L.C	Yearbook Of International Law Commission
Y.B.U.N	Yearbook Of The United Nations

INTRODUCTION

1.1 INTRODUCTION

The role of diplomatic agents in international law is indeed vital. It endeavours to protect the interests of the sending State and its nationals, promote friendly relations, and enhance cultural as well as scientific relations between the sending and receiving States.

Diplomacy has been in existence since time immemorial. The agents entrusted with this noble duty were accorded special privileges and immunities as a sign of respect to the sovereign sending State. The ^{protection} honours accorded to them ^{was} were special in the sense that the same were not given to other foreigners in the receiving State. Since then the protection and honour of the dignity of the diplomatic agents became as equally important as their duty. It was considered a high crime to violate the ^{person} honour of the agent. Such a crime could sometimes result in the death penalty or confiscation of the property of the offender, or both.

In the beginning, the privileges and immunities were accorded to the diplomatic agent on the basis of his status as a representative of the head of the sending State. The diplomatic agent was ^{regarded as} then personifying his head of State. Later on when diplomatic missions were established, the theory of extraterritoriality was developed. According to this, the premises were ^{regarded} as if they were ~~on~~ the territory of the sending

State. The premises of the missions were like ships floating on the seas in other territories. A nother theory has now been developed which accords privileges and immunities on the basis of 'functional necessity'. This theory justifies ~~that~~ the privileges and immunities ^{of diplomats as} ~~are being made~~ necessary only to enable the agents ^{to} carry out the functions of the missions.

The preamble of the Convention on Diplomatic Officers adopted at Havana in 1929, provides that diplomatic officers do not in any case represent the person of the Chief of State but only their governments. The diplomatic agents should only claim privileges and immunities essential to discharge their official duties.

The international law on the privileges and immunities of the diplomatic agents is the result of State practices and customary law for generations. The privileges are now codified into an international instrument, i.e The 1961 Vienna Convention On Diplomatic Relations, hereinafter referred to as the 1961 Vienna Convention. However, the preamble of this Convention reiterates that the rules of customary international law shall continue to govern questions not specifically regulated by this instrument.

1.2 RATIONALE

It is urged that there is an urgent need for increased security for diplomatic agents. It is also imperative that all parties to the 1961 Vienna Convention and the 1973 Convention on

the Prevention And Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, hereinafter referred to as the 1973 Convention discussed in this dissertation recognise that the sanctity of the institution of diplomacy needs to be safeguarded. This is the main rationale for choosing the dissertation topic.

This work deems it fit to conclude that civilised and friendly relations among States could be maintained and promoted if some of the suggestions put forward in this dissertation are seriously appreciated.

1.3 THE OBJECTIVES

The objective of this study is to trace how some of the privileges and immunities are enshrined in the provisions of the 1961 Vienna Convention. The immunities and privileges are arranged in order to deal with the premises of the mission first then the functions and finally the person of the diplomatic agent. Although Articles 22, through 36, provide for the diplomatic privileges and immunities, this study will concentrate on Article 22 which provides for the protection of the premises, and Article 29 for the Inviolability of diplomatic agents.

Though the duty to honour and protect diplomatic agents by the receiving State is well codified under international law, this study seeks to establish that the violation of diplomatic agents has of late increased. Some diplomats have been attacked and assaulted, others are kidnapped and taken hostages while some have been fatally shot. There are quite a number of reasons for

such attacks and hence violations of diplomatic inviolability. But most importantly, this work endeavours to find out whether individuals and political organisations have found diplomatic agents as assets and integral part of their struggles. It also looks at existing international arrangements for the protection of diplomats to assess their adequacy within the realm of the 1973 Convention. Therefore, this study is mainly concerned with two Conventions; the 1961 Vienna Convention and the 1973 Convention. This study will in addition look at other methods ^{measures} adopted at the United Nations to enhance the protection of diplomats. The study will also briefly look at the 1977 European Convention On The Suppression Of Terrorism, hereinafter referred to as the 1977 European Convention and the 1971 Organisation of American States Convention To Prevent and Punish Acts Of Terrorism, hereinafter referred to as the 1971 OAS Convention.

1.4 SCOPE

This research will concentrate on the crimes committed by private individuals and political organisations and not those of the States. It had been argued during the preparation of the 1973 Convention that there were enough measures to cater for the violations of diplomatic immunity by State agents. Therefore, we will analyse the 1973 Convention to find out the protection accorded to diplomatic agents against crimes committed by private individuals and political organisations.

According to Nicolson, the term diplomacy " is derived from the Greek Verb 'diploun' meaning 'to fold'. In the days of the Roman Empire all passports, passes along imperial roads and way bills were stamped on double metal plates, folded and sewn

together in a particular manner. These metal passes were called 'diplomas'. At a later date this word 'diploma' was extended to cover other less metallic official documents, especially those covering privileges or embodying arrangements with foreign communities or tribes".¹

For the purpose of this dissertation, a diplomat is one who is a representative of a government who engages in relation with another government ^{for} to the benefit of his own State. The work deals specifically with only permanent mission diplomats and therefore excludes ad hoc diplomats or those of special missions and also representatives of States to inter - governmental organisations including representatives of States to international conferences. The dissertation takes this line of focus from the 1961 Vienna Convention which concentrates on permanent diplomatic missions. In situations where mention is made of those in the excluded categories, it is meant merely for clarification purposes and it is not to be taken as part of the general arguments of the dissertation.

The term 'terrorism' is employed in this study to refer to criminal acts committed against diplomats by private individuals and political organisations. This is because it was the objective of the preparation of the 1973 Convention to protect diplomatic agents from acts of terrorism perpetrated by individuals and private organisations. If this is the case, one could reasonably conclude that acts which form crimes in the 1973 Convention are

¹

Nicolson Harold, Diplomacy (Oxford University Press, London, 1963) P.26

in *stricto sensu* acts of terrorism. This, we find to be the case even though the word terrorism did not find its way into the 1973 Convention. However, this study defines terrorism as: "an intentional and unlawful use of force or violent attack against the person of the diplomatic agent, diplomatic mission or property in order to intimidate or coerce any State in furtherance of political or social objective²."

"The protection of diplomats" involves the preservation of diplomatic immunity by a State. The State must treat the diplomat with due respect and prevent any attack on his person, freedom or dignity. For the purpose of this study, it also implies the prevention, prosecution and punishment of perpetrators of crimes against diplomats.

1.5 METHODS OF STUDY

While doing this research we shall rely very much on the library materials in form of books and articles in periodicals. However, there were very few books on the subject of the privileges and immunities of diplomatic agents. Further there is dearth of information on the regional Conventions discussed in chapter VI. The search has rather found plenty of books and articles on 'terrorism'. In the event, the libraries of the International Islamic University Malaysia, the National

² This definition is influenced by versions of the United Kingdom (1974), A.H. Buckelew (1986), The U.S. Federal Bureau of Investigation (1980), U.S. Department of Justice (1984), and U.S. Department of Defence (1983) quoted by Schmid Alex P. and Jongman Albert J, et al, Political Terrorism: A New Guide To Actors, Authors, Concepts, Data Bases, Theories And Literature, (North - Holland Publishing Co. Amsterdam, Oxford, New York, 1988), P.35

University of Malaysia, The Agricultural University of Malaysia, the National University of Singapore and the National library of Malaysia will form our main out-of-campus sources.

The research had also sought to carry out some field study to interview diplomats. It is however disheartening to note that this has been the most difficult part of our study since our exploratory discussions with potential respondents have drawn almost a complete blank. Hence the dissertation depends mainly on library research. The main sources for the 1961 Vienna Convention and the 1973 Convention are the Year Books of International Law Commission (I.L.C.) which are available in our source libraries and the research has drawn heavily on them. It is also worth mentioning that the American Journal of International Law (A.J.I.L.) has also been extensively used.

1.6 ARRANGEMENTS OF CHAPTERS

The dissertation has been divided in the following order:

Chapter 1 (Introduction) introduces this study.

Chapter 11 deals with the traditional privileges and immunities of diplomatic agents and their development. It traces the earlier history particularly since the beginning of residential diplomacy.

Chapter 111 examines diplomatic privileges and immunities as provided for in the 1961 Vienna Convention with special emphasis on Articles 22 which provides for the protection of the diplomatic premises and 29 for the inviolability of diplomatic

agents. tion and the 1977 European Convention.

Chapter 1V outlines some of the causes of terrorism and the problem of finding an internationally accepted definition of the term 'terrorism'. It also looks at the violations of diplomatic immunity in form of acts of terrorism. There are two kinds of violations. One of the violations is committed by the State agents or done with the help of the State organs and another one which is the main focus of this study is by private individuals and political organisations.

Chapter V presents an analysis of the 1973 Convention on The Prevention And Punishment Of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. This discussion will touch on the motive of the offender and the duty of State Parties to prevent the preparation of crimes in their territories. Further, it will deliberate on the taking of appropriate measures to legislate jurisdiction of crimes in the municipal law, to disseminate information to other State Parties and to prosecute or extradite the offenders. The discussion will also look at the issue of asylum with specific reference to the perpetrators of crimes against diplomats and examine provisions on dispute resolution and the interpretation of the 1973 Convention.

Chapter VI looks at other methods[?] adopted at international and regional levels to enhance the protection of diplomats. It deals with resolutions of the United Nations, the OAS 1971

Convention and the 1977 European Convention.

CHAPTER 11

Chapter VII concerns conclusions and suggestions on how protection of diplomats could be strengthened. The duty to honour and protect diplomatic agents does not fall solely on the receiving State but rather a duty that should squarely be shared by all States.

Since the immemorial establishment of diplomatic relations between States has been taking place on the basis of the mutual consent of the parties concerned. It is therefore worth noting that the creation and continuation of diplomatic relations are a matter of tacit consent and not of right.

Eileen Denza writes:

Every government is both a sending and a receiving State and its own diplomats abroad are sureties for its behaviour.¹

Treaties stipulating the mutual exchange of diplomatic relations were always made as a sign of diplomatic understanding. The honour and respect given to diplomatic envoys also come from this cordial relationship and understanding.

2.2 PRIMITIVE DIPLOMACY

Diplomacy in the primitive era began as occasional messages from one king of a tribe or local group to another. The

¹ Eileen Denza, Diplomatic Agents and Missions, Privileges and Immunities in an encyclopedia of public international law, Instalment 9, Edited by K. Bernhardt (North Holland, Amsterdam, 1986) P.95

CHAPTER 11

HISTORICAL DEVELOPMENT OF DIPLOMATIC IMMUNITY

2.1 INTRODUCTION

Since time immemorial the establishment of diplomatic relations between States has been taking place on the basis of the mutual consent of the parties concerned. It is therefore worth noting that the creation and continuation of diplomatic relations are a matter of tacit consent and not of right.

In Africa, diplomatic ties were known to have existed among the Eileen Denza writes;

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messages included inter tribal interests such as marriages, death of the ^kKing or his mother, coronations and other basic issues of mutual interest.

In Australia, the Arunta (Aranda) tribe in Central Australia, had institutions of messengers and envoys that were highly developed. The Diery and Wotjobaluk tribes and in Arnhem land, the Murngin, the Yiritja of the Kangaroo tribes all had institutions of messengers and envoys.²

In Africa, diplomatic ties were known to have existed among the Bantu of South Africa. The Ba-Rong Kings had special counsellors, called Tinyumi.³ The Wanyamwezi in Tanzania selected their most respected members for the posts of envoys, while the Bakong had this duty entrusted to the medicine-men. The King of Glidyi Ewe of the Gold Coast (Ghana) had salaried officials called Atikploto, (sing)? Atikloe.⁴ Dupuis' Muslim informants allege that the first Dahomean (Benin) embassy to Asante (Ghana) arrived in the Capital, Kumasi in the early 18th

² Ragner Numelin, The Beginnings of Diplomacy: A Sociological Study of Intertribal and International relations, (Oxford University Press, 1950) p.128

³ Ibid, P. 129.

⁴ Ibid, p. 132.

century.⁵ When King Mutesa of Buganda in Uganda converted to Islam, he is reported to have sent an emissary to his rival 'brother' King, Kabalega of Bunyoro, to inform him about the new faith.⁶

Envoys were members of a tribe or group which enjoyed general esteem and often belonged to the group of most outstanding persons of the tribe. The North American Indian diplomats ranked next to the princes in esteem.⁷ The Malayan Archipelago had envoys to inform other Kings of important events.⁸

In Greek history, special missions were exchanged between the Greek States.⁹ The Romans too, established relations with their neighbours in the form of treaties. The Roman Priest who

⁵ Ivor Wilks, Asante in the Nineteenth Century, The structure and evolution of a political order (Cambridge University Press 1975), p. 320.

⁶ Kasozi Abdu B. THE SPREAD OF ISLAM IN UGANDA, (OUP 1987) P. 21.

⁷ Ragner Numelin, Op. cit, P.134.

⁸ Ibid, P.138.

⁹ NICHOLSON, Diplomacy, (3rd Ed. Oxford Univ. Press, 1969) P.38. See also B. SEN, A diplomatic handbook of International Law and Practice. (2nd. Ed. Martinus Nijhoff, 1979) P.3.

was in charge of Roman^{e/s} relations with other countries was known as 'Petiales'.¹⁰

2.3 The Bible mentions diplomatic relations in 2 Kings 18:35, and 1 Kings 10. The incident of King Solomon and the Queen of Sheba is very famous both in the Bible and the Quran (Q.27:22-44) as one of the early signs of diplomatic relations. The Jews established relations with friendly countries and not necessarily with their neighbours who they considered as enemies and uncivilised. They employed messengers MAL'AK on public and private occasions.¹¹

In the Islamic world of West Asia, since the time of the Prophet Muhammad (P.B.U.H), emissaries had been sent abroad for religious and political purposes. Quresh mentions eighty incidents in which the Prophet sent and received envoys.¹² The Prophet is reported to have sent envoys to Byzantium, Egypt, Persia, Ethiopia and other countries. Although these missions were specific in nature, others which were made during the Abbasids caliphate were general and of international character.

¹⁰ B. Sen, Op. cit, PP.3-4

¹¹ Ragner Numelin, Op. cit, PP. 144.

¹² Muhammad Siddique Quresh, Foreign Policy of Muhammad, (Islamic Publications (PVT) Ltd. 1989) PP.56-99

The Fatimids and Mamluk Kings, too, did send and receive envoys.¹³

2.3 PHASES OF DIPLOMACY

The Era of diplomacy can be divided into two phases;

- 1) The first phase is that of early diplomacy in which the envoys were not designated to be permanent, or in other words emissaries were sent on specific missions at on behalf of their majesties. Therefore the diplomats
 - 2) The second phase of diplomacy is that of resident ambassadors who were sent to the receiving States to stay there until recalled.
- The custom of appointing early resident ambassadors first started in Italy and then spread to other European States around the world in the middle of the fifteenth century.

Generally, all diplomats are citizens of sending States. Mattingly writes,

By the 1450s all the major States of the peninsula had set up organised chanceries which required written reports from their agents and kept copies of records. Each of these

McClellan Grant V. Diplomatic Immunity: Principles and Practices, (St. Martin's Press Inc. 1989) P.30

¹³ B.Sen, Op. cit., P.5

chanceries was the centre of permanent embassies which provided a constant flow of the information and channels of official intercourse with important neighbours.¹⁴

It is through the resident envoys that the concept of extraterritoriality developed and began to be used on the premises of the envoys. Under this concept, "the offices and homes of the diplomats and even their own persons were to be at all times as though they were on the territory of the sending State and not the receiving one."¹⁵ Therefore the diplomats were not subject to the local jurisdiction because they were always considered to be residing in the sending State. During the occasion of a security problem at the embassy of the United States in Moscow, the Secretary of State, George Shultz told a press conference on April 8, 1987 "they (Soviets) invaded our sovereign (sovereignty)."¹⁶

Generally, all diplomats are citizens of sending States. The French constitution for example forbids French citizens to

¹⁴ G. Mattingly, Renaissance Diplomacy, (Penguin Books, 1955) P.87

¹⁵ McClanahan Grant V, Diplomatic Immunity, Principles and Practices, (St.Martin's Press Inc. 1989) P.30

¹⁶ Ibid, P. 89.

act as diplomats of foreign countries in Paris. Britain too refuses to receive British subjects as diplomats.¹⁷

When a mutual agreement is signed to establish diplomatic relations, the appointment of the envoy himself is based on a tacit consent.¹⁸ A receiving State is free to refuse a diplomatic agent or declare a diplomat a persona non grata even after ^{he has} presenting his credentials. } Gr

It is important to note that these rules were reciprocal in

2.4 DIPLOMATIC IMMUNITY

Diplomatic immunity is as old as the institution of diplomacy itself.¹⁹ Under this immunity, there are rules that must be applied to the diplomats. These rules are founded on mutual consent and common usage which have been in existence for generations.

Dr. Ragnar Numelin has observed that primitive societies

The immunity and privileges were intended to give the envoy an opportunity to carry out his duties of office. The business of the diplomat was to promote peace and, therefore, he laboured for the public good. The office was not meant to be used for

¹⁷ SATOW'S Guide to diplomatic practice, (Longman 1978), P.89-90.

¹⁸ Grzybowski Kezimierz, 'The Regime of Diplomacy and The Teheran Hostage' I.C.L.Q. Vol. 30 (1981) P.43

¹⁹ Ibid Numelin Grant V, Op. cit. P.18

evil and wrong-doing. And if such a diplomat was asked to leave the country, it was intended to serve the cause of public peace. Presently, diplomats enjoy full immunity in the receiving state. Unless the sending State decides to waive that immunity, the receiving State cannot withdraw the immunities unilaterally.²⁰

It is important to note that these rules were reciprocal in a sense that a receiving State accorded such a treatment to a foreign diplomat in the same way as her agent would be accorded in the sending State. Since the foreign envoy was a personal representative of the sovereign ruler, the honour and respect accorded to him were supposed to be that befitting that ruler. Dr. Ragner Numelin has observed that primitive societies did develop customary procedures of starting wars, making peace, discussing trade and sending inter-community messengers who conducted business. These officers were recognised and entitled to free movement and personal inviolability. The host community would even provide food, shelter and sometimes would go to the extent of offering sexual privileges²¹.

²⁰ Mattingly G, Op. cit., PP. 40-44.

²¹ Ragner Numelin, Op. cit., P.113; See also Manchester McClanahan Grant V, Op. cit., P.18

It is accepted that the origin of diplomatic immunities is based on customary rules and usages that have been in practice for generations. Treaties too were made to give further strength to the privileges and immunities.²² There was also the practice of some States ^{of regarding} to regard the immunities and privileges as part of their common law.

Although these treaties were made to further enhance the importance of these rules, it remains a fact that the substance of the treaties were to be determined by the customary usage of international law. Since there were no written documents pertaining to the privileges and immunities of the diplomats it could not be ascertained whether in all States the rules intended to provide absolute or partial immunity. Also, written treaties did only refer to the rules of customary usage of international law and provided no further details. However we could deduce that since in most cases the envoy was the personification of the foreign emperor or king, the honour and respect that were accorded him were those befitting the sender.

The Greek Kings (750-350 B.C) had heralds who served them as their accredited messengers. The heralds were inviolable and

²² Hardy Michael, Modern Diplomatic Law (Manchester University Press, 1968), P. 5.

were assured of the right to return to their homeland. Any abuse or molestation against them was regarded as a grave offence against the gods of the cities, for the heralds were considered to be under the protection of these gods.²³

The Romans too treated the immunities of the diplomats as part of the Stoic Philosophy and codified them in their Civil Law. They believed that the immunities were derived from the Jus naturale and jus civilis. According to the Justinian Digest they were held sacred.²⁴

Diplomats are reported to have been treated courteously by the Saracen and Christians in the middle Ages. They were given hospitable and honourable receptions. It is reported that gifts were even bestowed upon the heralds who brought declaration of war.²⁵

When the Prophet Muhammad received a letter from Musaylamah (who claimed to be a prophet) in which he claimed partnership in authority and messengership with Muhammad and to divide the land between them, the Prophet said:

By God were it not that heralds are not killed, I would

²³ McClanahan Grant V, Op.cit, P.21. See also Ogdon Montell, 'The Growth Of Purpose In The Law Of Diplomatic Immunity', (1973) 30 A.J.I.L. P.450.

²⁴ Ogdon Montell, Op.cit, P.452

²⁵ Ibid P. 454

have beheaded the two of you (envoys).²⁶

The principle of inviolability was so deeply ingrained that even envoys of the enemy State ^{were} ~~was~~ entitled to the respect and protection. ^a A practice recognised for centuries.²⁷ Likewise the ancient Indian Kings sent envoys to one another and ^{these envoys} ~~they~~ too were accorded personal immunities and privileges in respect of residence, carriage, and postal correspondence.

2.5 SOURCE OF THE PRIVILEGES AND IMMUNITIES

Historically, the rules of the privileges and immunities of the diplomatic agents were not to be found in statutes or written documents, but in practices and usages that had existed for generations as rules of international law to protect the personal inviolability of the foreign envoy.²⁸

²⁶ A. Guillaume, The Life of Muhammad (Oxford Univ. Press, 1978), P. 649. This statement is quoted by the I.C.J Judge Tarazi, in his *dissenting opinion* from the lectures of Prof. Ahmed Rachid, of the Istanbul Law faculty, at the Hague Academy of International Law in 1937; (1980) I.C.J Reports, On the case Concerning the U.S Diplomatic and Consular Staff in Teheran. P. 59

²⁷ Green L.C, 'Trends In The Law Concerning Diplomats' (1981) 19 C.Y.B.I.L, P. 132.

²⁸ Murty B.S, The International Law Of Diplomacy; The Diplomatic Instrument and World Public Order, (New Haven Press, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1989) P. 335

Pierce Arrant (Pectus Aerodius) a sixteen century Judge of the Criminal Court in Angers said, "The ambassador is protected by a Law common to all people and has public character which derives its sanctity from three sources: Firstly, from the one sending him, secondly, from those to whom he is accredited thirdly, from the important nature of negotiations which his function carries on."²⁹ Gentili (Of the Positive School) was of the view that the law that protects the diplomat was derived from the practices of the States. However, he recognised that the law of nature was binding between States. He said that the right of the embassy was, by reason of a certain divine providence, immutable of universal application, and was admitted and recognised even by barbarous peoples.³⁰ West in 1851 in the follo Lord Denning M.R. in Rahimtoola V Nizam of Hyderabad³¹ remarked: sters and consuls of foreign nations are the means and

I think we should go back and look at the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted principles of international law and you will search in vain for any set propositions.

It is a duty of a receiving State to abide by the rules of

²⁹ Ogdon Montell, Op. cit., PP. 455-456

³⁰ Ibid.

³¹ (1958) A.C. 378.

of foreign countries in her capital. King Alphons X issued an order in the Twelfth century that guaranteed the inviolability of diplomats and the immunities from suit in court.³⁴ The Law of Castile, 1348 (Law 1X, Part VII, Title XXV of Las Siete Partidas) which was probably completed in 1263 by Alphonso X of Castile provides as follows; Envoys frequently come from the land of Moors and other countries to the court of the King, and although they may come from the enemy's country and by his order, we consider it proper and we direct that every envoy who comes to our country, whether he be Christian, Moor or Jew shall come and go in safety and security through all our dominions, and we forbid anyone to do him violence, wrong or harm or injure him in property.³⁵ In 1651 the Netherlands, by legislation forbade offending, damaging, injuring by word, act or manner, the ambassadors' residents, agents or other ministers of the Kings, Princes, Republics or others having the quality of public minister. It also prohibited any injury or insult directly or indirectly in any fashion or manner whatsoever in their own persons, gentlemen

³⁴ M.Ogden, Juridical Bases of Diplomatic Immunity (1936) P.46

³⁵ Traite du juge competent des Ambassadeurs (The Hague 1723) P.168, cited by Ogdon Montell, Op. cit., P.461

of their suit, domestic servants, dwellings, carriages and the like, under a penalty of being corporally punished ^{for} as violation of the law of the nations and disturbance of public peace. and usages that have been in practice for generations.

The English common law and the statute of Queen Anne 1708 asserts almost in similar terms that a person is guilty of a misdemeanour who, by force or personal restraints, violates any privilege conferred upon the diplomatic representative of foreign countries or who sues or persecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country or the person of a servant of any such representative is arrested or imprisoned.

The law of the United States, (the United States code section 252-254 of the title 22, Act of April 30, 1790) states that:

Every person who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of an ambassador or a public minister in violation of the law of nations shall be imprisoned for more than three years and a fine at the discretion of the courts.³⁶

← It is emphasized that the origin or sources of diplomatic carries with him an important duty. He is the eye and ear of his

³⁶ G.E. Do Nascimento The E. Silva, Diplomacy in International Law, (Leiden: A.W Sijhoff, 1972), P. 92.

law are generally derived from or based on customary rules of international law. And as a result the States owe their obligation not to any treaty or a statute but to the rules and usages that have been in practice for generations. Repat

2.6 CONCLUSION

A study of the subject of diplomacy since the medieval period gives an in-depth understanding of the importance of the work of diplomats. Gr

It is noted from the writers of diplomatic history that the role of diplomacy and diplomatic immunity ^{was} were recognised by primitive societies. In that respect we can refer to them as the pioneers of diplomacy. The reasons that necessitated the beginning of diplomacy in the medieval period make it more important today that the present society should uphold the virtues and honour of that office. It should be recalled that past generations did uphold the importance of diplomacy in society to the extent that the profession was noble and prestigious. Gr

A person appointed to the position of a diplomatic agent, carries with him an important duty. He is the eye and ear of his country in the receiving State. The establishment of diplomatic relations is an accepted form of friendly and mutual

understanding. Therefore, since this relationship is mutual and cordial it cannot be taken to be a right. The result of this tacit understanding extends to the honour and respect that are accorded to the diplomat in the receiving State.

The immunity and privilege accorded to the diplomat are as old as the institution of diplomacy itself. It was out of necessity that the receiving State was required to accord the diplomat all immunities and privileges. It was necessary for the envoy to carry out duties of his office without any interference from the receiving State. Secondly the envoy was the personification of the sovereign ruler. The violation of his office and person amounted to the abuse of the foreign head of State. Thirdly, it is contended that the violation of diplomatic agent could be a source of unpleasant relationship. Therefore, in order to avoid such a situation it was found necessary to give all possible assistance, honour and respect to the envoy of the sovereign country.

The extra-territoriality theory?

The following are some of the earlier codification on the international law of diplomatic immunity:
 Buntschli's Draft Code 1868, The Fiore Draft Code 1890, Resolution Of The Institute of International Law, Cambridge 1895, Passa's Draft Code 1901, Project of the American Institute Of International law 1925, Project of International Commission of American Jurists 1927, Phillimore's Draft Code 1926, Strapp's Draft Code 1926, Draft Code of The International Law Association of Japan 1926, The Resolution of The Institute Of International Law, New York, 1929, (1932) 26 A.J.I.L. PP.1-189

CHAPTER 111

PRIVILEGES AND IMMUNITIES OF DIPLOMATIC AGENTS

3.1 INTRODUCTION

The International Law Commission (hereinafter referred to as the Commission) was by the General Assembly resolution 685 (V11) of December 1952, requested to consider codifying matters concerning "Diplomatic Intercourse and immunities."¹ The Commission began work on the topic using the draft articles which had been prepared by the special Rapporteur and an extensive memorandum on the law of immunities and privileges which had been prepared by the Secretariat of the United Nations. The memorandum had analyzed earlier codification of the international law on the privileges and immunities of diplomats.² By the

¹ The International Law Commission had in 1949 drawn up a list of topics to be discussed which included a topic on "Diplomatic Intercourse and Immunities" but had not given it priority. Official Documents as quoted in (1954) 48 A.J.I.L. P.68

² The following are some of the earlier codification on the international law of diplomatic immunity: Buntschlis Draft Code 1868, The Fiore Draft Code 1900, Resolution Of The Institute of International Law, Cambridge 1895, Pessa`Draft Code 1901, Project of the American Institute Of International law 1925, Project of International Commission of American Jurists 1927, Phillimore's Draft Code 1926, Strupp's Draft Code 1926, Draft Code of The International Law Association of Japan 1926, The Resolution of The Institute Of International Law, New York, 1929, (1932) 26 A.J.I.L., PP.1-189

immunities and embody the results into an international convention.³ The governments of eighty one States were represented.³

The codification of the privileges and immunities in the modern treaties began with the General Act of the Congress of Vienna 1815 which was modified at Aix-la-Chapelle Axis La chapalle in 1818, the 1928 Havana Convention, the Draft Articles of the Harvard Law School and the 1946 Convention on the privileges and immunities of the United Nations.⁴

3.2 THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS.

The 1961 Vienna Convention attempts to spell out the international customary law on the privileges and immunities of diplomatic agents. It is specifically concerned with permanent diplomatic missions. Hence the topic our study.⁵

PERSONS ENTITLED TO THE PRIVILEGES AND IMMUNITIES.

The following persons are entitled to diplomatic privileges and immunities:

Article 29 provides for diplomatic agents.

Article 37 provides for the following categories of persons entitled to

³ United Nations Conference on Diplomatic Intercourse and Immunities: Vienna March 2- April 14 1961, (1961) 55 A.J.I.L., P.1062

⁴ Grzybowski Kazimierz, "The Regime Of Diplomacy and the Tehran Hostages" (1981) 30 I.C.L.Q., P.48, See also Donoghue Joan E, "Perpetual Immunity for Former Diplomats? A response to Abisinito Affair: A Restrictive Theory of Diplomatic Immunity" (1989) 27 C.J.T.L., P.620

⁵ Official Documents (1958) 52 A.J.I.L., P.180, Reports of the International Law Commission hereinafter referred to as I.L.C (1957) 1 Y.B.I.L.C., PP. 6-7

privileges and immunities⁶:

- (a) Members of the family of the diplomatic agent if they are not nationals of the receiving State.
- (b) Members of administrative and technical staff of the mission and members of their families.
- (c) Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State.
- (d) Private servants of the members of the mission if they are not national or permanently resident in the receiving State.
- (e) Article 38⁷ provides for diplomats who are nationals of or permanently resident in the receiving State.

THE INVIOABILITY OF DIPLOMATIC AGENTS

The protection of diplomatic agents is enshrined in Article 29 of the 1961 Vienna Convention which provides that:

*The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*⁷

Looking at the wording of this article, it is certain that it describes two important duties which are vital to the inviolability of the serving diplomat.

The first duty of a receiving State is to ensure that the diplomat is not

⁶ Some of these persons enjoy full diplomatic immunities while others enjoy only partial immunities.

⁷ This Article with a slight difference is similar to Article 17 of the Harvard Law Draft.

liable to any form of arrest or detention. Conventionally, it is known that arrest and detention are made by the government. The Article, therefore, could be interpreted to infer that the government shall not arrest nor detain a diplomat. The receiving State shall receive him with honour and respect. The article obliges the State to restrain its organs or agents, for example, the police, the customs and others from applying local measures⁸ on the person of a diplomatic agent. In other words, the receiving State must guarantee non-exercise of measures that may constrain the function of the foreign envoy.

The State shall treat him with honour and respect because he is the representative of a foreign sovereign State. It shall in that respect accord him V.I.P treatment wherever he is. None shall molest his honour, dignity and person. The State shall not treat him like any other foreigner but accord him high regard and honour. The concept of inviolability is a supporting principle from which all privileges and immunities derive. The inviolability obligates receiving States to afford the person of the diplomatic agent an increased protection.⁹ The privileges and immunities based on international law give diplomatic agent positive right[?] which other inhabitants do not possess.¹⁰ The privileges and immunities allow the agent to carry out his/her duties without

⁸ The Supreme Court of the United States, expressed the view that an attack upon the house of an envoy is equivalent to an attack upon his person. Precaution must be taken against mob violence and if the attack is done an apology must be expressed to the sending State. Moore: Digest, Vol.V, P.62 quoted by B.Sen, Op. cit., P.116

⁹ Commentary on Article 17 Harvard Law Draft, (1932) 26 A.J.I.L., PP.91-3

¹⁰ (1957) 1 Y.B.I.L.C., P.52

fear.¹¹ China, too, recognised her failure of non-commission or lack of restraint in the acts which infringed upon the personal

The second duty envisaged in Article 29 is that a receiving State, apart from non-application of the local measures on the person of the envoy, is enjoined to give due and unreserved protection to the person of the diplomat from individuals and private groups or organisations. It is vital for the receiving State, the law enforcement authorities and the courts to act within proper limits to observe the duty imposed by Article 29.¹² the barracks where he was detained for a while. The President of Guatemala recognised the failure of his government

In the case of United States diplomats^{IC} and ~~C~~Consular staff, the ^{Gr. Sp.} International Court of Justice spelt out a two-fold duty on the part of a receiving State, namely to desist from any act attributable to the government or its agents which would infringe the inviolability of the diplomatic mission and its staff and the obligation to protect against such infringement by members of the public.¹³ note of protest for the arrest of their colleague and they demanded his release. The Soviet government recognised the duty of non exercise of local

The violent incident in which a Russian envoy was arrested in London in 1708 gives us an insight into the obligation of the receiving State towards a diplomat. The Queen in her obligation to fulfil the duty of protecting the diplomat made appropriate restitution for the exercise of the local measures on

¹¹ Higgins Rosalyn, "The Abuse Of Diplomatic Privileges And Immunities; Recent U.K Experience" (1985) 79 A.J.I.L., P.641

¹² Brown Jonathan, "Diplomatic immunity; State Practice, The Vienna Convention On diplomatic Relations" (1988) 37 I.C.L.Q., P.73

¹³ The United States Diplomatic and Consular staff In Tehran, I.C.J. Reports, (1980), P.3.

the person of the diplomat.¹⁴ China, too, recognised her failure of non commission or lack of restraint in the acts which infringed upon the personal inviolability of the diplomat when Chinese soldiers murdered C.Von Ketteler, the German Minister in Peking and Mr. Sugiyama, the chancellor of the Japanese legation.¹⁵

Mr. Leavell, the American Minister to Guatemala, was stopped by a police officer in the city of Guatemala and taken to the barracks where he was detained for a while. The President of Guatemala recognised the failure of his government to fulfil the duty of protecting the person of the diplomat and promised to make appropriate restitution for violating the personal inviolability of the foreign envoy.¹⁶ On July 14, 1918, Mr. Diamandi, the Romanian Minister to Russia was arrested. As a sign of protest and solidarity, the entire diplomatic corps, altogether nineteen heads of missions, sought audience with V.I.Lenin and presented a note of protest for the arrest of their colleague and they demanded his release. The Soviet government recognised the duty of non exercise of local laws on diplomats and the Minister was released.¹⁷

Even though the Iranian Minister to the United States, was allegedly arrested for disorderly conduct on November 27, 1935, the Minister was released

¹⁴ Satow, Op. cit. P. 121 & 177

¹⁵ Przetacznik Franciszek, Protection of officials of Foreign States according to International Law, (Martinus Nijhogg Publishers: The Hague/Boston London, 1983) P. 24.

¹⁶ Ibid, p. 25.

¹⁷ ibid. Przetacznik Franciszek, Op. cit. P. 27.

on the ground of diplomatic immunity and the United States made restitution for the violation of the duty of non commission.¹⁸

3.3 THE UNITED STATES DIPLOMATS IN TEHRAN.

The most important case ^{to} in which international attention has been directed was that concerning the United States diplomats ^{ic} and consular staff in Tehran.¹⁹ This case involves ^{an} the attack on diplomats and the violation of the mission premises.

The facts in brief are that on February 14, 1979 at about 10.45 am, during the political unrest in Iran following the fall of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States embassy in Tehran, taking 70 persons hostages including diplomats in the embassy. In the incident two persons associated with the embassy were killed and serious damage was caused to the embassy and the residence of the ambassador.

In response to the appeal from the embassy during the attack, Mr. Yazid, the Deputy Prime Minister, arrived at the embassy at about 12.00 noon. He quelled the disturbance at the embassy and restored the control of the embassy to the officials of the mission. On March 11, 1979, the United States ambassador received a letter from the Prime Minister expressing regret for the attack on the embassy and stated that arrangements had been made to prevent repetition of such incidents and indicating readiness to make reparations for the damage.

In November 1979, a very large number of demonstrators marched to and fro

¹⁸ Ibid.

¹⁹ (1979) International Court of Justice, (I.C.J) Reports, P.19. See also Grant V. McClanahan, Op.cit, P.230, Przetacznik Franciszek, Op. cit, P. 27.

in front of the United States embassy. The Police Chief came to the embassy and assured the Charge' d'affaires that the police was doing all that was possible to protect the embassy. At about 10.30 am, on November 4, the United States embassy compound in Tehran was overrun by a strong armed group which described themselves as Muslim students and followers of the Imam's policy. They gained access to the building and tried to set it on fire. All diplomats^{ig} and consular staff in the embassy, were taken hostage. GT

During the ordeal repeated calls were made to the Iranian foreign ministry. The Charge' d'affaires too, who was at the ministry at the time of the seizure appealed to the authorities for help to rescue the diplomats. But no security personnel were sent to provide relief and protection to the embassy and the diplomats. On the following day November 5, 1979, the United States consulates in Tabriz and Shiraz were seized by militant Iranian students. As a result diplomats consuls and other personnel were taken as hostages and the embassy records were ransacked. GT

On November 18, 1979, when Ayatollah R. Khomeini, was questioned by the press about the holding of the hostages, he responded by saying that the diplomats were spies and subject to being taken hostage.

The United States, requested the International Court of Justice to adjudge and declare among others that: GT

4. The Government of Iran, in tolerating, encouraging and failing to prevent and punish the conduct described in the preceding statement of facts, violated its international obligation to the United States as provided for by;

Articles 22,24,25,27,31,37,and 47 of the 1961 Vienna Convention on Diplomatic Relations.

Articles 28,31,33,34,36,40 of the 1963 Vienna Convention on Consular Relations of leaving Iranian territory including means of transport.

Articles 4 and 7 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

That the government of Iran, is under a particular obligation immediately to secure the release of all the United States nationals. November 4, 1979.²¹

No paper or pause?
The International Court of Justice held: *Ivan de Jure*²¹, the Court held

1. That the Islamic Republic of Iran, by conduct had violated in several respects ^{the} obligation ^s owed by it to the United States of America under international conventions in force between the two countries as well as under the long established rules of international law.
2. That the violation of these obligations engages the responsibility of the Islamic Republic of Iran towards the United States of America under international law.
3. That the government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of November 4, and all that followed.
4. (a) That the government of Iran must immediately terminate the unlawful detention of the United States Charge'd'affaires and other diplomats, consular staff and other United States nationals in Iran.

Annuaire de Droit International Privé, 350 (1927), see also *Przetacznik Franciszek*, *Op.cit.*, P.38.

Ibid., P. 40.

(b) That it must ensure that all the said persons have necessary means of leaving Iranian territory including means of transport.

5.4 That the government of the Islamic Republic of Iran is under an obligation to make reparations to the government of the United States of America for the injury caused to the latter by the events of November 4, 1979.²⁰

↕ No preface or pause?

In the case of the Confederation Suisse V Ivan de Juth²¹, the Court held that the inviolability of the diplomatic agent, "guarantees . . . special protection instituted by law with a view to safeguard . . . more completely the physical and moral integrity of representatives of a State on diplomatic missions abroad".

The Supreme Restitution Court of Berlin of the Federal Republic of Germany, 1959, held as follows:

It is indisputably a rule of law in all civilised countries that the individual persons who are called diplomats . . . are entitled to receive from the local sovereign a very high degree of personal protection of their peace.²²

²⁰ The Iranian take over of the embassy was the only one which resulted in proceedings before the International Court of Justice. This was because the US and Iran were both signatory to the optional clause appended to the 1961 Vienna Convention, accepting the compulsory jurisdiction of the Court.

²¹ 22 *Revue de Droit International Prive*, 550 (1927), see also *Przetacznik Franciszek*, Op.cit., P.38.

²² Ibid., P. 40. Op.cit., P.72

These incidents are clear examples of violations of persons and honour of the diplomats provided for by Article 29 of the 1961 Convention.

3.4 THE DUTY TO PREVENT ATTACKS AND ABUSE OF DIPLOMATS.

The second part of Article 29 provides that, "... The receiving State ... shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Although it comes second to the first duty it appears that the international community now places much more emphasis on this duty. There have been a lot of attacks on the diplomats by private individuals or organisations. The receiving state is therefore obliged to give due and unreserved protection which is necessary to prevent any attack on the person of ^{the} diplomatic agent. The term "attack" is not defined but may include kidnapping and taking diplomats hostage, threat, attempt or conspiracy to do so.²³

It was observed that diplomats become an integral part of terrorism because of their importance as representatives of sovereign governments. Their importance and influence on the international scene is very significant and anything that affects them is likely to cause an alarm among nations. Therefore taking them as hostages earns ^{who?} them publicity as well as wealth through ransom and a release of fellow prisoners in any one country.

The wording of Article 29 cannot suffice to work as an instrument to prevent an attack on the diplomat. It is therefore necessary to have a better

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Brown Jonathan, Op. cit, P.72

mechanism by which a diplomat shall be protected. Therefore, Article 29 further provides that, "The receiving State . . . shall take all appropriate steps to prevent any attack on his person, freedom, or dignity." In other words the receiving State shall take all appropriate steps to prevent attacks on diplomatic agents.

There are no hard and fast rules as to what is supposed to be the appropriate steps. It is not known whether the standards should be that of the sending State or the receiving State. But it appears that the standard should usually be that of the receiving State. It is the receiving State which should look into its own security and protect the diplomats accordingly. Some countries, as a measure of protection to diplomatic agents, employ uniformed guards in front of the mission buildings but others do not depending on the security situation in those countries. But if the mission or the diplomatic agent feels that there is tension or a threat that requires extra protection, the agent or the mission can always apply for increased protection from the receiving State.

In the case of the United States diplomats in Iran, the embassy applied for more protection the moment it realised that there was a threat. It is an accepted fact that it might be difficult to prevent an attack on diplomats and their families. The receiving State may find it difficult to assign body guards to diplomats and their spouses. Some capital cities like London and Washington have thousands of these agents with diplomatic immunity. What those States can offer usually is the employment of armed guards outside the missions' buildings. We contend that the dependence on such a force may not be so reliable. The forces which were stationed at the United States embassy in Tehran did very little to

prevent an attack on the embassy from the militant students.²⁴ In 1961, the Spanish government was threatened with death.²⁵

In Egypt, in 1986, the Police force which was responsible for the protection of diplomats by guarding the embassies was on mutiny for days and the missions were left without protection.²⁵ Therefore extra precaution should be observed when employing security guards. The Egyptian police could possibly have escalated the mutiny by taking the diplomats hostage and demanding negotiations with the government for a raise in their pay which was basically the cause of the mutiny.

It is the basic duty of the receiving State to take all appropriate steps available to her to protect diplomatic agents. Since the second half of this century many diplomats have been victims of violent attacks. Appropriate preventive measures may arise in different situations. One such situation is when a warning or threat is communicated, and there is a likely attack on the diplomat. Second, is the situation when a diplomat is in actual danger or is attacked. Third, is the general situation which warrants general prevention from any attack on the diplomat whether there is an imminent danger or not.

There are many occasions when diplomats have been threatened or presumed to be in imminent danger. The threat is usually communicated to diplomatic agents or the press. In such circumstances the receiving State should step up the security measures.

²⁴ It should be remembered that the assassins of Indra Ghandi, the Indian Prime Minister, were her own security men.

²⁵ Grant McClanahan, Op. cit., p. 147.

For example, in 1948, the Cuban government took preventive steps when the United States ambassador was threatened with death.²⁶ In 1951, the Spanish government warned the ambassador of the United States about an assassination plot against him and assigned four plain clothesmen to keep a constant watch on him. When Mr. Y. Alon, the Israeli Military attache' in Washington was killed on August 19, 1974, President Nixon ordered the secret service to increase protection of officials of foreign States. When the United States ambassador, Mr. Davies, was killed in Cyprus in 1974, the President of Cyprus assured the Secretary of State, H. Kissinger, that he would take all necessary measures to protect American officials. On September 20, 1978, the Canberra government decided to reinforce the armed guards for officials of foreign States when the Indian High Commissioner received a threatening note²⁷. In 1970, a new police force, the executive protection service was created in Washington, in addition to all other measures in existence to give assured protection to foreign embassies and resident officials of foreign States.²⁸

Although all such measures are taken to prevent attacks on diplomats, it is submitted that more measures are still needed to protect the diplomats during their way to and from the embassies(car-protection). Diplomats have been blocked while travelling in their limousines and attacked or kidnapped. It is unlikely that bullet proof limousines can be provided to many diplomats but a way has to be found whereby less attacks could be envisaged against diplomats while travelling.

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- ²⁶ Przetacznicz Franciszek, Op. cit., p. 52.
- ²⁷ Ibid., P.53
- ²⁸ Ibid

However most of the diplomats are left in imminent danger when travelling in cars since no adequate protection can be provided by receiving States.

3.5 HOSTAGE TAKING OF DIPLOMATS AND NEGOTIATIONS.

It is also common knowledge that diplomats are attacked and sometimes taken hostage. The duty of a receiving State is to take appropriate measures to protect the diplomat. In a situation of hostage taking, usually there are two types of diplomatic kidnappings.

1. The first situation is where the diplomats are besieged within the building and taken hostage. In this situation a receiving State knows where the diplomats and their captors are. Indeed negotiations in this circumstance is inevitable. To what extent is the obligation of a receiving State in this regard? Should it attack the building? The attack could be futile because not all ~~all~~ rescues have been successful.²⁹ The State is therefore left in a dilemma. In the case of the Tehran seizure of the United States diplomats, if the rescue attempt by the United States had not been aborted, the results probably would not have been good for the hostages and their captors. It is presumed that Iran was ready for any surprises and eventualities and probably all the hostages would have died as a

²⁹ The Austrian government did not make a rescue attempt when the OPEC Ministers were taken hostages in Vienna. The German attempt to rescue the Israeli athletes in Munich in 1972 ended in the death of all. Bowyer Bell, Op.cit., 184-88 and 194, Gr
In November 1985, the Egyptian Commandos made a rescue attempt on the Egyptian plane at the Malta's Airport. It is still regarded as the worst rescue attempt in history as half the number of hostages were most likely killed by the commandos. Clutterbuck Richard, Kidnap, Hijack and Extortion, (The Macmillan Press Ltd, 1987) Gr
P.195

result of gunfight.³⁰

the Black September, issued a statement after the rescue attempt to free the Israeli athletes in Munich, that "Our fighters had strict orders not to harm the Zionist hostages unless in self defence."³¹ Hostage

taking Mr. A Dubs, the American ambassador to Afghanistan, was kidnapped by Muslim extremists in Kabul and taken to an hotel where he died of gunshots on February 17, 1979 as a result of gunfight between the Afghan police, who stormed the hotel where the ambassador was being held hostage by the extremists.³¹

Statistics indicate that 4% of all kidnapped victims are killed by terrorists,

while But not all rescues have been failures. There were quite a number of successful rescues.³² The British rescue squad managed to free Iranian diplomats and other people who had been taken hostage in the Iranian embassy in London when it was occupied by Anti-Khomeini supporters.³³

Such a situation the government does not know the whereabouts of the hostages nor

their Although these rescues have been successful attempts to do so should be discouraged, as in most cases there are a lot of casualties. It is suggested that the best method preferred is to talk to the captors of the hostages. Many scholars and diplomats too advocate negotiations as it has to a certain extent been successful. It is not usually in the intention of the terrorists to harm

³⁰ Ryan Paul B, The Iranian Rescue Mission, (Naval Institute Press:Annapolis, Maryland,1985), Aftermath Raid, P.125

³¹ Przetacznik Franciszek, Op. cit., PP.64-126.

³² The rescue operation of the Israeli passengers of Air France taken hostage at Entebbe-Uganda, in 1976, was very successful and a triumph for Israel. Przetacznik Franciszek, Op. cit., P.186. In May 1977, the Netherlands government too was able to rescue the hostages in a train hijack. Clutterbuck Richard, Op.cit., P.184

³³ Ibid, p. 191.

their hostages. In 1972, the Black September, issued a statement after the rescue attempt to free the Israeli athletes in Munich, that "Our fighters had strict orders not to harm the Zionist hostages unless in self defence."³⁴ Hostage taking is a medium through which ^{who?} they try to publicise their cause and achieve their demands.³⁵ This turned out to be the real situation when on November 18, 1974, Mr. Lechoco took hostage the Philippine ambassador to the United States. He demanded publicity and safe conduct for his son to the United States.³⁶ Statistics indicate that 4% of all kidnapped victims are killed by terrorists, while 33% of the diplomats kidnapped are released without payments and 50% are released on payments of ransom demand.³⁷

11. The second situation is where the hostages are kept in a secret place. In such a situation the government does not know the whereabouts of the hostages nor their captors. Unlike in the first situation where the government can threaten the captors that if their hostages are killed or harmed they too would receive a severe penalty, in this circumstance, the government cannot even threaten anyone because there is no way for a receiving State to know the place and the identity of terrorists. The hostages in this situation remain at the mercy of their captors. The hostage takers can choose to do whatever they like. If they

³⁴ Aston C. Clive, A Contemporary Crisis: Political Hostage-Taking And The Experience Of Western Europe, (Westport, Connecticut: Greenwood Press, 1982) P.89

³⁵ Laquer Walter, The Terrorism Reader: A Historical Anthology, (Wildhood house London, 1979) P.256

³⁶ Murphy John F, Punishing International Terrorists, (Rowman & Allanheld, 1985) P.24

³⁷ Wilkinson Paul, Terrorism And The Liberal State, (London: The Macmillan Press Ltd. 1977) P.225

choose to kill their hostages, they walk free to the praise of their organisations and sympathizers and if they decide to release them, it is out of their kindness. Public opinion has very little to offer in this regard unless they claim responsibility. Therefore, there is possibly no better option other than negotiations. citizens as hostages.

The basic obligation of a receiving State is that it shall take appropriate steps to protect the person, dignity and honour of the diplomat. But if it happens that a foreign envoy is attacked and taken hostage by the terrorists, the issue that arises is the extent of the obligation on the receiving State. The question is whether the receiving State is under a legal obligation to secure the release of the kidnapped diplomat. Primarily because of this dilemma States differ in policies of negotiation and giving in to the demands of hostage takers.

There are two schools of thought. The first school maintains that there should be no negotiations and that the receiving State should not give in to the demands of the captors. The second group consists of those who advocate for negotiations and to a certain extent give in to the demands of the captors.

In the first group we find the two strongest adherents of the policy of non negotiations, namely, the United States of America and Israel. These two countries vehemently refuse to negotiate with any terrorist group. There have been press releases and public declarations of non-negotiations policy with terrorists. The policy of non-negotiation advocated by these two countries has put the lives of their diplomats in real, imminent danger. The basic objection to the policy of negotiation is that going into negotiation and giving in to the

demands of the captors only encourage such terrorist groups to go for more citizens of these countries residing abroad. In their opinion, if the terrorists realise that these countries are not going to sit down and negotiate or give in to their demands, they would be deterred or discouraged from attacking and taking their diplomats or citizens as hostages.

Critics, friends and relatives of the captives consider this attitude inhumane, particularly since the option given to the terrorist is the killing of innocent diplomats. The hardline policy of non-negotiation by the United States has resulted in ^a individual high price in the form of lives of those taken hostage. A number of diplomats have been killed because of that policy.

1. Mr. E. Elron, the Israeli Consul General in Istanbul, was kidnapped by the

Although the objective of this policy has been to discourage terrorists from attacking American diplomats, recent figures suggest that there has been a continuing assault on American officials. In the period of 1971-1980 the United States Department listed 254 terrorist attacks on the their diplomats. Five United States ambassadors were killed in that period.³⁸

It is true that there have been instances where the parties refused to negotiate and thus hostages were released. For example:

Mr. J.W Sanchez, the Paraguayan Counsellor at Huzaingo was kidnapped in Buenos Aires on March 24, 1970 by the Argentine Liberation Front. The Government of Argentina refused to negotiate and four days later the Counsellor was released. The government of the receiving state had refused to negotiate with the kidnappers. Przetacnick Franciszek, Op. cit, P.126.

unharm³⁹. Mr. G. Jackson, the British Ambassador to Uruguay, was kidnapped by the Tupamaros on January 8, 1971 and released after nine month in captivity on September 9, 1971.⁴⁰

But the occasions when terrorists have released diplomats without harming them after a rejection of negotiations are rare cases and should not be taken as triumphs by those States which refuse to negotiate.⁴¹ Many diplomats have lost their lives as a result of the policy of non-negotiation. The list is long, but the following is indicative of what is happening in non-negotiation circumstances.

1. Mr. E. Elrom, the Israeli Consul General in Istanbul, was kidnapped by the Turkish People's Liberation Army on May 17, 1971, and was killed on May 23, 1971 because the receiving State refused to negotiate.⁴²
2. In 1975, Palestinian guerrillas burst into the Saudi Arabian Embassy in Khartoum on the occasion of a party in honour of the American Ambassador. They took hostage the Ambassadors of Saudi Arabia and the United States

³⁹ Przetacznick Franciszek, Op. cit., P. 55.

⁴⁰ Ibid.

⁴¹ The United States Agency for International Development official assigned to the Uruguayan Police department was kidnapped by the Tupamaros on July 31, 1970 and 11 days later was found dead with two shots in the head. The government of the receiving state had refused to negotiate with the kidnappers. Przetacznick Franciszek, Op. cit., P.126.

⁴² Louis M. Bloomfield / Gerald F. Fitzgerald, op. cit., P.16

and the Charge'd'affaires of the United States, Jordan, Japan and Belgium. They put forward several demands, one of which was that the Jordanian government was to release Abu Daud and other members of the Al-Fatah in the Jordanian prisons. The government of Jordan refused. The guerrillas released most of the diplomats except the American Charge'd'affaires, Mr. Moore, the American Ambassador to Sudan, Mr. Noel, and Mr. G. Eid, the Belgium Charge' d'affaires, who were later dragged to the basement of the embassy and shot dead on March 2, 1973.⁴³

4. On April 24, 1975, the Baeder-Meinhof group seized the West German Embassy in Stockholm and held 12 hostage, among them A. Stoeckler, the ambassador. The West Germany government refused to negotiate or to give in to the demands of the terrorists and manifested its decision to the receiving State. On April 25, 1975, the group severely wounded West Germany's Military attache', Colonel Von Mirbach, and blew up the Embassy. H. Hillegard, the head of the economic department at the Embassy, was killed by the explosion.⁴⁴

Franciszek Przetacznick sums up the reasons given by the governments of the receiving States who refuse to negotiate with the kidnappers of diplomats as follows:

- (a) That it is unconstitutional to release the prisoners who had already been

⁴³ Ibid, P. 20

⁴⁴ Przetacznick Franciszek , Op. cit, P. 63 note 126.

tried and sentenced. That the executive order cannot be used to free captives convicted without the approval of the Judiciary.

(b) That it is not legally possible and honourable for the government to negotiate with a criminal organisation even if it is meant to save innocent lives.

(c) Acceptance of these demands puts the future of the country at stake and creates a precedent which is very dangerous.⁴⁵

There is no doubt that these are good reasons but there is always a way for the States to achieve what they want. Therefore, there is no reason why concession^S could not be made to the demands of terrorist groups in order to secure innocent lives. There is not even a guarantee that once a State refuses to negotiate, there shall not be any attack on its diplomats. Despite the policy of non negotiation, attacks on diplomats and their embassies have continued unabated.

Of late, there were behind the scenes negotiations to secure the release of western captives in Beirut.⁴⁶ There have also been allegations of the United States seeking the assistance of nations which have been implicated in "terrorism" to intercede in getting captives freed. Syria and Iran are reported to have assisted in getting the Western hostages freed in Lebanon. Whether this was done at the request of the western countries or on humanitarian grounds,

⁴⁵ Ibid, P.55

⁴⁶ The famous "*Iran-Contra Affair*" arms scandal is very much seen as the objective of behind the scenes negotiations.

there appeared to be some negotiations going on behind the scenes and there were supposed to be demands and concessions. The fact that the captives were released after intercession is proof of some negotiations.⁴⁷

There is a possibility that terrorists have resorted to hit and run or suicidal activities in which they can attack diplomats or embassies and kill every one including themselves (the terrorists). This is so because the terrorists in such circumstances do not anticipate any concessions from the parties concerned. The rationale of non-negotiations⁴⁸ is not convincing.

There is no justification for a State to forego the precious life of a diplomat because of a hardline policy of non-negotiation, which is not even consistent at all times. If this policy were consistent in all circumstances perhaps one would tend to respect it but this is not the case.

Diplomats are innocent people with families and friends. It is not proper to sacrifice them so easily.⁴⁸ It is not the life of the diplomats that should be bartered for demands which are not even precious. There has always been a way out for the governments to secure their objectives, without resorting to violence

⁴⁷ The Israeli government is reported to have been forced into reconsidering a deal with the terrorists who had held over 100 Israeli passengers in an Air France aircraft at Entebbe. Israel Radio had announced that the Cabinet was willing to negotiate. But fortunately such negotiations did not materialise because of the successful rescue operation at Entebbe on July 3, 1976. Wilkinson Paul, Political Terrorism, (London: The Macmillan Press Ltd, 1974) P.214

⁴⁸ Crelinsten Ronald D./Szabo Denis, Hostage-Taking, (Lexington: Lexington Books, 1979), P.42

or hardline policies. There is therefore no reason why the governments cannot find amicable solutions to the kidnapping release of diplomats.

The Second School of thought advocates for negotiations. *Be consistent*

The second school advocates for negotiations in order to secure the release of diplomats. The following are some of the situations in which negotiation is anticipated:

(1) In the first situation, the receiving State is willing to negotiate and to a certain extent give in to the demands of the "terrorists".⁴⁹ Brazil is reported to have paid a high price in releasing prisoners as well as paying ransom money.⁵⁰ Interestingly, all these hostages were not Brazilian diplomats

49

This group has been criticised by the hardliners for choosing to bargain because it encourages other terrorist groups to go on with these activities of taking diplomats and citizens of countries who are willing to give in to their demands.

Wilkinson for example, says that:

The great disadvantage involved in any concession or bargain, which will have to deliver some tangible gain to the terrorists if it is to be effected, is that the terrorists will have to set a precedent and establish a model for emulation by other groups. Moreover, if the terrorists' weapon is seen to pay off against a particular government, the authority and credibility of that government is thereby gradually diminished, terrorist - groups are tempted into increasing brazen attempts at blackmail, and there is a dramatic inflation in the ransom price demanded by the terrorists. Wilkinson Paul, Op. cit, P.129

It is true that a government that succumbs to the demands of the terrorists pays a high price in the form of all those demands but not in loss of innocent lives.

50

There were three cases of diplomatic kidnapping in which Brazil either paid ransom or released political prisoners. See Baumann Carol Edler, Diplomatic

but Western diplomats and some of them came from countries which refuse to negotiate with terrorists. This did not really amount to a high price as it is being portrayed. On the one hand, Brazil negotiated and gave in to the demands of the groups⁵¹, while on the other hand, countries like the United States refused any contact with these groups and as a result many of her diplomats lost their lives.

This idea of negotiation should not be misunderstood to mean that whenever there is any attack on diplomats the sending State or receiving State should just give in to the demands blindly. It is suggested that careful study should be made to convince the attackers that hostage taking cannot be the solution.⁵² It is also proposed that effort should be made to find solutions to the terrorists' grievances through proper channels.

The second situation in which negotiation is anticipated is when the sending State is not interested in negotiation. The obligation on the receiving State in this regard is hard and usually is left with no other alternative except to play the 'wait and see game'. The result is sometimes good, that hostages are not killed but the worst has also been seen, where the hostages have been killed.

The third situation in which negotiation is likely is when the receiving State is not interested in negotiating with the captors because of its policy of non-negotiation while the sending State may be a willing party. The sending State

Kidnappings: A revolutionary tactic of urban terrorism.
(The Hague/ Martinus Nijhoff, 1973) P.74

⁵¹ (1972) 1 Y.B.I.L.C. P.6

⁵² Grelinsten Ronald D./Szabo Denis, Op.cit, PP.45-53

will probably place a heavy burden on the receiving State and accuse it of failing to play her part in protecting a diplomat. However, there is no clear rule as to what a receiving State should do in such a situation. It all depends on the circumstances of the events. If the receiving State is known to have influence over the alleged kidnappers or hostage takers, the duty on its part is indeed heavy. It would be presumed that in such a circumstance, the intervention of the receiving State would change the minds of those involved in the kidnapping. The hostage takers in the case of the United States diplomats in Iran were known to be fully under the influence of Imam Khomeini. There is no doubt that if he had asked them to withdraw from the embassy, they would have done so without hesitation. Therefore, abstention from influencing the student militants did put a greater burden on the government of the Islamic Republic of Iran. Abstaining from influencing the militant students amounted to violation of the inviolability of the internationally protected persons, namely, the United States diplomats^{ic} and consular staff.

Resolution 638 of July 1989 is in line with this idea. It condemned all acts of abduction and demanded immediate safe release of all hostages and abducted persons and called upon all States to use their political influence in accordance with the Charter of the U.N and principles of international law to secure release of all hostages and abducted persons and to prevent the commission of acts of hostage taking and abduction.⁵³

In circumstances where the receiving State does not have the influence but can negotiate for the release of the hostages, the general opinion is that a

53

Wellens Karel C, (Ed) Resolutions and Statements of The United Nations Security Council 1946 - 1992 - a thematic Guide(Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993) P.7

receiving State should do as much as possible to secure the release of the diplomat. How much this should be, again depends on the circumstances. The receiving State should consult or inform the sending State of all avenues it intends to take to secure the release of the diplomat. If the receiving State is capable of negotiating with the terrorists, it should do so unreservedly, to secure the release. Abrogation of that policy in that particular incident amounts to a failure to fulfil her duty in protecting the diplomat.

When Mr. K. Spret, the West German ambassador to Guatemala, was kidnapped on March 31, 1970, by members of the Rebel Armed Forces in Guatemala City, he was slain by his abductors on April 5, 1970.⁵⁴ Willy Brandt, the then Chancellor of the Federal Republic of Germany broadcasted a Communique to the effect that:

The government of Guatemala had been incapable of assuring the protection necessary to diplomatic agents accredited to her.

The Foreign Minister, too, submitted a protest note to the President of Guatemala saying that "the Guatemalan government had failed to provide adequate protection to Mr. K. Spret as required by international law because the Guatemalan government failed to obtain his release."⁵⁵

These communications and declarations cast a heavy burden on the Guatemalan government. It could be argued that the government had to go into negotiations in order to secure the release of the diplomat and therefore once it failed to

⁵⁴ Bloomfield Louis M./Fitzgerald Gerald F, Op.cit, P.10.

⁵⁵ Przetacznik Franciszek, Op.cit, P. 4.

do so, it abrogated its duty to protect the diplomatic agent.⁵⁶

It is quite difficult to be precise ^{as to} what the receiving State should do if a diplomatic agent is kidnapped in her territory. It all depends on the facts and how much the receiving State endeavours to get the diplomat released. There are no given rules ^{as to} of what the receiving State should do, but it should be seen by the sending State to have done enough to secure the release ^{of the diplomat}.

For example, When Mr. Ehrenfried Von Hollenben, the West German ambassador to Brazil, was kidnapped on June 11th, 1970, the Brazilian President Emilio Garrastazu Medici flew to Rio de Janeiro to take personal charge of the search⁵⁷ for the

56

It is clear from the communications of the German government to the Guatemalan government that Germany wanted to see that there were some negotiations taking place with the Rebel Armed forces regarding their demand for the release of 17 prisoners. But one wonders whether Germany would bow down to such demands if it had been in Guatemala's position. It may be remembered that Germany had been holding two Palestinian 'terrorists brothers' the Hamedei, who had been convicted in Germany. These two Palestinians were the object of negotiation swap with a terrorist group which was holding two Germans in Lebanon. The group demanded that Germany released these two brothers first if the Germans were to be released. But Germany refused to budge.

57

The Chancellor of West German, Mr. Willy Brandt, too, took personal charge of the Munich crisis when the Israeli athletes were taken hostages in 1972. This was a tremendous job done by the leaders of these countries to show how much they were concerned. These incidents do not set the standard guideline. As we have indicated earlier, there is no prescription of rules as to what the receiving State should do but it should be seen to be doing enough to secure the release of the diplomat.

ambassador.⁵⁸

Another disturbing problem about some of the groups which do not favour giving in to the demands of the terrorists is the inconsistent soft approach that follows incidents in which terrorists demand the release of prisoners. In the incident in which ambassador Noel, Moore and Guy Eid were murdered in Sudan in 1973, the group demanded, *which or what group?* inter alia, that Jordan releases Abu Daoud and other members of the Al Fatah movement in Jordan as well as Major Kafeh Hindawi, the Jordanian official, serving a life sentence for plotting against the government. The Jordanian government refused to entertain the demands and as a result the diplomats were killed. What followed was that on March 14, 1973, King Hussein announced that he had commuted the death sentence of Abu Daoud, an Al-Fatah leader, and 16 other Palestinian commandos.⁵⁹ It could be argued that if Jordan had negotiated with the terrorists on the release of the Al-Fatah leader, Abu Daoud, the assassination of the diplomats would not have occurred. But it was left to the terrorist group to decide the fate of the diplomats.

In this particular incident not only should Jordan have released the prisoners but Sudan, in whose territory the incident happened, should have done more than just communicating the messages. Sudan should have urged the governments whose diplomats had been taken hostage to find an amicable solution. A soft approach was necessary to consider some of the demands knowing very well how ferocious the Al Fatah group was in the Middle East. Sudan did not do much

⁵⁸ Bloomfield Louis M./ Fitzgerald Gerald F, Op. cit. P. 11.

⁵⁹ Ibid, P. 22.

to obtain the release of the diplomats as they only waited to see what would happen. It suffices to know that later Sudan released these terrorists into the hands of the Palestine Liberation Organisation. All those statements of condemnations by Sudan were quietened when sympathizers of the group objected to the intention of President Nimeiry placing the terrorists on trial. Nimeiry should have known the force of the Al Fatah in the Arab world and should have reacted earlier than that in order to save the lives of the diplomats. The obligation to protect the lives of the diplomats was not shown by Sudan nor by those countries whose diplomats had been taken hostage. They all either waited to see what would happen or decided that the lives of those diplomats should be sacrificed for the honour of the policies of those nations. Indeed the lives of these diplomats were more valuable than those people in the prisons.

The incident of the West German ambassador to Guatemala suggests a heavy burden on a receiving State. The duty of a receiving State to a kidnapped diplomat is undefined but it is clear that the receiving State must take all appropriate steps to safeguard and secure the release of a diplomat. Much as the appropriate steps are meant to be those of the receiving State they should convince the world and particularly the sending State that they were appropriate and effective.

The International Convention Against The Taking of Hostages (1979)⁶⁰ provides in its preamble that taking hostage is an offence of grave concern to the international community and in accordance with the provisions of this Convention, any person committing an act of hostage taking shall either be

prosecuted or extradited.

Article 3 states that;

1. The State party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, facilitate, when relevant, his departure.
2. If any object which the offender has obtained as a result of the taking of hostages comes into the custody of a State party, that State shall return it as soon as possible to the hostage or the third party referred to in Article 1, as the case may be, or to the appropriate authorities thereof.

The article enjoins State Parties to take all measures they consider appropriate to secure the release of the hostages. It also envisages situations of bargaining and concessions to the demands of hostage takers.

In resolution 579 of December 1985, the Security council affirmed the obligation of all States in whose territory hostages or abducted persons are held to take adequate measures to secure their release and to prevent the commission of acts of hostage taking or abduction in future.

3.6 DIPLOMATIC MISSION PREMISES.

The other important aspect of diplomatic immunity is the inviolability of the mission building.

Article 22 of the 1961 Vienna Convention on Diplomatic Relations states:

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

from search, requisition, attachment or execution.

Article 22 envisages mainly the following duties :

- (i) The first duty is that a receiving State shall treat the mission of the sending State as inviolable. Therefore it shall exercise restraint and non-commission of all acts which may violate that inviolability in the form of entering the premises of the mission without permission.⁶¹
- (ii) The second duty is that the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission from invasion and prevent disturbances or distraction of its dignity.
- (iii) The third duty is that the receiving State shall as well exclude the furnishings, property and means of transport from the local jurisdiction in the form of search, requisition, attachment or execution.

The receiving State is required to treat the premises of the mission with honour and dignity. It shall restrain its agents or organs, e.g the police or army, from entering the premises of the mission unless prior permission is granted. The concept of the inviolability of domicile was upheld by Article 22.

⁶¹ The principle of non violation of the premises of the mission had been enunciated with regard to the U.N Headquarters. It was emphasised at the time of drafting the Convention on the privileges and immunities of the U.N. in London that the headquarters of the organisation should enjoy immunity by local authorities for purpose of arresting any one or serving a writ. (1957) 1 Y.B.I.L.C., P.58

The premises of the mission were like floating ships regarded as portions of foreign territory.⁶² The concept of extraterritoriality was extended to the premises of the mission in order to confer absolute privileges and immunities.⁶³ However, recent interpretations refer to extraterritoriality as just a "functional necessity". Harvard Draft is silent about the extraterritoriality of the premises of the mission. However Article 2 of the Draft provides that the privileges and immunities are conferred on the basis of functional necessity. It states that the receiving State shall permit a sending State to acquire land and buildings to the discharge of functions.

In Radwan V. Radwan⁶⁴ Cumming - Bruce J said,
 "... there is no valid foundation, or alleged rule that diplomatic premises are to be regarded as outside the territory of the receiving

⁶² Deak Francis, "Immunity Of Foreign Missions From Local Jurisdiction" (1929) 23 A.J.I.L. P.591

⁶³ 1. The fiore Draft Code 1890 extends the concept of extraterritoriality to the offices of the legation, consular archives and to the residents of the Ministers and diplomatic agents, Article 363.
 2. The resolution of the Institute of International Law 1895 provides in Articles 7, 8, 9, and 10 the concept of extraterritoriality of the acts of the Ministers or representatives and their residences.
 3. The project of the American Institute of International Law 1925 and the Project of the International Commission of Jurists 1927 Articles 21 and 23, and Article 16 of the Havana Convention refer to the premises as domicile of the sending State.
 4. The Phillmore's Draft Code 1926 provides that the residence of diplomatic agent and the residence of the diplomatic suit are deemed to be extraterritorial
 6. The Pessô's Draft Code 1911 does not consider this concept as it allows the agents of the State to remove a criminal by force if the head of the mission refuses to give his consent.

State." He said that extritoriality in this (as in every case) is a fiction only for diplomatic envoys are in reality not without but within the territory of the receiving State. The premises of the mission are inviolable and local authorities may enter them only with the consent of the head of the mission. But this does not make the premises foreign territory or take them out of the reach of the local law for many purposes. For example a commercial transaction in the embassy may be governed by the local law particularly tax law, marriage may be celebrated there only if conditions laid down by the local law are met and children born in it, unless their father has diplomatic status, acquire local nationality. He also said that if the premises of the mission were part of the territory of the sending State that would have been done at the formulation of the 1961 Convention.

The question whether the agents of the receiving State may enter the premises of the mission in case of fire or national security was an issue of great concern and controversy during the formulation of Article 22. It touched on the position of the receiving State in cases of extreme emergency in order to eliminate a grave and imminent danger to human life, public health or property or to safeguard the security of the State, fire or crime violence in the premises of the mission. Among the ideas discussed were that the head of the mission would cooperate with the local authorities in cases of fire, epidemic or other extreme emergency. But this was opposed and in particular by delegates who, in their opinion, thought it dangerous to leave it to a receiving State to judge a

situation that requires emergency attention.⁶⁵ It is contended that if such an idea had been put into the article, there would have been abuse or misuse of it by either communist or western receiving States, by making an abrupt check up on the missions for their own ends in the guise of an emergency or safeguard the State security. Therefore, the idea was dropped.⁶⁶

On June 14, 1980 the Liberian authorities entered the French embassy and removed the son of the late Head of State, who had taken refuge in the mission. It had been one of the most heinous crimes any civilised government could commit. Spain broke off diplomatic relations with Guatemala on February 1, 1980, after the local police had stormed the embassy against the wishes of the ambassador, to relieve the occupation of the premises by a group of peasants who had taken the ambassador and other diplomats hostage.⁶⁷ Cuba on the other hand has seen exceptions to the concept of absolute inviolability of the diplomatic premises from a different angle. When some armed refugees broke into the Ecuadorian embassy in Havana on February 13, 1981 and took the ambassador and three other hostages, the Cuban security forces stormed the building. The authority in Havana replied to the protest by the government of Ecuador that they would act

⁶⁵ (1957) 1 Y.B.I.L.C. PP.55-59, see also (1962) 56 A.J.I.L. PP.100-2.

⁶⁶ However there are different views if the ambassador is himself taken hostage and the local authorities believe that he is in no position to give consent they may take such action necessary to rescue the situation. It may also appear that the hostage takers are about to carry out their threats in the premises of the mission. The local authorities may act in a manner deemed fit in consultation with the sending State. Denza Eileen, Op. cit., P. 267, Sutton Stephen, "Diplomatic Immunity and The Siege Of The Libyan People's Bureau" (1985) Public Law, P.197.

⁶⁷ B.Sen, op. cit. P.113

unilaterally whenever it was necessary to establish order.⁶⁸ ^{added} Havana had done it
in a similar manner ^{around that time} when 14 armed refugees had entered the Papal Nunciature and
took four nuns hostage⁶⁹.

Article 22 provides absolute inviolability to the premises of the foreign ^{Repetit}
mission in a receiving State and under no circumstances should the agents of a ^{See}
receiving State enter the mission without prior permission of the head of the ⁵⁸
mission.⁷⁰

Although in certain circumstances a receiving State can take a risk in
cases where it is absolutely sure of the abuses of the mission, the popular
opinion is that in no way should a receiving State order its agents to enter the
premises of the mission without prior permission from the head of the mission.

Contrary to the concept of absolute inviolability, in 1973, the Iraqi

⁶⁸ The Aden Government was also of the view that
diplomatic immunity does not protect diplomats who
violate international law. Therefore the government
considered its storming of the Iraqi embassy as legal
and while the retaliatory measure taken by Iraq was
illegal. (Foreign Broadcast Information Service,
Sept. 1979).

⁶⁹ B. Sen, Op. cit. P. 113

⁷⁰ There have been other violations of the premises
through electronic mechanism in the form of listening
devices and the tapping of telephones. There had been
allegations of embassy bugging of the United States
embassy in Moscow and at the Soviet embassy in
Washington. In 1983 atleast 236 diplomats charged with
"bugging" other embassies were expelled. Gerhard Von
Glahn, Law Among Nations, An Introduction To
International Law, P. 512, (1973) Keesing's
Contemporary Archives, P. 25893

ambassador was called to the Pakistani Foreign Affairs Ministry and told that there was evidence that arms were being smuggled into the country and stored at the Iraqi embassy. A request for the search was refused by the ambassador. In the event a raid on the embassy in the presence of the ambassador was made in which arms were found in crates in the embassy.⁷¹ Article 22 of the 1961 Vienna Convention is categorical that the receiving State shall not enter the mission building save with the permission of the head of the mission.

Although Iraq had used the mission in contradiction to Article 41(3) which forbids the premises to be used in any manner incompatible with the functions of the mission, it was highly improper that the embassy was raided. Article 41(3) does not authorise a receiving State to enter and make a search in the premises of the mission. The mission must remain inviolable at all times and the inviolability is not lost because of unlawful acts⁷².

In keeping with the spirit of Article 22 of the 1961 Vienna Convention, the agents of a receiving State may not enter the foreign mission save with the consent of the head of the diplomatic mission. In 1906 Carlos Weddington, the son of the Chilean Charge de affaires at Brussels, shot and killed the secretary of the legation. He took refuge in the legation which the police guarded without forcing its entry into the mission. Britain too exemplified it in the events of April 17, 1984 in which a young British policewoman was allegedly killed in London by shots of gunfire from a window of the Libyan People's Bureau

⁷¹ Eileen Denza, Op. cit., P.95, see also the 1973 Keesing's Contemporary Archives, P.25893

⁷² Higgins R, Op.cit, P.646

Repet
See pp
58, 60,

(equivalent to an embassy). Bureau to search and seize the murderers of Constable Fletcher. We find that this view cannot be entertained for a number of reasons:

The facts of the incident are as follows: On February 1984 the Chancery building of the Bureau was taken over by a group of Libyan students. On April 17, a planned opposition demonstration was held in front of the embassy at the same time when a pro-Qadhafi counter demonstration of about 20 people was also going on. The police had been notified and took position in front of the building. Later on, there was a burst of gun fire alleged to have come from the Libyan embassy windows. The bullets killed the policewoman, Yvonne Fletcher, and eleven demonstrators were injured. All the demonstrators were evacuated from the area and the building was cordoned off. The British government showed some desire to evacuate the building and search it. Meanwhile the Libyan government prevented anyone from leaving the British embassy in Libya.⁷³ Although the British government was absolutely sure that the gunfire was from the embassy it did not force its way into the embassy. Other opinions suggest that the British government did not make any attempt to force its way and search the building, not because it was keeping to the spirit of article 22, but because it feared retaliatory measures against British diplomats and citizens in Libya. That is why the search was made after making sure that their diplomats were safe in Libya.

Goldberg⁷⁴ disagrees with the concept of the inviolability of the diplomatic missions which are used in a manner incompatible with the functions of the mission (Article 41 (3)). He opines that the British police should have

⁷³ McClanahan Grant V, Op.cit., p. 6.

⁷⁴ (1984) 30 South Dakota, P.1 P. 521

entered the Libyan Peoples Bureau to search and seize the murderers of Constable Fletcher. We find that this view cannot be entertained for a number of reasons:

First, the diplomatic premises enjoy absolute immunity since the beginning of residential diplomacy. Secondly, the storming of the embassy would erode the inviolability of the premises. Thirdly, the storming of the embassy would set a precedent. In the case of the United States Diplomats, Iran complained that the embassy had been used for criminal purposes other than the official functions. If we are to adopt Goldberg's views, the seizure of the U.S embassy in Iran would then be justified.

In the incident when Iraq invaded Kuwait, the Iraqi soldiers entered the French ambassador's residence in Kuwait city and seized four French citizens, including a military attache'. This was contrary to the Vienna Convention on Diplomatic Relations which provides that the residence of the diplomatic agent shall be inviolable. They also entered the Belgian and Dutch embassy compounds and the residence of the Canadian ambassador.⁷⁵ Iraq, on its part, denied the incidents and referred to the missions as former diplomatic missions.

The Security Council by resolution 667 demanded that Iraq fully comply with the 1961 Vienna Convention and that the government should not hinder diplomatic and consular missions in the performance of their functions.

In regard to international law, Iraq failed to observe its obligation to protect and honour the inviolability of diplomatic missions. It could not pursue its own course without the consent of the sending States. Even if the diplomats had done anything wrong which might have warranted the closure of the embassies,

⁷⁵ Gerhad Von Glahn, Op. cit., P. 521 . A.Q (1963) P. 525

due regard to international norm of respect and honour had to be observed. To take all appropriate steps to protect the premises of the mission against intrusion.

In 1908 the British embassy in Tehran was surrounded during revolutionary disturbances by Persian troops. This was because it had granted refuge to certain political offenders.⁷⁶

On June 14, 1980 Liberian troops, invaded the French embassy in Monrovia, and arrested Adolphus B. Tolbert, son of the late Liberian President, William R. Tolbert, who was assassinated during the April 12, 1980 coup. Although France protested, the Liberian Defence Ministry, denounced the asylum that had been granted to Adolphus. It described it as a grave situation which necessitated entry into the mission without permission.⁷⁷

It may be noted that a Court in the United States⁷⁸ has held that:

- (a) A foreign embassy is not to be considered the territory of the sending State.
- (b) The local police have the authority and responsibility to enter a foreign embassy if the privilege of diplomatic inviolability is not involved when an offence is committed there in violation of local law.

⁷⁶ Eagleton Clyde, *The Responsibility Of The State For The Protection Of Foreign Officials*, (1925) 19 A.J.I.L. P.297.

⁷⁷ B. Sen *Op.cit.*, P.113
The Liberian Defence Ministry commented that such was a grave situation which warranted entry into the mission premises without permission. But international law requires that permission must be given by the head of the mission before entry is effected.

⁷⁸ *Fatemi v. United States Dist court*, A.C (1963) P. 525

The second duty imposed on a receiving State is the special duty to take all appropriate steps to protect the premises of the mission against intrusion or damage and prevent any disturbance of the peace of the mission or impairment of its dignity. Since the wording of Article 22 is similar to that of Article 29 it is apparent that the duty imposed under it is the same.

The State of Malaya (Malaysia) at the Vienna conference on Diplomatic Intercourse and Immunities 1961, had proposed a restrictive approach to the duty of protection of the mission premises. The representative suggested that instead of "The receiving State is under a special duty to take appropriate steps to protect the mission. . . ." ^t The provision should read ~~that the~~ "The receiving State is under a special duty and shall take all appropriate steps to protect the premises".⁷⁹ The purpose of the proposal was of result and not of means.[?]

In support of this proposal Belgium cited an incident in which ^{the} ~~an~~ ^{was} ~~Embassy~~ ^{where?} was burnt down and ransacked and the life of the members of the mission ~~were~~ ^{was} endangered. The police assigned to guard the premises had been withdrawn and there ^{was} ~~were~~ no apology or compensation from the receiving State. The proposal was referred to the drafting committee but was not embodied in the final text.⁸⁰

It is mandatory that a receiving State should take all appropriate steps to protect the embassy from attacks, intrusion, damage or any sort of disturbance. If a State abdicates its obligation to protect the premises, it is legally liable to pay for the damage caused. When a German mob attacked the British embassy in Berlin after the outbreak of world war I, the German

Gerhard Von Glahn, *Op.cit.*, P. 522.

⁷⁹ U.N. Doc A/CONF. 20/C.1/114 (1961)

⁸⁰ Kerley Ernest, "Some Aspect of The Vienna Convention On Diplomatic Intercourse and Immunities" (1962) 56 A.J.I.L., P.104 *Article 22 (1958) 52 A.J.I.L. P. 192*

government expressed regret and paid damages to the British government.⁸¹

Article 22 (2) I.e. " . . . to prevent any disturbance of the peace of the

The protection of diplomatic missions is indeed "a special duty" and therefore some countries have special police departments which are responsible for their protection. The police are trained to take care of the diplomats and the missions. The Metropolitan police force of about 3,800 members in Washington, is given instructions and training in the special subject of the status of diplomats. In 1970, a uniformed division of the secret service was created to protect the increasing number of diplomats. They wear a distinctive police uniform with special insignia.⁸² Another force, the "Diplomatic Protection Group" is assigned to protect foreign embassies in London.⁸³ In emergency cases, when an embassy requires extra protection or a twenty four hour security guard, it is such a force which is provided.

Egypt and India, among others, have special police forces in charge of protecting diplomats. Such forces undergo special instructions and training in regard to diplomats.⁸⁴ Other countries too, although they do not have ^a special division in the police to protect diplomats, provide [^] a special protection whenever required by foreign missions.

3.7 DEMONSTRATORS INFRONT OF THE MISSION PREMISES

It is observed that another situation which usually worries a receiving State involves demonstrations. Some demonstrations are peaceful while others

⁸¹ Gerhad Von Glahn, Op.cit, P. 522.

⁸² McClanahan Grant V, Op. cit., P.119

⁸³ Wilkinson Paul, Op. cit, P.142

⁸⁴ Commentary on Article 22 (1958) 52 A.J.I.L., P. 192

are violent. The police force has to take precaution to keep the spirit of Article 22 (2) i.e. " to prevent any disturbance of the peace of the mission or impairment of its dignity."

The United States had a law enacted in 1937 that prohibits hostile placards and demonstrations closer than 500 feet from the embassy. But in March 1988, The U.S Supreme court ruled that protesters could demonstrate immediately outside foreign missions provided the demonstration did not interfere with the mission's normal activities or become a threat to its security. This decision therefore abrogates the 500 feet rule.⁸⁵

In most countries demonstrations in front of the embassies require special permits. It is anticipated that with such a procedure, the police is given ample time to prepare for any eventuality. It is not known exactly whose judgements have to be satisfied to establish that the demonstration outside the embassy does, or does not, disturb the peace of the mission. It is not clear whether the mission ^{which} ~~has to~~ ^S inform a receiving State that the demonstration outside disturbs the functions of the mission or ^{it is the} ~~for~~ a receiving State ^{which} ~~to~~ judges that such a demonstration ^S ~~exceeded~~ the limit and therefore ~~it~~ disturbs the peace ~~inside the building of the mission.~~

Suppose the diplomatic mission were to inform the receiving State that the crowd outside the mission building actually disturbs the peace, would the police disperse the crowd? It all depends on the circumstances of the demonstration. The embassy is usually informed if there would be any demonstration. This is so

because in many countries staging a demonstration requires a police permit. However, in the United States it is an offence to display a flag or placard intended to intimidate or ridicule foreign diplomatic mission.⁸⁶

It is suggested that the immunity and inviolability of diplomats should not be used to curtail the fundamental rights of the citizens of a receiving States from staging demonstrations, presenting memorandum of protests to the missions and ^{to curtail} freedom of speech against a sending State. The citizens of a receiving State should be allowed to express their opinion in a manner that would not affect the normal functions of the mission. Political demonstration *per se* does not amount to the impairment of the dignity of the premises of the mission.⁸⁷ Special demonstrations ^{for the purpose of delivering} in the form of giving memorandum to the embassies should be allowed to give a clear notice of the sentiments of the people of a receiving State.

Alternatively, it may be argued that Article 22(2) should override the local law and rights of freedom of speech and assembly because the embassies are treated as special buildings of the sovereign sending governments and established under international law based on mutual understanding. The mission is inviolable and a receiving State is under obligation to prevent such disturbances.

⁸⁶ Jewish Defence League cited by Sutton Stephen, Op.cit, P.195

⁸⁷ Regina V. Rogue, Bow Street Magistrate Court, June 1984, Foreign Affairs Committee Report, Paragraph 50.

3.7 EXPROPRIATION OF THE MISSION PROPERTY.

The third obligation envisages that the receiving State shall not expropriate the property of the mission even if the expropriation is in the public interest. If such a situation (of public interest) arises it should be dealt in the spirit of mutual understanding. There is no absolute right of either a receiving State to order the expropriation or a sending State to refuse to give up the mission. The establishment of the diplomatic relations is by mutual understanding and respect and it is that spirit which is implied in every situation. There is no use of force in any situation by either side.⁸⁸

In 1966, when the fleet line underground railway was about to be constructed in London, the foreign office sought the consent of the diplomatic missions in London. There was a general compulsory procedure, but this was not applied in relation to diplomatic missions out of concern to protect the peace and dignity of the diplomats and their missions.⁸⁹

Article 22 also accords the means of transport of the mission some form of inviolability which is not absolute. The immunity is only from search, requisition and attachment. It appears the immunity does not exclude towing away the means of transport and parking fees. AP news reported that foreign embassies in the District of Columbia were still ignoring requests to pay \$17.5 Million Overdue bills to parking ticket firms.⁹⁰ Russia owes the City of

⁸⁸ Commentary on Article 22 (1958) 52 A.J.I.L. P.187,
See also (1962) 56 A.J.I.L. P.102

⁸⁹ Eileen Denza. Op. cit., P. 85

⁹⁰ New Sunday Times 29/11/92 printed in Malaysia

who?

Washington \$ 3.8m while Nigeria owe them \$ 77,830.⁹¹ However it is suggested that this article was not meant to be read in isolation. Although the wording of the article mentions, search, requisition, attachment and execution, it is contended that this article has to be read together with other Articles like Article 23, which exempts the mission premises from taxation.

3.8 LEGAL DUTIES

The diplomatic agent is under a legal duty not to abuse the inviolability accorded to him under Articles 29 of the 1961 Vienna Convention.

Article 22 and 29 are read together with Article 41(3). The international customary law is emphatic that a diplomatic agent is under a legal duty under international law to carry out his functions in a manner that is compatible with the objectives of his mission. Article 41(3) of this Convention states that,

The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by any rules of general international law or by any special agreement in force between the sending and the receiving State.⁹²

⁹¹ AFRICA, EVENTS, Vol.9, No.12 Dec. 1993 P.35

⁹² This article provides that a diplomat is duty bound under international law not to engage in activities which are incompatible with the functions of his office. For example, he is not supposed to gather classified information of a receiving State, take photographs of the prohibited areas, engage in espionage, interfere in the internal affairs of a receiving State or commit any crime. The article is categorical that all his activities must conform to the functions of his mission. Unfortunately this legal liability cannot be tested in any court of law simply because Article 29 of this Convention confers absolute immunity on a diplomatic agent. It provides that, " The

Refer

The foregoing discussion also brings us to observe that the 1961 Vienna Convention On Diplomatic Relations offers very important provisions on the protection of diplomats, which are enshrined in articles 22, and 29, in an agent

The objective of these provisions is to oblige the receiving State to protect diplomatic agents, not only from the wrath of the private citizens or organisations but also its very agents or organs, which may violate the diplomatic immunity. The inviolability of a diplomatic agent is not a sole right of protection of a receiving State, which can do away with or withdraw whenever it pleases, but it is a right ^{of} to the diplomatic agent, which is found in the international law of customary practices and usages. The obligation of State Parties is to abide by the provisions of the 1961 Vienna Convention On Diplomatic Relations, which in fact, codifies the practices and usages of international law.

person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."

It is also noteworthy that Article 41(3) does not mention the likelihood of misusing documents (Article 24) and Communication (Article 27) as being incompatible with the functions of the mission. Should we assume that these articles cannot be used in violation of Article 41(3) or should we imply that this sub-section is meant to be read together with Articles 24 and 27?

It is argued that the mission is the seat of the diplomatic functions which include all the activities of the diplomat. The diplomat is entrusted to use all facilities accorded to him under this Convention in a manner which is compatible with the objectives of diplomatic relations. The duty requires that he shall use all these facilities in the spirit in which they were accorded to him.

The mission of a diplomatic agent is meant for public good and to promote friendly relations. He is therefore under legal duty to behave in a manner that befits the mission. He is not expected to behave in a manner that would bring disrepute to himself or/and a sending State. The diplomatic utility has always been seen in a sense of promoting friendly relations.

The detention of Mr. Mohammed Yusuf in 1985, a Nigerian diplomat who was implicated in the kidnap of Mr. Omaru Dikko in London, is still attracting academic criticism whether under international law, Britain could detain an agent who possessed a diplomatic passport though he was not accredited to the British government. If such a detention is allowed, it might create a very dangerous precedent that may affect the welfare of other diplomats passing through third States to or from the accredited missions. The Magistrate had ruled in this case, that "... the diplomatic passport, although was recognised by the British High Commission in Lagos and the Immigration Officer in London, did not confer diplomatic status on Mr. Mohammad!"⁹³ Earlier on, diplomatic immunity had also been rejected in another case.

In Regina V. Governor of Pentonville Prison Ex Parte Teja.⁹⁴ The court held that unilateral action in appointing a diplomatic agent did not confer diplomatic immunity on the representative and held that "... until this country had accepted and received the intended representative as a persona grata, the diplomatic agent was not immune from proceedings in the English Courts."

Teja, had been arrested on leaving Heathrow Airport, London, for Geneva, following a warrant of arrest issued by the Indian government, for a number of offences. He held a Costa Rican diplomatic passport. In the event the ambassador of Costa Rica wrote to the Secretary of State for Foreign and Commonwealth Affairs requesting that the diplomat be freed. The President of Costa Rica too sent a telegram to his ambassador to affirm that Teja was a Costa Rican diplomat.

⁹³ Adeoye Aninsanya: "The Dikko Affair And Anglo-Nigerian Relations" (1985) 34, I.C.L.Q. P.606.

⁹⁴ (1971) 2 Q.B 274 (C.A)

In Australia the court ruled that Meier, a Canadian and former citizen of the United States who had a Canadian as well as a Tongan diplomatic passport was entitled to diplomatic immunity. Mr Meier had been given a diplomatic Visa at the Australian High Commission in Fiji.⁹⁵ However when the Netherlands government detained an Algerian diplomat for carrying explosives, it confiscated the explosives but released the diplomat because of the diplomatic immunity.⁹⁶

In 1900, the French Ministry of Foreign Affairs published a document in connection with the case of Duc de Veragna whose personal effects were seized in execution of a judgment during his temporary stay in Paris, to the effect that, "a diplomatic agent passing through France, even if he only has a temporary mission to do in the State to which he is proceeding should be regarded as an accredited diplomatic agent and accordingly exempt from local jurisdiction."⁹⁷ As the establishment of diplomatic relationship is mutual, the waiver or withdrawal of the diplomatic immunity cannot be done away with unilaterally. The concept of reciprocity in the regime of diplomacy plays much larger role than is accorded under international law.⁹⁸ International law accords protection to all diplomats whether in a receiving State or another State through which the passage takes place. The Preamble of the 1961 Convention on Diplomatic Relations, affirms that the rules of the customary international law shall continue to apply

⁹⁵ Sydney Morning Herald, July, 29 1978

⁹⁶ U.N Doc S/ 10816 as cited by E. Denza, Diplomatic Law. Commentary On The Vienna Convention On Diplomatic Relations. (Oceana Publication Inc. 1976) P. 259

⁹⁷ (1901) J.D.I.P. 342 cited by B. Sen, A Diplomatic Handbook Of International Law and Practice. (Martinus Nijhoff Publishers, 1988) P. 206

⁹⁸ Grzybowski Kezimierz, 'The Regime Of Diplomacy And The Teheran Hostages' I.C.L.Q. Vol. 30 (1991) P. 57

Vol. 40 (1991)
Vol. 30 (1981)

to questions not regulated by the provisions of the present convention, outside the local jurisdiction in the form of search, requisition, attachment or

3.10 CONCLUSION

This chapter has discussed the two main important articles regarding the inviolability of diplomatic immunities and privileges; Article 29 which provides for the privileges and immunities of diplomats and 22 which provides for the inviolability of diplomatic missions.

In Article 29 two important obligations were discussed. These are the duty of the receiving State to treat diplomatic agents with honour and respect and to abstain from arresting or detaining them. The receiving State shall guarantee non exercise of all measures that may constrain the functions of the diplomatic agent. The receiving State, the law enforcement authorities and the courts shall act in a manner that protects the inviolability of the agent as enshrined in this article.

The second duty is that the receiving State shall take all appropriate steps to protect the diplomat from any attack on his person, dignity and honour from private individuals and political groups. The duty to protect the diplomat extends to situations of kidnapping or hostage taking. The receiving State shall take all appropriate steps to gain his release. It appears that what matters most is the safety of the diplomatic agent.

This chapter has also discussed Article 22 regarding the inviolability of diplomatic missions. The article envisages three main important duties:

First, the receiving State shall treat the mission as inviolable. It shall restrain its agents from entering the mission premises with out permission. Secondly, the receiving State is under a special duty to protect the premises of the mission from invasion and prevent any disturbances or distraction of the

mission. Thirdly, the furnishings, property and means of transport fall outside the local jurisdiction in the form of search, requisition, attachment or execution.

The above discussion has touched on a number of measures taken by the international community to honour and protect the diplomatic agent. Basically this was to enable him carry out the duties of his office without the slightest hindrance or interference from a receiving State. It was also meant to give further protection against individuals who might harm him. The list of diplomats who are victims of the attacks by both government organs and private individuals is non exhaustive of all the incidents.

Although the 1961 Vienna Convention is a very comprehensive document on the protection of diplomats it is contended that there are some ambiguities and lacunae which required further international conventions.

Finally, we analyzed the legal duty of the diplomatic agent not to abuse the inviolability accorded him under the international law. The diplomat is legally bound to act in a manner which is compatible with the functions of his mission. The only snag is that the legal liability cannot be tested in any court of Law.

1 The English term terrorism did not come into general use until the equivalent French word 'terrorisme' had developed in the French Revolutionary period 1793 - 98. Wilkinson Paul, (Ed) Terrorism: British Perspectives, (G.K. Hall & Co. An Imprint of Macmillan Publishing Co. N.Y. 1994) P.XIV

2 Terrorism was first used as a word during the French Revolution as a synonym for a reign of terror. It was later used to refer to systematic use of terror. Vide: Theckrah John Richard, Encyclopedia of Terrorism and Political Violence, (Routledge and Kegan Paul: London & New York, 1987) P.99. See also Frank M. Thomas et al. "Preliminary Thoughts Towards An International Convention On Terrorism", (1974) 68

CHAPTER 1V

AGAINST TERRORISM AND DIPLOMATS

4.1 INTRODUCTION

The following discussion looks at terrorism and some of its causes. It deals with the problem of definition of the term "terrorism" and comes out with a tentative definition for the purpose of this study. The violation of diplomatic immunity is divided into two categories. One such violation is done by the government agents and the other by private individual and political organisations. The dissertation looks at acts (terrorism) perpetrated by the later. latter

The word "terrorism" originated during the era of the French revolution and the Jacobin reign of terror.¹ It was identified as State action, when it was used as an instrument of political repression. Later when the government grew stronger terror was institutionalised and legalised.²

¹ The English term terrorism did not come into general use until the equivalent French word 'terrorisme' had developed in the French Revolutionary period 1793 - 98. Wilkinson Paul, (Ed) Terrorism: British Perspectives, (G.K. Hall & Co. An Imprint of Macmillan Publishing Co. N.Y. 1994) P.XIV

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4.2 CAUSES OF TERRORISM

The recourse to terrorism is taken for various reasons and among these the following are considered for this study:

- (a) Extreme nationalism or autonomists and separatists ^{agitation by} agitation. e.g The Basque Separatists ETA, and The Tigers of Tamil Eelam, LTTE of Sri Lanka.
- (b) Ideological; This type of function fights for a complete change in the whole political, social and economic structure. For example The Red Brigades of Italy.
- (c) Exiled groups, forced by police or government action to operate exclusively abroad e.g: The Armenian Secret Army For the Liberation of Armenia.
- (d) Issue Group terrorists. These are employed by some people who seek to change specific policies. For example the Animal Liberation Front, the Anti Abortion bombers etc.
- (e) Religious extremists. These seek to impose their own beliefs or religious order on the masses.³
- (f) State-sponsored terrorism is used as a tool of foreign policy by regimes which seek to suppress dissidents at home⁴ or intimidate and destroy exiled opponents and dissidents, weaken adversary States or export revolution.⁵ The governments of China, Cambodia, North Korea, Uganda under

³ Wilkinson Paul (Ed.) Terrorism: British Perspectives, (G.K. Hall & Co. An Imprint of Macmillan Publishing Co. N.Y. 1994) P.1

⁴ In 1595, Sultan Mohammad of the Ottoman Empire killed his nineteen brothers to eliminate dynastic competitors. Bell Bowyer J, Transnational Terror (Hoover Policy Studies, 1975) herein after referred to as Bell Bowyer J, Terror, P.4

⁵ Ibid

4.3 Idi Amin and Libya under Gaddafi have all been accused of this type of terrorism.⁶ The United States and the USSR have been accused of engaging in and exporting terrorism.⁷ Schlagheck writes that:

The Superpower-terrorism "connection" assumes many forms. It may take the form of support for groups using terrorism against friends or allies of the rival superpower, or against that superpower directly. "Support" includes providing funds, weapons, training, political endorsement or other logistical assistance (passport, intelligence, use of diplomatic facilities, etc.) to groups that use terrorism. The support may be channelled through a proxy or delivered directly by the superpowers' own military and intelligence services. Cuba frequently is identified by the United States as a Soviet proxy in Latin America and Africa, while expatriate Cubans in the nationalist - terrorist group known as Omega 7 are considered American proxies due to attacks on Chilean and Cuban officials. U.S. aid to Afghani Mujahedeen resisting Soviet occupation and Soviet support of Palestinian effort against what they consider Israeli occupation of Palestinian lands are further examples of the indirect Soviet-American conflict that often involves terrorism, proxies, and allies. Neither Superpower officially admits to sponsoring terrorism or publicly endorses terrorism, and the evidence to substantiate their involvement is scarce, indirect, or frequently unavailable.⁸

⁶ Grant Ward Law, Political Terrorism (Cambridge University Press 1989), P.175.

⁷ Syed Jaffar AlSagaff, Motives Behind U.S - Britain Accusation Against Libya. (University Publication 1992) P. 25 See also J. Bowyer Bell, A time terror (Basic books Inc, 1978) P.174 and Fan Yew Teng, The Continuing Terrorism Against Libya, (Egret Publication, Kuala Lumpur 1993) PP.47-75.

⁸ Vide: Schmid Alex P., Jonathan Albert J. et al. Political Terrorism, Characteristics, Causes, Controls (Macmillan Education Ltd. 1990) P.171

4.3 DEFINITION

A precise legal definition of the term terrorism is not yet formulated and the inability to agree on the nature of the problem continue to frustrate the world community. It has now become a matter of course for writers on terrorism to begin by pointing out how hard it is to define terrorism.⁹

Hoffman dedicated the entire doctoral dissertation to the definition of the term 'terrorism.' He defined it as follows:

Terrorism is a purposeful human political activity which is directed towards the creation of a general climate of fear, and is protagonist, other human beings and, through the same course of events.¹⁰

⁹ H.Vetter & G. Perlstein, "Perspectives On Terrorism" quoted by Antje C. Petersen, "Extradition And The Political Offence Exception In The Suppression Of Terrorism", (1992) 67 I.L.J., P.769

Professor Richard Baxter at Harvard University and former judge of the International Court of Justice did not find it necessary to define the term terrorism. He remarked; "We have cause to regret that a legal concept of terrorism was inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose. Vide: Murphy John F, "The Future Of Multilateralism And Effort To Combat International Terrorism", herein after referred to as Murphy John, "The Future", (1986) 25 C.J.I.L., P.37.

In September 1976, the New York Times reported Mr. Abu Zoid Durda, the Libyan Acting Foreign Minister to have defined 'terrorism' as follows; "to station American forces overseas is 'Terrorism'"; "to monopolize the wealth of countries is 'terrorism'"; "to dominate the outlets of seas and oceans is 'terrorism'"; to use wheat and gold as political toys when the world is starving is 'terrorism' Vide: J.Bowyer, Op. cit, P.96 . A Boston Irishman is reported to have defined the terrorist as "anyone the British don't like." Paul Wilkinson, Political Terrorism, (The Macmillan Press Ltd, 1974), P.51

¹⁰ Vide: Schmid Alex P, Jongen Albert J. et al, Political Terrorism: A new Guide to Actors, Authors, Concepts, data bases, Theories and Literature(North-Holland Publishing Company, Amsterdam, Oxford, New York, 1988) P.4

but could not implement it.¹³ This is due to differing views on definition of the word 'terrorism' as well as 'offences which could be characterised as falling under it.' Many States as well as political organisations have given different definitions of the word 'terrorism'.¹⁴ For example, Israel¹⁵ and its allies have viewed all action against it, whether on the Arab land it occupies or not, as acts of terrorism. In other words, it does not recognise any actions by any movements in Palestine for self-determination, while other States do consider some of these movements as genuine liberation organisations. The governments in both the East and the West¹⁶ often use the word terrorism to describe their opponents even when no violence has been used.¹⁷ The courts too cannot be relied upon when it comes to the definition of the term 'terrorism'.¹⁸

¹³ In a memorandum to the Secretary General of the United Nations, (the Secretary General had invited member states on 24th April, 1978 to send proposals to him) the member States suggested to him that it would be hypocritical to limit oneself to the condemnation of terrorism without giving due consideration to its underlying causes. They believed that treatment should not be restricted to symptoms. Robert A. Friedlander, Terrorism. Documents of International and Local Control. (1990 Oceana Publications, Inc. Vol:111), P.124

¹⁴ Stohl Michael, The Politics Of Terrorism, (Marcel Dekker, Inc. 1979) PP. 24 - 27.

¹⁵ Israel is of the view that the most vicious and persistent terror crimes are those originating from the Middle East. (1972) Y.B.U.N. PP.642 - 3

¹⁶ For full deliberation on the question relating to International Terrorism, see (1972) Y.B.U.N., PP.639-650

¹⁷ Thackrah John Richard, Op. cit, P.55

¹⁸ The courts in the United States have been more sympathetic to offenders from the Northern Ireland than to those from the Arab world (Middle East). Yarnold Barbara M, International Fugitive. A new role for the International Court of Justice, (Praeger: New York, West

Although this research is about terrorism against diplomats and the 1973 Convention forms one of its central axes of discussion, the term terrorism does not appear in the 1973 Convention. It was left out due to controversies on 'who is a terrorist' and 'what amounts to terrorism'.¹⁹ Considering the divergent opinions on what amounts to terrorism and who a terrorist is, it is no wonder that there is no universally acceptable definition of the word. Because of these controversies surrounding the term, it is almost impossible to find a definition which would be comprehensive enough to take care of these opinions.²⁰ The International Law Commission defined 'international terrorism' in Article 16 of the draft code of Crimes Against Peace and Security as follows:

The undertaking, organising, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a

Port, Connecticut, London, 1991) P.30 - 46. We have also observed that there are different views on who is to be considered a terrorist. The examples of the Palestine Liberation Organisation Chief, Yasir Arafat and the UNITA Chief Jonas Savimbi have been cited here to show that, these two chiefs, have double status. In some countries, they are considered terrorists while others consider them national heroes and accord them 'VIP' or 'Head of State' treatment.

¹⁹ (1972) 11 Y.B.I.L.C. P.7

²⁰ The United Nations has not been much more effective. Although it established an ad hoc committee on international terrorism in 1972, the committee finally issued a report and recommendation in 1979. It did not produce a convention defining, let alone prohibiting terrorism. Moreover every resolution of the General Assembly condemning terrorism has included a paragraph reaffirming the right to self determination as if the later justifies the former. Halberstan Malvina, "Terrorism Of The High Seas: The Achille Lauro, Piracy And The IMO Convention On Maritime Safety" (1988) 82 A.J.I.L. P.310

nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

- (2) The participation by individuals other than agents representatives of a State in the commission of any of the act referred to in paragraph

1.²¹

For From our working definition of terrorism,²² the first element of this

definition is that the crime should be intentional. Secondly the offender should be aware of the status of the diplomat. Thirdly, it must be done in order to intimidate any person or State and fourthly, it must be done in furtherance of political or social ambitions.²³ This definition therefore excludes a car accident and the like from acts of terrorism.

4.4 VIOLATION OF DIPLOMATIC IMMUNITY AND PRIVILEGES

Violation of diplomatic immunity and privileges can be divided into two

aspects;

4.4.1 Violation of diplomatic inviolability by government agents.

The violation of diplomatic inviolability by State agents has been in existence since the institution of diplomacy was created. The head of the

²¹ MacCaffrey Stephen C, "Current Developments, The Forty Second Session of I.L.C" (1990) 84 A.J.I.L, P.933

²² Refer to 'Introduction' Supra: P.5

²³ Ambassador Fields' is reported to have told the judicial committee that "If you define terrorism, you ought to win the nobel prize, because we have been grappling with this definition for the last dozen years; to my certain knowledge I would think it would be extremely difficult to find a definition that even the United States and Britain could agree to" Hearing before the Subcomm. on the constitution of the Senate Comm. on the judiciary, 99th Cong., First Sess. 164 (1985).

community or society would welcome and treat with honour and respect any diplomat whose office was considered peaceful. However in other circumstances, he would order the torture or assassination of an envoy whom he considered to be an enemy²⁴ or a source of evil.²⁵

²⁴ Mattingly G, Op.cit, P.47 & 49, See also 'Ambassador of ill will' Ibid, 178 - 205

²⁵ The Prophet Muhammad's envoys were generally warmly received with honour and dignity as he personally reciprocated to those he received. However it is reported that two of his envoys were abused. The Prophet's envoy to king Kisra' of Iran was abused and the message he had carried to the king, was ripped apart in his presence. Musaylamah too, is reported to have tortured ambassador Habib to death. Vide: Siddiqui M.Y.M, Organisation Of Government Under The Prophet, (Idarah) Adabiyat-i, Delhi, 1987)P.230-5

In about 1526, Don Inigo de Mendoza, Charles V's ambassador to England was sent through France. He was refused safe conduct and therefore he ventured to proceed without it. Consequently, he was taken prisoner for four months. Vide : Mattingly G, Renaissance Diplomacy, Penguin Books, 1955)P.87

In 1708 M. de Mathveof (Matveev), the Russian ambassador to London who was about to present a letter of recall was arrested with some degree of violence at the instigation of certain merchants to enforce payment of debts but was released shortly afterwards on bail offered by friends. On hearing of the incident, the Queen commanded the Secretary of State to express regret to the ambassador who was not satisfied and hurriedly left the country without presenting the letters of recall. In order to make amends, the British envoy at St. Petersburg, was accredited as special envoy to Peter the Great at a public audience to express the Queen's regret of the assault on the person of the ambassador. Vide: Satow, Guide To Diplomatic Practices, (Longman 1978) P.121

Count Ghillemberg, the Swedish Minister to the Court of St. James 1716 was implicated in a vast diplomatic intrigue directed against King George 1 and engineering an insurrection in Scotland with the assistance of a Swedish military force. A letter which contained his report was intercepted by the Danes who informed London. The diplomat was detained and his archives were seized. The Spanish ambassador lodged a formal protest. As a retaliatory measure the Swedish government ordered the

It was these acts of abuse on diplomats that necessitated the establishment

arrest of Mr. Jackson, the British Minister resident in Stockholm. The crisis was solved after the exchange of Ghillemberg and Jackson. Vide: Kazimierz Grzbowski, "The Regime Of Diplomacy And The Tehran Hostages" 1981 30 I.C.L.Q. P.43

In 1735, when the Polish King died, Russia intervened militarily to stop one of the candidates who was not favourable to them from becoming King. In the event, the Russians arrested the French ambassador for giving support to the candidate they did not favour. The ambassador was accused of interfering in the internal affairs of Poland and violating its legal and political order. Ibid

The professional standards which had become accepted within the Asante diplomatic corps were interestingly exemplified in the mild protest registered by the members of the Asante Embassy to London against their mistreatment, prior to their embarkation in 1895 by the Governor of the Gold Coast. The protest stated:

We cannot bring this to a close without mentioning the fact that since our arrival here (Cape Coast) we have been closely studying his Excellency's policy towards us, and have observed how contemptuously he has been treating individual members of the Embassy, and have satisfied ourselves as to the direction in which it tends, and shall lay the same before our royal master; who has invariably treated Her Majesty's officers to his court with unvarying respect and esteem. We would rather leave it with the civilised world to say whether any person or persons who are the bearers of a message from one party to another, professedly friendly, should be treated other than courteously, gentlemanly, and at least for the time being, as un-amenable to the laws of the land of which they are sent.

Our royal master, we may at once assure you, for the information of his Excellency, is so immoveable desirous of maintaining peace and mutual regard between Ashanti and the Government, that no petty annoyances would be allowed to defeat his aim and good will.

Correspondence relating to affairs in Ashanti Accounts and Papers, V11 as cited by Ivor Wilks in his Asante In The Nineteenth Century. The Structure and Evolution of a Political Order (Cambridge University Press, 1975) P.325

of the privileges and immunities.²⁶ When an abuse, injury or murder was inflicted on the person of the diplomats, the sending State would in revenge attack the receiving State.²⁷ It was important, therefore, that foreign envoys should be given due respect and that nothing should be done to violate their honour and dignity.²⁸

It is also submitted that the privileges and immunities were the result of the honour and respect given to the sovereign foreign ruler under the theory of personal representation. Since the envoy is the personification of the foreign sender, the honour that deserves being accorded to him was that which deserved being given to the sovereign sender. It was in that respect that an abuse of a diplomat amounted to an abuse of a sovereign ruler by whom he was sent. However the theory of personal representation began to fade away as a result of the downfall of empires and kingdoms.²⁹

Since diplomats were special representatives of their majesties, the emperors and kings, a method by which protection of the interest of their sovereign rulers could be assured was necessary to enable the envoy ^{to} carry out the duties and official function of their majesties without the least interference

²⁶ For example the Diplomatic Privileges Act 1708 U.K (Often known as the Act of Anne) is the result of violation of diplomatic inviolability.

²⁷ Nicolson Harold, Diplomacy, (Oxford University Press, London, 1963) PP.17- 19

²⁸ The privileges and immunities are now codified into an international instrument, the 1961 Vienna Convention on Diplomatic Relations. The 1973 Convention was formulated to prevent and punish Crimes against internationally protected persons including diplomatic agents.

²⁹ Satow, Op.cit., P.106

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from the receiving State.³⁰ The receiving State was by this idea required to give special exception to the general rule; 'That everyone is bound by the law'.

4.4.2 Terrorism ^{against} on diplomats by private individuals or political organisations.

The second type of violations against diplomatic inviolability is that which is carried out by private individuals or political organisations. According to our working definition of the term terrorism these violations amounts to terrorism.³¹ Political terrorism is the resurgence of political murder and kidnap and seen as a strategy of political organisations who feel that their causes have been suppressed by their respective governments. They contend that the only way out is a resort to political violence in all forms. In doing so they seek to bring their grievances into the international arena. They also believe that by resorting to violence, the world will come to their sympathy and assistance. Therefore political bombings, kidnapping and assassinations are real and frequent occurrences for the struggle of political organisations.³²

³⁰ Murty B.S, The International Law Of Diplomacy; The Diplomatic Instrument And World Public Order, (New Haven Press, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1989) PP.337 - 8

³¹ It is learnt that individual terrorism (not on diplomats) is traced back to the Ancient Greek and Roman Republics, hence the assassination of Julius Caesar while group terrorism first manifested at the end of the middle ages. Friedlander Robert, Op.cit, P.7

³² On August 28, 1968, The United States ambassador to Guatemala, John G. Mein, was shot dead during a kidnap attempt. In 1969, Mr. Charles Burke Elbrick, the United States ambassador to Brazil, was kidnapped by men who ambushed his limousine in a street not far from the embassy in Rio de Janeiro. The revolutionary movement (MR 8) demanded the release of 15 prisoners and their safe conduct to Algeria, Mexico or Chile, within 48 hours or else Mr. Elbrick, would be executed. On September 5, the Brazilian government, agreed to the demands and to

Terrorism is an act of political desperation rooted in the belief that violence is legitimised when it becomes a form of public protest designed to compel the government agents to act in a particular way. Political deprivation or frustration is the key impetus of violence. The common denominator therefore for the terrorist activities has been the political protest.³³

Serious political terrorism against diplomats by private individuals and political organisation is a late development in the second part of the 19th Century and took deep roots in the twentieth century. There are very scant records to show that the act of hostage-taking of diplomats by private individuals or organisations has existed for a long time. Even though there were political organisations that resorted to political violence this did not take place against diplomats until lately.³⁴

4.5 REASONS FOR TERRORISM AGAINST DIPLOMATS

Researches on contemporary terrorism or revolutionary terrorism show that the political organisations who have reasons to believe that they have been oppressed have now found diplomats a favourable instrument for their cause. The terrorist movement select diplomats because they represent the epitome of the enemy.³⁵

broadcast the MR-8 Manifesto and the following day flew the 15 prisoners out to Mexico. Two days later the ambassador was released. The FALN kidnapped the Deputy Chief of the United States military mission and released him about eight days later with some shoe polish in his hair

³³ Friedlander Robert, Op.cit, P.7

³⁴ Stohl Michael, Op.cit, P.147

³⁵ Bell Bowyer J, Terror, Op. cit, P.18

First, it enables them to seek bargain with and or concessions from either the receiving State, the sending State or any other third party on commission or omission of an act on demand. By kidnapping diplomats or taking them as hostage the political organisations tend to coerce the parties concerned to give in to their demands. These political organisations have to a certain extent succeeded in achieving their these goals.³⁶

For example on February 17, 1980, there was a large reception at the Dominican embassy in Bogota. Many foreign diplomats had been invited. Across the road there was a University playground where 25 members of the M 19 movement arranged to play football as a cover prior to their taking over the embassy. When one of them who was on the watchout signalled that the guests had arrived, the referee blew the whistle and all the members of the group took up arms and ran across the road into the embassy compound killing the embassy guard. They swiftly moved into the building, seized it, and took 75 people hostage including 14 ambassadors. They eventually released all non-diplomatic staff and one ambassador keeping the rest for a period of two months. They demanded the release of 300 prisoners and a ransom of \$50ⁿ Million. The Colombian government refused to negotiate on either demand but the businessmen from countries whose ambassadors had been held volunteered to pay a ransom of \$2.5ⁿ Million upon which the Colombian government agreed that the terrorists and their hostages would be flown to Havana where on arrival the diplomats were released.³⁷

³⁶ Paul Wilkinson, Terrorism And The Liberal State, (The Macmillan Press Ltd, 1977). P.212

³⁷ Clutterbuck Richard, Kidnap, Hijack and Extortion. (London: The Macmillan Press Ltd. 1987) P.191

On March 1, 1973 there was a diplomatic reception in honour of the American ambassador ^{to} in Sudan at the Saudi Arabian embassy ⁱⁿ at Khartoum. The Charge' d'affaires, Curt Moore, was about to be replaced by the new ambassador Mr. Cleo Noel. ^{On that} During the occasion the Black September broke into the embassy waving guns and other ammunition. ^S some of the guests escaped over the fence wall, while others were allowed to leave through the main entrance. But Mr. Curt Moore, Mr. Cleo Noel, the Belgium Charge' d'affaires, Guy Eid, the Saudi ambassador and the Jordanian Charge' d'affaires were taken ^{as} hostages.

The Black September demanded that the Jordan ^{an} government released seventeen members of their group including Abu Daoud and that, the Americans free Sirhan Sirhan the convicted killer of Robert Kennedy. In addition, the government of Israel was required to release Arab women Fedayeen prisoners and the Germans were to release members of the Baadar Meinhof. The negotiations were not fruitful because Jordan refused to comply with the demands while the American President Mr. Richard Nixon, declared before television cameras that the United States cannot and will not bow to blackmail. While security forces and newsmen waited to see the developments, a muffled burst of shots were heard inside the building some few minutes after 9.00 p.m. It was later learnt that Moore, Noel and Eid had been killed. A few hours later the Fedayeen surrendered to the security forces in Sudan. They were tried and convicted but the sentence was later commuted. They were handed over into the custody of the Palestine Liberation Organisation.³⁸

³⁸ Ibid, P. 89 See also Louis M. Bloomfield / Gerald FitzGerald, Crimes Against Internationally Protected Persons: Prevention And Punishment, An Analysis of the 1973 Convention, (Praeger Publishers, Inc. 1975) P.20.

Secondly, these political organisations do, by taking diplomats as hostages, seek to publicise their cause.³⁹ Since the diplomats are international persons, due attention is usually given to any incident that affects them. Therefore, these organisations use diplomats as a channel through which their grievances could be taken⁴⁰ or heard in the international arena. They choose diplomats whom they consider valuable or who may be considered influential to their cause. This may explain why third world diplomats are generally found to be free in their movements with a relaxed security and many of them use the underground train in London whereas the diplomats of the first world or for that matter the developed world are not as free, and have a more tight security. They are in most cases captives of their own career.

The usual demands put forward by these organisations are; inducing payments of ransom, release of political prisoners or detainees and gaining publicity. It will be recalled that in 1904, Raisuli, a Moroccan rebel kidnapped an American and an Englishman (these were not diplomats) and demanded that the United States and the British governments compel the Sultan of Morocco to comply with his ransom, prison release as well as other demands.⁴⁰ Later on these demands became

³⁹ When President Suharto paid a State visit to Holland in Sept 1970, a group of Ambonese militants seized the Indonesian Embassy in the Hague with apparent aim of publicising their cause and trying to force the Indonesian President to negotiate the future of the Ambon. Wilkinson Paul, Terrorism And The Liberal State Op.cit, P.182

⁴⁰ Livingstone, Kress and Wanek, International Terrorism in the Contemporary World (Greenwood Press Inc, 1978) P.26.

part and parcel of the terrorism bargain.⁴¹ and we direct that every envoy who comes to our country, whether he be Christian, Moor or Jew shall come and go in safety and security through all our dominions, and we forbid anyone to do him violence, wrong or harm or injure him in property.

4.6 RESPONSES TO TERRORISM AGAINST DIPLOMATS

Diplomats have, as a result of these activities, come to be an integral part of revolutionary terrorism. As a result of these acts by the political organisations and private individuals, safeguarding the personal inviolability of the diplomatic agents required increased protection and legislation.

It will be seen that a number of countries ^{have} enacted laws which were aimed at safeguarding the person of a diplomat.⁴² To mention a few:

King Alphonso X issued an order in the ^ttwelveth century that guaranteed the inviolability of diplomats and the immunities from suit in court.⁴³ The Law of Castile, 1348 (Law 1X, Part VII, Title XXV of Las Siete Partidas) which was probably completed in 1263 by Alphonso X of Castile provides as follows:

Envoys frequently come from the land of Moors and other countries to the court of the King, and although they may come from the enemy's country and

⁴¹ On January 23, 1973 the United States ambassador to Haiti Mr. Clinton E. Knox was seized by two men and a woman while driving to his residence in the hills outside Port au Prince. He was taken out of his car and driven in another car to his residence at gunpoint. He was there taken hostage. They demanded the release of thirty one prisoners, safe passage out of Haiti and a ransom of US \$500,000.00. The United States refused to pay the ransom but Haiti came up with \$70,000 which the kidnappers accepted in addition to the release of twelve prisoners. In Mexico the government after consultation with the United States and the Haiti governments agreed to the demands of the kidnappers. It was later that Knox and Christenson were released. The kidnappers and their collection were flown to Mexico where they were given sanctuary but the ransom was confiscated by the Mexican government.

⁴² Satow, Op.cit., P.121

⁴³ M.Ogden, Juridical Bases of Diplomatic Immunity (1936) hereinafter referred to as M.Ogden, Juridical, P.46

by his order, we consider it proper and we direct that every envoy who comes to our country, whether he be Christian, Moor or Jew shall come and go in safety and security through all our dominions, and we forbid anyone to do him violence, wrong or harm or injure him in property.⁴⁴

The English common law and the statute of Queen Anne 1708 asserted almost in similar terms that a person is guilty of a misdemeanour who, by force or personal restraints, violates any privilege conferred upon the diplomatic representative of foreign countries or who sues or persecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country or the person of a servant of any such representative is arrested or imprisoned.

The law of the United States, (the United States code section 252-254 of the title 22, Act of April 30, 1790) states that, 'Every person who assaults, strikes, wounds, imprisons or in any other manner engages in violence against the person of an ambassador or a public minister in violation of the law of the nations shall be imprisoned for more than three years and a fine at the discretion of the courts.'⁴⁵

It is emphasized that the origin or sources of diplomatic law are generally derived from or based on customary rules of international law. And as a result the States owe their obligation, not to any treaty or Statute but to the rules and usages that have been in practice for generations.

The United Nations⁴⁶ and other regional bodies⁴⁷ have come up with a

⁴⁴ Traite du juge competent des Ambassadeurs (The Hague 1723) P.168, cited by Montell Ogden Op. cit., P.461

⁴⁵ G.E. Do Nascimento E Silva, Diplomacy in International Law(1972), P. 92.

⁴⁶ See: The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), The Hague Convention For The Suppression Of Unlawful

number of conventions in order to combat terrorism against diplomats and among these instruments is the 1973 Convention on The Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents which is the central theme of this study.

4.7 CONCLUSION

This brief study on terrorism and diplomats finds that there are various reasons for the causes of terrorism. The study also ^{shows} discusses that the most common denominator in all terrorist phenomena is the political protest. Although all political protest ^s begin as domestic violence or uprising, eventually the protest ^s crosses ⁱⁿ borders to other States. In the event, crimes which are perpetrated in the circumstances of political protest are committed beyond the original borders in which they originated. The transformation of political protests into violence is a sign of frustration by political organisations which press for reform or change. In doing so the political organisations endeavour to attract the world attention and sympathy to their causes. The actors in the political protest sometimes manifest their struggle through killings, kidnappings and other forms of violence. They are often indiscriminate and no one is innocent? Diplomatic agents are chosen by the actors in political protests for their role and status at the international arena. This is because anything that affects them causes much uproar and is

Seizure of Aircraft (1970), The Montreal Convention For The Suppression Of Unlawful Acts Against The Safety Of Civil Aviation (1971), The Convention Against The Taking Of Hostages (1979).

47 Reference is being made to: The Convention To Prevent and Punish The Acts Of Terrorism Taking The Forms Of Crimes Against Persons And Related Extortion That Are of International Significance (1971), The Organisation Of The American States Inter - American Convention On Extradition (1981) and The European Convention On The Suppression Of Terrorism (1977).

given much wider coverage than other violations. The governments too, would be more willing to succumb to the demands of the actors if the captives are diplomats. The international community has responded by domestic legislations, regional as well as international treaties and conventions to protect the welfare of diplomats. One of these instruments is the 1973 Convention which is the central theme of this study.

5.1 INTRODUCTION

The need for the 1973 Convention was stressed upon the Commission in a letter received from the President of the Security Council dated May 14, 1970.¹ It illustrated the need for a draft convention due to increasing attacks on diplomatic agents and other internationally protected persons. These attacks not only affected the personal safety and freedom of innocent persons, but also prevented them from exercising their official functions, thus hampering the normal course and safety of international relations, the communication between governments and international organisations and friendly relations and cooperation between States.² The principle involved, as viewed by some of the United Nations representatives, was that of the inviolability of diplomatic agents and a consequent obligation on the part of States to protect internationally protected persons.³ Others felt that there was a need to protect and prevent attacks on diplomats by

¹ U.N Doc S/9789 cited by Bloomfield Louis /FitzGerald Gerald, Crimes Against Internationally Protected Persons: Prevention And Punishment; An analysis of the U.N Convention, (Praeger Publishers, Inc. 1975) pp. 47 - 49

² (1972) 1 Y.B.I.L.C. P.6

³ Ibid P.16

CHAPTER V

APPREHENSION, PROSECUTION AND PUNISHMENT OF OFFENDERS.

5.1 INTRODUCTION

The need for the 1973 Convention, was stressed upon the Commission in a letter received from the President of the Security Council dated May 14, 1970.¹ It illustrated the need for a draft convention due to increasing attacks on diplomatic agents and other internationally protected persons. These attacks not only affected the personal safety and freedom of innocent persons, but also prevented ^{who} them from exercising their official functions, thus hampering the normal course and safety of international relations, the communication between governments and international organisations and friendly relations and cooperation between States.² The principle involved,³ as viewed by some of the United Nations representatives, was that of the inviolability of diplomatic agents and a consequent obligation on the part of States to protect internationally protected persons.³ Others felt that there was a need to protect and prevent attacks on diplomats by

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² (1972) 1 Y.B.I.L.C. P. 6

³ Ibid P. 16

prosecuting those who commit such crimes and by ensuring that they do not escape punishment by taking refuge in other countries.⁴

The Lacuna in the law that is found in the 1961 Convention was the direct concern of the international community which has great regard for the welfare of diplomats. The United Nations therefore found it necessary to come up with another convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents.⁵

This study therefore seeks to analyse the provisions enshrined in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents.

5.2 THE OBJECTIVES OF THE 1973 CONVENTION.

The main objective of the 1973 Convention is partially to fill one of the gaps that had been created by the 1961 Convention. The United Nations, therefore, served this objective by adopting it.⁶

The 1973 Convention does not deal with the violation of the diplomatic immunity by receiving States or the abuse of diplomatic immunity by diplomats. The Convention is also meant not to address crimes or acts of terrorism perpetrated by diplomats or by sending States through the diplomatic missions. We hope that future

⁴ U.N Doc A/8892 cited by Bloomfield/FitzGerald, Op.cit., P.49.

⁵ (1972) 1 Y.B.I.L.C., P.15

⁶ 1972 1 Y.B.I.L.C., P.5

researches would look into these two issues.

It had been suggested at the formulation of this convention that there were enough laws to cater for the violation of diplomatic immunity by States⁷ and therefore, the Convention was devoted to the criminal acts of political organisations and private individuals.⁸ It may be suggested that since the establishment of diplomatic relations is by mutual consent, member States would behave themselves and would not violate the inviolability of diplomatic agents.⁹

⁷ (1972) 1 Y.B.I.L.C. PP.11, 15 and 16

⁸ One of the problems concerning offences committed by the governments of receiving States against diplomats, is that, it is customarily a matter of mutual settlement and as of now it appears that the world can do very little to punish a State that commits any violations. This is basically due to the fact that diplomatic relations are established by mutual agreement. It is, therefore, by the same means that misunderstandings or conflicts can be solved. Unfortunately, this method is not so effective and does not seem to solve these problems.

⁹ This study does not overlook the economic sanctions and suspension of diplomatic relations as means of reacting to these abuses and violations. But these methods, whenever applied, have proven to be fruitless. The decisions of the International Court of Justice, have also been without any force. The issue reverts to the same recourse that such conflicts should be solved by mutual understanding. The normalization of diplomatic relations between Iran and the United States, Britain and Libya, reverts to the same means of settlement. The international community is probably left with very few choices under the United Nations. But so far there are no cases in which the United Nations has compelled a State to abide by its resolution on the abuse of diplomats. In the case of the United States diplomats and consular staff in Teheran, the Security Council of the United Nations, in its resolution 457(1979), adopted on December 4, 1979, requested the Secretary General to lend

The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, was formulated against the background of the increased acts of terrorism ^{against} on diplomatic agents.¹⁰ The focus of the United Nations, in resolution 2780 of the General Assembly was directed towards crimes committed by private individuals and political organisations.¹¹

The 1973 Convention¹² was opened for signature ⁱⁿ at New York on

his good offices for the immediate implementation of the resolution. The resolution called on the Iranian government to release the United States diplomats and consular staff. When the Secretary General came back from his mission to Iran, he informed the Security Council, that at that time the government authorities in Iran, were not prepared to respond to the calls of the international community for the release of the hostages. The international community can do very little to bring about a compliance of states which violate the diplomatic immunity. Vide: Pretaczinik Franciszek, Op.cit, PP.258-9

10 (1972) 1 Y.B.I.L.C., P.5

11 Bloomfield Louis M./ FitzGerald Gerald F, Op.cit, P. 47.

12 The Commission had been requested by resolution 2780 of the General assembly to study the question dealing with the offences committed against diplomats and other internationally protected persons under international law. The working group considered the draft documents and observations which had been prepared by the member States: Draft conventions by Uruguay to the general Assembly; Draft conventions and observations by Denmark, Convention to Prevent and Punish the Acts of Terrorism Taking The Form of Crimes against Persons and Related Extortions that of International Significance, of The Organisation Of American States 1971; The International Civil aviation Organisation convention, The Convention For The Suppression of Unlawful Seizure of Aircraft 1970 and The Convention For The Suppression Of Unlawful Acts, Against The Safety Of civil Aviation. (1972) 1 Y.B.I.L.C., P.185

14 December 1973.¹³

The preamble reiterates:

...The purposes of the United Nations Charter concerning the maintenance of international peace and promotion of friendly relations and co-operation among States. Considering that crimes against diplomatic agents and other internationally protected persons jeopardizing the safety of these persons create a serious threat to the maintenance of international relations which are necessary for co-operation among States.

Convinced that there is an urgent need to adopt appropriate and effective measures for the prevention and punishment of such crimes,

as reasons for the preparation of this instrument by which effective and appropriate measures can be found for the prevention and punishment of such crimes.

¹³ Prior to the 1973 Convention, steps had been taken both at regional and international level to strengthen measures pertaining to the prevention and punishment of crimes against the internationally protected persons, including diplomats. For example:

1. The 1937 Geneva Convention On "Prevention Of Terrorism."
2. Resolution VI Of The American Foreign Ministers Held In Havana In 1940. It was resolved that the governments should adopt measures to prevent and suppress activities directed by foreign governments or groups.
3. The Convention On Special Missions (1969) adopted by the General Assembly Resolution 2330 (XXIV) of December 8, 1969.
4. The General Assembly of The Organisation Of American States in a meeting held on June 30, 1970, resolved to condemn acts perpetrated against officials of foreign states.
5. The 1971 Organisation Of American States Convention "On Prevention And Punishment Of Acts Taking The Form Of Crimes Against Persons And Related Extortion Of International Significance."
6. The Council Of Europe Ministers' Committee adopted a resolution on December 11, 1970 on "Protection Of Members Of Diplomatic Missions And Consular Posts."

Inaccurate quotation

5.3 CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS.

Article 1 of the 1973 Convention sets out the meaning of internationally protected persons, 'ratione personae' as The Head of the government, the internationally protected persons of State or international organisations under international law or international agreements¹⁴, family members of such officials. The Commission did not consider cabinet ministers to be part of this Article.¹⁵

Article 1(2) defines "alleged offender" as a person ^{as to} ~~against~~ whom there is sufficient evidence to determine prima facie that he has committed or participated in the crime. *What crime?* Gr.

Article 2 lists the following as constituting crimes 'ratione materiae' against internationally protected persons including diplomats;

- (1). The intentional commission of :
 - (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
 - (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
 - (c) a threat to commit any such attack;
 - (d) attempt to commit any such attack; and
 - (e) an act constituting participation as an accomplice

¹⁴ Existing agreements such as the 1961 Vienna Convention, the 1963 Vienna Convention on Consular Relations, The 1969 Convention on Special Missions, The General Conventions of 1946 and 1947 on the Privileges and Immunities of the United Nations And Specialised Agencies. (1972) 1 Y.B.I.L.C. P.187

¹⁵ International Law Commission Draft Articles, (1972) 11 I.L.M. P.979

3.4 The ~~in~~ in any such attack shall be made by each State Party a crime under its internal law. F

The same article under clause 2 provides that:

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

3. Paragraphs 1 and 2 of this article in no way derogate from the obligation of State Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person.

Article 2 deals with two issues: 13

First, it determines the crime 'ratione materiae' and secondly, Gr
the competence of State Parties to prosecute and punish offenders. The article describes crimes such as the intentional commission of murder, kidnapping and other attacks upon the person of the diplomatic agent. The violent attack upon the premises of the mission, residential premises and means of transport of the internationally protected persons. Incomplete sentence

The general expression "violent attack" was used to avoid difficulties in definitions which may arise in connection with the listing of the crimes. It was urged that the crimes in Article 2(a) are usually found in the penal codes of State Parties. Each State Party is therefore at liberty to utilise local definitions.¹⁶ It is however noted that Article 2 of the 1973 Convention, unlike Article 1 of the OAS Convention, does not describe these crimes as constituting terrorism.

¹⁶ (1972) 11 I.L.M. PP.983 - 6, See also (1972) 1 Y.B.I.L.C., PP.187 - 196

5.4 The Motive of The Crime

This study finds no single objection to the wording of Article 2 in which crimes are illustrated. However the strongest objection relates to the motive and circumstances in which crimes are committed.¹⁷ In other words, some States believe that if these crimes are committed in the course of struggle for liberation or self-determination, the offence would be politically motivated.¹⁸

The issue as to whether a crime is politically motivated or not has been the main reason for lack of an overwhelming ratification of the 1973 Convention.¹⁹ States which support liberation organisations and self-determination were uneasy with

¹⁷ Members observed that the primary question was how the international community could protect itself against acts of terrorism and not the motive of the criminals. (1972) Y.B.U.N, P.642

¹⁸ In 1972 the U.S. draft convention for the prevention and punishment of certain acts of international terrorism was decisively rejected by the General Assembly because it was considered to be directed against liberation movements. Murphy John F, The Future, Op. cit, P.55 See also the General Assembly resolution 40/61 1985 which affirm the inalienable right to self determination and independence of peoples under the colonial and racist regimes and other forms of alien domination, and upholding the legitimacy of this struggle, in particular the struggle of national liberation movements, G.A. Res. 40/61 U.N. GAOR supp (No. 53) at P.301, U.N Doc A/40/53 (1985).

¹⁹ Reports from the office for combatting terrorism of the U.S Dept. of State provide that diplomats have become the major target of international terrorism. Despite diplomatic increase in attacks there are a few States which are Parties to the 1973 Convention, Murphy John F, The Future, Op.cit, P.46

the general application of the provision and sought to exclude incidents in which liberation organisations or movements were involved. Burundi, for example, made the following declaration:-

In respect of cases where the alleged offender belongs to a National Liberation Movement recognised by Burundi or by International Organisation of which Burundi is a member and their actions are part of their struggle for Liberation, the government of the Republic of Burundi reserves the right not to apply to them the provisions of Article 2 and 6 paragraph 1.²⁰

The liberation movements do not consider some people to be innocent.²¹ On the contrary, the objective of these organisations is to demoralise everyone.²¹ It is meant to generalise a situation of fear among the people. The movements consider anyone who does not resist an oppressive government as one condoning it.²² Therefore some diplomats are kidnapped and some are killed with violence. The 1973 Convention does not refer to crimes 'ratione Materiae' in Article 2 as common crimes, nor does it refer to them as political offences²³. Article 2 of the 1971 OAS Convention specifically describes the crimes against internationally protected

²⁰ Multilateral Treaties Deposited With The Secretary General, Op.cit, P. 84.

²¹ Friedlander Robert A, Terrorism: Documents Of International And Local Control, (V.1 Oceana Publications, Inc. Dobbs Ferry, N.Y. 1979), P.1

²² Neil C. Livingstone, The War Against Terrorism (Lexington Books, 1982), P. 135.

²³ One of the reasons for lack of overwhelming ratification of the 1973 Convention is found in the description of offences as "political offences" or "common crimes" in local legislation and extradition procedures.

persons as common crimes. However the 1973 Convention leaves it upon the individual States as well as judicial courts to investigate and decide what amounts to common crimes or political crimes.²⁴

5.4.1 Judicial Decisions

which courts?

This section of the study looks at the decisions of the courts for the definition of political offences.

In Re Castioni; The British Court of the Queen's Bench held that a political offence must be committed in the course of political disturbance during which two or more parties in the State are contending and each seeks to impose the government of its choice.²⁵ This is a celebrated case and has been referred to by many writers on political offences exception.²⁶

In Re Giovanni Gatti, a French Court of appeal of Grenoble described political offences as those which injure the political organism; which are directed against the constitution of the

²⁴ The term 'common crime' is sometimes used to refer to 'political crime'. However a 'political crime', is not the same as a 'political offence'. A political offender is a person accused of a 'political offence' and is eligible for asylum and is not subject for extradition whereas a political offender of a common crime is a person accused of or convicted for a political crime and as such is not eligible for asylum and is subject to extradition. Vide: Przetacznik Franciszek, Op. cit, P.104

²⁵ L.R. (1891) 149 IQB, P.156

²⁶ Re. Meunier (1894) 2 Q.B, P.415 and Quinn V Robinson (111) 783 F.2nd PP.776, 811 (9th circ).

What is the difference?

government and against the sovereignty; which trouble the order established by fundamental laws of the State and disturb the distribution of powers. The Court held that ^{the} political offence affects the political organisation of the State whereas the common crime affects organisations other than those of the State.²⁷

The Chilean court In the Matter of the Extradition of Hector Jose Campora Nas and others, 1957, had the following definition. "a political offence is that which is directed against political organisation of the State or the civil rights of its citizens and that the legally protected rights which the offence damages are constitutional normality of the country affected."²⁸

The definition given by the decided cases have maintained the traditional interpretation of political offences.²⁹ It is most likely that certain courts would treat crimes against diplomats as political offences. It is also to be considered that some courts may as well be influenced by the foreign policy of the government of the State in deciding crimes of terrorism.³⁰ However, it was asserted during the formulation of this Convention that the existence of the motive for the commission would not shield the

²⁷ Przetaczick Franciszek, Op. cit., P.105

²⁸ Ibid .

²⁹ Quinn V. Robinson 641 F.2d 504 (7th Cir. 1989).

³⁰ Yarnold Barbara M, International Fugitive. A New Role For The International Court Of Justice, (Praeger, N.Y. Westport, Connecticut, London, 1991) PP.31- 46

offender from prosecution.³¹ Therefore these crimes are common crimes and not political offences.

5.5 EXTRATERRITORIAL JURISDICTION

Article 3 provides that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over crimes set forth in Article 2 in the following cases:

(a) When the crime is committed in the territory of that State on board a ship or aircraft registered in the State;

(b) When the alleged offender is a national of that State;

(c) when the crime is committed against an internationally protected persons as defined in Article 2 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the State mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Pursuant to Article 3, each State shall enact municipal law to establish jurisdiction over crimes mentioned in Article 2. Although the 1973 Convention requires States to legislate offences and punishments for crimes, it does not actually mean that there were no States with such provisions prior to this Convention.³²

³¹ (1972) 1 Y.B.I.L.C. P.190

³² For example, the Bolivian Penal Code of November 3, 1834 provides that:

An attempt against the life of an official of a foreign state shall be condemned to prison from four to ten years and a murder of such official shall be punished by the death penalty.

The Polish Penal Code of January 1, 1970 says that: a person who commits an active assault upon an official of a foreign state (the head of the diplomatic representative) shall be subject to the penalty of

The United States Code (amended in 1972 and 1976) section 116(a) of Title 18 of the United States Code (as of October 8, 1976), as amended by the Act of the Prevention and Punishment of Crimes Against Internationally Protected Persons, states that, murder in the first degree of foreign official, official guest or internationally protected person shall be punished by life sentence. The attempt of such a crime is punishable by imprisonment of not more than twenty years. Conspiracy to murder of an internationally protected person (section 1117), is liable to imprisonment for any term of years or for life; conspiracy to kidnap is subject to the same penalties. Under Section 112(a) of title 18 of the United States Code (amended 1976), assault, attack, injury, imprisonment, or violence to a foreign official, official guest, or internationally protected person or any attack upon the person or liberty of such a person shall be fined by not more than \$10,000 or imprisonment or both.³³

The United States amendments to those sections, though may not necessarily be the result of this Convention, meet the requirement of the 1973 Convention which provides that State Parties should legislate to make crimes which violate diplomatic immunity punishable by severe punishments. On July 11, 1985 Senator Arlen Specter introduced a bill that expanded the United States

deprivation of liberty from one to ten years. Przetacznick Franciszek Op.cit., P.70

jurisdiction to include terrorists who attack American nationals abroad. The amendment to title 18 of the U.S Code, Section 1202 grants U.S. court, jurisdiction to prosecute any foreign national who, in an act of international terrorism, attempts to kill, kills assaults or make any violent attack upon any American national. It also provides for the prosecution of any terrorist found within the territorial limits of the U.S regardless of the situs of his offence.³⁴

This study finds that there are three basic problems regarding legislation, apprehensions and prosecution of offenders:

First, the legislation on crimes and punishments of crimes committed against internationally protected persons has not been uniform and therefore the description of crimes and punishments in municipal legislation differ from one country to another. It is the prerogative of each State Party to adopt its own legislation. Therefore some of these legislations consider appropriate penalties which take into account the grave nature of crimes while others do not. The idea of appropriate penalties which take into account the grave nature of crimes might be the result of earlier legislations of increased punishment when an offence is committed against internationally protected persons. Many States had increased

³⁴ S.1429, 99th Cong. First Session (1985) quoted by Donnelly L, "Extraterritorial Jurisdiction Over Acts Of Terrorism Committed Abroad: Omnibus Diplomatic Security And Antiterrorism Act Of 1986" (1987) 72 C.L.R. P.606.

punishments prior to the 1973 Convention.³⁵ The difference in punishment from one country to another and from one case to another indicates some difficulty encountered by the courts in sentencing the perpetrators.³⁶

³⁵ According to the Swedish Penal Code of February 16, 1864: if violence or other ill-treatment is directed against an official of a foreign state, "the offender" if the ordinary punishment is forced labour of not more than ten years, shall be punished with forced labour for life. If the ordinary punishment is less, it shall be increased by two years above the maximum. Where the ordinary punishment is imprisonment or fine, he shall be punished with forced labour.

Under Article 20 of San Marino Republic's Law: an offence committed against an official of foreign state shall be punished by "double" penalty provided for the commission of such offence against private persons. The same legislation appear in Article 141 of the Paraguayan Penal Code 1914. Vide: Przetacznic Franciszek, *Op.cit.*, PP.69 - 70

³⁶ In 1971, the Pakistan Criminal Court, sentenced to death M.Feroz Abdullah who had killed Z.Wolniak, the Polish Vice-Minister, at the Karachi airport, in 1970. The Turkish Military Court, in Istanbul, gave death sentences to two men and three women who killed the Israeli Consul General Mr. E.Elrom. The Chinese People's High Tribunal in the Peking Municipality pressed for a death sentence to Cheng Chick for the surprise attack and serious wounding of E.Lerary, the wife of a staff member of the French Embassy in Peking in 1975. In 1978 the Cypriot Court, passed a capital punishment upon S.M. Khadar and Z.H. Ahmed al-Ali, for the murder of Y.El Sabai, a special envoy and personal friend of Egyptian President, A.Sadat, the Cypriot President later, commuted to life imprisonment. In 1972, the Brazilian Military Tribunal imposed a life sentence upon those who had kidnapped E.Von Holleben, the German ambassador in 1970. Further the court in Los Angeles, gave a life imprisonment to G. Yanikian, who had killed M.Baydar, the Turkish Consul General in Los Angeles in 1973. The court in Rome, sentenced Mehmet Ali Agca, a Turkish, to life imprisonment for making an attempt on the life of the Pope in 1981. The supreme court of Transvaal (South Africa) committed A. Protter to prison for 25 years for occupying the premises of the Israeli consulate in

Secondly, it is submitted that although these offences are grave in nature and should be seen within that context, the perpetrators of these crimes should not be tried by military courts, or other tribunals,³⁷ as in most cases they have no legal procedures where the accused are supposed to be heard and represented.³⁸

Thirdly, the practices of the States with regard to the apprehension and punishment of the perpetrators of crimes against diplomats differ. In many cases, the offenders are either given

Johannesburg and killing the vice consul. The Brazilian Court sentenced C.T de Silva to ten years in prison for his part in the kidnapping of the U.S. ambassador. The members of the South Moluccan Commando were sentenced to six years in prison by the Amsterdam Criminal Court, for the occupation of the Indonesian Consulate General in Amsterdam, in 1975.

Unfortunately when the Sudanese court sentenced the murderers of C.A.Noel, the American ambassador to the Sudan, G.C Moore, the American Charge' d'affaires and G.Eid, the Belgian Charge' d'affaires to life imprisonment, the Sudanese President, commuted the sentence to seven years and turned the murderers over to the Palestine Liberation Organisation after a shortwhile. Vide: Przetacznick Franciszek, *Op.cit*, PP.77 - 78

³⁷ Terrorists extradited by the U.S to U.K face a special court system that lacks some of the protection a defendant could ordinarily expect to have in the U.S courts. Under the Emergency Provisions enacted in reaction to the waves of terrorism in Northern Ireland, the Diplock courts (named after Lord Diplock who recommended their installation) were empowered to try offenders accused of crimes of terrorism. The courts can adjudicate without a jury. Antje Petersen, "Extradition And The Political Offence Exception In The Suppression Of Terrorism" (1992) 67 *I.L.J.*, 786

³⁸ Article 10 of the Universal Declaration of Human Rights and Article 9 of the International Covenant On Civil And Political Rights (1966).

minor sentences and sometimes even released without punishment or long sentences which extend to life imprisonment or even the death penalty. The question of the death penalty has been compounded by the Amnesty International and some developed countries, who have been campaigning against it. The thrust of the argument of the campaigns has been that such a penalty is inhuman and that it does not serve the purpose of punishment.³⁹ It is also believed that since of late there has been some miscarriage of justice, it is possible to hand down a death penalty to an innocent person.

As of now, many countries and particularly some of the developed countries have abolished the death sentence. Indeed this means that perpetrators of crimes against diplomats in those countries cannot receive the death penalty. It therefore appears that there would be severe penalty in one country for those who violate the inviolability of the diplomats while in other countries minor and sometimes insignificant penalties will be meted out to the offenders.⁴⁰

³⁹ Article 1 of the Second Optional to The International Convention on Civil and political Rights Aiming At the Abolition of the Death Penalty (1990) provides:

- (a) No one within the jurisdiction of a State Party to the present optional shall be executed.
- (b) Each State shall take all necessary measures to abolish the death penalty within its jurisdiction.

⁴⁰ Our concern here is that what costs the life of a person in one State should as well do so in another and particularly where the internationally protected persons are concerned. The authority to legislate a death penalty should not be left to each individual State

These contradictions raise the need for a uniform maximum penalty that could be applied in all cases of offenders of the diplomatic inviolability. The Convention requires State Parties to make crimes in Article 2 punishable by appropriate penalties that put into account the grave nature of the crime. The 1973 Convention leaves it upon each State Party as a prerogative to decide what should be the appropriate punishment for the offence(s).

5.6 PREVENTION OF CRIMES AGAINST DIPLOMATS

Article 4 provides that:

State Parties shall cooperate in the prevention of the crimes set out in Article 2, particularly by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.
- (b) Exchanging information and co-ordinating the taking of administrative and other measures appropriate to prevent the commission of those crimes.

Article 4 of the Convention under discussion states that parties to this Convention shall co-operate in the prevention of the crimes⁴¹ stated in Article 2 by preventing preparations for the commission of crimes whether inside or outside their respective territories and by exchanging information and taking other administrative measures which will prevent the commission of

Party. What is required is that the punishment should consider the grave nature of the offence and this could be anything short of the death penalty. If there is no way by which the severest punishment can be made uniform then the death penalty in regard to abuse of diplomats should be abolished worldwide.

⁴¹ Chapter 111 Questions relating to International terrorism, (1972) Y.B.U.N.

crimes. It is suggested that a State incurs international liability if it fails to exercise its authority to prevent terrorist acts from taking place on its territory.⁴²

Article 4 requires States Parties to be vigilant against all preparations of crimes in their territories. The events leading to the assassination of King Alexander of Yugoslavia and the French Foreign Minister in 1934, are seen as examples of the earliest preparations of such crimes.⁴³ A number of States have directly or indirectly supported terrorism by providing support to perpetrators of crimes in their own territories.⁴⁴ Although there is a significant disagreement over the definition of 'State terrorism', there are acts which have been described as terrorist acts and sponsored by States.⁴⁵ The State sponsored terrorism include financing terrorist organisation and providing training facilities and other necessary requirements for the commission of crimes in another State.⁴⁶

It is absolutely clear that if a State knows or is likely to

⁴² John Murphy, Legal Aspects Of International Terrorism: Summary Report Of International Conference, December 1978, (Westview Publishing Company, 1980) herein after referred to as John Murphy, Legal Aspect Of International Terrorism, P.27

⁴³ Friendlander Robert A, Op.cit., PP.217 - 258.

⁴⁴ (1972) 1 Y.B.I.L.C., PP.5 & 7

⁴⁵ Schlagheck Donna M, Op.cit., P.123

⁴⁶ (1972) 1 Y.B.I.L.C., P.26

know that certain preparations are being made in its territory with or without the support of the government agents for the commission of acts of violence against a diplomatic agent inside or outside that State, such knowledge amounts to State sponsored terrorism.⁴⁷ This would be the case if a State does not act to stop such preparations.⁴⁸

It is submitted that under the present circumstances it is difficult to ascertain acts which form terrorism in general. The Fifth Congress on "Prevention of Crime and Treatment of Offenders", Geneva, September 1975, focused on the phenomenon of terrorism,

⁴⁷ Article 4 of the Declaration on Rights And Duties enjoins States "to refrain from fomenting civil strife in the territory of another State, and to prevent the organisation within its territory of activities calculated to foment civil strife."

Article 2(6) of the Draft Code of offences Against The Peace and Security of Mankind, describes terrorism as "undertaking or encouragement by authorities of a State of terrorism activities in another State, or the toleration by the authorities of a State of organised activities calculated to carry out terrorist acts in another State. (1954) 11 Y.B.I.I.C, P.112

General Assembly resolution 2625 (XXIV) 1970, provides that "Every State has the duty to refrain from organising, instigating assisting or participating in acts of civil strife or terrorist acts in another State . . . Also no State shall organise, assist foment finance incite or tolerate subversion, terrorist or armed activities directed toward the violent overthrow of the regime of another State." Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations October 24, 1970

⁴⁸ See deliberation of an international Convention on Terrorism along with the General Resolution 3034 (XXVII) U.N Doc A/AC. 160/2 (1973).

which has no accepted definition in the codes.⁴⁹ It is noticed that in one situation these acts are referred to as support for *self-determination and independence*, while in others, they are referred to as acts of violence thereby constituting terrorism.

The duty imposed on a State is to stop all those activities which might be construed as preparation for the violation of the personal inviolability of diplomatic agents. The Convention enjoins States as provided for in Article 4 to co-operate and prevent the commission of such crimes against internationally protected persons. In doing this a State is required to take all practical measures to prevent the commission of crimes, not only in her own territory but in others as well.⁵⁰ In the United States V. Arjona

⁴⁹ Wilkinson Paul, Terrorism And The Liberal State, (The Macmillan Press Ltd, 1977) herein after referred to as Wilkinson Paul, Terrorism And The Liberal State, P.173

⁵⁰ This duty finds its first expression in Article 3 of the 1937 Geneva Convention on the Prevention of Terrorism, to the effect that, "It is the duty of every state to refrain from any act designed to encourage terrorist activities directed against another state and to prevent the acts in which such acts take shape."

In Resolution VI of the Foreign Ministers' Meeting held at Havana, in 1940, it was resolved that the governments of the American Republics shall adopt within their territories all necessary measures to prevent and suppress any activities directed, assisted or abetted by foreign governments or foreign groups or individuals, which tend to subvert the domestic institutions or foment disorder in their internal political life.

While the Organisation of American States required its member states to adopt measures in their national legislation which could prevent and punish crimes of that kind and to co-operate among themselves, in Europe, the Council of Europe Ministers' Committee adopted a resolution on December 11, 1970, the "Protection of Members of Diplomatic Missions and Consular Posts." In

the court observed that, "The law of nations require every national government to use 'due diligence' to prevent a wrong being done within its own dominions to another nation with which it is at peace or to the people there of"51

To effect the prevention, a State is required to demolish the facilities being used by a group and arrest perpetrators as well as send information to the States concerned. The information should be sent to other concerned States even if the perpetrators are held in prison. This would help other parties to guard against any eventualities which might have skipped the eyes of the State where the commission of the crime was being prepared. In this regard therefore, the preparation for the assassination of the King of Yugoslavia in another country which knew or ought to have known, amounted to State sponsored terrorism.

The spirit under which Article 4 of the 1973 Convention, was formulated requires a receiving State to take appropriate steps to prevent any attack on a diplomat and to prevent the preparation of crimes. The wider implication of Article 4 requires States to cooperate and disseminate information among State Parties in order to prevent criminal offences against diplomatic agents. The duties of the state are :-

this resolution they encouraged close cooperation among European states in matters affecting the diplomats against attacks and punishments of those who perpetrate crimes against the diplomats.

- (a) to ensure that its territory is not used by anyone to prepare evil operations which violate ~~the~~ diplomatic inviolability.
- (b) (It is incumbent on the state) to refrain from encouraging the preparation of those acts.
- (c) to prevent by all necessary measures the offenders of crimes against diplomats from escaping to another country.
- (d) to share the information which the State has with others on the offender and nature of the crime.

The duty to prevent and punish offenders is very important and has always been implied in all circumstances. When the United States diplomats were taken hostage in Iran the United States, in her application to the International Court of Justice, stated that under Article 4 of the 1973 Convention the government of Iran, violated its international legal obligations to the United States in tolerating, encouraging and failing to prevent and punish the perpetrators of those crimes.

Although the final deliberation by the court did not specifically refer to the provisions of the conventions as mentioned in the statements of the United States, it was clear that there was a violation of Article 4 of this Convention when the government of Iran tolerated and encouraged the offenders.

The duty imposed on receiving States under the 1973 Convention

Vladimir Prokhorov, *Pravozachnik*, Op.cit., P.73

1944, pp.76 & 77

5.6.1 THE DUTY TO APPREHEND AND PROSECUTE OFFENDERS OF CRIMES AGAINST DIPLOMATS.

The duty of a State to punish perpetrators of crimes against diplomats has been exercised for a long time. In ancient Rome, a special tribunal existed whose main function was to deal with perpetrators of crimes against the inviolability of foreign officials and sometimes the offender could be handed over to the sending State to serve his punishment satisfactorily. In 565 B.C, Lucius Minicius and Lucius Manlius were delivered to the Carthaginian ambassador whom they had struck and were later sent to Carthage. Those who had robbed the French ambassador in Rome, in 1500, were hanged and exposed to the public. In 1720, Sweden, condemned to death her own citizens who had publicly insulted the ambassador of Louis XV.⁵² The four people who were found guilty of killing C.Von Kettler the German Minister and Sugiyama the Chancellor of the Japanese legation in Peking were given death sentences. When Vasiliev and Stein attacked Von Twardowski, the German ambassador to Soviet Russia, in 1918, they were put on the firing squad and all their properties were confiscated⁵³. In 1930, the assassin of M.Vojkor, the Soviet envoy in Warsaw, was sentenced to life imprisonment.

The State Party in which any of the crimes set forth in Article 1 has been committed shall, if it has reason to believe that the offender has fled to its territory, take such measures as may be necessary to arrest the offender and to hand him over to the authorities of the State Party to which he is extraditable. It shall also communicate to all other States concerned, directly or through

⁵² Vide: Przetacznik Franciszek, Op.cit., P.75

⁵³ Ibid, PP.76 & 77
(Revised) S. 102 - 404 (tent-Draft No.6), 1985

the Secretary General of the United Nations, all ^{the} pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

2. Whenever any of the crimes set forth in Article 2 has been committed against an internationally protected person, any State Party which has information concerning the victim and the circumstances of the crime shall endeavour to transmit it, under the conditions provided for in its internal law, fully and promptly to the State Party on whose behalf he was exercising his function.⁵⁶

This article provides that State Parties should cooperate in sharing information on terrorists. It requires the State to which the alleged offender has fled to communicate to all concerned States all pertinent facts regarding the crime(s) committed and all available information regarding the identity of the alleged offender. The information that has to be disseminated has to be accurate and precise to avoid misleading other Parties from working on information that may not be wholly true.⁵⁷ Therefore, the need for a strong intelligence capability is very important if there is to be anything done to track down the perpetrators of crimes.⁵⁸

A well-developed intelligence net-work is a necessity to do the surveillance of suspected terrorists and terrorist groups, the infiltration of their movements, development of informer networks;

⁵⁶ The Article is based on Article 4 of the Montreal, The Hague and Article 8 of O.A.S Conventions, (1972) 1 Y.B.I.L.C., P.206

⁵⁷ (1972) 1 Y.B.I.L.C., P.11

⁵⁸ Wilkinson Paul, Terrorism And The Liberal State, Op. cit., P.134

and the collection, storage and analysis of information.⁵⁹

The need for such information on computer is that it is easily retrieved than that recorded on papers. Since it requires reliable and accurate information to do this work, it is necessary to have well trained and disciplined members of the intelligence agency. Members of C.I.A and other agencies like the Mossad of Israel have had the reputation of good training. But even if the third world were able to have better equipment as well as good training, the safety and reliability of the information contained therein would be doubted as very rich terrorist groups could buy any information they need from members of such agencies. Although such information can even be bought from agencies of developed countries like the C.I.A and the K.G.B on payment of cash the situation would be worse where a third world agency is the target of information. There would be less resistance to temptations of money.⁶⁰

Another obstacle in sharing information on the movements of terrorists is the sympathy of certain countries towards these terrorist organisations and/or the fear that these organisations

⁵⁹ It would be beneficial if all countries possess computers like the Octopus at the Langley, Virginia at the Headquarters of the C.I.A. This computer is very vital for this agency as it gathers data on the terrorists movements and the details of their activities. Neil C.Livingstone, The War Against Terrorism, (Lexington Books, 1982) P.161

⁶⁰ Wilkinson Paul, Terrorism And The Liberal State, Op.cit, P.164

might retaliate against these countries. One incident among others in which cooperation was lacking was the hijack of the Achille Lauro. Although this incident did not affect diplomats as such, the fact that there was no cooperation in sharing information on the terrorists is note worthy.⁶¹

⁶¹ On October 7, 1985, a group of terrorists seized the Italian Cruise Liner, the Achille Lauro, which was leaving the Egyptian port of Alexandria, heading for another, Port Said. They demanded that Israel release fifty Palestinian prisoners. They threatened to kill hostages, starting with the American passengers. The United States promptly dispatched a special rescue team of highly trained military personnel to keep the ship in international waters. Although Italy alerted its military rescue forces it preferred to seek a diplomatic solution. On October 8, Syria refused the ship to dock and there were some indications that an American hostage had been killed. The United States did not make a rescue attempt even though it was able to follow the ship, with the help of the Israeli intelligence, into Egyptian waters. In Egypt, there were negotiations between the hijackers including Abu Abbas and the P.L.O. On Wednesday 9th October, the hijackers left the ship after which it was discovered that they had killed the wheel-chair bound American, Leon Klinghoffer. Italy, sought extradition of the four hijackers from Egypt. It was at this moment that the violation of the duty of cooperation in disseminating the information occurred. The Egyptian President falsely stated that the hijackers had already left the country and that he could not be of any assistance. When the United States learned from reliable intelligence sources that the hijackers were still in Egypt and were about to leave, they intercepted the Egyptian Air plane that was carrying them and forced it to land in Italy. Meanwhile, Egypt insisted that Abbas and his associates were still within Egyptian jurisdiction in a hijacked plane and therefore the hijackers could not be removed from the Egyptian plane. Egypt was still holding the Achille Lauro and its crew and could swap them with the terrorists. The United States Department of Justice obtained an arrest warrant for Abbas, in Washington, and required Italy to arrest him. The Italian government, however, did not see the United States request though formally correct as good enough to satisfy the factual and substantive requirements of Italian law. Eventually, Abbas was

The violation of the duty of cooperation occurred when the Egyptian President gave false information on the whereabouts of the hijackers and when the Italian government made mockery of its judicial system by allowing Abbas to leave the country and decided to try him in absentia.⁶² This was clear manifestation of the violation of the call for sharing of information about the perpetrators of crimes as well as punishing them and not giving them sanctuary.⁶³ Lack of cooperation among States has greatly aggravated the difficulties the world community has had in combatting international terrorism. This lack of cooperation constitutes State sponsored terrorism.⁶⁴

The need for all States to share intelligence to prevent terrorist attacks, assisting in the arrest and trial of the perpetrators, and cooperating to enforce sanctions against any State government which sponsors terrorism were very much to be found in the Achille Lauro case.

allowed to leave for Yugoslavia. Later on, the Italian judiciary and prosecutors proceeded to try Abu Abbas, in absentia, and was sentenced to life imprisonment. The killer of Leon Klinghoffer, was sentenced to thirty years, the second in command was handed twenty four years while the third received fifteen years.

⁶² Murphy John F, The Future, Op.cit., PP.47-9

⁶³ Heymann Philip B, "International Cooperation In Dealing With Terrorism : A review of law and recent practice." (1990) Vol. 6:1 A.J.I.L.& Pol'y, PP. 1-6.

⁶⁴ Murphy John F, The Future, Op.cit., P.40

The governments which gave sanctuary to terrorist groups were supposed to prevent ^{what attack?} such an attack promptly if they had known of the plan. Thus any ^{sharing of} ~~the~~ information between those countries and Italy, the ^{flag state} ~~home~~ of the cruiser, would have prevented the attack and the hijack. The United States, with the help of the Israeli intelligence agency, were able to ascertain which political group was actually in command. It is this same information which was ^{used} ~~shared~~ to track down the plane that was carrying perpetrators to ^{the} ~~a~~ ^{of sanctuary.} ~~sanctuary~~ State. It is noticed that cooperation is vital if arrest of the offender is to be a reality. Lack of cooperation initially prevented Italy and the United States from getting the offenders in Egypt.⁶⁵

The cooperation in sharing intelligence information is very important. The United States, Israel, Italy, Germany, Spain and the United Kingdom are reported to be sharing information on terrorist groups; their activities, organisational structure, and movements of their members.⁶⁶ It is through ^{such} ~~such~~ sharing of ^{this} ~~this~~ information that they were able to track down well-known

⁶⁵ Heymann Philip, Op.cit, P. 8 - 9.

⁶⁶ In order to combat terrorism in Northern Ireland and to restrict outside supply of arms, the United Kingdom has needed active assistance of the governments of Ireland, France and the U.S.A, Wilkinson Paul, Terrorism: British Perspectives, (G.K Hall & Co. An Imprint of Macmillan Publishing Co. N.Y. 1994), P.24

international offenders.⁶⁷ For example, Germany, was able to arrest Hamadei, who was carrying a suitcase full of explosives. He was also accused of hijacking TWA Flight 847, en route to Rome from Athens. Greece arrested Rashid who detonated a bomb on an American jet flying over Hawaii. This cooperation resulted in the seizure of a lot of weapons and equipment meant for terrorism in Europe.⁶⁸ Although these incidents did not specifically affect perpetrators of crimes against internationally protected persons, it is worth noting the importance of sharing information on terrorism.

Another case of interest in sharing information involves Georges Ibrahim Abdallah who led a small terrorist group, the "Lebanese Armed Revolutionary Factions" (FARL). The operations of this group were mainly aimed at diplomatic officials. For example, in 1982, when the deputy military attache' Lt. Col. Charles Ray was killed, FARL, claimed responsibility. It was alleged that it was the same gun that was used to kill the Second Secretary, Yecov Barsimantov, of the Israeli embassy. FARL, also claimed

⁶⁷ Article 1 of the Organisation of American States Convention "To Prevent and Punish Acts of Terrorism Taking the form of Crimes Against Persons and Related Extortion of International Significance." (Washington, February 2, 1971), obliges States to cooperate in prevention and punishment of acts of terrorism, especially kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the State has the duty under international law to accord protection. The convention formed part of the legal material used in the formulation of the 1973 Convention. See OAS. Council, Off. Rec Ser.G.Cp/Doc S4/70/Rev.1 at P.5 cited by Przetacznik Franciszek, Op.cit., P.90

responsibility for the assassination of an American General, Leamon Hunt, in Rome. Abdallah was also suspected of the assassination of the American ambassador to Beirut in 1976. The French counter terrorist officials obtained much of the information about FARL from the Mossad, the Israeli agency. This information led to the arrest and prosecution of Georges Abdallah in Paris.⁶⁹

The non-cooperation in sharing the information about the terrorist groups and their movements has led some countries to taking unilateral action against the terrorist groups with specific measures such as the use of force, economic sanctions, and diplomatic protests.⁷⁰

5.8 APPREHENSION OF PERPETRATORS OF CRIMES AGAINST DIPLOMATS.

Article 6 states that:

1. Upon being satisfied that the circumstances so warrant, the State in whose territory the alleged offender is present shall take appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. Such measures shall be notified without delay directly or through the Secretary General of the United

⁶⁹ Ibid, P. 27.

⁷⁰ Article 18 of the Vienna Convention on the Law of Treaties, May 22, 1969 provides that "A State is obliged to refrain from acts which would defeat the purpose of a treaty when:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to be a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry is not unduly delayed.

Nations to:

- (a) the State where the crime was committed;
- (b) the State or States of which the alleged offender is a national or, if he is stateless person, in whose territory he permanently resides;
- (c) the State or States of which the internationally protected person concerned is a national or on whose behalf he was exercising his functions;
- (d) all States concerned; and
- (e) the international organisation of which the internationally protected person concerned is an official or an agent.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

- (a) to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, which he requests and which is willing to protect his rights; and
- (b) to be visited by a representative of that State.

Article 6 provides that a State Party where the offender is present shall, if satisfied of the circumstances of the case, take the offender into custody for the purposes of either prosecution according to local law or extradition to a State where he is to be prosecuted. The extradition request shall be carried out subject to conditions and limitations recognised by the law or practice of the surrendering State.⁷¹

⁷¹ Similar wording or objective finds place in
 1. Article 6 of the International Convention Against The Taking Of Hostages 1979, It says that:
 Upon being satisfied that the circumstances so warrant, any state party in the territory of which the alleged offender is present, shall, in accordance with its laws take him into custody or take measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
 2. Article 7 of the Convention For The Suppression Of Unlawful Acts Against The Safety Of Civil Aviation (Montreal Convention 1971) provides that: the contracting

The satisfaction which is referred to in this section is that, the person(s) present is the alleged offender(s) of the crime(s) in Article 2 of this Convention.⁷² The evidence presented should demonstrate the following elements; that the offence was committed within the jurisdiction of the requesting State, that the offence charged is an offence in the 1973 Convention, that the requested person is the offender and that the evidence establishes probable cause to believe that the accused is guilty of the charge.⁷³ The burden of proof is on the State seeking extradition. It must produce competent evidence to support the belief that the accused has committed the charged offence. However, it does not need to prove beyond reasonable doubt but only that there are reasonable

Article 7 provides that:

state shall, if it does not extradite him, be obliged to submit the case to its competent authorities for the purpose of prosecution.

3. Article 10 of the Convention For The Suppression Of Unlawful Acts Against The Safety of Maritime Navigation 1988 says, to the same effect in almost similar wording.

4. Article 7 of the Hague Convention For The Suppression Of Unlawful Seizure Of Aircraft (1970) provides this to the effect that the contracting State shall if it does not extradite be obliged to submit the case to its competent authority for the purpose of extradition. Although the legislations given above are not directly concerned with diplomats there is a similarity in the language used.

The wordings in all these conventions do suggest that the State in whose territory the offender is present should think of extraditing him/her first. It is only if it cannot extradite him that it should submit him/her to her competent authorities.

⁷² (1972) 1 Y.B.I.L.C., P.206

⁷³ Sapiro Miriam E, *Op.cit.*, P.667 & 668. See also Abu Eain V. Adam, 529 F.Supp.685 (ND 111 1980)

grounds to believe that the accused is guilty.⁷⁴ Although such an offender is held under a special legal framework, there is no doubt that the humanitarian principles will apply to him when he is being held.⁷⁵ Therefore, the offender will be notified of the reasons of his arrest, produced before a magistrate within twenty four hours and would be free to consult a lawyer of his choice. Article 9 of this Convention⁷⁶ provides that " Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in Article 2 shall be guaranteed fair treatment at all stages of the proceedings."

5.8.1 PROSECUTION OR EXTRADITION.

Article 7 provides that:

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit him, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution through proceedings in accordance with the law of that State.

This Article gives an option to the State Party in the territory in which the alleged offender is present the option either to extradite him or submit the case to its competent

⁷⁴ Quinn V. Robinson 783 F.2d 776 (9th Cir. 1986)

⁷⁵ Article 10 of the Universal Declaration of Human Rights States that "Every one is entitled in full equality of the law to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him. Article 9 of the international Covenant On Civil and Political Rights (1966) provides to the same effect.

⁷⁶ Article 9 is equivalent to Articles 4 and 8 (c) of the O.A.S. Convention

authorities for the purpose of prosecution. The oldest legal principle dealing with terrorism was developed by Hugo Grotius (1624). It provides for either extradition or prosecution "aut dedere, aut judicare".⁷⁷ It is, however, argued that the obligation of the State is not to try the accused but only to submit the case to be considered for prosecution by the appropriate national authority.⁷⁸

However, it is submitted that the trial of an offender in a State where he did not commit the crime posses some difficulty. The evidence presented in a criminal trial requires to prove beyond reasonable doubt that the suspect is the offender. This will requires the prosecution to produce evidence that implicates the accused. There must be witness(es) to the crime who can identify the offender and other credible evidence necessary to convict a criminal. It is the objective of this Convention that a person convicted of any crime described in Article 2 should receive a punishment that takes into account the grave nature of the crime against internationally protected persons.⁷⁹

On the other hand extradition involves a State, at the request of another, surrendering a person accused of a crime under the laws of the requesting and the surrendering State for the purpose of

⁷⁷ Schlagheck Donna M, Op.cit, P.120, See also Murphy John F, The Future, Op.cit, P.60, and Sapiro Miriam E, Op.cit, P.667

⁷⁸ Murphy John F, The Future, Op.cit, P.43

⁷⁹ Evans Alona E and Murphy John F, Legal Aspect Of International Terrorism, (Lexington Books 1978) P.506

prosecution.⁸⁰ The request for extradition may also be for a convicted person, who has escaped from a prison to another State. The concept of extradition has a venerable tradition in the relation between States. It dates back to circ. 1280 B.C., to a clause in the peace treaty between Pharaoh Ramses 11 and King Hattusili 111 which provided for the return of the fugitive criminals.⁸¹ Earlier extradition agreements were primarily for the purpose of delivering political and religious offenders to the sovereigns. Later it was utilised for the exchange of common criminals.⁸²

The process of extradition is usually based on bilateral agreements or reciprocity. It is a general rule that there is no obligation to extradite in the absence of a bilateral treaty.⁸³

⁸⁰ Osborn defines extradition as "The delivery by one State to another of a person accused of committing a crime in another." Osborn's Concise Law Dictionary (8th Ed.) Rutherford Leslie and Bone Sheila (Ed).

The United States Supreme Court defines extradition as "the surrender by one nation (the requested State) to another (the requesting State) of an individual accused or convicted of an offence outside of its territory and within the territorial jurisdiction of the other, which being competent to try and punish him demands the surrender" Terlinden V. Ames 184 U.S. 270, 289 (1902) quoted by Sapiro Miriam, "Extradition In Era Of Terrorism: The need to abolish the political offence exception" (1986) 61 N.Y.U.L.R., note 3, P.655

⁸¹ M.C. Bassiouni, International Extradition And World Public Order, (1974) PP.3-4 quoted by Antje C. Petersen, Op.cit., P.771

⁸² Yarnold Barbara M. International Fugitive. A new role for the International Court of Justice. (Praeger, New York, Westport, Connecticut, London 1991) P.12

⁸³ Ibid., P.11

The accused is held in custody until the formal application by the requesting State is received for the courts to decide. Usually the courts are empowered to decide whether the accused should be extradited or not.

Extradition plays an important role in cooperation ^{between states} to combat terrorism.⁸⁴ The extradition treaties eliminate chances of offenders escaping from punishment. They ^{ensure} assure that terrorist offenders are accountable for their acts wherever they are. Extradition treaties are based on the principle of mutuality. If a requested State extradites an offender to the requesting State the chances are that such an act will be reciprocated. The extradition treaties also confirm that contracting parties accept each other's judicial system.⁸⁵

Several countries have made bilateral as well as multilateral extradition treaties as ^{one} some of the ^{means} methods by which perpetrators of crimes can be prosecuted and punished. However, bilateral extradition treaties remain the primary instruments of extradition. For example, ^{extradition} some of these treaties are between the United States and Canada⁸⁶ and the 1973 memorandum of understanding between the United States and Cuba.⁸⁷ Article 4(2)(1) of the U.S.-Canadian

⁸⁴ Antje C. Petersen, Op.cit, P.767

⁸⁵ Ibid, P.771

⁸⁶ (1972) 11 I.L.M. P.22.

⁸⁷ "Cuba-United States Memorandum of Understanding on the Hijacking of Aircraft and Vessels", (1973) 12 I.L.M. P.370.

extradition treaty provides that "[a] Kidnapping, murder or other assault against the life or physical integrity of a person to whom a contracting party has the duty according to international law to give special protection or any attempt to commit such an offence with respect to any "such person" shall not be considered a political offence for the purpose of this treaty.⁸⁸

The governments of the United States and Canada, therefore do not offer political asylum to fugitives requested in either State for actual or attempted violation of diplomatic immunity and are liable for extradition. This treaty covers not only cases committed in the territories of contracting parties, but also offences committed outside the two territories. Article 1 of the treaty says "each party agrees to extradite to the other party persons found in its territory who have been charged with or convicted of offences specified in the treaty and committed within or outside that territory." Canada and the United States, both have legislation establishing extraterritorial jurisdiction over attacks on diplomats. Therefore, requests for extradition of persons charged with such an offence is very much likely to be granted.

1.3.2 PROBLEMS OF EXTRADITION

The Nordic States agreed to have a scheme on extradition whereby each State would enact legislation containing similar

⁸⁸ Murphy John F. *Punishing International Terrorists: The Legal Frame Work For Policy Initiatives* (Newman and Allenheld, 1989) P.37

terms.⁸⁹ The European Convention on Extradition 1957, aims to establish uniform rules with regard to extradition as part of the general aim that strives to achieve greater unity among the members of the Council of Europe.

The Preamble of The Convention of The American States on Extradition of February 25, 1981 in Caracas, Venezuela, reads :

"The close ties and the cooperation that exists in the Americas call for the extension of extradition to ensure that crime does not go unpunished."⁹⁰ In view of this, "the States oblige themselves to surrender to other State Parties that request their extradition, persons who are judicially required for prosecution, are being tried, or have been convicted, or have been sentenced to a penalty involving the deprivation of liberty." (Article 1).

This is a remarkable convention which strives to deter terrorism in South America. Since South America has been a centre of international terrorism it is suggested that adhering to the principle of the 1973 Convention would help to deter such acts in the region.

5.8.2 PROBLEMS OF EXTRADITION

The problems of extradition might not be many but there are very substantial elements in the process of extradition wherever it

⁸⁹ Murphy John F, Punishing International Terrorists; The Legal Frame Work For Policy Initiatives. (Rowman and Allanheld, 1989) P.37

⁹⁰ Ibid, P. 39.

occurs.

The first problem is the requirement of the bilateral treaties in any extradition proceedings. Although Article 8 provides that the 1973 Convention could be taken as a legal instrument for the purpose of extradition, it is generally accepted that there should be a bilateral treaty for any extradition proceeding. It has been conventionally accepted that there is no obligation to extradite in the absence of a bilateral extradition treaty.⁹¹

The second obstacle is sometimes due to carelessness or genuine error in the paperwork and in the communication between the requesting and the surrendering State, extradition treaties, wrong identification of the offender, irregularities in the description of offences, the relevant laws and the supporting evidence.

The third problem is due to fear of retribution or retaliation ^{from} ~~from~~ others or the same organisations to which the offender who is the subject of extradition belongs. The requested State is usually reluctant to hand over the alleged offender out of fear of retribution.⁹² It is noted that many countries would not like to

⁹¹ Yarnold Barbara M, Op.cit., P.13

⁹² The usual obstacle in the local prosecution is that local authorities are subjected to numerous threats from the terrorist organisations to the extent of pressing for light sentences or any means of quick release from prison. The terrorist organisations also press governments in whose territories the offenders are held not to allow the extradition applications. When France arrested Georges Ibrahim Abdallah, in 1984, it chose to put him on trial rather than extradite him. The French government was under substantial pressure to release him by the Lebanese Armed Revolutionary Factions

be entangled with terrorist organisations for fear of striking at

(FARL). A few months after his arrest, Gilles Sydney Peyrolles, the Director for the French cultural centre in Tripoli, Libya, was kidnapped. The French learned that the kidnappers would only release Payrollers, in exchange for Georges Ibrahim. A senior official from President Mitterrand's Socialist party who had close relations with Algeria arranged for an Algerian official to visit Georges Abdallah, who gave the official the names of the people he should speak to in Beirut. The Algerian official met these people in Beirut. It was conveyed to the kidnappers that it was impossible to remove Georges from the judicial process but given the state of the criminal charges against him, "It is possible to foresee that Georges Abdallah will only be subjected to proceedings in a correctional court." It was on that understanding that the organisation FARL released its hostage, Peyrolles. Unfortunately for Georges Abdallah, immediately after the release of Peyrolles, evidence surfaced implicating him directly and personally for the shootings of Chapman Ray an American Military attache' in Paris who was killed in 1982 and Barsimantov of the Israeli Embassy. It was after this that new proceedings were instituted for the shootings and homicide.

Sp. Georges Abdallah sent a public letter to the Justice Minister, complaining of the delay in releasing him. He wrote, "The French government informed me that I would be judged within a month for the use of false documents and expelled to the country of my choice if the Arab militants who had Mr. Peyrolles freed him. But I am still in prison." The FARL's representative threatened retaliation unless France released Georges Abdallah and two other members. The following months witnessed bombs exploding throughout Paris causing death, damage and injuries. The Algerian government, too which took part as intermediary felt betrayed and pleaded for his release. The French Security Minister met the judge and urged him to delay his decisions. He later told the press that the evidence against Georges Abdallah seemed very weak. An official in the Justice Ministry issued orders to the Public Prosecutor's office to dismiss the charges against Abdallah. The terrorists retaliated with a wave of new bombings in 1986, when the Public Prosecutor failed to release him. There was an implication in the statements made by the French Prime Minister and the Interior Minister, suggesting that France might be prepared to make a deal by which Georges Abdallah would be released in exchange for an end of terror of bombings in Paris. Although Georges was sentenced to life imprisonment, the kind of pressure under which the government of France, had were magnificent and could not be ignored. Vide:

wrong choice of word

be entangled with terrorist organisations for fear of striking at

Heymann Philip B. Op. cit, PP.27-32

In the incident of hijacking of Achille Lauro, the Italian government allowed Abu Abbas to leave Italy despite an application for extradition from the United States. The Prime Minister had indicated that Abbas would be tried in Italy when he said that relinquishing the terrorist would be contrary to Italian law. In other words, in Italy it is the judiciary not the executive which had the responsibility for handling the case of Abbas. However, the government released him shortly after. Whether the Italian judiciary proceeded to prosecute and sentence Abbas to life imprisonment it did not really matter because he had already left the country.

When Germany arrested Mohammed Ali Hamadei for carrying a suitcase full of explosives, it refused to extradite him to the United States. The U.S Justice Ministry was supposed to forward the application request to Germany. Shortly after that, two German nationals were kidnapped in Beirut and the kidnappers demanded that Germany should not extradite Hamadei to the United States, but release him in exchange for the two German relief workers, Mr. Heinrich Strubig and Mr. Thomas Kempter. Germany never extradited him and went on to try him for murder and hijacking at the same time negotiating for the release of the two German nationals. Time, December 16, 1991, P.23

Greece refused to extradite Al-Zumar to Italy. Greek officials, had notified Italy that they would detain Zumar until he had served his sentence. But later the Greek Minister of Justice denied extradition saying that Zumar's actions constituted legitimate political expression. This he did inspite of the court's ruling that he was subject to extradition.

In 1977 France released Abu Daoud who was suspected of masterminding the 1972 terrorist attack at the Munich Olympics. West Germany and Israel had applied for his extradition but both requests were denied on technical grounds. Hemann Philip B. Op.cit, PP.22-24

These examples, indicate that it has not been so easy to prosecute the terrorists. In either way and in many circumstances, the state in whose territory the offender was found had to compromise its principles for such reasons as given in the foregoing examples. There has not been much done to alleviate the situation except that some other states have sometimes made diplomatic protests or in other circumstances threatened to isolate any nation that would refuse to cooperate against terrorism.

whose? ?
their interests worldwide. As a result of these fears, some States refuse to extradite and quietly release the offenders to safe havens.⁹³

The effect of the fear of reprisals or retaliations by the organisations must have been the result of the release of the assassins of the diplomats in Khartoum⁹⁴ and a free passage and transport to the hijackers of the Achille Lauro by Egypt to another country. Greece allowed Al Zumer, to flee to Algeria. The Italian government allowed Abu Abbas to leave Italy. Germany too released the Palestinians who had taken hostage the Israeli athletes in Munich in 1972.⁹⁵

Fourthly, it is also observed that an amnesty is usually offered to the hostage takers in return for safe release of their

⁹³ For example, in August 1973, two Arab terrorists attacked Athens Airport, leaving five persons killed and 55 injured. The terrorists were tried and sentenced to death. This sentence was commuted under pressure of those who seized the Greek freighter in Karachi, in 1974. These were the three members of the muslim international guerrillas who held two sailors hostage and made a forced flight on a Pakistani aircraft to Egypt and later to Libya. Greece expelled the two terrorists in response to Libya's undertaking that they would be held answerable for their activities. But Libya, was said to have been reluctant to act on its reported promises. Hence it became labelled as a sanctuary of terrorists. Wilkinson paul, Terrorism And The Liberal State, Op. cit, P.216

⁹⁴ See chapter 1V

⁹⁵ Clive Aston C, A Contemporary crisis; Political Hostage Taking And The Experience of Western Europe, (Westport, Connecticut:Greenwood Press,1982) PP.73 and 79

hostages⁹⁶ as it had been suggested to the hostage takers of the Israeli athletes, in Munich.⁹⁷ In such circumstances the offenders are neither extradited nor prosecuted.

The fifth problem pertains to the definition of terrorism. As observed in the fourth chapter there has not been a well unified definition of the word terrorism⁹⁸ and as a result, States and academicians offer different definitions. It suffices to know that one's rebel is another's statesman.⁹⁹

⁹⁶ Crelinsten Ronald L./ Szabo Denis, Hostage Taking, (Lexington Books, 1979) P.58

⁹⁷ Clive C. Aston, Op.cit., P.65

⁹⁸ Laquer Walter, Ed. The Terrorism Reader, A Historical Anthology, (Wildwood House London, 1979) P.268, See also Sapiro Miriam, Op.cit., P.654

⁹⁹ History has recorded that Jonas Savimbi, the leader of UNITA in Angola, received a red carpet welcome in Washington and an audience with the President of the United States. He is a well known rebel who has been fighting a guerilla war to topple the Angolan government for years. Not many countries would give him such hospitality. In Angola, he is a rebel and a terrorist.

Another figure who occupies double status is the leader of the Palestine Liberation Organisation, Mr. Yasir Arafat. Many countries do respect and recognise him as the leader of the Palestinian State, and therefore he is received by heads of states and attends state functions in those countries where he is recognised. But until recently, there were some countries which did not give him that due and treated him as a terrorist or a person who sponsors acts of terrorism. It therefore virtually depends on state policy to define who and who is not a terrorist. The P.L.O leader would now enjoy full recognition from all States including the United States of America. This follows the recent exchange of letters of recognition between the Palestinian Liberation Organisation and the States of Israel on Sept. 13, 1993 at the White house, Washington. See also Ferencz Benjamin B, "When ones person's terrorism is another

While the U.N General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations contained in Assembly resolution 2625 (XXV) of October 24, 1970, provides that "Every State has the duty to refrain from organising, instigating, or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed toward the commission of such acts", the declaration makes an exception to the obligation of the States to assist peoples struggling for their right to self-determination and independence.¹⁰⁰

Article 3 of the constitution of the International Criminal Police Organisation (Interpol), provides that "It is strictly forbidden for the organisation to undertake any intervention or activities of a political, military, religious or racial character."¹⁰¹ According to this article, the international police would not involve itself in crimes committed in the process of political struggles or self-determination, liberation motivated activities or such acts which are politically motivated. However in

person's heroism" 1981 Human Rights, PP.38-42

100 D.Schindler/J.Toman, Eds. The Laws Of Armed Conflicts, (Sijthoff & Noordhoff International Publishers: The Netherlands, 1981) P.129, See also, Paul Wilkinson, Terrorism And The Liberal State, Op. cit, P.232

101 Murphy John, Legal Aspect Of International Terrorism, Op.cit, P.13

1984 Interpol adopted a resolution announcing a more liberal interpretation of Article 3 of its constitution. The resolution allows Interpol to become involved in antiterrorist activity by law enforcement officials at the preventive stage¹⁰²

In 1977, the Diplomatic Conference on Laws of War adopted a proposal which in effect provided a measure of legal protection ^{against} for terrorist attacks. Under this proposal, liberation movements are accorded lawful belligerent and prisoner of war status as of right.¹⁰³ The proposal recognises the activities of the liberation movements as well as their status. Terrorism therefore should not be confused with the struggle of the peoples' rights of national liberation.¹⁰⁴

Sixth, the principle of extradition under international law, extradition treaties, bilateral and multilateral treaties or conventions, Statutes, codes of procedures and sometimes constitutional provisions exempt political offenders from the process of extradition.¹⁰⁵ The principle of non-extradition for

¹⁰² Murphy John F, The Future, Op.cit, P.54

¹⁰³ Wilkinson Paul, Op. cit, P.234

¹⁰⁴ Questions relating to International Terrorism, (1972) Y.B.U.N, P.642

¹⁰⁵ Murphy John, Legal Aspect Of International Terrorism, Op.cit, PP.7 & 10

political offences was first laid down by Belgium, in 1833,¹⁰⁶ to the effect that "no foreigner may be prosecuted or punished for any political crime antecedent to the extradition, or for any act connected with such a crime." Extradition is hampered by the fact that the political offence exception contained in many extradition treaties protects from extradition, political offenders of all types, non violent and violent alike including terrorists.¹⁰⁷ The political nature of terrorism has led many States to provide terrorists with protection from extradition.¹⁰⁸ Unfortunately, the 1973 Convention does not forbid the application of a "political offence" exception in extradition treaties in regard to crimes committed against diplomats.¹⁰⁹

Since the Belgium Law, there have been bilateral as well as multilateral treaties emphasising that political offences are not extraditable. The Argentinean - Extradition Law No. 1612 of 1885 and the French Extradition Law Article 5 of March 10, 1927 provide, that extradition shall not be granted when "offences committed shall be of political character or connected with political offences."¹¹⁰

¹⁰⁶ Elsewhere it is said that the principle was developed by France in the Jacobean constitution 1793. Schlagheck Donna M, Op.cit, P.120, See also Sapiro Miriam, Op.cit, note 29, P.660

¹⁰⁷ Antje C.Petersen, Op.cit, P.767

¹⁰⁸ Schlagheck Donna M, Op.cit, P.120

¹⁰⁹ Murphy John F, The Future, Op.cit, P.64

¹¹⁰ Franciszek Przetacznik, Op.cit, p. 108.

The 1974 Treaty of Extradition between the United States and Australia provides that extradition shall not be granted when the offence is political in character. Article 3 of the 1953 Treaty between Belgium and Lebanon provides that extradition shall not be granted if the offence is regarded by the requested party as a political offence or as an offence connected with political offence.¹¹¹ It is interesting to note that this treaty provides that it is the requested State¹¹² which shall determine whether in its

¹¹¹ Ibid, P. 106.

¹¹² The definition of these terms by the judiciary and sometimes a role assumed by the executive has been detrimental and wanting. The judiciary is sometimes influenced by the state's foreign policy. This leaves the system with a double standard. On one occasion the offences which are committed, do amount to 'terrorism' and on another, are treated as acts of political movements, liberation or self-determination. Therefore some governments have assumed the role of judiciary in determining whether a particular case requires to be deemed as political or related therewith and therefore considered for asylum or not. The decision of the executive in a certain case whether a particular person deserves to be extradited or not may be based mainly on the interest of the State in which that person is found. Sometimes the decision is based on political or economic motives. The executive, therefore cannot be depended upon to decide cases of alleged offenders.

The United States - United Kingdom treaty on extradition provides that power to grant political asylum and to refuse to surrender persons declared extraditable by the courts is to be exercised by the executive on the basis of political rather than legal criteria. According to this treaty the executive may have the final decision on asylum applications. On the other hand, the United States' extradition statutes (18 U.S.C. Sections 3181, 3184, 3186, 3188-95) are interpreted as to permit the Secretary of State a 'de nova' review of the evidence presented to the court in cases where the magistrate certifies that there is enough evidence to permit extradition. But the executive is not permitted to order extradition where the court's decision is to accord asylum to the fugitive. M.Charif Bassiouni, Legal

view the offence is political or not.¹¹³ Although in most cases it is the courts which usually decide whether an offence is political, it appears from this provision that apart from the judiciary, the executive, by its own standards can decide whether the offence committed is political or not. Under the political offence exception, the requested State may deny extradition of the offender if it considers the crime to be a political offence.¹¹⁴

The French and Israel Treaty of 1958 on extradition gives a wider view on non extraditable offences. Article 4 provides that extradition shall not be granted if the requested State considers that the elements of the offence or motives for the request are based on political, religious or racial considerations.¹¹⁵ In 1985 the U.S and U.K signed a supplementary treaty exempting a number of violent crimes from the protection of the political offence exception.¹¹⁶ This was due to frustration of the U.S and U.K governments at the unwillingness of the U.S courts to extradite alleged offenders of I.R.A.¹¹⁷

Responses To International Terrorism: U.S Procedural Aspects, (Nijhoff Publishers, 1988) P.181

113 Sapiro Miriam E, Op.cit, note 76, P.668 and note 83, P.669

114 Ibid, P.655

115 Przetacznick Franciszek Op.cit, P. 106.

116 Extradition Treaty, June 8, 1972, U.S- U.K Northern Ireland, 28 US.T 227 T.I.A.S No. 8468; Supp. Treaty.

117 Sapiro Miriam E, Op.cit, P.664

Apart from the bilateral and multilateral treaties, there are States whose constitutions, as discussed below in the text, provide or contain special provisions on non-extradition offences or acts which may be connected with or based on political, racial or religious offences. The exception clause has been characterised as a "double -edged sword" because while it protects the requested person against retaliatory trial by his political adversaries, it is detrimental to international public order because it offers shelter and immunity from criminal liability to persons who commit very serious offences.¹¹⁸

Article 3 of the 1977 European Convention provides a special provision which can remedy all the encumbrances of the bilateral extradition treaties and other arrangements. It provides that "The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition are modified as between Contracting States to the extent that they are incompatible with this Convention." This means that bilateral treaties and other extradition arrangements which exempt political offences would, in that regard, have to conform to Article 1 of this Convention which does not consider crimes therein as political offences.

Seventh, many States apply methods of torture in detention as well as the death penalty. It is usually a pre-condition to extradition that the alleged offender would not be tortured pending prosecution or that he would not be sentenced to death. Although

this has nothing to do with the provision of the 1973 Convention, it is suggested that in a way it hampers the extradition of offenders since many countries have means of torturing suspected offenders.¹¹⁹

Eighth, extradition may be difficult even in situations where there are bilateral treaties when existing diplomatic relationship between States becomes strained. The extradition treaty may be suspended and the request ignored.

Article 7 frustrates the 1973 Convention, as the State has to be satisfied as to whether the extradition requested is necessary.

All extradition incidents which have been discussed in this study were either frustrated by this very provision or lack of will on the part of the requested State to extradite. Therefore, it is most likely that no one has ever been extradited under this Convention.¹²⁰ Infact it has been stated that this Convention *per se* does not create a legal obligation to extradite,¹²¹ that it contains only an inducement.¹²² Under the applicable U.S Statute, a fugitive can only be extradited only in accordance with

¹¹⁹ Amnesty International lists 32 countries with whom U.S has extradition treaties which have some kind of torture of prisoners in the recent past. Amnesty International Report 1984.

¹²⁰ Yarnold Barbara M, Op.cit, P.12

¹²¹ The U.S has construed this phrase to exclude the antiterrorist conventions on the ground that they are not strictly speaking "extradition treaties" even when they expressly provide that they can be used as the basis of extradition. Murphy John F, The Future, Op.cit, note 48, P.45

¹²² Murphy John F, The Future, Op.cit, P.42

applicable "bilateral extradition treaty" in force.¹²³ "political

It is however noted that the 1971 OAS Convention depends much on the bilateral treaties for the purpose of extradition. Article 3 provides that "Persons . . . charged or convicted . . . shall be subject to extradition under the provisions of the extradition treaties in force between parties or, . . . in accordance with their own laws."

The weakness ^{of} the 1973 Convention prompted States ^{which,} formulating conventions and contracting bilateral treaties to include provisions which exclude from the "political offence" exception crimes committed against internationally protected persons. Hence Article 1(c) of the European Convention on the Suppression of Terrorism 1977, provides that a serious offence involving an attack on the life, physical integrity or liberty of international protected persons, including diplomatic agents shall not be regarded as political offence or that inspired by political motive.¹²⁴

Political offences are generally divided into two kinds: 'Pure' political offences for example treason, sedition and espionage; and 'ordinary' offences often violent crimes which occur in circumstances connected with political disturbances. In determining whether the political offence exception applies, the Anglo - American courts use the "Political incidence test" which is different from the European courts' theory of "Injured rights

¹²³ (1982) 18 U.S.C S.3181

¹²⁴ Jochen A. Frowein, Op.cit., P. 79

approach". The European theory also differs from the "political motivation approach" of the courts of Switzerland and the Netherlands.¹²⁵ Although ordinary crimes are enumerated in the penal codes, it is contended that these crimes can attain the "political offence" status when a relative test is used. It is therefore observed that there has not been a precise definition of the political offences and as a result the extradition treaties lose value in combatting terrorism.¹²⁶ Earlier cases do not offer analysis of any determination of political offences.¹²⁷

5.8.3 CONSTITUTIONAL PROVISIONS AND THE 1973 CONVENTION.

Other critical issues concerning the 1973 Convention have to do with constitutional provisions. Some countries have constitutions which contain special provisions for exclusion from extradition of political offences or acts connected therewith. For example, the 1946 Brazilian constitution states that extradition of foreign subjects "shall not be granted for political crimes". The 1949 Costa Rican -Constitution, Article 31 and the 1936 Honduras constitution Article 20 provide that, extradition shall never be granted for political offences or any acts connected therewith.¹²⁸ Ireland refused to sign the European Convention on the Suppression

¹²⁵ Yarnold Barbara M, Op.cit, P.17

¹²⁶ Antje C.Petersen, Op.cit, 775, See also Sapiro Miriam, Op.cit, P.660

¹²⁷ Sapiro Miriam E, Op.cit, note 90, P.670

¹²⁸ Franciszek Przetacznik, Op.cit, p. 109.

of Terrorism because it believes that extradition of political offenders is inconsistent with Article 29 of its constitution.¹²⁹

Infact, Constitutional provisions override the 1973 Convention, and any interpretation made is likely to be independent of any other document including this Convention. It is the judiciary which decides whether the offence is political or not and whether any act is connected therewith considering other local legislations as well as government policies.

Finland made a reservation upon signature of the 1973 Convention in 1974 and confirmed it upon ratification on October 31, 1978 that:

It reserves the right to apply the provisions of Article 8, paragraph 3, in such a way that extradition shall be restricted to offences which, under Finnish Law, are punishable by a penalty more severe than imprisonment for one year and provided also that other conditions in the Finnish Legislation for extradition are fulfilled.¹³⁰

However Franciszek Przetacznik¹³¹ observes that since the following documents,

(a) the General Assembly of the Organisation of American States (OAS) by its resolution 4, of June 30, 1970¹³²

(b) The OAS Convention to Prevent and Punish¹³³

¹²⁹ Sapiro Miriam E, Op.cit., note 186, P.685

¹³⁰ Przetacznik Franciszek Op.cit., P. 115.

¹³¹ Ibid.

¹³² The resolution recognised that kidnapping of officials of foreign states and extortion are serious crimes.

¹³³ Article 2 provides that kidnapping, murder, and other assaults against officials of foreign states, "shall be considered common crimes of international significance

(c) the Uruguayan Draft¹³⁴ (a working paper on the formulation of The 1973 Convention).

(d) R.D. Kearley's Draft¹³⁵ (a working paper on the formulation of The 1973 Convention).

formed part of the preparatory documents of the 1973 Convention, it is apparent that the offences committed against officials of foreign States are considered common crimes and therefore extraditable.

However, the government of Israel in its declaration stated that its accession to the 1973 Convention does not constitute acceptance by it as binding of the provisions of any other international instrument, or acceptance by it of any other international instrument as being an instrument related to the 1973 Convention.¹³⁶

It has however been observed that some of the recent legislations have made exceptions to political offences. A typical

regardless of motive".

¹³⁴ Article 1 of the draft provides that murder and other offences against the life and physical and mental integrity of officials of foreign States regardless of their motives are common crimes.

¹³⁵ Article 2, provides that "an international crime described in Article 1 shall not be considered as a political offence or as an act connected with such an offence."

¹³⁶ Multilateral Treaties Deposited with the Secretary General, Status at 31st Dec 1986 United Nations, New York 1984, p. 85.

example being an attempt on the life of the head of State. Belgium amended its laws following an assassination attempt on the life of Napoleon III to make it an extraditable offence if an attempt is made on the life of the head of State.¹³⁷ Likewise, in recent years, exception has been extended to crimes against human life, genocide, attacks on diplomats as well as hijacking aircrafts. The tension between the legal principles "extradite or prosecute" and the "Political offence exception" is one of the weaknesses in an effort to apply international law to the prevention and punishment of terrorism.¹³⁸ The European Convention on the Suppression of Terrorism which was adopted by the Council of Europe in 1977, among others excludes the following from the classification of political offence:

- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention.
- (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons.
- (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits such an offence.¹³⁹

Article 2 additionally excludes from "political offence" a relations and foreign policy.¹⁴⁰ Therefore, extradition has been

¹³⁷ Moore John Norton, "Toward Legal Restraints On International Terrorism", (1973) 67 A.J.I.L., P.88

¹³⁸ Schlagheck Donna M, Op.cit., P.120 .6 & 7

¹³⁹ (1976) 15 I.L.M., P.1272, See also, Alona E.Evans/ Murphy John F. Murphy, Legal Aspects of International Terrorism (Lexington Books, 1978) P.497.

serious offence involving an act of violence other than one covered by Article 1. However, Article 13 of the European Convention provides that "any State may . . . declare that it reserves the right to refuse extradition in respect of any offence connected with a political offence or an offence inspired by political motives. . . ." This provision in a way reverses the purpose of the Convention. The Scandinavian countries, France and Portugal, reserved the right to declare any of the enumerated offences in Article 1 to be politically motivated. . . .¹⁴⁰ Despite disappointing record of western political and judicial cooperation against terrorism, the prospects for improvement are much better in Europe. Europe share similar values including the belief in the sanctity of individual human life, the rejection of violence as a method of resolving political differences and a commitment to a democratic government and the rule of law.¹⁴¹ It is argued that similar treaties should be encouraged to enable States to extradite offenders of crimes against internationally protected persons.

It is however noted that the extradition process is indeed more difficult than it seems to be as it involves conventional and customary international law as well as issues of international relations and foreign policy.¹⁴² Therefore, extradition has been

¹⁴⁰ Antje C. Petersen, Op.cit., P.783

¹⁴¹ Wilkinson Paul, British, Op.cit., P.6 & 7

¹⁴² In re Mc Mullen, the alleged offender, was a deserter from the British Army who joined the Provisional Wing of the Irish Republican Army. He was charged with

more often denied than it has been granted. What some countries do is to prosecute the offenders under their own laws and then deport them. Spain became a well publicised haven for persons wanted for various crimes in the U.K.¹⁴³ In 1978, President Mobutu of Zaire criticised Belgium for granting asylum to some of his political Republican Army attack on British soldiers, which resulted in the death of one of them. He was thereafter charged with murder but

participating in the bombing of Claro Barracks in Britain in which a charwoman was killed. Britain sought his extradition from the United States pursuant to the extradition treaty between both countries. At the hearing, Mc Mullen alleged that Britain's extradition request was political. The magistrate agreed and found that "an insurrection and a disruptive uprising of a political nature did exist in northern Ireland, in 1974, when the offender participated in the bombings and that his actions were directed by his organisation."

In Abu Eain's case, the offender was alleged to have killed two young Jewish males and wounded 36 others by detonation of explosives in a trash bin in a public market place in Tiberius, Israel, in 1979. When Israel sought his extradition from Chicago the Magistrate refused the plea of political offence and said that "random and indiscriminate placing of explosives near a bus stop on a public street diffuses any theory that the target was a military one or one justified by any military necessity."

In 1983, the United States District Court for the Northern District of California ordered the release from jail of William Joseph Quinn, a member of the Irish Republican Army who was accused of shooting a London police constable to death in 1975, and of conspiring to send letter bombs to a Catholic bishop, a British judge and a newspaper executive. The explosives were placed at a railroad station and two restaurants. In contrast with Abu Eain's case the court ruled that all the alleged crimes constituted political offences. Murphy John, Op.cit., P.50-1, See also Yarnold Barbara M, Op.cit., P.23

- 46

143 Scott Davidson, et al, "Treaties Extradition And Diplomatic Immunity; Some recent development" (1986) 35 I.C.L.Q., P. 429

adversaries.¹⁴⁴

The District Judge of Southern District of New York, denied a request to extradite Joseph Patrick Thomas Doherty to Britain. Doherty claimed to have been involved in the provisional Irish - Republican Army attack on British soldiers, which resulted in the death of one of them. He was thereafter charged with murder but escaped before sentencing. He claimed that his offences were political. The Court upheld this contention. However in 1979, when Italy requested the extradition of one Piperno on the ground that he had participated in the kidnapping and murder of Prime Minister Aldo Moro, in 1978. The Court of Appeals of Paris, rejected the claim that the offences were political in nature. In 1968, an Austrian court found that the seriousness of the offences, the killing of several persons by explosives, outweighed the political motive.¹⁴⁵

Italy requested the extradition of Zumer from Greece after he allegedly participated in the bombing of a Synagogue in Rome that injured dozens of people and killed one child. Greek had notified Italy that it would detain Zumer until he had served his sentence

¹⁴⁴ Mobutu considered this act as an effective support to those willing to overthrow him and hence a hostile act. Wijngaert Van den, "The Political Offence Exception To Extradition" quoted by Gilbert Geoffrey S, "Terrorism And The Political Offence Exception Reappraised" (1985) 34 I.C.L.Q. P.695

¹⁴⁵ Murphy John, Op.cit P. 54 - 55.

for passport violation. But the Greek Minister of Justice denied extradition thereafter stating that Al Zumer's action constituted legitimate political expression.¹⁴⁶ A fugitive who flee to a State that is politically sympathetic or that embraces a broad view of the political offence exception may escape prosecution and punishment. If extradition is denied on the basis of political offence exception or another ground, the requested State may lack the jurisdiction to prosecute or punish the requested person.¹⁴⁷

Apart from the theory of political offence, there have been other situations in which the victim State is not willing to put pressure on the sanctuary State.¹⁴⁸ One such situation arises when the offender is in a sanctuary State that is politically or economically important to the victim State. For example, the United States bargained with Iran on the release of hostages in Lebanon and took lesser measures with Syria regarding terrorism while it did not find any difficulty in attacking Libya.¹⁴⁹

¹⁴⁶ Bulgaria is reported to have turned over to West Germany four suspected German terrorists. See John Murphy, Legal Aspect Of International Terrorism, Op.cit, P.24

¹⁴⁷ 1 Restatement of Foreign Relations Law of the United States (Revised) S.402 -404 Tent. Draft No.6, 1985

¹⁴⁸ Heymann Philip B, Op.cit, P. 11.

¹⁴⁹ It may be remembered that the United States bargained with the Islamic republic of Iran in the famous 'Iran-Contra Affair' arms deal, while it did not find it difficult to attack Libya. Although Syria has remained on the United States' list of sponsors of terroristic activities the U.S never took steps to attack it. Recently there have been official meetings between the Syrian officials and the United States government.

The second situation relates to the historical nature of relationship. For example, Italy has long historical as well as economic ties with Libya, while France has similar ties with Syria. Italy and France would therefore be less willing to adopt severe measures against these two countries respectively.¹⁵⁰

However it is learnt that some State Parties have responded positively to the letter and spirit of Article 7 of this Convention which provides that a State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay the case to its competent authorities for the purpose of prosecution through proceedings in accordance with the law of that State.¹⁵¹ Therefore, some States have tried and sentenced offenders found in their

150

In January 1977, France released Abu Daoud who was suspected of masterminding the 1972 terrorist attack at the Munich Olympic Games. Although Germany and Israel had filed request applications for extradition both requests were dismissed on technical grounds. ~~The likelihood of~~ fear of terrorist retribution and desire to maintain good relations with Arab States being the cause for the release, cannot be ruled out.

Italian Prime Minister Craxi's handling of the Achille Lauro hijackers is another situation that is worth noting. In this incident the Italian government allowed Abu Abbas to leave Italy. Abu Abbas who had negotiated the return of the Achille Lauro was wanted in the United States for savage attacks on civilians. When the United States sought extradition of Abbas, Italy announced that the United States' request though correct did not satisfy the factual and substantive requirements laid down by Italian Law.

151

Murphy John F, Punishing International Terrorists: The Legal Framework For Policy Initiatives (Rowman & Allanheld, 1989), PP.117 -18

territories. also extradite him /her to a requesting State where

On November 15, 1982, Switzerland rejected a request from Poland for the extradition of F. Kruszyk, M. Michalski, M. Plewinski and K. Wasilewski, who on September 6, 1982 occupied the Polish embassy in Berne and took 12 members of its staff including the Polish officials as hostages. In rejecting the extradition of these men, the Swiss authorities told the Polish government that they wanted to try the men because the offences were committed on Swiss soil.¹⁵²

In another incident which concerns hijacking and not specifically diplomats, is when the Federal Republic of Germany denied a Czech request for the extradition of 10 Czech nationals who had hijacked a Czech airliner to West Germany, killing the pilot and injuring the co-pilot in the struggle. When the request for extradition was received, it was held that the offenders could not be extradited because the case had already been submitted for prosecution in a German Court. They were convicted and received sentences ranging from seven years and above.¹⁵³

The wordings of Article 7 of the 1973 Convention are basically meant to give an option to a State Party in whose territory the alleged offender is found, or present, to either

¹⁵² Przetacznik Franciszek, Op. cit., P. 147.

¹⁵³ Alona E. Evans / John F. Murphy, Op. cit., P. 512 note 24.

prosecute or else extradite him /her to a requesting State where he/she would be prosecuted and punished. The ultimate objective of the 1973 Convention is to punish the offender for the crimes committed wherever he/she may be.

5.8.4 ALL OFFENCES IN THE 1973 CONVENTION ARE EXTRADITABLE

The offences contained in Article 2 of the 1973 convention are extraditable. Article 8¹⁵⁴ provides that:

1. To the extent that the crimes set forth in Article 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. State Parties undertake to include those crimes as extraditable offences in every future extradition ^{treaty to be concluded} between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State.
3. State Parties which do not make extradition conditional on the existence of a treaty shall recognise those crimes as extraditable offences between themselves subject to the procedural provision and the other conditions of the law of the requested State.
4. Each of the crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of Article 3

The Provisions of Article 8 are corollary to Article 7. The International Law Commission intended that the provision of Article 8 ^{should} assist in implementing the options provided in Article 7 to

154

Article 8 reproduces Article 8 of The Hague and Montreal Conventions and Article 5 of the Rome draft, (1972) 11 I.L.M., 992

effect the legal basis of extradition. *the law of the requested*

Article 8(1) ^{*applies*} apply when the States concerned have an extradition treaty which does not include the offence for which extradition is sought. It provides that all offences listed in Article 2 shall be deemed to be extraditable offences in any extradition treaty existing between States.¹⁵⁵ The paragraph is intended to cover all extradition treaties irrespective of the manner in which the extradition offences are described therein. Article 8(2) covers the situations of State Parties which make extradition conditional on the existence of an extradition treaty and no such ~~a~~ treaty exists at the time when extradition is requested. A State which chooses to extradite is enjoined to consider this Convention as a legal basis for extradition in the existing treaties between States. Article 8(3) apply to cases between those States which do not make ~~an~~ extradition conditional on the existence of a treaty. The State Parties shall effect the implementation of the decision to extradite in ^{*the*} a manner provided

155

Although this article is emphatic on the crimes in Article 2 being extraditable, there is still a difference of opinion as to who should be extradited in case there is a request. And the snag as already seen, is caused by the definition of the word 'terrorism.' There are some opinions that even among the friendly States of Europe and United States and Canada, there is still some disagreement about what falls under 'terrorism' when such crimes are committed. The extradition problem is two-fold. The requested state has to decide whether the offence committed was politically motivated and this has not been ~~so~~ easy. And if it decides otherwise and proceed to extradite the offender the likelihood of facing reprisals from the terrorist or political organisations would be envisaged.

for in the procedural provisions of the law of the requested State.¹⁵⁶ Unlike Article 3 of 1971 OAS Convention which depends basically on bilateral treaties for the purpose of extradition this provision provides a broader perspective which covers three different situations.¹⁵⁷

5.8.5 EXTRATERRITORIAL JURISDICTION FOR EXTRADITION.

Finally, Article 8(4) seeks to establish jurisdiction over crimes set forth in Article 2 for the purpose of extradition between State Parties as if such crimes have been committed, not only in ^{the} a State in which they occurred but also in the territories of States Parties as required in Article 3.¹⁵⁸ The article enjoins State Parties to take appropriate measures to establish jurisdiction over crimes set forth in Article 2 as if those crimes had been committed in those States.

Article 1 of the United States - Canadian Extradition Treaty

¹⁵⁶ (1972) 1 Y.B.I.L.C. PP.218 - 225, See also (1972) 11 I.L.M. P. 992.

¹⁵⁷ See: Supra, PP.156

¹⁵⁸ Article 3 provides that:

- (a) when a crime is committed in the territory of that or on board a ship or aircraft registered in that state;
- (b) when the alleged offender is a national of that State;
- (c) when the crime is committed against an internationally protected person as defined in Article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

provides that each party agrees to extradite to the other party, persons found in its territory who have been charged with, or convicted of, offences specified in the treaty and committed within the territory of the other or outside thereof.¹⁵⁹

This article establishes extraterritorial jurisdiction over offences not only committed within the territories of the parties to this treaty, but also over other offences that might be committed in the other parts of the world. In line with the 1973 Convention, the 1971 U.S.-Canada Extradition Treaty establishes extraterritorial jurisdiction over attacks on diplomats. Therefore a request for any extradition of person(s) charged with such offence(s) is most likely to be granted. Likewise, State Parties to the 1973 Convention are encouraged to adopt measures that bring within their jurisdiction for the purposes of extradition crimes committed within and outside their territories.

The Mexican criminal penal code establishes jurisdiction over many offences of abuse of diplomats. Articles 148 of the code apply to Mexican embassies and consulates abroad and to foreign embassies and consulates located in Mexico¹⁶⁰.

The Danish Penal code (1939) too provides in article 8 that

1. Danish criminal jurisdiction shall comprehend an offence committed outside the Danish State irrespective of the domicile of the offender;

¹⁵⁹ Evans Alona E / Murphy John, Op.cit, P.324.

¹⁶⁰ Ibid, p. 284

- (i) If the offence is prejudicial to the independence, security, constitution or public authorities of the Danish State or constitutes a breach of official duties or interests protected by law in the Danish State by reason of their special relationship thereto.

The implications of this article are comprehensive. The words "prejudicial to the independence . . . of the Danish State" have a wide meaning and therefore would bring into its fold of jurisdiction for the purpose of prosecution, many offences committed in and outside Denmark.

The Israeli Penal Law (Offences - Committed abroad), amended 1972¹⁶¹ provides :

The courts in Israel are competent to try under Israeli Law a person who has committed an act abroad which would be an offence if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communication link with other countries.¹⁶²

This amendment was made a year before the 1973 Convention was formulated. Therefore it cannot be held to be the outcome of that convention. But indeed it is the result of many attacks on Israeli interests including diplomats. Israel has since the 1967 War, been ^{Gr} on a State of war with its Arab neighbours. A considerable attack ^{Gr} was made on the Israeli interests worldwide, including its citizens, diplomats as well as its aircrafts.

¹⁶¹ This amendment is not the result of the 1973 Convention

¹⁶² "Extraterritorial Jurisdiction And Jurisdiction Following Forcible Abduction: A new Israel Precedent in International Law", (1974) 72 M.L.R., PP.1087-8.

The need for such a legislation was compelling. With such a Law, Israel could prosecute the offender of a crime against its interests anywhere in the world as if such a crime had been committed in Israel. The legislation of extraterritorial criminal jurisdiction acts as a good deterrent to all those who would commit crimes against Israel. Although it does not specifically refer to diplomats, the wording of the law naturally brings into its fold diplomatic agents. Under this legislation, the Israeli court convicted Faik Balut, a Turkish citizen, of the offence of belonging to Al-Fatah in Lebanon and Syria. He was sentenced to seven years in prison.

The Israeli legislation is a model as far as abuse of diplomats and other international criminal offences are concerned, since it brings into its jurisdiction all offences committed outside national boundaries. But whether other crimes which are not international in nature deserve such a legislation is a question of interest to many scholars of international law.¹⁶³

The United States too, has the following legislation.

Section 1116(c) of Title 18 of the United States Code provides that:

¹⁶³ The usual pattern of legislation is that State jurisdiction over criminal offences should be and is restricted to only those crimes committed within its territory. The Israeli legislation brings within its jurisdiction all crimes committed all over the world as long as they are prejudicial to Israeli interests. This extraterritoriality creates a precedent where many countries can legislate such a law and arbitrarily prosecute the alleged criminals.

If the victim of an offence under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offence if the alleged offender is present within the United States irrespective of the place where the offence was committed, or nationality of the victim, or the alleged offender.

This Section is indeed very comprehensive as it covers all offences committed by any person against an internationally protected person, including diplomats whether such a person is a United States citizen or not, provided that the offender is in the United States at the time of indictment.

Law No.75-624 of July 11, 1975 of the French Criminal Code extends legal competence to offences committed abroad, specifically crimes committed against French diplomats and consuls in foreign States.¹⁶⁴

Although most of these legislation were made prior to the 1973 Convention, the articles reflect the spirit in which Article 8(4) was made. If such legislations of extraterritorial jurisdiction were made by all the parties to this Convention, the protection of diplomats and their security would be enhanced and the message to the perpetrators of crimes would be loud and clear, that there would be no escape.¹⁶⁵

¹⁶⁴ Crelinsten Ronald D/Szabo Denis, Op. cit., P.64

¹⁶⁵ A District Court in Atlanta, has awarded compensatory damages of half a Million US Dollar each to three women against Kelbesso Negewo, also a refugee for detaining and torturing them while he was an army officer in Ethiopia. Amnesty International, Newsletter Nov. 1993 Vol.XX11, Number Eleven.

5.9 The Unilateral Action

The unilateral action (or extralegal remedy) is an act the in form of the use of force by one State with the objective of rescuing its citizens or cause to bring into its jurisdiction perpetrators of international crimes. It is unilateral (and extralegal) in the sense that a State in which the alleged offender is present is not usually consulted or asked for its permission. The unilateral action has also been used to trap terrorists as well as demolish their equipment in a sanctuary State. It is unilateral in a sense that usually the sanctuary State does not give consent to such action. The resort to unilateral actions is also due to frustration by countries who find extradition of offenders difficult. As we have already pointed out, some countries, due to fear of reprisals or retribution from the terrorists groups¹⁶⁶ or sympathizers, allow the terrorists to flee to safe havens. In such situations, some States resort to unilateral action against terrorists to rescue their citizens, diplomats and sometimes to bring the offender(s) to their countries to answer charges.

The first mode of a unilateral action is the abduction of offenders from States in which they might be found.¹⁶⁷ Fawaz

¹⁶⁶ Although the offender in this illustration did not affect diplomat as such, the crime committed was international in nature.

In 1972, Egypt refused landing rights to the Hostage-takers of the Israeli athletes. Clive C. Aston, Op. cit., PP.73 and 79

¹⁶⁷ Murphy John F, The Future, Op.cit., P.83, See also Ahmed V. Wigen 726 F.Supp. 389 (E.D.N.Y 1989).

Younis¹⁶⁸, a Lebanese, was lured into a yacht in international waters, in 1987. The FBI agents then arrested him and transported him to the United States where he was tried and convicted of involvement in the 1985 hijacking and destruction of a Jordanian airliner at the Beirut international Airport. Adolf Eichmann, a Nazi war criminal was kidnapped from Argentina by Israel agents in 1960 and the United States invaded Panama in order to obtain control over Manuel Noriega.¹⁶⁹

The second mode of remedy which Yarnold describes as extralegal is the disguised extradition. It is a method through which a State relies upon its immigration laws to deny an alien the privileges of remaining in the State. In carrying out the expulsion or deportation provision of such a law, it places the individual directly or indirectly in the control of the State agents which seeks his extradition.¹⁷⁰ Britain sought Desmond Mackin's extradition for participation in a shoot-out in which a British soldier was wounded.¹⁷¹ The magistrate court in the US found that Mackin's case fell within the political offence exception and extradition was denied. On appeal, the US appeal court upheld the ruling in Mackin's case. However, the immigration and

¹⁶⁸ Although the offender in this illustration did not affect diplomat as such, the crime committed was international in nature.

¹⁶⁹ Yarnold Barbara M, Op.cit., PP.47 - 59

¹⁷⁰ Ibid., P.67

¹⁷¹ Mackin's case too did not affect diplomats

naturalisation services had by then initiated proceedings against Mackin for illegal entry into the United States. He was subsequently deported to the Republic of Ireland.¹⁷²

The third type has to do with rescue operations. The classic case of the Israeli Raid at Entebbe, on June 27, 1976, was a unilateral action taken when four terrorists of the Popular front for the Liberation of Palestine hijacked an Air France shortly after take off from Athens airport. They flew to Benghazi, Libya, for refuelling before going to Entebbe. On July 3, under the cover of darkness, three plane loads of Israeli commandos made a surprise landing at Entebbe, and rescued the hostages. One Israeli soldier, 3 hostages, 20 Ugandan soldiers and all the hijackers were killed.¹⁷³

This and many other successful and unsuccessful unilateral

¹⁷² Yarnold Barbara M, Op.cit, P.68

¹⁷³ The Israeli negotiations revealed that Idi Amin (then President), was not making efforts to free the hostages but he was actively involved in supporting the hijacking. When the aircraft landed at Entebbe six Palestinians joined the hijackers. The hijackers demanded the release of 53 prisoners. President Amin informed the hostages that the hijackers did not have grudges against them but the fascist Israeli government. All the Israelis were segregated whilst the non-Israeli women and children were released and allowed to go to Paris. The Israeli government decided to go ahead with the military raid on Entebbe. The Ugandan aircrafts, at the airport were all destroyed. One Israeli woman who had been taken to the hospital was never heard of again. Kenya helped Israel to refuel and to carry out emergency surgery on the wounded. That was the work of General intelligence and Reconnaissance Unit 269 (Israel). Vide: Neil C.Livingstone, Op.cit, P.186

rescue operations are known to be the result of unsatisfactory negotiations between the terrorists and the victim States.¹⁷⁴

174

In another incident, (in which diplomats were not affected but only for clarification) the members of the West German Boarder Protection Group Nine (GSG-9), or locally known as Grenzschutzgruppe-9 received intensive training from a wide range of methods including tactics by Israel. When the Lufthansa flight 181 from West Germany was diverted in 1977, the Unit was activated and 28 men were picked for the rescue along with medical and communication personnel. They caught up with the flight at Larnaca, Cyprus, but the government of Cyprus refused them a rescue attempt. The hijacked plane left for Bahrain, Dubai, South Yemen and then landed at Mogadishu airport, in Somalia. While in Aden, the terrorists murdered the pilot and dumped his body at Mogadishu, and declared that if the government of West Germany did not agree to release their comrades from prison, they would destroy the aircraft and the remaining hostages. The government of Somalia, under pressure from Western governments, allowed the rescue to take place. The terrorists were made to believe that the German government was considering their demands before their deadline. The plane of commandos landed at Mogadishu, unobserved by the terrorists. The GSG 9 were dressed in dark clothing and their shoes were so soft that they could crawl without any noise. They utilised spike microphones to ascertain the exact locations of the terrorists. When their leader was informed that there were some complications, he called the others in one place to decide how to react to the new complications. It was at this moment that the commandos blew off the starboard doors of the plane and the windows of the emergency exits above the wings. They used stun grenades to blind the terrorists. They rushed into the plane and all the hijackers were brought down by submachine gun fire and one was badly wounded. None of the passengers was seriously hurt. Ibid, P.176

In 1976, France, also used force to rescue a bus load of children held hostage on the Somali boarder. The representatives of the terrorists in Somalia had made demands from the French government and threatened to cut the throats of the children if their demands were not met. The French soldiers attacked the terrorists on the Somali boarder, killing all of them and rescued all the children except one who had been killed by the terrorists. Vide: Alona E.Evans/Murphy F.John, Op.cit, P.556

Although we have called such actions unilateral, in actual sense, they are not unilateral, because, in one way or another, a third State appears to have offered some help.¹⁷⁵ For example, Kenya, was instrumentally used when Israel raided Entebbe Airport without which such an operation could not have been such a success. Likewise, Somalia (in this particular incident was the sanctuary State) offered considerable assistance and cooperation to the German rescue team. Although these incidents were rescues from terrorist groups in no way were diplomats directly involved. If there was any diplomat in any one of them, she/he was only a passenger and would not have been the main target of the terrorists.

Two rescue attempts that are also worthy of attention are the Project Blue Light and the SAS operations. The former was an operation authorised by President Jimmy Carter on a rescue mission to free fifty-three United States hostages, comprising mainly of diplomats and members of the Consular corps, who were held in Iran, after the seizure of the United States embassy, by student

175

The unsuccessful rescue attempt which was carried out unilaterally was the unsuccessful attempt made when the Egyptian Saiga attacked the airport at Larnaca in Cyprus. They were sent against the wishes of the government of Cyprus, and until the last moment when they went into operation, they did not have the blessing of the government. It is not known whether this attempt was intended to give ample opportunity to their commandos to exercise their skills or whether it was a show off to the Cyprus government. When the 15 minute firefight was over, fifteen Egyptian commandos lay dead, their C-130E had been destroyed and the rest were in custody.

militants students . The latter took place when the SAS (Britain), went into operation to free hostages in the Iranian embassy in London. Both these incidents concerned diplomats and embassies and are therefore very important for this discussion.

In May 1977, the White House announced the formation of a commando force similar to that of West Germany and Israel. The core of the force designated as Project Blue Light was stationed at Fort Bragg. The United States had also formed the Black Beret Ranger units in 1977, that engaged in training exercises to free the United States diplomats and to retake nuclear installations and oil refineries that had been captured by terrorists. In 1979 Project Blue Light constituted a new Unit code named Delta. It represented the cream of the United States military establishment. Its commander, Colonel Charles Beckwith, had received training from the SAS (UK) and Israel.

The first exhibition of the Delta's capabilities came in 1980 on a secret mission to free the United States diplomats and consular staff in Iran, following the failure of about five months of diplomatic negotiations to win their release. Unlike the previous rescue operations, the hostage takers in Iran were Iranian nationals receiving considerable support from the home government.¹⁷⁶

176

The Iranian rescue mission posed some difficulties in operation unlike the previous rescue missions which all took place at international airports. Tehran, was about seven hundred miles away from the border with sophisticated radar and detection equipments. Six

This mission failed solely on technical grounds.¹⁷⁷ One of that affected the rotor blades. It was decided to abandon it. Its

helicopters, and RH-53 Sea Stallions were put aboard the US aircraft carrier Nimitz and later on two more were added to the mission. On 24th April 1980, the rescue attempt was given the green light. With the help of Egypt, six C 130 Hercules took off from an undisclosed location in Egypt with a ninety-member contingent of commandos, fuel, jeeps, motorcycles, weapons and sophisticated communication radar-jamming equipment. They followed the Red Sea to the Gulf of Aden where they refuelled in mid-air and continued to Masirah Island off the coast of Oman. They crossed the Gulf of Oman after a short rest and entered Iranian air space. Meanwhile, after 7.30 am the eight helicopters left the deck of the NIMITZ which was by then operating in the Gulf of Oman near the Iranian coast and proceeded to a location about 200 miles Southeast of Teheran (Desert One), scheduled to rendezvous with C 130s and refuel and then continue to a second location near Garmsar, about 50 miles from Tehran which was scheduled to be the actual stage for the raid. Here, the commandos were to take off from the helicopters and then later driven to a garage 700 yards away where they were to remain hidden until the following night. The helicopters would then be flown to a site covered with camouflage netfitting. Friends in Tehran, had organised trucks and were pre-positioned near the garage. These would carry 26 commandos on the night of the April 26th into Tehran. Most of them were to go straight to the embassy and the rest were to rescue three Americans held at the foreign ministry. The hostages were then to be driven to Amjadieh Stadium where there would be helicopters waiting to airlift them to an auxiliary airfield near Oman, about 50 miles Southeast of Teheran, where the C130 were to be waiting for the hostages. Precautions were taken and therefore two of the helicopters were to be kept in reserve during the entire operation only to be used in the event of mechanical problems or any interferences. Secondly, A C 130 gunship (Hammer) was to be deployed overhead at the embassy to spray the streets around the embassy and Foreign Ministry with heavy calibre machine gunfire to prevent reinforcements from aiding the militants. It was also scheduled that once the C 130s were airborne, they were to be escorted out of the Iranian air space by US fighter planes from the carrier fleet waiting in the waters off the Iranian coast.

the helicopters made an emergency landing with a hydraulic problem that affected the rotor blades. It was decided to abandon ^{what} it. Its crew and equipments were taken by another. Then, shortly afterwards, the rest encountered a severe dust and sand storm. Another chopper was forced to return to the aircraft carrier NIMITZ when its gyrocompass and one of its two altitude indicators failed. And the third helicopter had a hydraulic problem. In view of all these problems which developed after entering the Iranian air space, it was decided that the operation be abandoned. The rescue attempt was unsuccessful and eight men were killed and five injured as a result of a collision between a chopper and C 130s during the withdrawal to the NIMITZ.¹⁷⁸ The United States is also reported to have also been involved in the Son Tay Rand and Mayaguez rescue missions.¹⁷⁹ It should be taken into account that such an operation was taken against international law because it violated the Iranian sovereignty.

The last of these episodes or rescue attempts is that of the SAS (Britain). The SAS is a 900 man strong, twenty-second Regiment formed during World War II. SAS only come into operation whenever there is a major terrorist crisis, sometimes as advisors to the affected party or to other units going into the field for the first

¹⁷⁷ Ryan Paul B, The Iranian Rescue Mission, (Naval Institute Press, 1985) P.79

¹⁷⁸ Neil C. Livingstone, Op.cit., P.187

¹⁷⁹ See: Essays On Strategy, Selection From The 1984 Joint Chiefs Of Staff Essay Competition, (Washington : National Defence University Press, 1984) PP.4-6

time. It is reported that two of the SAS men accompanied the West German GSG9 team to Mogadishu in 1977, giving both tactical advice and also expertise on the use of equipment. Another team was sent to Italy when the Italian Prime Minister, Aldo Moro, was kidnapped.

United Nations Charter discourages the use of force as a method of solving. In May 1980, in fact barely a month after the Delta Storm operation, members of the SAS demonstrated their considerable skills, but this time in Britain. Therefore, it did not encounter any obstacles similar to those faced in the Delta operation. Five Iranian Arab men from the group seeking self-determination for the Iranian province of Khuzestan took over the Iranian embassy, seized twenty six hostages, and demanded the release of ninety one fellow Arabs, then imprisoned by the Khomeini government, and a safe conduct out of the country. They threatened to kill some of their hostages if their demands were not met. A decision to make a rescue attempt was therefore made when one of the hostages was killed. About twenty SAS commandos dressed in black, armed with pistols and submachine guns, and with faces covered with hoods, stormed the embassy from its roof and adjacent houses. One of the terrorists died in the assault and another died later as a result of wounds he had sustained. The fifth man was taken into custody. One of the hostages was killed and two wounded by the terrorists who opened fire on them when the commandos began the rescue.¹⁸⁰

It is apt to reiterate here that all rescue attempts, particularly those in foreign States should be discouraged unless

with the permission of the State in which the hostages are found. It is urged that diplomatic solution is a more civilised method¹⁸¹ which should be given priority in all circumstances unless and only if such a method cannot succeed should rescues be considered. The United Nations Charter, discourages the use of force as a method of solving problems between member States.¹⁸² The member States are encouraged to use all other means to find an amicable solution. The operations are seen internationally as acts of war against sovereign States, because inevitably innocent civilians will be killed or injured usually through crossfire. This is unavoidable when raids are restricted to terrorists bases which are usually found in areas of civilian population.¹⁸³ There is a danger of losing the support of both domestic and international opinion.¹⁸⁴

¹⁸¹ Crelinsten Ronald D./Szabo Denis, Op. cit., PP.42

¹⁸² It has been suggested that the concept of self help or unilateral action falls under Article 51, of the United Nations Charter, which allows measures of self defence. Whether a unilateral action to rescue diplomats falls under this Article is an interesting debate of legal importance.

¹⁸³ This is because counter terrorism involves a fight against a hidden target that it leads to actions which violate ethical norms. The frustration of fighting a movement which is largely invisible creates a powerful thirst for intelligence and revenge. For example France used torture on detainees in Algeria in 1954 - 61, The British army's abhorrent measures against post 1954 anti colonial campaigns in Palestine, Malaya, Cyprus, and the Northern Ireland policy of shoot to kill, the Nazi response to the attack on Reinhard Heydrich in occupied Bohemia on 27 May 1942, when Hitler ordered 10,000 people taken hostage and 100 to be shot that night. Wilkinson Paul, British, Op.cit., PP.21 & 22

¹⁸⁴ Wilkinson Paul, British, Op.cit., P.8

There have been other methods employed by victim States such as economic sanctions. The United States applied some economic measures against the Islamic Republic of Iran when its diplomats were held by militant students in Tehran. the formulation of this Convention. The article suggests that any previous treaty prior to

The fourth method is by making a complaint to the International Court of Justice, in the same way as the United States did in respect of Iran. This serves a useful purpose in the sense that it would focus attention on the illegal acts of the respondent State and raise the consciousness of the world community regarding such activities.

The fifth mode is by making a diplomatic protest. This could be done even by other States sympathetic to the victim State. It is vital for other States and particularly the developed States, since their support is very important as a contribution to solidarity against terrorism. There have been many of these kinds of protests in the diplomatic world. Although the right to

5.10 Asylum For The Perpetrators Of Crimes Against Diplomats.

Article 12 provides:

The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those Treaties.

Article 12 of the 1973 Convention under discussion is not emphatic on whether there should be asylum for the perpetrators of

crimes against internationally protected persons or not. While the provisions of Article 8 are decisive and clear that offences in Article 2 are extraditable, Article 12 gives preference to the bilateral treaties made on asylum prior to the formulation of this Convention. The article suggests that any previous treaty prior to the 1973 Convention which excludes some or all crimes mentioned in Article 2 as non extraditable offences, such a treaty takes priority over Article 8. The impact of Article 12 on the Convention is that it defeats the general objective of the Convention on extradition.¹⁸⁵

The crimes against diplomats such as murder, kidnapping and others should be regarded as common crimes because they are committed against internationally protected persons. These crimes are not to be considered political offences simply because of the motives of the offenders, but because the victims of such offences are internationally protected persons.¹⁸⁶ Although the right to grant asylum is basically left to the competence of each State, State Parties should give due priority to the 1973 Convention and most especially to Article 8 of this Convention.

Articles 7 and 8 tend to negate all possibilities of giving asylum or sanctuary to anyone who commits crimes against internationally protected persons. These articles are affirmative

¹⁸⁵ Franciszek Przetacznik, *Op.cit*, P.132

¹⁸⁶ (1971) 1 Y.B.I.L.C., PP.11 - 12

of the requirement that a State in which the offender is present should extradite him\her to the requesting State for trial and prosecution. The requested State has to ascertain the conditions of trial and punishment in the requesting State, for some countries do not allow extradition where it is certain that the offender is likely to face torture in detention or death sentence for his/her crimes. After ascertaining all these conditions, a State should not hesitate to extradite the perpetrator(s) of the crime(s) against the internationally protected persons. If a State chooses not to extradite for various reasons, it should submit the offender to its competent authority for prosecution.

The objectives of the 1973 Convention are clear. That is, to adopt appropriate and effective measures for the prevention and punishment of such offenders of crimes against internationally protected persons. They should not go free nor should they be given safe haven after committing crimes against internationally protected persons. The basic foundation of the 1973 Convention provides that a State should extradite or prosecute the offenders in the local courts. The wording of Section 8(1) removes any doubt by stating that all crimes listed in the article are "extraditable offences".

The Convention does not refer to these crimes as common crimes but crimes which should be punishable by appropriate penalties which take into account their grave nature. These crimes are grave

in nature because they are committed against internationally protected persons.¹⁸⁷ The principles of international law as contained in other conventions refer to these crimes as "common crimes" which make the offenders not eligible for asylum. Under this principle, it is not permissible for States to grant asylum to persons accused of or condemned for common crimes. For example, Article 1 of The 1928 Havana convention, provides that "it is not permissible for States to grant asylum . . . to persons accused or condemned for common crimes."¹⁸⁸

The 1935 Montevideo^e Treaty On Political Asylum and the 1939 Montevideo^e Treaty On Political Asylum And Refuge Articles 1 and 3 respectively provide that States are not permitted to grant asylum to persons charged with common crimes and should be extradited.¹⁸⁹ The 1954 Caracas Convention On Diplomatic Asylum provides that, "It is not lawful to grant asylum to persons who at the time of requesting it, are under indictment or on trial for common offences or have been convicted by competent regular courts and have not served the respective sentences . . . save when the acts giving rise to the request for asylum . . . are clearly of a political nature."¹⁹⁰

¹⁸⁷ (1972) 1 Y.B.I.L.C. P.15

¹⁸⁸ Franciszek Przetacznik, Op.cit., P.124 (Washington 1968)

¹⁸⁹ Ibid.

¹⁹⁰ Przetacznik Franciszek, Op. cit., P.125.

¹⁹⁰ Ibid P. 132

Article 2 of the 1968 Draft Convention On Diplomatic Asylum States that "homicide or an attempt against the life of the head of State ... shall not be considered as a political offence nor as a motive to change a mixed offence from its status as a common law offence to a political offence."¹⁹¹ Asylum shall also not be granted to a person charged with genocide or crimes against humanity.¹⁹² Article 1(2) of the 1967 United Nations Declaration on And Territorial Asylum provides that the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity.¹⁹³

The granting of asylum to a refuge seeker is entirely in the hands of a requested State. It has to decide who qualifies for asylum in its territory. But this right does not seem to extend to crimes committed against officials of foreign States especially crimes such as kidnapping, murder, and other assaults against the lives or personal integrity of international ^{ly} protected persons.

Article 2 of the Organisation of American States (OAS) Convention To Prevent And Punish Acts Of Terrorism Taking The Form Of Crimes Against Persons And Related Extortion That Are Of

¹⁹¹ 6 Digest of International Law 734, (Washington 1968) cited by Franciszek Przetacznik, Op.cit., P.125.

¹⁹² Przetacznik Franciszek, Op. cit., P.125.

¹⁹³ Ibid, P. 132

International Significance (1971 Washington) states that kidnapping, murder and other assaults against the lives or personal integrity of officials of foreign states, as well as extortion in connection with crimes are considered common crimes of international significance regardless of motive. The 1971 Rome Draft,¹⁹⁴ provides that crimes against officials of foreign States such as kidnapping, murder, and other assaults against the lives and physical integrity of internationally protected persons are deemed to be extraditable offences. The 1972 Kearney's draft¹⁹⁵ also provides that crimes such as murder, kidnapping, grievous bodily harm, extortion, attempt to commit or participate in any of such crimes are not considered to be political offences.¹⁹⁶ This provision suggests that a State may in a unilateral request submit

It is therefore suggested that, although the 1973 Convention does not say in explicit terms that the crimes in Article 2 are common crimes, it treats all such crimes in Article 2 as extraditable offences without due regard to the motive.¹⁹⁷ It is apparent that all such crimes are common crimes. Therefore unless otherwise an interpretation is made to the effect that Article 12 means that with the exception of crimes committed

¹⁹⁴ The Rome Draft Convention was transmitted by Denmark (GAOR: 27th Session, Supp, No. 10 A/8710/Rev.1).

¹⁹⁵ Richard D. Kearney (Chairman Of International Law Commission) Draft Convention (U.N. Doc A/CN4 IL.182), Dated February 28, 1972

¹⁹⁶ Przetacznik Franciszek, Op. cit., PP.141 and P.115.

¹⁹⁷ Ibid., P. 131.

against foreign officials specified in Article 2, the provisions of this Convention shall not affect the application of Treaties on Asylum in other situations, there is no justification for the inclusion of Article 12 in this Convention. *reservation made was that the consent of each party to a dispute is necessary.*

5.11 DISPUTE RESOLUTIONS

The last of these articles which requires attention and which is more likely to frustrate the objective of this Convention is Article 13(1) which provides that "Any dispute between two or more State Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration". This provision suggests that a State may in a unilateral request submit a dispute on interpretation to arbitration or the International Court of Justice. However the provision of Article 13(2) allows States to declare that they are not bound by paragraph 1 of this provision.¹⁹⁸ *its domestic legislation.*

It is suggested that a unilateral request by a party to a dispute is not feasible, because in such a case the other party usually denies to be bound by the outcome of such a request. It is important that the two parties, by mutual consent, agree to settle

¹⁹⁸

Article 13(2), " Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The State Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation."

their dispute by arbitration or at the International Court of Justice. This is the reason why a number of countries¹⁹⁹ made a declaration to the effect that they are not bound by this provision in accordance with Article 13(2).²⁰⁰ The observation made was that the consent of each party to a dispute is necessary.²⁰¹

5.12 INTERPRETATION OF THE 1973 CONVENTION.

Another problem we intend to include in this discussion is the interpretation of the 1973 Convention in general. Although Article 13 gives solutions to disputes concerning the interpretation of the convention, many other States prefer to interpret it in accordance with the local legislation which in turn gives a wide variety of interpretations. Switzerland made a declaration to the effect that the Swiss Federal Council interprets Article 4 and 5, paragraph I of the 1973 Convention to mean that Switzerland undertakes to fulfil the obligation contained therein subject to the conditions specified by its domestic legislation.²⁰²

¹⁹⁹ They are; Argentina, Bulgaria, Byelorussia, Soviet Socialist Republic, Czechoslovakia, Democratic Republic of Korea, Ecuador, El-Salvador, German Democratic Republic, Ghana, Hungary, India, Iraq, Israel, Jamaica, Malawi, Mongolia, Pakistan, Peru, Poland, Rumania, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republic and Zaire.

²⁰⁰ Multilateral treaties, Deposited with the Secretary General, Status as at 31st December 1986, United Nations. N.Y, 1987, p. 83-86.

²⁰¹ Ibid.

²⁰² Ibid., page 86.

This may encourage many other States to carry out their duties in accordance with the local legislation which could be a hindrance to the effectiveness of this 1973 Convention.

5.13 CONCLUSION.

In conclusion, we have observed that the main instrument which the international Community uses for the prevention and punishment of the perpetrators of crimes against internationally protected persons is the New York Convention of December 14, 1973.

The impact of the 1973 Convention is that, as we have seen, some State Parties legislated to have jurisdiction over crimes specified in Article 2 and punish the offenders with appropriate penalties which take into account the grave natures of the crimes.

There has also been relatively little improvement on co-operation to share information regarding terrorist groups, their members, and their movements particularly in Europe and America. The outcome is that many of the highly wanted offenders of crimes against internationally protected persons have been arrested and brought to trial. It is also the result of this cooperation that many of these offenders cannot move freely as they used to in the 1970s. The fact is that some of the offenders are now known and the information is disseminated among member States. The other provision that is very important is Article 7 which requires a State Party in ^{whose territory} ~~which~~ the offender is present, if it does not extradite him, to submit him to its competent authorities for the purpose of prosecution. There has been a problem in implementing

this provision. Some States neither extradite nor prosecute the offenders in the local courts. This is probably due to fear of reprisals from the terrorist groups, or for reasons that some groups are considered to be political in nature. Some countries do recognise certain organisations as political and to that extent they do not consider them as terrorists nor their activities. They look at their struggle as a means to achieve self-determination.

The last of these provisions which is worthy of our attention as far as this subject is concerned is Article 8(4) which establishes "Extraterritoriality" for the purposes of extradition. The provision states that for the purpose of extradition, such crimes shall be treated as if they had been committed not only in a State in which they occurred but also other territories of other States.

In conclusion, we find that the 1973 Convention has significant loop holes which are manoeuvred by State Parties and political organisations to frustrate the international effort to combat terrorism against diplomats. Further conclusions are to be made in the final chapter.

This Convention is the main subject of this dissertation and has been discussed in detail in Chapter V

Schlaghecker Donna W. International Terrorism: An Introduction To The Concepts And Actors. (Lexington Books D.C Heath and Company, Massachusetts/Toronto, 1988), P.121 & 123

(1993) 47 Y.P.U.N. P.1147 - 3. See also Wilkinson Paul. Terrorism And The Liberal State. (The Macmillan Press Ltd, 1977) herein after referred to as P. Wilkinson. Terrorism and The Liberal State. P.226

CHAPTER SIX

INTERNATIONAL MEASURES OR INTERNATIONAL INSTRUMENTS

OTHER METHODS ADOPTED TO ENHANCE THE PROTECTION OF DIPLOMATS.

6.1 INTRODUCTION

This chapter looks at measures taken at both ^{the} international and regional levels to enhance the protection of diplomats. The first part ^s will look at the United Nations resolutions and the second part will be concerned with two of the regional conventions, namely the 1971 Organisation of American States Convention to Prevent And Punish Acts Of Terrorism Taking The Form Of Crimes Against Persons And Related Extortion That are Of International Significance and The 1977 European Convention On The Suppression Of Terrorism.

6.2 INTERNATIONAL MEASURES

The most serious problem with the 1973 Convention¹ is that its ratification has not been as overwhelming² as in the case of the 1961 Vienna Convention on Diplomatic Relations. It took almost four years before the Convention was brought into force in February 1977. By 1993, 172 States were members to the 1961 Vienna Convention and only 86 State were members to the 1973 Convention³.

As a result of the lack of overwhelming support for the Convention the Nordic States, namely Denmark, Finland, Iceland, Norway and Sweden came up with the suggestion which was adopted in resolution 35/68 at the 35th Session of the General Assembly 1980, to the effect that, a 'Communication Channel' between States and through the Secretary General, would be established against any

¹ This Convention is the main subject of this dissertation and has been discussed in detail in Chapter V

² Schlagheck Donna M, International Terrorism: An Introduction To The Concepts And Actors. (Lexington Books D.C Heath and Company, Massachusetts/Toronto, 1988), P.121 & 123

³ (1993) 47 Y.B.U.N. P.1147 - 8, See also Wilkinson Paul, Terrorism And The Liberal State. (The Macmillan Press Ltd, 1977) herein after referred to as P.Wilkinson, Terrorism and The Liberal State, P.226

serious violation of the protection, security and safety of diplomatic and consular mission and representatives. It was also to report on measures taken by a State to bring offenders to justice and to prevent repetition of violence, and eventually to communicate the final outcome of the trial proceedings against the offenders by a State where such proceedings are held.⁴ The lack of ratification also resulted in resolution 34/145 for the Convention Against The Taking Of Hostages 1979.⁵ In 1980 the General Assembly adopted resolution 35/168 in which it deplored all violations of the principles and rules of international law governing diplomatic relations. It ^{urged} argued all members States to ensure the protection, security and safety of missions and representatives and to prevent illegal activities against their security.⁶ On December 11, 1985 the General Assembly adopted another resolution 40/73 in which it emphasised the duty to take appropriate steps to protect the premises of the mission, prevent any attack on diplomatic and consular representatives and to apprehend the offenders and to bring them to justice.⁷ On December 3, 1986 the General Assembly adopted resolution 41 /78 in which it recommended States to cooperate closely through, inter alia contacts between the diplomatic and consular missions and the receiving State, with regard to practical measures designed to enhance the protection, security and safety of diplomatic and consular missions and representatives and with regard to exchange of information on the circumstances of all serious violations of diplomatic immunity.⁸ Again on December 7, 1987,

⁴ B.Sen, *Op. cit.* P.125

⁵ Schlagheck Donna, *Op.cit*, P.123

⁶ (1980) 34 Y.B.U.N. P.1148

⁷ (1985) 39 Y.B.U.N. P.1173

⁸ (1986) 40 Y.B.U.N. P.994

the General Assembly adopted resolution 42/154 considering effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives. Another resolution 43/167 of the General Assembly ^{was adopted} took place on December 9, 1988. It urged States to observe, implement and enforce the principles and rules of international law governing diplomatic and consular relations.⁹

6.3 REGIONAL RESPONSE TO TERRORISM AGAINST DIPLOMATS.

6.3.1 INTRODUCTION

This discussion will briefly look at two regional Conventions regarding the protection of diplomats. These are: The 1971 Organisation of American States Convention To Prevent And Punish Acts of Terrorism Taking The Form Of Crimes Against Persons And Related Extortion That Are Of International Significance, and The 1977 European Convention On The Suppression Of Terrorism. The objective underlying this discussion is to find out the impact of the regional responses and whether infact the provisions of these Conventions offer some better method to combat terrorism against diplomats. *Badly worded*

6.3.2 The 1971 OAS CONVENTION

During the 1960s there was a wave of acts of terrorism arising from political activities in the Americas.¹⁰ It was in response to these activities that the General Assembly of The Organisation Of American States convened and resolved on June 30, 1970, inter alia:

To condemn such acts. . . when perpetrated against representatives of foreign States, as violations not only of human rights but also of the

⁹ (1988) 42 Y.B.U.N. P.807

¹⁰ Evans Alona E, Legal Aspect Of International Terrorism. (Lexington Books, Massachusetts, Toronto, 1978) P.299

norms that govern international relations.

The resolution also directed the Inter- American Juridical Committee to prepare a draft convention on procedures and measures to fulfil the purpose of the resolution in cases where the prescribed acts might have international repercussions. This led to the formulation of the 1971 OAS Convention of January 8, 1971.

During the deliberation on the draft convention by the conference of foreign ministers, six governments who thought that the convention should have dealt with a wide range of issues pertaining to terrorism in general walked out in protest when the conference instead adopted a convention on specific issue, namely the kidnapping of diplomatic agents.¹¹ The conference was also given another shock when three governments either abstained or voted against the convention because of what they believed was an excessive infringement on State sovereignty.¹²

The objectives of the Convention are very well reflected in the preamble. It provides:

... The General Assembly of the Organisation, in resolution 4, of June 30, 1970, strongly condemned acts of terrorism, especially the kidnapping of persons and extortion in connection with that crime, which it declared to be serious common crimes;

Criminal acts against persons entitled to special protection under international law are occurring frequently, and those acts are of

¹¹ "The Inter- American Convention On Kidnapping Of Diplomats" (1971) 10 Columb J.T.L. PP. 392 - 397

¹² The Convention did not the expected ratification from the beginning. See: Stohl Micheal, The Politics Of Terrorism. (Mercel Dekker, Inc, N.Y., 1978) P.180

international significance because of the consequences that may flow from them for relations among States. . . .¹³

The preamble declares from the outset that acts of kidnapping of persons and extortions in connection with that crime are common crimes. Common crimes ^{which} are ordinarily to be found in penal codes are treated so for the purpose of prosecution and extradition. It is also the objective of the convention to curb criminal acts of terrorism against persons entitled to special protection under international law because of the repercussions of such acts on international relations.

6.3.3 THE PROVISIONS OF THE 1971 OAS CONVENTION.

The discussion intends to look at three provisions of this convention.

Article 1 states:

The contracting States undertake . . . to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the State has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

First, the provision describes 'ratione personae' as "persons to whom the State has the duty according to international law to give special protection" The provision is not explicitly clear whether the description includes other categories such as government officials, ministers, representatives of government organisations and international public organisations.¹⁴ However, the negotiating

¹³ (1971) 10 I.L.M. P.255

¹⁴ Przetacznik Francizek, Protection of Officials Of Foreign States According To International Law. (Martinus Nijhoff Publishers, 1983) P.14

history of this convention shows that it was intended to cater for a special class of diplomatic agents.¹⁵

Further, Article 1 establishes that kidnapping, murder, and other assaults which affect the life and physical integrity of diplomats (*ratione materiae*) are acts of terrorism. This is the case even though the 1971 OAS Convention does not define terrorism. It nevertheless describes these acts as offences of terrorism. Therefore it may not be necessary to define terrorism in regard to these offences in any court of law in the Americas.

~~The second provision is that found in Article 2 which provides that "... kidnapping, murder and other assaults . . . shall be considered common crimes of international significance, regardless of motive."~~ ^{Redundant}

In addition to the preamble, this provision reiterates that the offences described in Article 1 are common crimes regardless of the motive. Therefore a political activist shall not claim the 'political offence exception' when he commits any of these offences.¹⁶ This is because common crimes are ordinarily considered so for the purpose of prosecution and extradition. These crimes by the fact that they are considered common crimes do not amount to political offences.¹⁷ This is an exceptional provision which has no equivalence in the 1973 Convention. It seeks to negate the use of the 'political offence exception' in so far as these crimes are concerned.

BILATERAL TREATIES

Article 3 of this Convention provides that:

¹⁵ Evans Alona, Op.cit. P.301

¹⁶ Przetacznik Franciszek, Op. cit. P.14

¹⁷ Ibid

Persons who have been charged or convicted . . . shall be subject to extradition under the provisions of the extradition treaties in force between the Parties or, in the case of State that do not make extradition dependent on the existence of a treaty, in accordance with their own laws.

According to this provision the Convention depends almost entirely on the bilateral treaties for the purpose of extradition. The provision does not in any way suggest that the 1971 OAS Convention could be taken as a legal instrument for the purposes of extradition. The article also ^{ies} clarify that a particular State has the exclusive responsibility to ascertain whether the acts perpetrated fall within the confines of the treaty and if the details are applicable. As it has been learnt on the problems of extradition¹⁸ ^{over} much dependence on bilateral treaties for extradition has its consequences. However, the 1981 Caracas Inter-American Convention on Extradition urges State Parties to simplify procedures of extradition and promote mutual assistance in the field of criminal law on a wider scale than ^{is} provided for in the treaties in force.¹⁹

Although we have noted that Article 2 provides that the offences described in Article 1 are common crimes, we find that this objective is defeated by Article 6 of the same convention. Article 6 provides that "None of the provisions of this Convention shall be interpreted so as to impair the right of asylum". In other words, Articles 1 and 2 should not necessarily be taken as abrogating the right to asylum of offenders.

Franciszek Przetacznik gives different interpretations[?] to this provision. He says that the provision means that "with the exception of crimes committed

¹⁸ Supra. P.137

¹⁹ Murphy John, Punishing International Terrorism: The Legal Framework For Policy Initiatives. (Totawa, N.J. Rowman and Allenheld, 1988) P.39

against foreign officials. . . the principles of the right to asylum apply to other situations."²⁰ ?

However we do not find this interpretation sound to justify the inclusion of this provision in the Convention. If the objective of the provision was to offer asylum to offenders after serving their punishment for the crimes committed or other offences not pertaining to officials of foreign States, we contend that this too, would not have necessitated the presence of this provision in the Convention.²¹ This is because it is within the prerogative of the States to offer asylum. Therefore Article 6 defeats the purpose of this convention.

6.4 THE 1977 EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

6.4.1 INTRODUCTION

The European Convention on the Suppression of Terrorism was adopted by the Council of Europe on Nov. 10, 1976. It was signed by 17 out of the 19 member States on January 27, 1977.²²

It is noted that unlike the previous two conventions discussed this one is not exclusively concerned with diplomatic agents. It caters for other offences described in other conventions.²³ ?

THE OBJECTIVES

The Convention begins its introduction by stating the objectives. It provides

²⁰ *Przetacznik Franciszek, Op.cit. P.132*

²¹ *Wardlaw Grant, Political Terrorism: Theory Tactics and Counter - Measures. (Cambridge University Press, N.Y. 2nd Ed. 1990) P.114*

²² *Evans Alona, Op.cit, P.497*

²³ *Ibid*

that the Council of Europe:

... is to achieve a greater unity between its Members;
 ... (is to show an awareness) of the growing concern caused by the
 increase in acts of terrorism;
 ... to ensure that the perpetrators of such acts do not escape
 prosecution and punishment;
 ... (and to emphasise that) extradition is a particular effective
 measure for achieving this result.²⁴

As seen from the introduction, the Convention acknowledges the increase in
 acts of terrorism and that the perpetrators of these crimes escape to safe havens
 where they cannot be prosecuted or extradited to other States for prosecution
 because of the encumbrances of extradition. Since extradition is an effective
 measure for prosecution and punishment of offenders the Council found it
 necessary to come up with a measure which would limit some of the obstacles of
 extradition. The Convention excludes the 'political offence exception' from all
 offences described therein.²⁵

In general, the Convention appears to be an additional instrument to
 Conventions and Treaties in which problems of extradition have hampered the
 prosecution of offenders. Therefore the Convention does not follow the usual
 pattern of describing the "ratione personae". Further, when it comes to the
 offences "ratione materiae" it, among others, describes crimes mentioned in the
 provisions of other conventions.²⁶

²⁴ (1976) I.L.M. P.1272

²⁵ Murphy John, Op.cit. P.45

²⁶ Weinberg Leonard B and Devis Paul B, Introduction To Political
 Terrorism. (Mcgraw - Hill Publishing Co. N.Y. 1989) P.168

6.5 THE PROVISIONS OF THE 1977 EUROPEAN CONVENTION

Since the objective of this Convention concerns the extradition of perpetrators of crimes, it begins in Article 1 with solving one of the problems of extradition, the 'political offence exception'. It provides that:

For the purpose of extradition between Contracting States none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

For the purposes of this discussion Article 1 (c) mentions crimes against internationally protected persons, *inter alia* providing among others that:

an offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents.

However for the purpose of extradition all offences in Article 1 are considered extraditable. The alleged offenders shall not plead the "political offence" exception. Unlike other provisions in the previous conventions this provision is emphatic that these acts are not political offences.²⁷

The Convention strives to achieve greater unity among members of the European Council in extradition arrangements. Article 3 provides that:

The provisions of all treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.

This means that other arrangements which do not consider some of the crimes to be extraditable, shall to that extent be inconsistent with this convention.

One notable issue that requires mention is the absence from the convention

of a provision pertaining to asylum similar to that to be found in the 1971 OAS Convention and the 1973 Convention. The absence of such a provision strengthens our argument that it defeats the purpose of the convention and hence it was deliberately omitted. It cannot be by coincidence that it was left out.²⁸ for the inclusion of this provision in this Convention.

Lastly The 1977 European Convention aims at strengthening measures on

6.6 CONCLUSION

This discussion has looked at a number of resolutions at the Security Council and the General Assembly of the United Nations. The lack of overwhelming ratification of the 1973 Convention necessitated further measures to strengthen the protection of diplomatic agents. Therefore the resolutions adopted among others; appealed to States which had not yet become members to do so, urged member States to ensure the protection, security and safety of missions and representatives, to prevent acts of violations of the diplomatic immunity and urged member States to cooperate and share information on acts of terrorism against diplomats.

The 1971 OAS Convention with the exception of one provision has very comprehensive measures of protecting diplomats. Article 1 explicitly calls crimes against diplomats acts of terrorism. Article 2 refers to crimes in Article 1 as common crimes. Common crimes are generally known because they are to be found in the penal codes worldwide and therefore are treated so for the purpose of extradition or prosecution. Therefore the political offence exception does not apply to these crimes.

Although Article 2 refers to all crimes in Article 1 as common crimes

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It is apt to argue that Europe, with its proactive human rights posture could not have accidentally left out the provision on asylum.

CHAPTER VI.1

Article 6 defeats this objective. The offenders of these offences can qualify for asylum even before they are prosecuted. If the right to asylum was meant to be exercised after the offender has served his sentence or even if the offence was other than those prescribed in the above article there would be no need for the inclusion of this provision in this Convention.

Lastly The 1977 European Convention aims at strengthening measures on extradition. It was adopted after having noted that many offenders escape prosecution and punishment. One of the obstacles it endeavours to remedy is the use of the political offence exception in crimes of terrorism. It was also intended that all other treaties and arrangements on extradition should conform to this Convention.

As the establishment of diplomatic relationship is mutual, the waiving or withdrawal of the diplomatic immunity cannot be done unilaterally. International law accords protection to all diplomats whether in a receiving State or through which the passage takes place. The Preamble of the 1961 Convention on Diplomatic Relations affirms that the rules of the customary international law shall continue to apply to questions not regulated by the provisions of the present convention.

2. The most important and unwritten law in matters concerning diplomatic

CHAPTER V11

CONCLUSIONS AND SUGGESTIONS

The foregoing discussion brings us to a number of conclusions:

1. The 1961 Vienna Convention On Diplomatic Relations offers very important provisions on the protection of diplomats, which are enshrined in Articles 22 and 29.

The objective of these provisions is to oblige the receiving State ^{redundant} to be duty-bound in protecting the diplomatic agent, not only from the wrath of the private citizens or organisations but also its very agents or organs, which may violate the diplomatic immunity. The inviolability of the diplomatic agent is not a sole right of the receiving State which can do away with or withdraw whenever it pleases, but it is a right of diplomatic agents, which is found in the international law of customary practices and usages. The obligation of the States is to abide by the provisions of the 1961 Vienna Convention On Diplomatic Relations, which in fact, codifies the practices and usages of international law.

As the establishment of diplomatic relationship is mutual, the waiving or withdrawal of the diplomatic immunity cannot be done unilaterally. International law accords protection to all diplomats whether in a receiving State or through which the passage takes place. The Preamble of the 1961 Convention on Diplomatic Relations, affirms that the rules of the customary international law shall continue to apply to questions not regulated by the provisions of the present convention.

2. The most important and unwritten law in matters concerning diplomatic

intercourse is the principle of reciprocity. The concept of reciprocity in the regime of diplomacy plays much larger role than is accorded to it under international law. It is argued that the entire career of diplomatic immunity has been founded and maintained on mutuality and reciprocity. Every receiving State is in fact a sending State. Each receiving State accords diplomatic immunity to diplomats of the sending State so that its diplomats would be treated the same while in ^{the} sending State. There are many incidents which may have occurred had it not been for this principle. As seen in the discussion, the British government in the fatal shooting of P.C. Yvone Fletcher in 1983, would have ordered a search of the Libyan peoples' Bureau had it not been that thought, that Libya, would have done the same. When the British officers entered the Libyan People's Bureau after the diplomats had left, the Libyan authorities too, ordered the search of the British embassy in Tripoli. There are many incidents which can be cited in relation to reciprocity. However, the main important fact is that normal existence of international relations owe much to the principle of reciprocity than to any other written law

3. The discussion held during the field work found that some of the diplomats were affirmative that the provisions of the 1961 Convention on Diplomatic Relations offer adequate protection against private individuals. There is no need for any additional measures providing for similar provisions. Article 29 of the 1961 Convention on Diplomatic Relations is emphatic that receiving States are under obligation to take appropriate measures to protect the diplomatic agents. This is so even though there is a lacuna in the law which does not provide for the violation of diplomatic inviolability by the receiving States. Even though the Convention does not provide for punitive measures against any State that disturbs the inviolability of the diplomatic immunity, it

nevertheless obliges the States to take appropriate steps to protect the diplomats. The fact that some countries fail to offer adequate protection to diplomats against State agents does not necessarily affect the credibility of the provisions of the 1961 Vienna Convention.

It is certain that a reasonable protection has been set up in form of the provisions of the 1961 Vienna Convention to protect diplomats. However the protection differs from one State to another depending on the security situation of a receiving State. In one situation, some receiving States are vulnerable and easily targeted by terrorists and, in fact, require increased security for diplomats. For example, a diplomat narrated that during the Gulf War, his country stepped up the security of diplomats for the allied States because of the Gulf war crisis during that time.

The protection of diplomats, therefore, varies from one country to another. While in some States, around the clock, special protection is provided by specialised agencies, in others such protection is provided only in special circumstances. This finding therefore seeks to separate the weakness of some countries to implement the provisions of the Convention from the document itself.

It is however recommended that receiving States should step up appropriate measures to protect diplomats from their agents and other private individuals. They should also make arrangements for occasional patrol of the surroundings of diplomatic missions and diplomats' residences as well as screen their mail deliveries to avoid delivery of explosives. It should, whenever possible, offer

security alarms at their residences. It was learnt that some of the sending States offer their diplomats such facilities besides the protection provided by receiving States. the attacks are directed against internationally protected persons.

4. This study has found that the attacks on diplomats occur for a number of reasons.

In the first instance, it is due to lack of commitment by some countries to the principles of the United Nations Charter, as well as the 1961 Vienna Convention on Diplomatic Relations. This is why there have been increased attacks on diplomats although many States believe that the provisions pertaining to the protection of diplomats are adequate.

Secondly, the attacks occur due to the fact that some countries fail to instruct their agents on the protection of diplomats and their inviolability. One diplomat recalls an incident where a receiving State had mounted a military road block where she was asked to produce her travel documents inspite of the diplomatic number plate on her car. The army personnel read the identification papers upside down! Such a situation reveals lack of training of the government agents and respect for foreign officials. The diplomat cannot claim immunity from a government agent who does not even know who a diplomat is. The government agent may therefore proceed to search the diplomat and the car in violation of diplomatic immunity. It is suggested that the receiving States should take appropriate steps to train all its agents on the inviolability of diplomats.

Thirdly, there are some receiving States who have committed themselves to helping the liberation groups and to a certain extent have allowed or encouraged such attacks to take place either by covering up those who commit acts of violation or/and allow them to go free. Neither do these States make any

effort to detain and prosecute the offenders, nor do they share information with other States about their movements. This attitude is highly deplorable particularly when the attacks are directed against internationally protected persons.

Fourthly, sometimes the receiving States also encourage or assist in violation of the immunities of diplomats whose States are considered unfriendly. This is sometimes due to their direct interference in what is usually called the internal affairs of the State or when they are implicated in assisting a dissident opposition group in the receiving State or in exile.

This way of solving such problems by receiving States is unacceptable and it is such unorthodox method, which has been referred to, in this study as 'State-Sponsored Terrorism'. It is because it goes against all norms of international law. The receiving States should abstain from encouraging such abuse of diplomatic agents.

5. The responsibility of the States in protecting a diplomat extends to the situation where he is kidnapped. The receiving State is supposedly required under Article 29 of the 1961 Convention to take appropriate measures to secure his release. This includes talking to and negotiating with the captors of the diplomats. What matters is the safety of the diplomatic agent and not the means by which he is rescued from his kidnappers. The receiving State must endeavour to see that he is released and is safe. Reference is made to the 1979 Convention on The Taking of Hostage. The incident concerning the West German ambassador to Guatemala, K. Sprei, who was killed on March 31, 1970 by his kidnappers suggests that there should be strict liability on the part of receiving States in matters

of protecting diplomats. The idea of talking to and negotiating with the hostage takers may only be favourable to those who accept or advocate negotiations with kidnappers and not with others who reject such a notion outright but it serves in the protection of diplomats.

The two schools on negotiations, namely, those who wish to negotiate and those who vehemently reject any negotiations cannot be reconciled on a theoretical basis. Practically, it is believed, some States would wish to talk to the kidnappers. One diplomat was of the opinion that talking to the kidnappers amounts to recognising them. But other diplomats were favourable to negotiations. One of them suggested that it is through talking to them that one would know the truth. This turned out to be the real situation when on November 18, 1974, Mr. Lechoco took hostage the Philippine ambassador to the United States. He demanded publicity and safe conduct of his son to the United States. While many States would favour talking to the diplomats, there is no clue that the States would give in to the demands of the hostage takers.

Talking to and negotiating with the terrorists in diplomatic kidnapping is a subject many feel cannot be reconciled on the basis of a common policy. It is suggested that each State should be left to conduct its own course of solving the kidnap problem of kidnapping. No interference should be made with the receiving State to make it difficult for it to, or not to, enter into any talks.

6. Although many receiving States have improved on the security of the diplomats by providing necessary personnel and other forms of protection, the sending States too have stepped up measures to assist in the protection of their diplomats. For example, while it is easier to just walk into the third world

embassies with minor security checks, it is observed that many other embassies have strict security measures at the entrance of their missions. Far from the mission building, the main gate is manned by security personnel whose duty is to carry out body checks as well as searching the hand bags with electrical devices. The Israeli embassies and consulates are supplied with armed guards, walls and windows are reinforced, closed circuit television cameras are installed and inspection of parcels and visitors is stepped up. The United States too, employs stringent measures at its missions. It also employs marines, electrical devices and security cameras.

The option of seeking permission for entry into the mission or applying

7. There have been suggestions that the removal of the diplomatic

car plates from their limousines would minimise the attacks on diplomats as the offenders would find it difficult to identify the diplomats. Although this sounds ~~as~~ a good suggestion, it does not take into account the fact that ~~the~~ attacks on diplomats are usually well calculated. There are not many mistakes about the identity of persons attacked. The pre-planned attacks enable the offenders to study and identify their targets right from their residences to the mission buildings including the routes. Therefore whether the diplomatic car plate numbers are on the car or not, the offenders can easily identify their targets. Some of the diplomats are in favour of retaining the diplomatic car plate numbers. One suggested that in any attack the people who might be present should be able to recognise that the victim is a diplomat.

8. The mission buildings are inviolable and under no circumstances should receiving States enter their premises without the permission of the heads of the missions (Article 22). Any attack on the mission or entry into it without

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 permission for reason which may or may not be justified, for example, that activities which are incompatible with the functions of the mission (according to Article 41), are being carried out in the mission building, is not acceptable under the same convention and under any other acceptable source of international law. Some receiving States have taken a carefree attitude when it comes to mob demonstration by their citizens against the sending State. The receiving State is under a duty to protect the mission even if such demonstration is, according to the receiving State, justified.

The option of seeking permission for entry into the mission or applying diplomatic pressure on the sending State should be exhausted before embarking on any attack on the mission building. It is recommended that, the receiving State could as well use pressure on the sending State to obtain its permission. Other means of solving such problems are not acceptable under international law. If such practices of breaking into the missions are not discouraged, some irresponsible States might be encouraged to mount occasional searches on embassies of countries they consider unfriendly.

9. The objective of the discussion in the fifth chapter is to find out whether the provisions enshrined in the 1973 Convention enhance the protection accorded to diplomatic agents. The 1973 Convention was formulated due to increased acts of terrorism against internationally protected persons including diplomatic agents. The need for this Convention was overwhelming since the 1961 Vienna Convention did not specifically provide for the prosecution and punishment of perpetrators of crimes. Since the beginning of the second part of this century, there has been all forms of attacks on diplomats committed by private individuals

and political organisations. It was therefore the objective of the 1973 Convention to prevent, prosecute and punish crimes committed against diplomats. Although this Convention was initiated by the resolution of the United Nations General Assembly, it has however lacked an overwhelming ratification as it is in the case of the 1961 Vienna Convention. This has been caused by a number of reasons:

(i) First, many member States were of the opinion that it was crucial to find solutions to the causes of acts of terrorism before the United Nations could embark on methods of prosecutions and punishments of crimes perpetrated by terrorism. However the majority thought that the need for the prevention of crimes was immediate and should be given priority. This was the case because most of those crimes are to be found in the penal codes around the world. The causes of the crime to which the 1973 Convention seeks to punish therefore remain largely unsolved. As it had been suggested at the formulation of this Convention, the prevention of terrorism lies with finding solutions to the causes.

(ii) The second problem concerns crimes described in Article 2 of the 1973 Convention. Although it was deliberated upon during the formulation of this Convention that crimes against diplomats shall not form part of the activities of the liberation movements, State Parties have continued to treat these crimes as acts of liberation movements or self determination.

(iii) Third, is the definition of the term 'terrorism'. Although the term does not form part of this Convention, this study finds that the 1973 Convention is one of the international legal instruments formulated to combat terrorism. It is learnt that the term terrorism has continued to cause problems among legal experts as well as government agents. It is therefore extremely difficult to ascertain in precise terms what amounts to terrorism. The 1973 Convention

therefore fails to effectively combat terrorism.

(iv) This study finds that it is difficult for some State Parties to implement the provisions of this Convention because of the following reasons:

(a) Some State Parties continue to fear reprisals or retaliation by private individuals or political organisations against their interests. As a result such States fail to perform their obligation under this Convention. Consequently, many would be detained offenders are not prosecuted nor extradited but set free. This has been the case even where there are bilateral extradition treaties.

(b) Some State Parties are sympathetic to the activities of the political organisations which perpetrate crimes against diplomats. Therefore these crimes are not seen as violent crimes or common crimes but offences incidental or directly concerned with political activities seeking to establish democratic governments. Therefore State Parties have continued to accord assistance in the form of logistics, funds and other necessary materials to political organisations. The State Parties therefore fail to prevent the preparation of these crimes and dissemination of information regarding the organisations and commission of crimes.

10. This study has revealed that one of the problems in the prosecution of the perpetrators of crimes against terrorism has been "Extradition." The study therefore found that there are basically three obstacles in the extradition process.

First, it is usually claimed that the circumstances in which these crimes are committed are either political or related thereto. The Middle East countries, give shelter to people in their region, to South Americans and others

whose struggle or political aims they support. The offenders from Britain, had until the supplementary treaty between United Kingdom and The United States of America found it easier to get shelter across the Atlantic in the United States. It all depends on the country where the offender seeks asylum and her policy towards such a struggle.

Burundi, as observed in chapter III, made a declaration upon signing of the 1973 Convention, that in respect of cases where the alleged offenders belong to the national liberation movements recognised by Burundi or any other international organisation of which Burundi is a member and their actions are part of their struggle for liberation, the government of the Republic of Burundi, reserves the right of not applying the provision of the 1973 Convention to such situations.

The declaration creates a precedent by which many States might not recognise crimes in Article 2 of the 1973 Convention as offences if they are committed in the struggle of liberation by the recognised organisations. In one way or another, all such groups are recognised by regional groupings, which sympathise with their objectives. Therefore, the likelihood of many offenders escaping punishments to other countries is foreseeable. This attitude should be discouraged and States should stand together to curb crimes committed against diplomats.

Secondly, most of the bilateral treaties between States do offer an exception to political offences or those related to political offences. The "political offence" exception, as discussed in Chapter V, has been used in many ways to give shelter to terrorist groups. It is therefore proposed that the

"political offence " exception should be done away with altogether and these offences should be treated as common crimes or war crimes. A revised or an additional protocol, whenever adopted, should provide for the removal of other impediments relating to extradition. It is suggested that the exception should be dropped altogether, when offences are committed against diplomats and other internationally protected persons. The political offence exception has in a way frustrated the 1973 Convention. This is the case even where bilateral treaties exist. Under this exception any offender of a crime incidental to or politically motivated cannot be extradited. Although some bilateral treaties have limited extradition to pure political offences it nevertheless remains an obstacle in the extradition of offenders. It is, therefore, observed that although the 1973 Convention treats all these crimes as extraditable, it does not provide in explicit terms that its provisions will be preferred over bilateral treaties. And as a result bilateral treaties which exempt these crimes on the basis of "political offence" exception are preferred by States to the international conventions. On the one hand the exception shelters political offenders from persecution and on the other it hurts the international community by sheltering international criminals.

Third, is the absence of bilateral treaties among State Parties. Extradition has been unnecessarily difficult because the 1973 Convention has not been taken by State Parties to be a legal instrument for extradition. This has been so even though Article 8(2) provides that this Convention may be considered as a legal basis for extradition. Bilateral treaties have been found to be fundamental prerequisites in any extradition request concerning crimes under this Convention. Therefore, in the absence of any extradition treaty this

Convention fails.

11. It may be noted that the world community has done very little in removing the causes of 'terrorism'. Many causes of terrorism are the result of oppression by political groups against the rest of the community.

12. There are also other struggles of political oppression of ruling cliques or parties by tyrants. They detain many citizens denying and violating peoples' human rights and civil liberties. In order for the oppressed to stand up to the tyrants they use all means of force. It is probably the language the tyrants understand.

It may be argued that the United Nations has not done much in trying to solve many of these conflicts. For example, it did not bother very much to look into the grievances of the Islamic Republic of Iran against the United States embassy in Tehran. International law was used to favour one conflict over the other. It has been argued that international law should be applied fairly to all cases. For example, the question of Palestine has been dragged along with one veto after another for a long time although at the time of writing this dissertation there has been a break through in the peace process. New cases like the Iraqi-Kuwaiti conflict received much more attention than the Israeli-Palestinian conflict. The civil war going on in the Northern Ireland has never been put on the Agenda of the United Nations' Security Council. However, this discussion appreciates that steps are being taken to find a political solution to the crisis. The Security Council has not acted swiftly and actively enough to solve these and many other conflicts which are referred to as "Internal Matters" of the State.

Independent organisations like the 'Amnesty International' have highlighted the suffering of the oppressed people. It is only individual countries who have sometimes stood up to oppose these regimes. The United States of America and Britain have sometimes done that in cases where their interests were not affected. The problem of 'terrorism' in general needs a united front to confront it.

12. Article 7 provides for extradition or prosecution. If the State decides not to extradite the offender, its duty is only to submit the offender to its competent authority for prosecution. It is up to the judiciary to decide whether the offender stands trial. In States where the executives interfere with the judiciary, it is most likely to interfere with the proceedings of trial and the result may be superficial.

The second problem concerns trial evidence which is required to convict the suspect in a criminal court. The process of collecting evidence and witnesses from the State in which the crime was committed may be cumbersome and difficult. Therefore the evidence required to convict a person in a criminal court must be beyond reasonable doubt. In cases of this nature, even competent courts cannot convict a person when the evidence presented lack some credibility.

13. This study leads us to certain conclusions which enable us to not make the following proposals.

1. It is evident that the 1961 Convention on Diplomatic Relations has some ambiguities and it is also not comprehensive in its coverage of all aspects of diplomatic practices. It is also apparent that at its formulation in 1961, the Convention created a number of problems in international law some of which have not been solved. It was found out among others that the Convention did not provide for the prosecution and

3. punishment of perpetrators of crimes against the internationally protected persons. Fortunately, this problem was solved in 1973, by the formulation of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. The other problems regarding the violation of the inviolability of diplomatic immunity by the receiving State and the abuse of diplomatic immunity by diplomats or the sending states through their missions have not been seriously tackled until this date.

We would therefore suggest that the international community convenes a meeting or a convention within the ambit of the United Nations General Assembly to deliberate on these problems which require the consensus of the international community and which have always been a source of the violation of diplomatic institution.

2. A convened meeting would as well deliberate on the solutions of diplomatic rupture or row between states. There has not been a systematic way of solving these problems and as a result many incidents have occurred. It has also been noticed that regional or pacific arbitrations have not really been so successful in solving these problems. This work therefore proposes that the international community establishes an "*International Diplomatic Arbitration Commission*" to help resolve disputes between States concerning diplomatic ruptures. The main objective of this commission would be to explore every available peaceful and diplomatic means of resolving diplomatic conflicts between States. This would be useful for disputes which may not reach the International Court of Justice.

3. Even though the International Court of Justice is empowered to handle disputes concerning diplomats, it is generally perceived that its role has been one of advisory and has not had any appreciable impact on the parties. Therefore, it is strongly suggested here that the role of the International Court of Justice, should be strengthened in order to make its judgement binding on the parties. Article 94(2) of the U.N. Charter, empowers the Security Council, to take action on any party that fails to perform its obligation incumbent upon it under the judgement of the International Court of Justice. This article needs to be enforced.

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4. It is proposed that Article 12 should be removed altogether from the Convention and another which would give strength to "Extradition" should be formulated. The United Nations Conventions should be given priority over bilateral treaties.

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